

53/83

SUPREME COURT OF VICTORIA

MURTAGH v THOMPSON

Gray J

5 August 1983

MOTOR TRAFFIC – CARELESS DRIVING – COLLISION WITH ANOTHER VEHICLE – CAR DRIVEN HOME WITHOUT EFFECTIVE FOOT BRAKE – DEFENDANT CONVICTED FOR POST-ACCIDENT DRIVING – DEFENDANT ENTITLED TO KNOW PARTICULARS OF CHARGE.

M. was driving his father's motor car when it collided with the rear of another vehicle. M. had applied the foot brake, but it proved to be totally inoperative. After the collision, M. was able to drive the car home without having an effective foot brake. Subsequently, M. was charged with careless driving based upon his driving immediately before and in the course of the collision. When M. gave evidence, he was questioned by the court concerning his post-accident driving, and he was convicted in respect of that driving. Upon order nisi to review—

HELD: Order absolute.

1. A defendant is entitled to know what case is made out against him, and the evidence should be confined to that case.

Johnson v Miller [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104, applied.

2. As the court acted upon evidence which made out a fresh case, and which the defendant had no opportunity to meet, the conviction should be set aside.

GRAY J: *[After setting out the facts, His Honour continued]: ... [3]* At the end of the evidence the solicitor for the applicant submitted that the information should be dismissed. The Magistrate did not in terms deal **[4]** with the submission made, but stated that he considered the applicant's driving home after the accident was of itself careless driving. In the course of debate with the solicitor for the applicant, the Magistrate conceded that he was unable to make any findings as to the manner in which the applicant drove his car, but repeated that he considered that the admitted fact the applicant drove his car home without brakes was of itself careless driving. The Magistrate stated that as the information was expressed in terms which alleged careless driving in Wyndham Street, that he felt justified in convicting the applicant upon the basis of his post-accident driving without any effective foot brakes.

The order nisi was granted on a number of grounds which, in one way or another, allege that the Magistrate was not entitled to act upon the post-accident driving of the applicant and that the conviction was accordingly imposed in error. The applicant's argument before me was that the Magistrate had based the conviction upon a quite different set of facts from those upon which the charge was based. It is well established that a defendant is entitled to know what case it is that he has to meet, so that he can endeavour to meet it. In this, although the information was couched in general terms, it is quite apparent that the charge was based upon the events surrounding the collision. It is even more apparent **[5]** that the charge was not based in any way upon post-accident driving by the applicant. Not a word of evidence concerning post-accident driving was led by the prosecution. The only evidence in relation to this matter was extracted by questions asked by the Magistrate. The matter does not permit of much argument. It is fair to say that the applicant's case was not very strenuously opposed by Mr Ross, who appeared for the respondent.

For the proposition that a defendant is entitled to know what case is made out against him and that the evidence should be confined to that case, I refer to *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR at p467; [1938] ALR 104. I refer in particular to passage in the judgment of Dixon J at pp489-491. In particular I refer to the following passage at p489:

"In my opinion the prosecutor should be required to identify the transaction on which he relies, and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity,

is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged, but also of the particular act, matter or thing alleged as the foundation of the charge. A Court hearing a complaint or information for an offence must have before it a means of identifying with the matter or transaction alleged in the document a matter or transaction appearing in evidence."

This was not a case where the evidence led was capable of supporting more than one offence. The [6] evidence led by the prosecution was rightly concerned with the subject matter of the charge against the applicant, namely, the circumstances surrounding the collision. It is, in my opinion, quite clear that the Magistrate was not entitled to act upon evidence of a quite apparent [nature] that the applicant had no opportunity at all to meet the quite fresh case which was suddenly made against him upon the basis of the evidence extracted by the Magistrate. It is, perhaps, open to question whether the Magistrate would have been justified in basing a conviction for careless driving upon the applicant's post-accident driving if that conduct had been made the basis of the charge. However, that is not a matter that arises for decision upon these proceedings. It is sufficient to say that I am satisfied that the order nisi should be made absolute.

APPEARANCES: Mr. JD McArdle, counsel for Applicant/Defendant. Mr D Ross, counsel for Respondent/Informant.
