66/76

SUPREME COURT OF VICTORIA

PARKINSON v TAYLOR

Gillard J

5 March 1976

MOTOR TRAFFIC – CHARGES ALLEGED TO HAVE OCCURRED ON A HIGHWAY – MEANING OF "HIGHWAY" – DISCUSSION BY MAGISTRATE THAT HE HAD SOME LOCAL KNOWLEDGE – MAGISTRATE DECIDED TO CONDUCT A VIEW OF THE AREA – NO OBJECTION BY POLICE – DEFENDANT NOT CONSULTED – MAGISTRATE TRAVELLED IN POLICE INFORMANT'S VEHICLE TO THE SCENE – VIEW CONDUCTED – UPON RETURN TO COURT CHARGES DISMISSED ON GROUND THAT AREA NOT A HIGHWAY – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958.

On charges of careless driving and driving without "P" plates, the question arose as to whether the alleged offences were committed on a "highway". Evidence was led that the defendant drove on a beach section of road near a 'boat hole', that there were speed restrictions erected in the area, and the area was used by cars towing boats to a ramp, and for persons going to and from the beach at Sandy Point. Discussion indicated that the Magistrate had some local knowledge of the area as he expressed some concern as to whether the tide was in or out at the time. He decided to conduct a view of the area after which he indicated that p10-11 *Vickery* suggested that the area was not a highway. The charges were dismissed. Upon Order Nisi to review—

HELD: Order nisi discharged.

1. Little attention was paid to the interests of the defendant. If the conviction had followed on the basis of the informant pointing out the place where the offences were alleged to have occurred, there could be little doubt that the conviction would have to be set aside.

***Scott v Numurkah Corporation* [1954] HCA 14; (1954) 91 CLR 300; [1954] ALR 373; and**

***R v Magistrates Court at Lilydale; ex parte Ciccone* [1973] VicRp 10; (1973) VR 122 at 128, followed.**

2. As a matter of strict law the evidence of the demonstration was inadmissible, since the defendant neither expressly consented nor asked for such a demonstration but by the way in which the prosecution was conducted, without any objection from the prosecutor — and, indeed, with his co-operation — the inadmissible evidence was put before the magistrate.

3. What happened at the scene may be regarded as merely a confirmation of the indication arising from the record of the proceedings in court, namely, that the magistrate was not satisfied beyond reasonable doubt that the prosecution had proved its case, and, accordingly, he was seeking confirmation of that view. No proper and persuasive proofs had been given to him that the offence had occurred on a highway in the relevant sense.

4. It was true the evidence was uncontradicted when given, but it assumed a knowledge of local geography and that the person hearing it would understand the evidence with his knowledge of local geography. It appeared the magistrate did have that local knowledge and he found the evidence as given by the police officers was insufficient to prove that the place where the offences were committed was 'a highway'. It was unacceptable to him, accordingly, when the magistrate sought an inspection with the informant to discover whether or not his knowledge was accurate, the informant now could not complain about his action, having regard to the way the prosecution was presented.

GILLARD J: ... Having regard to those statements, it would appear that the magistrate had looked at the law, and if he looked at pages 10 and 11 of *Vickery*, to which my attention has been drawn by Mr Briglia, it would appear that he must have had in mind the statutory definition of 'highway' and the various cases which Mr Briglia has cited to this court, indicating that the magistrate must have directed himself on the law reasonably accurately. It therefore appears that, insofar as he found that where the alleged offences were committed was not a highway, this finding must be regarded as one of fact.

Accordingly, it is necessary to look at the evidence to discover whether or not the magistrate should have found that a *prima facie* case had been made out by the police. It has been earnestly

argued by Mr Briglia that there was a *prima facie* case of an offence having been committed on the highway in the pieces of evidence of the informant to which I have already drawn attention, but the informant's evidence, when it is closely examined, rather suggested that he was assuming the magistrate knew the area concerned, and the discussion about the tides at the end of the evidence rather confirms that view.

Without objection from the informant, the magistrate decided to have an inspection and the informant took the magistrate to the scene and pointed out where the offences allegedly occurred. So far as the informant was concerned, he must be taken as relying on his action as being real evidence of the facts. (See *Gould v Evans & Co* (1951) 2 Times Law Reports 1189; *Buckingham v Daily News* (1956) 2 All ER 904; [1956] 2 QB 534). It was a demonstration not merely to enable the Magistrate to understand the evidence given before him in court. (cf *Scott v Numurkah Corporation* [1954] HCA 14; (1954) 91 CLR 300; [1954] ALR 373. Little attention seems to have been paid to the interests of the defendant at all. If the conviction had followed on the basis of the informant pointing out the place where the offences were alleged to have occurred, there could be little doubt that the conviction would have to be set aside. (See *Gould v Evans*, *Scott v Numurkah Corporation* (*supra*), *R v Magistrates' Court at Lilydale; ex parte Ciccone* [1973] VicRp 10; (1973) VR 122 at 128).

The evidence adduced by the informant before the magistrate was presented on the basis that the magistrate knew the area. Because of this knowledge it seems pretty clear that at the end of the prosecution case, the magistrate was not satisfied with the police evidence that the offence had occurred on 'the highway'. He therefore sought an inspection. The defendant's consent to such a course was not sought. The defendant, who appeared in person before me, stated to me that he in fact was at the inspection by the magistrate. He said he drove himself to the scene in his own motor car. As a matter of strict law the evidence of the demonstration was inadmissible, since the defendant neither expressly consented or asked for such a demonstration but by the way in which the prosecution was conducted, without any objection from the prosecutor — and, indeed, with his co-operation — the inadmissible evidence was put before the magistrate. (See *Domsalla v Barr* (1969) 3 All ER 487 at 493; [1969] 1 WLR 630). What happened at the scene may be regarded as merely a confirmation of the indication arising from the record of the proceedings in court, namely, that the magistrate was not satisfied beyond reasonable doubt that the prosecution had proved its case, and, accordingly, he was seeking confirmation of that view. No proper and persuasive proofs had been given to him that the offence had occurred on a highway in the relevant sense. The discussion as to the tides rather strengthens this conclusion.

In one sense what happened was an irregularity which is based on a notion of imputed bias and which could have been waived. (See *R v Lilydale Magistrates' Court* (*supra*)). But if its effects could be waived, then the defendant should be able to benefit from the irregularity. Indeed, in practical terms, there would be no evidence of bias whatever, that the Magistrate had been adversely affected in coming to his decision. In fact, there was no bias in any relevant sense, and accordingly, the informant cannot rely upon such irregularity.

Mr Briglia also argued that the evidence of the prosecution was uncontradicted. Accordingly, he said, the magistrate should have accepted it to the extent of finding that a *prima facie* case had been presented by the prosecution. This submission, unfortunately, contains a fallacy. It is true the evidence was uncontradicted when given, but it assumed a knowledge of local geography and that the person hearing it would understand the evidence with his knowledge of local geography. It appeared the magistrate did have that local knowledge and he found the evidence as given by the police officers was insufficient to prove that the place where the offences were committed was 'a highway'. It was unacceptable to him, accordingly, in my view, when the magistrate sought an inspection with the informant to discover whether or not his knowledge was accurate, the informant now cannot complain about his action, having regard to the way the prosecution was presented. Mr Briglia also alleged that the evidence of the informant of what happened at the inspection afforded some evidence from which a *prima facie* case could be made out. He submitted that on that evidence there was sufficient to show that the public in fact used that area as a passage for vehicles. (cf. *Schubert v Lee* [1946] HCA 28; (1946) 71 CLR 589).

A close examination of this material that I have made since I reserved my decision shows that it falls far short of establishing any such conclusion. Accordingly, the Orders Nisi must be discharged. I discharge the orders with costs, if any, to be taxed.