17/69

SUPREME COURT OF VICTORIA

GRIFFIN v SANDRINGHAM DRIVE-IN THEATRE PTY LTD

Starke J

21 October 1969

SUNDAY ENTERTAINMENT – DRIVE-IN THEATRE – USED FOR PUBLIC ENTERTAINMENT ON A SUNDAY WITHOUT PERMISSION BEING FIRST OBTAINED – A STAGE PERFORMANCE GIVEN AND MUSICAL ITEMS RENDERED ON A SUNDAY – PUBLIC WERE ADMITTED UPON PAYMENT – WHETHER PERFORMANCE WAS WITHIN THE ACT – CHARGE DISMISSED BY THE MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *SUNDAY ENTERTAINMENT ACT* 1967, S6.

HELD: Order nisi absolute. Matter remitted to the Court to be dealt with in accordance with this judgment.
1. In the circumstances it was plain that the public were ordinarily admitted on Sunday to the theatre if they wished to resort to it and that they had to pay money for that privilege which payment entitled them to enter the restaurant and witness the entertainment being conducted therein. The payment also entitled them to the privilege of subsequently seeing the film. And the performance in question was a performance of entertainment of the stage, and it fell within sub-para.(c) of s3, that is "any concert, recital or other presentation of music including music for ballroom or other dancing".

2. That being so, the Magistrate misdirected himself and the order nisi was made absolute.

STARKE J: This is an order nisi to review the decision of the Court of Petty Sessions made at Cheltenham on 14 May 1969. The defendant was charged under s6 of the *Sunday Entertainment Act* 1967 with being the occupier of land known as the Sandringham Drive-in Theatre, Tulip Street, Cheltenham, that it did permit such land to be used for public entertainment without first obtaining the permission in writing of the Chief Secretary. The offence was alleged to have occurred on 11 August 1968 and the information was dated 31 March 1969. At the conclusion of all the evidence the Magistrate dismissed the information.

Section 6 of the *Sunday Entertainment Act* provides that

> "Every owner, lessee or occupier of any land or building who permits such land or building to be used in contravention of the provisions of section 5 shall be guilty of an offence.
> Penalty $500 or imprisonment for six months."

Section 5, which is referred to in s6 provides:

> "5(1). No person shall hold or conduct a public entertainment on a Sunday or cause a public entertainment to be held or conducted on a Sunday without first obtaining the permission is writing of the Chief Secretary to the holding or conduct thereof.
> Penalty $500 or imprisonment for six months or both."

It is, I should say at this point, common ground that the Chief Secretary did not give a permission in writing for the holding of the entertainment which is alleged to have been held.

Section 3 is the definition section, and it provides that:

> "Public entertainment means any entertainment, amusement, contest, exhibition, display or other attraction to which members of the public are ordinarily admitted upon payment of money or other consideration or by ticket, programme, donation or other device purchased for money or other consideration. Without limiting the generality of the foregoing it includes any of the following where members of the public are so admitted:
>
> (a) any performance of any entertainment of the stage,

(b)....
(c) any concert, recital or other presentation of music including music for ballroom or other dancing."

On 12 June 1969 Master Collie granted an order nisi on these grounds:

1. That the Stipendiary Magistrate should have held that the informant had established a *prima facie* case.

(2) That the Stipendiary Magistrate was wrong in holding that there was no evidence that public entertainment was being held within the meaning of the *Sunday Entertainment Act* 1967, s3.

(3) That the Stipendiary Magistrate should have held that s3 of the *Sunday Entertainment Act* did not place an onus on the informant to lead evidence that the entertainment described to him was entertainment to which members of the public are ordinarily admitted on payment of money or other consideration, or by ticket, programme, donation or other device purchased for money or other consideration.

(4) That the Stipendiary Magistrate should have held that the entertainment described was public entertainment within the meaning of s3 of the *Sunday Entertainment Act*.

The reasons given by the Stipendiary Magistrate for dismissing the information appear in para 18 of the affidavit of Mr Griffin in the following terms:

"The Stipendiary Magistrate, Mr Ross, then dismissed the said information and stated that he was satisfied that there was no evidence having regard to the definition that public entertainment was being held in the present case."

The facts are, and I think these are not in dispute, although there are two affidavits, that the restaurant was within the boundaries of the drive-in theatre, that on Sundays, but Sundays only, a stage performance was given and there were also musical items rendered, that in order to enter the theatre on any day, weekday or Sunday it was necessary for adults to pay a dollar, and children twenty cents, that this ordinarily occurred on Sunday after Sunday according to the inference from evidence which was given by a director of the defendant company, that on Sundays only when the requisite entrance fee had been paid the customers then had the right to go into the restaurant and observe the entertainment which took place in there.

In these circumstances it seems to me plain firstly that the public are ordinarily admitted on Sunday to the theatre if they wish to resort to it, secondly that they have to pay money for that privilege which payment entitles them to enter the restaurant and witness the entertainment being conducted therein. The payment also entitles them to the privilege of subsequently seeing the film. And finally – and I think this is conceded by Mr Neesham for the respondent – the performance in question was a performance of entertainment of the stage, and also it falls within sub-para.(c) of s3, that is "any concert, recital or other presentation of music including music for ballroom or other dancing". That being so, in my view the Magistrate has misdirected himself. I am, of course, unable to say that if he had correctly directed himself he would have recorded a conviction; that depends on what facts he accepts and what facts he does not accept.

In those circumstances, I think that the only course that I can take is to make the order absolute and remit the matter to the Court of Petty Sessions at Cheltenham, to be dealt with in accordance with this judgment. I order that the applicant's costs be taxed, and when taxed paid by the respondent, not exceeding the sum of $120.

APPEARANCES: For the applicant/informant Griffin: Mr JR Hanlon, counsel. Thomas F Mornane, Crown Solicitor. For the respondent/defendant Sandringham Drive-In Theatre Pty Ltd: Mr TA Neesham, counsel. Barbour & Arnold, solicitors.
