11/70

SUPREME COURT OF VICTORIA

DE KRUIFF v SMITH

McInerney J

7 May 1970 — [1971] VicRp 94; [1971] VR 761

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT INVOLVED IN MOTOR VEHICLE ACCIDENT – DRIVER INTERCEPTED IN HOTEL – TAKEN TO POLICE STATION FOR BREATH TEST – READING .205BAC – BREATH TEST CONDUCTED AT 8.48PM – EVIDENCE UNCLEAR AS TO THE TIME OF THE COLLISION – DEFENDANT CHARGED WITH DRINK/DRIVING OFFENCES – PLEADED GUILTY – CONCERN EXPRESSED BY MAGISTRATE AS TO WHETHER THE BREATH TEST WAS TAKEN WITHIN TWO HOURS OF THE DRIVING – PRESUMPTION OF CONTINUANCE – WHETHER APPLICABLE – MAGISTRATE INVITED DEFENDANT TO CHANGE HIS PLEA TO NOT GUILTY – PLEA CHANGED – BOTH CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

HELD: Order nisi discharged.
1. In relation to a case where an unrepresented defendant pleads guilty, a Magistrate ought to satisfy himself that the unrepresented defendant really understands the effect of a plea of guilty; at all events, where the facts and circumstances suggest a triable defence.

2. The Magistrate, having formed the view that the defendant appeared to be a person of little or no understanding of the issues involved, acted properly and in accordance with the highest traditions of his office in intimating, after he had formed the view that on the evidence there was a reasonable doubt as to the guilt of the accused, that he would treat the plea of guilty as having been made only provisionally and finally intimating that he treated the plea as one of not guilty.

3. It was a matter for him in his discretion to decide whether or not he would treat the defendant as having pleaded not guilty, and even if he did not formally take the step of getting the defendant to replead, and to plead not guilty.

4. It was open to the Magistrate to find that he was not satisfied that the accident occurred within two hours of 8.48 p.m. On the state of the evidence, all that could be concluded was that it must have occurred between 6.30 and 7.45 p.m., and one was then left with the position that the breath analysis made at 8.48 p.m. was not shown to have been made within two hours of the time when the defendant last drove the motor vehicle.

5. The Magistrate was not bound to apply the presumption, that indeed, on the material proved before him there were solid reasons for doubting whether the presumption was applicable. In the first place, it was clear from the Magistrate's affidavit that at the end of the prosecution case on the first day he was left with reasonable doubt as to whether the defendant had consumed any alcohol between the time when he last drove a motor car and the time when his breath test was taken.

6. What the Magistrate, in the end, was saying was that having regard to the fact that he was not satisfied beyond reasonable doubt that the accident had occurred within two hours of 8.48 p.m. – the time when the breath test was taken – he could not use the breath test in the manner sanctioned by s81A(2) as creating a statutory presumption that at the time of the driving of the car the defendant had .205 per cent alcohol in his blood, and that having regard to his doubt as to whether the defendant had consumed alcohol between the time when he last drove a motor car and the time when the breath test was taken, it was not proper to apply the presumption of continuance.

7. What the Magistrate was saying was that on all the evidence he was not satisfied that the accused had not had liquor between the time of the driving and the time of the taking of the breath test, and that having regard to the fact that the accused was found in an hotel, that he may have had anything up to an hour or even slightly more between the time of the accident and the time when it was discovered that the accident occurred, it was impossible to say that a magistrate should not have had reasonable doubt, or that the magistrate should have been satisfied beyond reasonable doubt.

McINERNEY J: This order to review raises a short but interesting problem in relation to the

operation of s81A of the *Motor Car Act* 1958, and the matters relevant to that problem have been well and succinctly argued on both sides.

The order nisi granted by Master Collie on 16 December 1969 was one to review an order made by the Magistrates' Court at Bendigo on 17 September 1969, dismissing an information laid by the informant, Jan Frans De Kruiff, against the defendant Kenneth William Leslie Smith, which charged him with having driven a motor car on a highway, to wit, Lyttleton Terrace, while the percentage of alcohol in his blood expressed in grams per hundred millilitres did exceed .05 per cent. That information came on for hearing before the Court of Petty Sessions at the time as another information, which charged the defendant with having driven a motor car whilst under the influence of intoxicating liquor or a drug to such an extent as to be incapable of having proper control of such motor car. The magistrate dismissed both informations. No challenge to the dismissal of the information for driving under the influence is made in these proceedings.

The order nisi was granted on five grounds, the first of which is the unhallowed dragnet clause which has been so often condemned in this Court, namely, that the stipendiary magistrate was wrong in law in dismissing the said information. The second is that the stipendiary magistrate was wrong in law in holding that there was no evidence of the time when the accident occurred. The third, that the stipendiary magistrate was wrong in law in rejecting the evidence of the breath analysis on the ground solely that there was no evidence of the time when the accident occurred. The fourth, that the stipendiary magistrate was wrong in law in holding, if he so held, that the evidence of the breath analysis was inadmissible in the circumstances, and the fifth, that the stipendiary magistrate was wrong in law in holding, if he so held, that he had no option but to dismiss the information on the ground that the sample of the defendant's breath may have been furnished more than two hours after the alleged offence.

When the matter came on for hearing before me yesterday I pointed out to Mr Chernov, who appeared for the informant to move the order nisi absolute, that there did not appear to be anything in the material to indicate that the stipendiary magistrate had rejected the evidence of the breath analysis or that he had held that it was inadmissible, and Mr Chernov agreed that the comment was justified, and he has not sought to argue grounds 3 and 4. The argument has been directed substantially to grounds 2 and 5.

The information came on for hearing in the first instance at the Magistrates' Court at Bendigo on 13 November 1969, the court being then constituted by a stipendiary magistrate sitting with two honorary justices. The defendant, who was unrepresented, pleaded guilty to the charge the subject-matter of the present proceedings, and also to the charge of driving under the influence. The informant then gave evidence, and at the end of his evidence the magistrate, who according to his affidavit, referred to "the serious nature of the offences charged and to the fact that the defendant appeared to be a person with little or no understanding of the issues involved", intimated to the prosecutor the matters which he regarded as insufficient in the evidence as it stood, and that before the case of the prosecution was closed he would give the prosecutor the opportunity to call further evidence on these matters.

The matters to which the stipendiary magistrate was evidently referring are the two matters to which he refers in para. 3 of his affidavit, namely, that "at the conclusion of the evidence given for the prosecution on 13 November 1969 I was not satisfied on two questions, namely (a) whether the defendant had driven the motor car within two hours preceding the time when the breath test was made, and (b) whether the defendant had consumed any alcohol between the time when he last drove a motor car and the time when the breath test was taken". Apparently in consequence of the intimation so given by the magistrate the prosecutor then led the further evidence set out in para. 8 of the affidavit of the informant Jan Frans De Kruiff, namely, the evidence of Constable Ronald Claude Andrews, which appears at p7 of the affidavit of De Kruiff. At the conclusion of that evidence the magistrate, according to his affidavit, intimated that the case would be adjourned to 17 November 1969, to enable the prosecution to call further evidence if any was available. That account differs somewhat from the account given in para. 10 of the informant's affidavit, which is to the following effect:

> "The magistrate then stated that there was very little evidence of the time when the accident occurred, and after cautioning the defendant asked him whether he could recall the time of the accident. In

> reply, the defendant from the floor of the Court stated that the accident had happened at about 7.40 p.m. The defendant then commenced to give an explanation as to how the accident had occurred and referred to the fact that his statement could be supported by a friend. The magistrate then asked the defendant if he wanted to call his friend as a witness and the defendant said yes. The magistrate then adjourned the hearing to 17 November 1969 to allow the defendant to produce a witness and further to allow the prosecution to produce as a witness the driver of the other car involved to give evidence as to the time of the accident."

The magistrate's account differs from what is there said by the informant as appears from the following sentences from para.4 which follow what I have already read:

> "I then attempted to explain to the defendant the reason for the adjournment, and it was in the course of my doing so that the defendant said from the floor of the Court that the accident had occurred at 7.40 p.m. I intentionally disregarded that statement because it was made by the defendant in answer to a question by me at a time when the defendant had not been cautioned or advised as to his rights to refuse to answer or give evidence."

The information then came on again before the Court of Petty Sessions on 17 November 1969, this time before the stipendiary magistrate, sitting alone. When the case was called the defendant appeared unrepresented and pleaded guilty to both charges, but the magistrate then stated that he would only take a plea of guilty provisionally. Although the informant's affidavit states in para. 11 that the hearing was resumed, it appears from para. 12 of that affidavit that when the prosecutor, Senior Constable Brian Larkin, asked the magistrate whether the court required the police witness to give evidence again and that in reply the magistrate stated that such evidence was required. The informant in his affidavit states that he was then called as a witness and gave the same evidence as is referred to in para.6 of his affidavit, that is the same evidence as he had given when the matter was before the court on 13 November. The prosecutor then called Constable Andrews, who gave the same evidence as is referred to in para.8 of the affidavit, and then called Robert Wayne Featherston, painter, the owner of the car into which the defendant's vehicle had crashed on the night of 7 November 1969. At the conclusion of Featherston's evidence the case for the prosecution was closed. It is to be observed that in Featherston's evidence he was asked, in reply, apparently, to a question as to what time the accident occurred, he said: "I am unable to say exactly what time that the accident happened. I parked my car there at 6.30 p.m. and did not go out there until 7.45 p.m."

The magistrate's affidavit says that "when the prosecution closed its case I intimated to the defendant that I had accepted his plea of guilty only provisionally and that I would now treat his plea as one of not guilty. I then stated that I was not satisfied on the evidence as to when the accident occurred and therefore was not satisfied either that the defendant had driven a motor car within the two hours preceding the time when the breath test was taken, or that the defendant had been under the influence of liquor at the time when he drove the motor car. Accordingly, I dismissed both informations." He goes on in para. 5 to say:

> "In reaching my decision I intentionally excluded from my consideration the statement made by the defendant from the floor of the court as to the time when the accident happened, because I deemed it to be inadmissible in the circumstances in which it was made. Excluding his answer to that question I was not satisfied on the evidence as to the matters mentioned in para. 4 of this my affidavit".

In summary, the material before the court on the second occasion showed that the witness, Featherston, had parked his Holden panel van at the kerb in Lyttelton Terrace at 6.30 p.m., that he had returned to the panel van at about 7.45 p.m. to find that it had been damaged by the defendant's car having crashed into the rear of it. Constables De Kruiff and Andrews arrived at the scene at about 8.15 p.m. and after conversations with the defendant and a barman of the Cumberland Hotel, and again with the defendant, Constable De Kruiff took the defendant to the Bendigo police station, where Senior Constable Booth conducted a breath analysis test. The certificate given in accordance with Schedule 7A of the *Crimes Act* 1958 by Senior Constable Booth shows that the breath test was conducted at 8.48 p.m. and that a certificate of the result of that test was given by him to the defendant at 8.55 p.m. in accordance with the provisions of s408A(2). The breath analysis test indicated, according to the certificate, that the quantity of alcohol present in the blood of the defendant at the time and place referred to was .205 grammes of alcohol per 100 millilitres of blood, which expressed as a percentage is .205 per cent.

It appeared from the evidence of Constable De Kruiff that at the time when he arrived at the scene of the accident there was still water running out of the radiator, but there was not a large volume of water flowing from the radiator to the gutter and that it could have been only a relatively small leak in the radiator. In these circumstances, the state of the evidence was such that the magistrate could have concluded that the accident occurred at some time between 6.30 p.m. and 7.45 p.m., but as Mr Chernov has frankly conceded, if one disregards the statement made by the defendant from the floor of the court on the first day's hearing, there was no evidence which precisely fixed the time of the occurrence of the accident.

It appears to me probable that on the second day's hearing the matter was completely reheard, the magistrate having intimated to the prosecutor that he required the police to give evidence again, and if the magistrate treated the hearing on the second occasion as a complete rehearing *de novo*, then there was not before the court on the second occasion any evidence of the statement made by the accused from the floor of the court during the course of the first hearing.

The magistrate, however, has made it clear that he expressly disregarded that statement, although it was obviously within his memory, and that his reason for disregarding it was that it was a statement made by the defendant without any caution having been administered to him and that in the circumstances he regarded it as improper to use the statement against the defendant, the defendant not having been cautioned and not having been advised of his rights to refuse to answer or to give evidence. Neither the affidavit of the informant nor the magistrate's affidavit expressly describe or specify what is the caution there referred to, but it seems very likely that the caution that the magistrate is referring to is that provided for by s398 of the *Crimes Act* 1958.

Mr Chernov has argued that the magistrate was not entitled to disregard the statement made by the defendant from the floor of the court as to the time at which the accident had occurred, and that he was also not entitled to disregard the fact that the defendant had pleaded guilty, both on the first occasion and on the second occasion when the matter came before the court. As to the first of those matters, it would appear that the stipendiary magistrate obtained this answer from the defendant at a time when he was endeavouring to do no more than ascertain whether the defendant has any knowledge of the time of the accident, and that he was not attempting to obtain any admission or any incriminating evidence from the defendant, that he had not indeed given him any caution, and was not endeavouring to ascertain from the defendant whether the defendant intended or desired to give evidence, or to make an unsworn statement, or to decline to say anything at all. In those circumstances, the magistrate appears to have taken the view that he had a discretion to reject and disregard the answer given by the defendant.

That he had such a discretion is, I think, established by many authorities. The existence of such a discretion is referred to by Newton J in *Genardini v Anderton* [1969] VicRp 61; [1969] VR 502, at pp505, 506, in the passage to which Mr Chernov drew my attention this morning. This discretion was discussed by me in my ruling on the *voire dire* in the case of *R v George Lindsay Banner* (29 August 1969, unreported), and by the Full Court in their judgment on appeal against Banner's conviction [1970] VicRp 31; [1970] VR 240.

It is settled that if a court, in the exercise of its discretion, decides to reject evidence, such a discretion is rarely to be overruled by an appellate court. In general it will not be overruled unless it is clear that the discretion has been exercised on wrong principles or having regard to extraneous considerations or without taking into account all the relevant considerations. Nothing of that character appears here. I think that the magistrate was entitled to exercise his discretion in the way he did, and consequently that he was entitled, indeed bound, having so exercised his discretion, to disregard the statement of the defendant that the accident had occurred at 7.40 p.m.

I turn then to the question of the effect of the defendant having pleaded guilty. It is clear that a plea of guilty is a formal confession of the existence of every ingredient necessary to constitute the offence: see for instance *R v Inglis* [1917] VicLawRp 99; [1917] VLR 672; 23 ALR 378. Whether the same result would now be arrived at as was arrived at in this case may be doubted. The report suggests, indeed the language of the case stated, which is set out in the report at p672, suggests that Madden CJ, the trial judge, had refrained from sentencing the prisoner. The trend of more recent authorities is that until sentence has been pronounced, the court has the power to permit a plea of guilty to be withdrawn.

The existence of such a discretion is recognized in the decision of the Full Court in *R v Tonks and Goss* [1963] VicRp 19; [1963] VR 121, by the Full Court of New South Wales in the case of *R v Foley* [1963] NSWR 1270; (1963) 80 WN (NSW) 726, and very recently in the speech of Lord Upjohn in the House of Lords in the case of *S (an Infant) v Manchester City Recorder* [1969] 3 All ER 1230, at pp1247, 1248; see also *R v McNally* [1954] 2 All ER 372; [1954] 1 WLR 933; (1954) 38 Cr App R 90, and numerous other cases which are cited in *Foley's Case* and in the case of *S v Manchester City Recorder*. Indeed, on 30 April 1970 in the case of *R v Durbin Edward Tillyard* (unreported), I permitted an accused person who had pleaded guilty to a charge of robbery with violence to withdraw his plea, it having appeared to me subsequently to his having pleaded guilty, that on material contained in the depositions he was not in law guilty of that offence, but guilty of other offences, in respect of which new presentments were subsequently filed, to which he subsequently pleaded guilty for which offences I subsequently sentenced him.

There are numerous cases which have laid down the proposition that a magistrate ought to satisfy himself that an unrepresented defendant really understands the effect of a plea of guilty; at all events, where the facts and circumstances suggest a triable defence; see for instance *Coysh v Elliott* [1963] VicRp 18; [1963] VR 114; *Thomason v Martin* [1964] WAR 136, and *Di Camillo v Wilcox* [1964] WAR 44.

The stipendiary magistrate, having formed the view that the defendant appeared to be a person of little or no understanding of the issues involved, acted, in my view, properly and in accordance with the highest traditions of his office in intimating, after he had formed the view, as apparently he did, that on the evidence there was a reasonable doubt as to the guilt of the accused, that he would treat the plea of guilty as having been made only provisionally and finally intimating that he treated the plea as one of not guilty. It was a matter, in my view, for him in his discretion to decide whether or not he would treat the defendant as having pleaded not guilty, and even if he did not formally take the step of getting the defendant to replead, and to plead not guilty, nevertheless *Coysh v Elliott* [1963] VicRp 18; [1963] VR 114, shows that this Court has on order to review proceedings power to allow a formal plea to be amended, or, alternatively, to treat it as amended. I propose to take the latter course, and to treat the plea of guilty as having been amended to a plea of not guilty.

I come then to what has really been the kernel of the problem before me, a problem which can be shortly stated and was shortly argued. Accepting, as Mr Chernov accepted, that it was open to the magistrate to find that he was not satisfied that the accident occurred within two hours of 8.48 p.m., that indeed, on the state of the evidence, all that could be concluded was that it must have occurred between 6.30 and 7.45 p.m., one is then left with the position that the breath analysis made at 8.48 p.m. was not shown to have been made within two hours of the time when the defendant last drove the motor vehicle.

In *Smith v Maddison* [1967] VicRp 34; [1967] VR 307, where a similar problem arose, I pointed out at p309 the matters necessary to be proved in order to give rise to the statutory presumption. Mr Chernov does not question the validity of that analysis of those matters, and accepts the fact that on the present material, if one disregards the plea of guilty and the statement of the defendant from the floor of the Court, he cannot invoke the statutory presumption. In *Smith v Maddison* I went on to point out that in cases where the statutory presumption did not apply, the matter was not necessarily concluded because it might, nevertheless, be open to the Court applying the presumption of continuance backwards in point of time from the time when the breath analysis certificate was taken to conclude that at the time of the driving of the vehicle the defendant had in his blood a percentage of alcohol greater than .05 per cent. I adverted in *Smith v Maddison* to the matters which would be relevant to establishing whether that presumption of continuance could be invoked. Mr Chernov has urged on me that the magistrate dismissed the information simply because he was satisfied that the statutory presumption could not be applied, and that he failed to consider the other matter, whether the common law presumption of continuance could be coupled with the result of the breath analysis so as to lead to a conclusion that the defendant had at the time of his last driving the vehicle, at some time after 6.30 p.m., more than .05 per cent of alcohol in his blood.

The argument is attractive, and has occasioned me serious thought. I have come, however, to the conclusion that on the whole of the material, and reading the whole of the magistrate's

affidavit, the magistrate was not bound to apply the presumption, that indeed, on the material proved before him there were solid reasons for doubting whether the presumption was applicable. In the first place, it is clear from the magistrate's affidavit that at the end of the prosecution case on the first day he was left with reasonable doubt as to whether the defendant had consumed any alcohol between the time when he last drove a motor car and the time when his breath test was taken. I take him then to be referring to the position when the prosecution case was closed, apparently for the first time, on the first day, and before Constable Andrews was called as a witness. It was apparently in consequence of his observations on that point that Constable Andrews was called as a witness on the first day.

Constable Andrews's evidence cannot, I think, be regarded as having any tendency to remove those doubts. To begin with, it is clear from Constable Andrews's evidence that he found the defendant in an hotel. He was drinking from a five ounce glass, which, according to Constable Andrews, the defendant said contained dry ginger and which, according to Constable Andrews's observation by smelling he believed did contain dry ginger. Constable Andrews asked a barman in the hotel, in the presence of the defendant: "Have you or anyone else in this bar served this man with any liquor?" – to which the barman replied: "No, only the glass of dry ginger and a packet of peanuts." The barman was not called as a witness by the prosecution and his statement, made in the presence of the defendant, even assuming it was made in the hearing of the defendant – and Mr Dunphy has suggested that it cannot be inferred that it was made in the defendant's hearing or that the defendant heard it, because while it was equally clearly made in the presence of Featherston, Featherston did not appear to have heard all that the barman said – nevertheless, even assuming that it was made in the hearing of the defendant, it is a statement of a third party which becomes evidence against the defendant only if it can be shown that the circumstances were such as would make it reasonable to treat the defendant's failure to comment or reply to the barman's statement as an adoptive admission of the truth of the matter stated by the barman.

Having regard to the circumstance that a policeman, following the occurrence of an accident, was questioning the barman as to whether the barman had served the defendant with any liquor, it seems to me that it is not reasonable to expect that a defendant would then volunteer, in contradiction of the barman's answer, some statement suggesting that he, the defendant, had in fact been served with liquor. It may well be that the barman was telling the truth; it may be, on the other hand, that the barman was performing an act of unsolicited friendship towards the accused by suggesting that the defendant had not been served with any liquor. At all events, I think it would be unreasonable to expect the defendant to have contradicted that assertion, and thereby precipitate further trouble upon himself.

In those circumstances, I do not think I can treat, or that it was open to the magistrate to treat, the barman's statement as evidence against the accused. There is no indication that the magistrate did in fact so treat it. He does not advert to it, however, in his affidavit.

Obviously, the magistrate was left in doubt as to whether the defendant had consumed any alcohol between the time when he last drove a motor car and the time when the breath test was taken, and the evidence of Constable Andrews, so far from removing that doubt, must have given it even more solid foundation.

In those circumstances, I am myself disposed to the view that what the magistrate, in the end, was saying was this: that having regard to the fact that he was not satisfied beyond reasonable doubt that the accident had occurred within two hours of 8.48 p.m., the time when the breath test was taken, he could not use the breath test in the manner sanctioned by s81A(2) as creating a statutory presumption that at the time of the driving of the car the defendant had .205 per cent alcohol in his blood, and that having regard to his doubt as to whether the defendant had consumed alcohol between the time when he last drove a motor car and the time when the breath test was taken, it was not proper to apply the presumption of continuance, to which I referred in *Smith v Maddison*. If that was the frame of mind of the magistrate, as I think it was, although it is not very well expressed in the affidavit, then it appears to me that the decision of the magistrate dismissing the information cannot be set aside.

It is to be borne in mind that this was a criminal charge, and that in a criminal charge the duty of the prosecution is to exclude all reasonable hypotheses consistent with innocence: see

Luxton v Vines [1952] HCA 19; (1952) 85 CLR 352, at p358; [1952] ALR 308, in the joint judgment of Dixon, Fullagar and Kitto, JJ, and see also the judgment of Dixon J (as he then was), in *Wright v Wright* [1948] HCA 33; (1948) 77 CLR 191, at p210; [1948] 2 ALR 565, where in discussing the question whether the civil and not the criminal standard of persuasion applies to matrimonial causes, as to the issue of adultery, he said:

> "But an important difference may well exist, if the Court of Appeal means that the principles of criminal law proof are to be applied in full, so that if there is some reasonable hypothesis compatible with innocence that is not convincingly excluded by the proofs advanced the party is to be acquitted of adultery notwithstanding that the Court has no belief in the hypothesis."

It seems to me that what the magistrate was saying was that on all the evidence he was not satisfied that the accused had not had liquor between the time of the driving and the time of the taking of the breath test, and that having regard to the fact that the accused was found in an hotel, that he may have had anything up to an hour or even slightly more between the time of the accident and the time when Featherston discovered that the accident occurred, it is impossible for this Court to say that a magistrate should not have had reasonable doubt, or that the magistrate should have been satisfied beyond reasonable doubt. In the case of *Dearman v Dearman* [1908] HCA 84; (1908) 7 CLR 549, at p553; 5 ALR 287, Griffith CJ pointed to the difficulty attending anyone seeking on appeal to set aside a judgment given against the person who carries the burden of proof. In the present case the informant had from start to finish the burden of proving the ingredients of the offence beyond reasonable doubt, and the Magistrate, having expressed reasonable doubt on the matters mentioned in his affidavit, and the circumstances being such as to preclude the informant from relying on the statutory presumption created by s81A(2), a presumption which might operate irrespective of any reasonable doubt (I say "might" because it may be necessary on some occasion to consider the problem of which Hudson J referred to in *Jones v Hayes* [1953] VicLawRp 52; [1953] VR 363; [1953] ALR 718) nevertheless, since that statutory presumption could not be invoked by the accused, it appears to me quite impossible to say that the magistrate was wrong in dismissing this information.

In those circumstances, and notwithstanding the skill with which Mr Chernov argued this case for the informant, I have come to the conclusion that the grounds of the order nisi are not made out. The consequence will be that the order nisi is discharged with costs.

APPEARANCES: For the appellant De Kruiff: Mr A Chernov, counsel. Solicitor for the informant: John Downey, Crown Solicitor. For the respondent Smith: Mr EF Dunphy, counsel. Every and Every, solicitors.
