30/72

SUPREME COURT OF VICTORIA

KROHN v DIXON

McInerney J

12 September 1972

MOTOR TRAFFIC – FAILING TO COMPLY WITH A RED TRAFFIC CONTROL SIGNAL – DEFENDANT PLEADED NOT GUILTY – DIFFERENCES BETWEEN THE INFORMANT'S EVIDENCE-IN-CHIEF AND CROSS-EXAMINATION – 'NO CASE' SUBMISSION UPHELD – CHARGE DISMISSED – WHETHER JUSTICES IN ERROR.

HELD: Order nisi discharged.
1. When the course of the proceedings was analysed and the terms of the submission made by the solicitor for the defendant and a ruling given were examined, it became apparent that what the Justices were saying was that on the evidence given they were not satisfied beyond reasonable doubt, and therefore not disposed to convict.

2. Looking at the material in this case, it is understandable that the Justices had a reasonable doubt. Having regard to the way the informant's evidence-in-chief was modified under cross-examination and to the absence of evidence as to the operation of the traffic lights cycle, it was understandable the Justices saying they were left with reasonable doubt.

3. It is a mistake to expect Magistrates' Courts, which operate in conditions which are far removed from the relative calm of the Supreme Court, with a great volume of business to be transacted in a very limited time, to adhere at all times strictly and unswervingly to rules of procedure if adherence to those rules would restrict unduly their ability to get at the heart of the problem quickly. If a Magistrates' Court, on a submission of no case, reaches a quite firm conclusion that the evidence of the prosecutor does not satisfy it beyond reasonable doubt, there is little or no useful purpose in requiring the court to go through the formality of saying: "I over-rule your submission of no case, but if you tell me that you are not going to give evidence I will say here and now that I am not satisfied beyond reasonable doubt."

4. There is nothing in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671 to preclude a court taking such a course if the circumstances suggest to the court that it is proper on the facts then appearing. In the instant case, what happened was that what began as a no case submission by a natural and perhaps imperceptible process to an invitation to dismiss the case because the evidence was unsatisfactory, and that the Justices acceded to the later invitation.

McINERNEY J: This is an order nisi granted by Master Brett on 11 February 1972, to review a decision of the Magistrates' Court at Oakleigh on 24 November 1971, constituted by Messrs A Rubenstein and B Hall, Justices of the Peace, dismissing an information laid by the informant, Eric William Dixon against the defendant Alan John Krohn.

The information charged that the defendant on 11 June 1971 at Mount Waverley being a driver on the carriageway of Huntingdale Road did fail to observe and comply with the instructions of a traffic control signal displaying a red circle alone, erected at or near the intersection with Railway Parade South and applicable to him.

The prosecution was conducted by Senior Constable Kevin Hastings and the defendant was represented by Mr Edwards, a barrister and solicitor. The evidence for the prosecution consisted solely of the evidence of the informant, who was cross-examined by the solicitor for the defendant, and then re-examined at the conclusion of the cross-examination. At the conclusion of the informant's evidence the Prosecutor closed the case for the prosecution. Mr Edwards then submitted that the information should be dismissed at that stage because there was no case for the defendant to answer.

According to the informant's affidavit Mr Edwards submitted that the case for the

prosecution did not include any evidence as to the colour of the traffic control signal displayed to the defendant, and it was submitted, therefore, that there was no evidence to show that the defendant failed to observe any traffic control signal.

According to the defendant's answering affidavit Mr Edwards' submission included the proposition that the prosecution evidence was not sufficient to discharge the onus at proof, and that included in the unsatisfactory evidence was insufficient evidence as to the colour of the traffic control signal displayed to the defendant. Mr Edwards further submitted that it was the responsibility of the prosecution to discharge the necessary onus of proof, and that there were methods available to the informant to satisfy the Court relative to the operation of the traffic control signal. Reference was made in the course of the answering submission of the prosecution to a statement made by the defendant to the informant when he was intercepted (to which I will refer hereafter) and the Court was invited to infer that the defendant knew that the traffic control signal displayed a red circle alone. The Prosecutor also submitted that there was a presumption as to the accuracy of the traffic control signals, and he cited in support of this proposition two cases: one of *Thompson v Kovacs* [1959] VicRp 40; [1959] VR 229; [1959] ALR 636 and the case of *Wells v Woodward* the citation of which is incorrectly stated in the affidavit but which correctly cited as *Wells v Woodward* (1956) 54 LGR 142, cited in vol 45 of the *English and Empire Digest* at p36, No 121, a decision of the Divisional court.

The Prosecutor's submissions were that *Kovacs case* was authority for the proposition that the traffic control signal was akin to a technical or scientific instrument and that its accuracy could be presumed until the contrary was proved. The prosecutor also submitted that *Wells' case* was authority for the proposition that traffic control signals were presumed to be operating correctly and that it should be presumed that if one traffic control signal in one carriageway displayed a red circle alone, then the traffic control signal in the other carriageway of the intersection displayed a green circle alone. (I take that to be a reference to the decision, in *Wells' case*, and not to the facts of the instant case).

The Prosecutor argued that at least a *prima facie* case had been established by the prosecution which could be rebutted by the defendant when his case was brought in.

The Justices, through the presiding Justice, then stated that the Court upheld the submission of no case to answer, rejected the Prosecutor's submissions and dismissed the information. The affidavit of the informant states that when asked for the reasons for dismissal the Chairman stated:

> "The Court is of opinion that there is not sufficient evidence in relation to the lights, which the policeman was unable to see, which lights were facing the defendant and accordingly a doubt is raised and we dismiss the charge."

That statement is amplified in the affidavit of the defendant, where it is said that when the presiding Justice of the Peace was asked by the Prosecutor for the Court's reasons for dismissal, the Chairman stated:

> "We do not think there is sufficient evidence from what this policeman has said. A doubt has been raised and the charge will be dismissed".

and that thereupon the Prosecutor asked a question of the Chairman, namely, whether the prosecution evidence which the Court had not thought sufficient included the informant's evidence on the colour of the traffic lights, to which the Chairman nodded his head affirmatively.

The order nisi was granted on the ground that (a) the Justices of the Peace constituting the said Magistrates' Court were in error in holding that there was not sufficient evidence before them to establish that there was a case for the defendant to answer, and (b) that the said Justices of the Peace ought to have held on the evidence that the informant had established a *prima facie* case for the defendant to answer that he had at the time and place referred to in the said information failed to observe and comply with the instructions of a traffic control signal displaying a red circle alone, and applicable to him.

The evidence before the Court was that at about 8.55am on Friday 11 June 1971, the

informant, who was apparently making his observations from a police car, the precise location of which was ultimately, after some hesitation and uncertainty on the part of the Informant, stated to be at the intersection of Grenfell and Huntingdale Roads, facing north west. From that position he saw, he said, the defendant drive a motor car south in Huntingdale Road, Jordanville. The registered number of the motor car was stated by him to have been GTV 792. The answering affidavit of the defendant states that this number was incorrectly given, the correct number being GTK-792.

According to the informant's evidence-in-chief, as the defendant approached the traffic control signal erected in Huntingdale Road, the lights changed to red for traffic travelling north and south in Huntingdale Road, but the defendant proceeded beyond the stop line and entered and passed through the pedestrian crossing against the red traffic control signal. The informant swore that the defendant was about 20 feet from the stop line when the lights changed to red and travelling at about 10 miles an hour; that the defendant did not stop his vehicle before reaching the stop line, and that when the informant intercepted the defendant and said to him, "What is your reason for failing to comply with the traffic control signal?" The defendant said, "None, I was too close before I saw it." The informant's evidence was that the incident occurred at a pedestrian crossing at the intersection of Railway Parade South and Huntingdale Road, Jordanville.

In the cross-examination of the informant, the solicitor for the defendant produced a map which he stated to have been drawn to scale and which the informant accepted as accurately representing the plan of the area. That plan is a plan of Huntingdale Road and the area between the traffic lights and the intersection of Huntingdale Road and Grenfell Road (which enters Huntingdale Road on the eastern side some distance to the south of Railway Parade which enters on the western side some distance to the south of the railway overhead bridge.).

The plan is drawn to a scale of one inch to twenty feet and it shows two sets of traffic lights, one set facing northward, consisting of three lights, one on the eastern side of Huntingdale Road close to a stop line some 15 feet or so to the north of the northern line of the northernmost pedestrian crossing, in line with which (on the eastern and western sides of Huntingdale Road) are the remaining two traffic lights of that set each facing north.

A little to the south of the southern border of that pedestrian crossing is the overhead railway bridge. Further south of the southern edge of the railway bridge is the southern pedestrian crossing, in line with the southern boundary of which are another two traffic lights (on the east and west sides respectively of Huntingdale Road) facing south, and on the stop line, again some 15 feet or so further south, another traffic light also facing south, erected on the west side of the intersection.

It is apparent from this plan that this series of lights are by no means as simple as the evidence-in-chief of the informant might at first have led the Court to believe.

In cross-examination, the informant assented to the proposition that he had a clear view of the pedestrian dressing, the lights, the stop line and the defendant's vehicle at the material time, and said that from the position of his vehicle he would be able to see the traffic control signals facing south, that they were working correctly, that the pedestrian crossing was one in which there were four separate sets of traffic control signals, one on each corner of the pedestrian crossings, that two of those lights would be facing north and the remaining two facing in a southerly direction, that from the position in which he (the informant) was, only two of these sets of traffic control signals would have been visible, namely, the sets of two traffic control signals facing south. He conceded that the sets of traffic control signals facing north would not have been visible to him and that he would not have been able to see whether they were working correctly. He conceded also that be did not see what colour the traffic control signals indicated on the northern side of the pedestrian crossing.

In re-examination he said that to the best of his knowledge the traffic control signals were operating correctly, that there was no reason to believe that the traffic control signals were not operating correctly, that other cars travelling in the same direction as the defendant had stopped at the intersection crossing when the signal displayed a red circle. He also stated, in re-examination, that the cycle of the traffic control signal was from a green circle alone to an amber circle alone,

and then to a red circle alone. The remainder of his evidence may, I think, be disregarded. It should be added, however, that in cross-examination of the informant the solicitor for the defendant suggested to him that the distance between the point in Grenfell Street where the police car was to the point of the most northerly traffic light erected on the eastern side of Huntingdale Road would have been something in the order of 334 feet at least, but that the informant stated that he did not think the distance was as great as that.

On this state of the evidence, Mr Tadgell moving the order absolute contended that the Justices had mis-directed themselves as to the rules to be applied in a submission of no case; that the only question which fell to be determined on such a submission was whether, on the material before the Court, the defendant could lawfully be convicted and that it was not, at that stage, relevant to enquire whether the evidence satisfied the Bench beyond reasonable doubt. In support of this proposition he relied on the judgment of the High Court in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671 where, at CLR p658, it is said:

> "When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether, on the evidence as it stands, the defendant ought to be convicted, but whether on the evidence as it stands, he could lawfully be convicted. That is really a question of law. Unless there is some special statutory provision on the subject a ruling that there is a case to answer has no effect whatever on the onus of proof which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the Tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. That is a question of fact."

At p659, Their Honours add:

> "A Magistrate who has decided that there is a case to answer may quite consistently if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made a *prima facie* case but it does not follow that in the absence of a satisfactory answer the defendant should be convicted."

I should, perhaps, have stated that it does not appear that at any stage of the hearing below the *Road Traffic Regulations* were tendered in evidence, but consistently with the decision of the Chief Justice, Sir Henry Winneke, in *Schuett v McKenzie* [1968] VicRp 24; [1968] VR 225 I allowed Mr Tadgell to tender those regulations in evidence before me, Mr Uren not opposing this tender and conceding that I could properly allow that tender to be made before me.

Mr Tadgell conceded that there were two questions of fact or two matters of fact which had to be borne in mind by the Court. First of all that the informant's observations were taken from a point some distance away from the point at which the defendant's car would have been called on to stop, and secondly, that the informant could not observe, and conceded that he could not observe, the colour of the light facing the defendant as he proceeded southward. But he submitted that the evidence of the defendant's answer to the question: "What is your reason for failing to comply with the traffic control?" "None, I was too close before I saw it." constituted evidence on which it would have been open to the Bench to have convicted the defendant, coupled with what was said in the cross-examination as set out in para.7 pp3-4.

Mr Tadgell conceded that it was necessary to prove that the traffic lights were operating correctly, and secondly, to prove that the traffic lights were synchronised so that whenever a red light appeared to northbound traffic, a red light would also appear to southbound traffic.

Although the evidence did not establish, formally speaking, the precise nature of the pedestrian crossings, it was, I think, taken as common ground between the parties that the traffic lights shown in the plans were not flashing lights of the kind associated with pedestrian crossings referred to in the regulations, but that they were push-button controlled lights capable of being operated by pedestrians.

Mr Tadgell supported his submission that the presumption ought to be made that the traffic lights were operating correctly and synchronously by the citation of the case of *Tingle Jacobs & Co (a firm) v Kennedy* [1964] 1 WLR 638 note or (1964) 1 All ER 888 note. I use the latter report.

The case was one of an appeal from a judgment of the County Court wherein the learned County Court Judge on the hearing of a claim for damages for negligence and a counter-claim of the same nature, arising from an intersection collision at the corner of Clarence Street and Thames Street in Kingston-upon-Thames had found himself unable to determine whether either party crossed the lights at green. The plaintiff's case was that his car was being driven down Clarence Street, that the traffic light applicable to him was green and that his vehicle was crossing with the lights when the defendant's car came across ahead of him from Thames Street with a resultant collision. The defendant gave evidence that he was proceeding in Thames Street when he saw the lights applicable to him at the intersection of Thames Street and Clarence Street, that it was red, then turned to amber and then to green, and that when it turned green he proceeded forward in Thames Street into the intersection.

A sergeant from the Traffic Department of New Scotland Yard gave evidence that the lights had been inspected in January and in April of 1962 and that there had been no reports of any trouble about them at all. The trial judge felt himself unable to hold that the lights were working properly and came to the conclusion that he was quite unable to decide where the truth lay; whether either party crossed the lights at green. He held that each of them owed some duty of care to the other, that each failed to perform that duty and that they were equally liable to blame.

The appeal was allowed and a new trial ordered. In the course of giving the judgment of the court, Lord Denning MR said:

> "It seems to me that in the face of the evidence from the sergeant of the Traffic Department of New Scotland Yard, it would not be right to suggest that the lights were not working properly. Furthermore, when you have a device of this case set up for public use in active operation, I should have thought that the presumption should be that it is in proper working order unless there is evidence to the contrary and there is none here. I can not agree with the County Court Judge's suggestion that the lights were not working properly.

It appears to me that when this judgment is analysed there are two propositions involved. There is first of all the proposition that having regard to the inspection of the lights in January and again in April, that the presumption of continuance was applicable. It being proved that the lights operated properly in January and again in April the presumption arose that on 4 April 1962, they were in proper working order. As to that first point, of course, there is no such evidence in this case. The informant has not sought to call in aid any presumption of continuance.

Secondly, the judgment of Lord Denning appears to me to call in aid the presumption as to the accuracy of some scientific or mechanical contrivance; a presumption of the kind which was invoked by Sholl J in the case of *Thompson v Kovacs* [1959] VicRp 40; [1959] VR 229; [1959] ALR 636 (to which the Justices were referred) by Lowe J in *Crawley v Laidlaw* [1930] VicLawRp 56; [1930] VLR 370; 36 ALR 311 and by Fullagar J in *Giles v Dodds* [1947] VicLawRp 70; [1947] VLR 465; [1947] ALR 584.

But it is one thing to establish that traffic control lights are operating effectively; it is another thing to establish that two sets of lights, separated by some substantial distance, are synchronised. The only evidence which was given as to the mode of operation of these lights was the evidence that the cycle was from a green circle alone to an amber circle to a red circle. There was no evidence given that the cycle was that when the red light was showing for northbound traffic at the traffic lights to the south of the southern pedestrian crossing; that the red lights would also be showing for traffic proceeding south, showing, that is, at the traffic lights at the northern end of the northern pedestrian crossing.

Mr Tadgell submitted that it was open to the Court to find, as a matter of inference, from the nature of the lights and the end which they were designed to ensure, namely, to ensure the safety of pedestrians, that if one set of lights were showing red, the other set of lights could not be showing otherwise than red. I think a Court might reasonably have concluded that the design of the system and cycle must have been that when the lights were showing green for pedestrians to cross the two sets of pedestrian crossings, both lots of traffic lights in Huntingdale Road would be designed to be showing red. But it does not follow from that consideration that immediately a button was pressed to operate the pedestrian crossing lights to turn green, that the lights would immediately turn green and that there might not have been, first of all, (for north and south traffic)

an amber light followed by a red light before the pedestrian light would show green to invite or entitle pedestrians to cross.

Mr Uren has submitted that there were substantial reasons in this case for doubting the reliability of the informant as a witness. With that submission, I am afraid I have to agree. If one looks at his evidence-in-chief and then contrasts that with what emerged in cross-examination, the pattern of the facts affecting this locality is significantly different. I do not pass that judgment as a judgment impugning, necessarily, the veracity of the informant. It may be that he was a careless witness or a witness who was not sufficiently observant. Certainly he seems to have erred as to the registered number of the defendant's car.

Certainly also, the intersection and the system of lights was by no means as simple as the evidence-in-chief suggested, and one has to bear in mind also that there was no evidence to show what the colour of the pedestrian lights was in the pedestrian crossings at any relevant time, and that at no stage was it expressly put to the defendant that he had gone through a red light. The question put to him was whether he had gone through a traffic control light. His answer conceding, as I read it, that he had, is consistent with his having gone through, or failed to stop, on the light turning to amber. The evidence that a number of cars proceeding South had stopped at the pedestrian crossing when the signal facing South displayed a red circle is consistent with those cars having stopped on the amber light, and with the observation of those lights having been made by the informant either at the time when the light turned to red, or at some stage when the light was showing red.

What has troubled me in this case has been the question whether on the whole what the Justices did was to rule that there was no case to answer or whether on the other hand, they ruled that they were not satisfied with the prosecution case and dismissed it. There is a very real distinction between the two processes. Mr Tadgell argued perfectly correctly that on a submission of no case the only question is whether there is evidence on which it is open to the Court to convict; the question is not whether the court ought to believe the evidence of the informant, but rather, whether assuming that that evidence is believed, it is open to the Court to convict. On the other hand, if the Tribunal is ruling on the sufficiency of the evidence as a whole it is open to the Court to come to the conclusion that having regard to the unsatisfactory nature of the evidence, it will dismiss the prosecution.

In *Benney v Dowling* [1959] VicRp 41; [1959] VR 237; [1959] ALR 644 to which Mr Uren referred me, on a summary trial of a motorist on a charge of driving whilst under the influence of intoxicating liquor, a Magistrate upheld a submission by defence counsel that police evidence of co-ordination tests to which the defendant submitted at the watch house was inadmissible on the ground that he was in custody and had not been cautioned. O'Bryan J came to the conclusion, on review, that the evidence objected to should not have been excluded and consequently made the Order Nisi absolute, remitting the case for re-hearing. One ground, however, of the Order Nisi to Review was "that on the evidence the Magistrate should have held that there was a case to answer". With respect to that ground it was said by O'Bryan J at p242 after a citation of the passage from *May v O'Sullivan* (to which I have already referred):

> "That proposition, in my opinion, was never intended to carry with it the proposition that a Magistrate has no discretion to say at the end of the informant's case whether there is, technically speaking, evidence upon which the defendant could lawfully be convicted, that he does not want to hear the defendant but will dismiss the information. What the Magistrate said here was this:
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> > 'In this case I have the evidence only of the two police constables and it is not sufficient to me to prove that the defendant was incapable of driving a motor car. I will not call on the defendant to answer the charge and the case will be dismissed.'
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> It is not clear whether he did or did not add something to the effect that the information given by the police officers had to be read in conjunction with the defendant's behaviour at the hospital and the evidence of Dr Dick. I would have no doubt, however, that the Magistrate did have those matters in mind when he said that he would not call on the defendant to answer the charge."

And then after citing the passage from p659 of the report in *May v O'Sullivan* (which I have earlier quoted) O'Bryan J added:

"It is common practice both in Courts of Petty Sessions and in trials before a jury that at the end

> of the case for the informant or prosecution although the evidence as it stands might justify a conviction, for the magistrate or a jury very often at the suggestion of the trial judge to say that he or it does or do not require to hear any evidence for the defence and to acquit at that stage. That is a very convenient practice and I do not think that the passage I have cited from *May v O'Sullivan* was intended to say that there is anything improper in such action. I would not therefore make the Order Nisi absolute on that ground."

Applying that to the facts of the present case and having regard to the invitation that was extended to me by Mr Tadgell to lay down a proposition that an inference ought to be drawn as to the reliability and efficiency of the function of traffic control lights, I am of the view that no such general rule can be laid down without qualification. There may be many cases of a simple set of intersection lights where the presumption can be drawn that if the light is showing red one way it must, at the same point of time, be showing green in the other direction.

There are many other intersections where the cycle is one of some complexity, — as e.g. where five or six intersections join and the system of control by traffic lights is necessarily therefore one of some sophistication. In such cases it might not be safe to rely on evidence of the efficiency of the lights, at least without evidence as to the nature of the particular cycle applicable for those lights. In the present case the two sets of lights were separated some 60 feet or so apart, and they were susceptible of operation perhaps by anything up to four sets of traffic control buttons. Obviously, considerable co-ordination would be required in the lighting cycle.

I doubt whether, when the evidence in the present case is closely examined, it would have been proper to overrule a submission of no case. What affects me more, and what I really base my decision on, is this: that when the course of the proceedings is analysed and the terms of the submission made by the solicitor for the defendant and a ruling given are examined, it becomes apparent that what the Justices were saying was that on the evidence given they were not satisfied beyond reasonable doubt, and therefore not disposed to convict it.

It may be that the Magistrates who arrive at such a view at the end of the informant's case ought to make quite clear and explicit what it is that they are decided. Certainly it would be wise for them to make quite clear and explicit the fact (if it be the fact) that they are going beyond a mere ruling on a submission of "no case to answer" and are saying that the evidence on the whole does not satisfy them beyond reasonable doubt.

Looking at the material in this case, I can understand the Magistrates having reasonable doubt. I do not say that I would, myself, necessarily have had such reasonable doubt. That is not a question for me. I have not seen or heard the informant giving evidence. But having regard to the way the informant's evidence-in-chief was modified under cross-examination and to the absence of evidence as to the operation of the cycle, I can understand the Justices saying they were left with reasonable doubt, and I think that that is what their ruling must really be understood as meaning.

It is, I think, a mistake to expect Magistrates' Courts, which operate in conditions which are far removed from the relative calm of these Courts, with a great volume of business to be transacted in a very limited time, to adhere at all times strictly and unswervingly to rules of procedure if adherence to those rules would restrict unduly their ability to get at the heart of the problem quickly. If a Magistrates' Court, on a submission of no case, reaches a quite firm conclusion that the evidence of the prosecutor does not satisfy it beyond reasonable doubt, there is little or no useful purpose in requiring the court to go through the formality of saying "I overrule your submission of no case, but if you tell me that you are not going to give evidence I will say here and now that I am not satisfied beyond reasonable doubt."

There is nothing in *May v O'Sullivan* to preclude a court taking such a course if the circumstances suggest to the court that it is proper on the facts then appearing. In the instant case, I think that what happened was that what began as a no case submission by a natural and perhaps imperceptible process to an invitation to dismiss the case because the evidence was unsatisfactory, and that the Justices acceded to the later invitation.

The result is that the Order Nisi will be discharged. MR UREN: Would Your Honour make an order for costs? HIS HONOUR: Mr Tadgell, do you have anything to say as to that? MR TADGELL:

No sir. HIS HONOUR: Order that the defendant's costs be taxed as between party and party and when so taxed paid, up to the amount of $200, by the informant.

APPEARANCES: For the applicant/defendant Krohn: Mr G Uren, counsel. Mr JK Edwards, solicitor. For the respondent/informant Dixon: Mr RC Tadgell, counsel. Mr J Downey, Crown Solicitor.
