

09/76

SUPREME COURT OF VICTORIA

MURPHY v EVANS

Murphy J

30 October 1975

PRACTICE AND PROCEDURE – DUPLICITY IN PARTICULARS – SEVERAL INSTANCES OF DISPOSAL OF LIQUOR TO DIFFERENT PERSONS ON THE SAME DATE – WHETHER INFORMATION BAD FOR DUPLICITY.

Charges of disposal of liquor in a manner other than authorised by licence. Order to review made absolute on grounds that the magistrate was wrong in law in holding that it was the responsibility of the defendant to establish on the balance of probabilities or at all that he had a *bona fide* belief that the person to whom he disposed of liquor intended to consume it with or ancillary to a meal or refreshment – it was conceded that this onus rests on the informant. The magistrate refused to dismiss the information for duplicity. Upon order nisi to review—

HELD: Order absolute. [cf MC47/1977] In relation to the submission that the informations were duplex, having considered all the circumstances of the cases, it appeared that an amendment of the particulars at this late stage should not be allowed. There were to be found in this case what have been called "overriding considerations of fairness", which suggested that the convictions irregularly obtained should be quashed and the informations not remitted for re-hearing. It was the Magistrate's duty to dismiss the informations.

MURPHY J: The particulars supplied by the informant clearly showed that the prosecution intended to rely in each case upon several separate instances of alleged disposal to different persons, albeit on the same dates. See *Johnson v Needham* (1909) 1 KB 626; 100 LT 493; *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104; *Davies v Ryan* [1933] HCA 64; (1933) 50 CLR 379; [1934] ALR 98 and *Byrne v Baker* [1964] VicRp 57; (1964) VR p443.

Mr Hooper rightly submitted that counsel for the defendant in the court below had from the outset and on more than one occasion, submitted that the several particulars provided rendered each information duplex. He had submitted too that the informant should be called upon to elect as to which particular act he intended to rely upon. Nonetheless, the informant had at all material times argued that he should not be called upon to elect as to which matter he intended to rely upon. The Magistrate accordingly declined to call upon the informant to elect.

Mr Hooper submitted that the matter should be considered in the same way that it would be considered if the Magistrate had called upon the informant to elect, and if the informant had refused to do so. In such a case, he submitted, it would be the Magistrate's duty to dismiss the information for duplicity.

There is in this State authority to support the submission that the Magistrate could follow this course. Indeed it might be put strongly as to say that the Magistrate should follow this course in those circumstances.