35/69

SUPREME COURT OF VICTORIA

MATHEY v HARRIS

Smith J

18 December 1969

PRACTICE AND PROCEDURE – PLEA OF GUILTY TO A DRINK/DRIVING OFFENCE – EFFECT OF A PLEA OF GUILTY – EVIDENCE GIVEN OF THE CERTIFICATE OF THE ANALYSIS BUT NOT PRODUCED TO THE COURT – PROSECUTOR SOUGHT TO HAVE THE MATTER STOOD DOWN WHILST THE CERTIFICATE WAS RETRIEVED – APPLICATION REFUSED – INFORMATION DISMISSED – WHETHER MAGISTRATE IN ERROR: *JUSTICES ACT* 1958, S91(4).

The defendant was charged with driving a motor car with a blood alcohol level exceeding .05. The information was dismissed. On review the dismissal was set aside and the information remitted to the Magistrate for re-hearing. On the re-hearing, the defendant appeared and pleaded guilty. The informant called a substantial body of evidence including the fact that the defendant was given a certificate of his breath analysis, but the document was not produced. The prosecutor sought leave to obtain the original certificate from nearby premises, but the Magistrate declined to stand the case down to enable him to do so, and again dismissed the information. Upon order nisi—

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrate with a direction to convict and impose a penalty.
1. The Magistrate was wrong in law in dismissing the information upon the re-hearing. Section 91(4) of the *Justices Act* 1958 provided, so far as material, that in the case of a summary prosecution the substance of the information shall be stated to the defendant and he shall be asked if he has any cause to show why he should not be convicted, and if he thereupon admits the truth of such information and shows no sufficient cause why he should not be convicted the Court shall, after hearing such evidence as it thinks fit with respect to the subject matter of such information, convict him accordingly.

2. When the defendant pleaded guilty at the re-hearing, that was a general admission of the truth of the facts alleged in the information. *Prima facie*, therefore, the conditions of sub-section (4) had been satisfied and the Court was under a duty after hearing such evidence as it thought fit with respect to the subject matter of the information, to convict the defendant.

SMITH J: ... The first ground of the order nisi was

> "that the Magistrate was wrong in holding that the information had not been proved because the certificate as to the reading given by the breath analysing instrument was not produced before him, notwithstanding that the defendant had pleaded guilty and that oral evidence as to the reading given by the said instrument had been given and not been objected to by the defendant."

In my view the Magistrate was wrong in law in dismissing the information upon the re-hearing. Section 91(4) of the *Justices Act* 1958 provides, so far as material, that in the case of a summary prosecution the substance of the information shall be stated to the defendant and he shall be asked if he has any cause to show why he should not be convicted, and if he thereupon admits the truth of such information and shows no sufficient cause why he should not be convicted the Court shall, after hearing such evidence as it thinks fit with respect to the subject matter of such information, convict him accordingly.

When the defendant pleaded guilty at the re-hearing, that was a general admission of the truth of the facts alleged in the information. *Prima facie*, therefore, the conditions of sub-section (4) had been satisfied and the Court was under a duty after hearing such evidence as it thought fit with respect to the subject matter of the information, to convict the defendant.

In such circumstances the evidence which is customarily given at that stage on behalf of the informant is not for the purpose of sheeting home the offence; it is to enable the Magistrate to understand what were the circumstances in which the offence was committed so that he will be able to decide what is the just penalty for him to impose; and when an accused person, after

evidence of that kind has been given on behalf of the informant, himself puts material before the Court, it is normally for the purpose merely of mitigating penalty.

It sometimes happens, however, that, after a plea of guilty and while evidence in relation to sentence is being given, something emerges which makes it necessary for the Court to go back to the question of guilt or innocence. It may be that at this late stage it is observed that the information is so framed that it discloses no offence. In those circumstances a plea of guilty is not an admission of an offence, and unless the information is amended and a new plea taken, the Magistrate, notwithstanding the original plea of guilty, will ordinarily dismiss the information.

Then again, it may appear in the course of the evidence relating to sentence that the facts alleged by the prosecution do not involve the commission of the offence charged in the information; or the accused may give some evidence which shows that his plea of guilty was not intended to admit all the necessary facts going to make up the charge, or that there is some cause why he should not be convicted. In these circumstances, too, the Magistrate may have to go back again to the question of guilt or innocence. The plea of guilty may be allowed to be withdrawn or, even without it being withdrawn, the Magistrate may, in some circumstances, properly reach the conclusion that the conditions of s91(4) are no longer satisfied and he may consequently dismiss the information.

What happened here, however, did not fall into any of the categories that I have referred to. What happened here was merely that, in the course of putting before the Magistrate evidence as to the circumstances of the offence so as to assist the Magistrate to decide the question of penalty, the informant put forward, without objection, secondary evidence of the contents of the document referred to in sub-section (2) of s408A.

The fact that this evidence was secondary evidence might have given ground for some objection had guilt or innocence then been in contest; but, as the Court was then considering merely the question of sentence and the informant was under no obligation to put forward full and formal proof of guilt, the fact that secondary evidence was given was of no significance. It did not negative, or raise any doubt about, the existence of all the elements necessary to constitute guilt. Accordingly, s91(4) continued to operate in accordance with its terms and to impose a duty on the Magistrate to convict.

[Ed note: The information was remitted to the Magistrate with a direction to convict and to deal with the defendant according to law.]
