13/69

SUPREME COURT OF VICTORIA

THOMSON v FRAWLEY

Newton J

14 October 1969

SUMMARY OFFENCE – BEHAVING IN AN OFFENSIVE MANNER IN A RAILWAY CARRIAGE – WHETHER "RAILWAY CARRIAGE" A "PUBLIC PLACE" – DEFINITION OF "PUBLIC PLACE" – CHARGE DISMISSED ON THE GROUND THAT RAILWAY CARRIAGE NOT A PUBLIC PLACE – WHETHER MAGISTRATE IN ERROR: *SUMMARY OFFENCES ACT* 1966, SS3, 17(1)(d).

HELD: Order nisi absolute. Dismissal set aside. Defendant convicted and fined $10 in default distress.
1. The words "railway carriage" included a carriage travelling between stations as well as a carriage at a station.

2. In holding that the railway carriage while in travel was not a "public place", the Magistrate overlooked the definition of the expression "public place" in s3 of the *Summary Offences Act* 1966, para. (c) of which included in the expression "public place" "any railway station, platform or carriage". This part of the definition clearly applied to s17(1)(d) and to hold that it was excluded by the context or subject matter was absurd.

NEWTON J: This is the return of an Order Nisi to review the decision of a Court of Petty Sessions at Ferntree Gully given on 21 May 1969 whereby an information against Simon Peter Leo Frawley was dismissed.

By the information Frawley was charged with behaving in an offensive manner on 18 May 1969 in a public place, to wit a railway carriage travelling between Ferntree Gully and Boronia.

Section 17(1)(d) of the *Summary Offences Act* 1966 provides so far as material that any person who in a public place, behaves in an offensive manner shall be guilty of an offence, and a maximum penalty of a fine of $100 or imprisonment for two months is prescribed.

The evidence before the Court of Petty Sessions established that Frawley on 18 May 1969 behaved in an offensive manner in a railway carriage travelling between Ferntree Gully and Boronia. But the Court, which was constituted by Mr LSF Smith SM, dismissed the information upon the ground that the railway carriage while in travel was not a "public place".

But in adopting this course the Stipendiary Magistrate overlooked the definition of the expression "public place" in s3 of the *Summary Offences Act* 1966, para. (c) of which includes in the expression "public place" "any railway station, platform or carriage". In my opinion this part of the definition clearly applies to s17(1)(d): indeed to hold that it was excluded by the context or subject matter would be absurd: compare *Ward v Marsh* [1959] VicRp 5; [1959] VR 26; [1959] ALR 233 especially at VR pp28-29 per Lowe J. And in my view the words "railway carriage" include a carriage travelling between stations as well as a carriage at a station.

Mr Graham, who appeared before me for the informant, also submitted that the railway carriage was a "public place'" by reason of each of paras (f) and (o) of the definition of "public place" in s3: see *Milne v Mutch* [1927] VicLawRp 28; [1927] VLR 190; 33 ALR 172; 48 ALT 180 and *Kearsley v Philips* (1882) 10 QBD 36. But it is unnecessary for me to express any view upon these matters.

The Order Nisi must therefore be made absolute with costs. Mr Graham submitted that the most expedient course in all the circumstances would be for me to deal with the matter finally without sending it back to the Court of Petty Sessions, and I agree with this submission. Frawley will be convicted and fined $10.

Frawley was not represented before the Stipendiary Magistrate, and the ground upon which the Stipendiary Magistrate dismissed the information was raised by the Stipendiary Magistrate himself, although I should add that the definition of "public place" in s3 of the Act was apparently not brought to the attention of the Stipendiary Magistrate by the police officer who conducted the prosecution.

Frawley did not appear and was not represented before me, but an affidavit of service was filed. I shall be grateful if the Crown Law authorities will bring to Frawley's attention the provisions of the *Appeal Costs Fund Act* 1964 as to indemnity certificates.

The formal order of the Court will be as follows:-
Order that the Order Nisi be made absolute with costs (including reserved costs) and that the decision of the Court of Petty Sessions dismissing the information be set aside and that in lieu thereof the defendant be convicted and fined $10. [Ed. note: Following discussion with Counsel for the Informant, His Honour varied the Order, so as to provide that the Informant's costs were fixed at $120, and that the fine of $10 was to be in default distress. His Honour said that since the informant wished him finally to dispose of the matter and since the defendant was not present, he would not order that the defendant be imprisoned in default of payment of the fine. Counsel for the Informant said that the Crown Law Department would supply the Stipendiary Magistrate with a copy of His Honour's Reasons for Judgment.

APPEARANCES: For the informant Thomson: Mr D Graham, counsel. Thomas F Mornane, Crown Solicitor. No appearance of or for the defendant Frawley.
