02/87

SUPREME COURT OF VICTORIA

LOWE v BROMLEY

Murray J

17 December 1986

PRACTICE AND PROCEDURE – APPLICATION FOR RE-HEARING OF MOTOR TRAFFIC OFFENCE – APPLICANT NOT SERVED WITH INFORMATION – SUBSEQUENTLY APPRISED OF RESULT – DELAY OF FIVE MONTHS IN FILING RE-HEARING APPLICATION – NO EVIDENCE AS TO MERITS OF DEFENCE – FAILURE TO NOTIFY ROAD TRAFFIC AUTHORITY OF CHANGE OF ADDRESS – TIME LAPSE BETWEEN INTERCEPTION AND FILING APPLICATION – WHETHER RELEVANT CONSIDERATIONS: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS11(3), 152.

On 19th February 1984 L. was intercepted by B., a police officer, for allegedly exceeding the speed limit. B. indicated that he would report the matter. Subsequently, L. changed his address on a number of occasions but did not notify the Road Traffic Authority. On 2nd October 1984, an information for the alleged offence was issued and sent to L.'s address. L. did not appear to answer the information, a conviction was imposed and his probationary licence cancelled. In late February 1985 L. was intercepted by a police officer and was then made aware of the conviction and order. L.'s solicitor, H. said he first became aware of L.'s conviction on 18th June 1985 and on 19th July 1985, filed an application with the court to set aside and re-hear the information.

When the application came on for hearing, L. swore that he did not receive the information and first learned of the order in late February 1985. He said he would have appeared at court if aware of the proceedings. L. was not cross-examined by the Prosecutor nor was any evidence led to show that the prosecution would be prejudiced by the grant of the application to re-hear. The Magistrate refused the application on the grounds that the applicant had not discharged an onus to indicate and provide details of his change of address to the Road Traffic Authority and the substantial passage of time between the date of the original offence and the re-hearing application. Upon order nisi to review—

HELD: Order nisi discharged.
1. The Magistrate misdirected himself in the exercise of his discretion because:
(a) there was no evidence to show that the applicant's failure to notify the Road Traffic Authority of his change of address had any bearing on the matter; and
(b) in the absence of evidence showing a prejudice flowing to the prosecution, the passage of time between the date of interception and filing the re-hearing application was irrelevant.
***Garner v Gallienne* (1985) 9 ACLR 808; MC 25/1985, distinguished.**

2. In all the circumstances, it was not appropriate to exercise discretion in favour of the applicant because:
(a) the substantial delay between the applicant's becoming aware of the conviction and the filing of the re-hearing application was unexplained; and
(b) to a lesser extent, there was no evidence by the applicant that he believed he had a good defence to the charge or could place material before the court which may have led to a different result on the charge.

MURRAY J: *[After setting out the chronology of events, the evidence given by the applicant and the Magistrate's reasons for decision, His Honour continued]* … **[4]** Mr Cudlipp submitted to the Magistrate that the fact that he had frequently moved his address was not of great importance in view of the fact that he took all reasonable steps to ensure that mail was forwarded to him and that, as a matter of natural justice, the application should be granted so that the applicant should be able to defend himself. Mr Cudlipp's affidavit then states that His Worship said in very brief terms that the onus was on the applicant to indicate and provide full details of his change of address to the Road Traffic Authority and that, in view of the substantial passage of time between the date of the original offence and the application for re-hearing, the application should be dismissed.

Before me, Mr Frankcom, who appeared for the applicant, submitted that it was clear that the reasons given by the Magistrate disclosed an error and that his discretion had miscarried. He submitted that His Worship did not give full weight to the right of the applicant to be informed

of the proceedings and to have an opportunity of defending himself, and that he was in error in relying on the applicant's failure to provide details of his change of address to the Road Traffic Authority, and to the substantial passage of time between the date of the original offence and the application for re-hearing.

In reply, Mr Downing, who appeared for the respondent, was disposed to admit that the reasons given by **[5]** the Magistrate indicated that some criticism could be levelled at the exercise of his discretion.

I agree with Mr Frankcom's submission because, in my opinion, both reasons given by His Worship are open to criticism. It is by no means clear, in my opinion, that had the applicant faithfully notified the Road Traffic Authority each time he changed his address, this would have had any effect. It seems to me that in the absence of any evidence one way or the other, one might very easily infer that when authority was given to issue the summons against the applicant the police followed a normal or what would appear to me to be a very normal course of serving the summons at the address which the applicant gave them at the time he was first apprehended.

In the absence of evidence that before either attempting personal service or service by post on the applicant, the practice of the police was to check with the Road Traffic Authority to see whether the applicant's address had changed. There is simply no evidence one way or the other that the failure of the applicant to notify his change of address to the Road Traffic Authority had any bearing on the matter. In this connection there is one aspect which perhaps touches on it, namely, the provisions of s11(3) of the *Magistrates (Summary Proceedings) Act* 1975 which provide that:

> "Where a copy of a summons is posted as provided in this section the deposition or affidavit of service shall state the manner of ascertainment of the address to which it was posted the time and place of posting..."

Nothing that the Magistrate said suggests that he had reference to the affidavit on the court **[6]** file or, that if he did, it was endorsed with a statement that the address to which the summons was posted, if it was posted, had been obtained from the Road Traffic Authority as opposed to from the applicant at the time of his first interception.

[7] The second ground on which the Magistrate based his decision was that a substantial passage of time had elapsed between the date of the original offence and the application for re-hearing. In my opinion, unless there is some indication that the passage of time between the date of the offence and the date of the application for re-hearing has been such as to cause some prejudice to the prosecution, the passage of time is irrelevant. In this case, as it appears, there was no attempt by the prosecution to suggest that the prosecution of the offence, if a re-hearing were granted, would be disadvantaged or prejudiced simply by reason of the passage of time. In any event the alleged offence was committed in February 1984 and the hearing of the information was not until October 1984 and it might be supposed that the traffic policeman would have very little memory of what must have been a fairly routine offence judging by the penalties which were imposed which do not suggest that any dramatic or very serious offence was disclosed before the Magistrate.

I was referred to a decision of Nicholson J reported in *Garner v Gallienne* (1985) 9 ACLR 808 in which some importance was attached to the lapse of time which had occurred between the date of the offence and the date of the application for re-hearing, but the facts of that case are very different. The time interval in that case was some eleven years and the application for rehearing was strenuously opposed by the prosecution and evidence was given that the records and other evidentiary material had long since been destroyed. In such a case the lapse of **[8]** time, of course, may be an important feature, but in a case such as the present one, the lapse of time between the offence and the application for re-hearing, in my opinion, is of little or no importance in the absence of some submission by the prosecution of some disadvantage or prejudice flowing from it.

Consequently, I think it is clear that the Magistrate misdirected himself in the exercise of his discretion and the question then arises as to whether I should simply send the matter back

to him or whether I should exercise the power conferred on this court and come to a conclusion which, on the proper exercise of a discretion, I think should be arrived at.

I have come to the view that I should exercise the discretion myself and consider the matter afresh. The material before the court is, in my opinion, far from satisfactory. Although the applicant appeared on the application for a re-hearing, no affidavit has been filed by him in support of the order nisi nor is there any suggestion that if he were granted a re-hearing any different result would follow. In *Garner v Gallienne* (*supra*) it is said that different considerations apply in criminal cases from those which apply in civil cases where application is made to set aside a default judgment and where the authorities indicate that the applicant must show an arguable case in order to succeed in having a judgment set aside.

While in criminal cases it may well be that an applicant should not be expected to go into his defence, I think it does not follow that an applicant should not **[9]** at least make a statement to the effect that he believes he has a good defence or that he believes that there are circumstances which, if he had had the opportunity of placing the facts before the court, would or might have led to a different result. Consequently, I think that the material is defective in that aspect, although, I do not place a great deal of weight upon it.

The matter which is a good deal more important is the very scant material in the affidavits relating to what happened between February 1985, when the applicant first became aware of the fact he had been convicted and his licence had been cancelled, and 18th July, when the application for re-hearing was served. As I have stated, it is agreed that the statement by Mr Hutchins that he first became aware of the conviction on 18th July, should be taken as referring to 18th June, but Mr Hutchins does not state how he became aware and he does not give any details of why, after that date, a month was allowed to elapse before the application was served.

Furthermore, the applicant himself does not condescend to any detail at all as to why, when he learned late in February 1985 that he no longer had a licence to drive, he apparently took no action until 18th June, a very substantial period of time, having regard to the very serious situation in which he found himself. He does not say that he was not aware there was any avenue open to him nor whether he took any other steps to apply for a licence again, the period of disqualification having elapsed or whether he ceased to **[10]** drive; he does not give any detail at all and his statement coupled with the rather curious statement by Mr Hutchins that the first time he was aware of the conviction was in June 1985, leaves a curious absence of any detail at all as to what happened. For all the material shows some other person may have informed Mr Hutchins in June 1985, of the conviction and Mr Hutchins may have himself got in touch with the applicant, if he was a client from previous occasions.

The applicant comes to this court complaining of the exercise of the Magistrate's discretion against him and having succeeded in showing some error, he then must fall back on the exercise of discretion in his favour by me. It appears to me that the whole of the material in this case is unsatisfactory and does not call for any particular discretion to be exercised in favour of the applicant and I therefore think that the appropriate order is that the order nisi be discharged.

(Discussion ensued re costs). I think in this case there is a little bit to be said against the ordinary principle that costs should follow the event by reason of the fact that, as Mr Frankcom has pointed out, I did find that the Magistrate misdirected himself in the exercise of his discretion. On the other hand, I think that the normal rule should apply to a certain extent because the applicant undertook these proceedings and he has failed in them. I think the justice of the situation may well be met by my ordering that the applicant pay $100 costs to the respondent.
