09/80

SUPREME COURT OF VICTORIA — FULL COURT

HEAD v BAILLIEU

Lush, Murphy and Brooking JJ

26 November 1979

CRIMINAL LAW – SUMMARY OFFENCES – FIVE CHARGES LAID – INDECENT LANGUAGE, OFFENSIVE BEHAVIOUR – DRUNK AND DISORDERLY, WILFUL AND OBSCENE EXPOSURE (2) – ON TWO CHARGES DEFENDANT CONVICTED AND MATTERS ADJOURNED FOR 12 MONTHS WITHOUT REQUIRING DEFENDANT TO ENTER INTO A RECOGNIZANCE – WHETHER MAGISTRATE IN ERROR – TWO CHARGES OF OBSCENE EXPOSURE DISMISSED – FINDING BY MAGISTRATE THAT DEFENDANT DID NOT HAVE THE NECESSARY STATE OF MIND – WHETHER MAGISTRATE IN ERROR: *VAGRANCY ACT* 1966, S7(1)(c); *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S80.

B. had consumed a good deal of alcohol at a bucks' party in Melbourne and was very drunk. After the dinner, B. walked up Lit Bourke Street and walked up to a couple, male and female, exposed his penis to them saying, "Have a bit of this, it's great." Later, he approached another couple an called out to the woman, "Get a load of this" and as he faced the woman exposed his penis to her. B. was later charged with five counts. At the hearing, the charge of using indecent language was dismissed. The charges of offensive behaviour and being drunk and disorderly were adjourned for twelve months, the magistrate saying that he did not require B. to enter into a recognizance to appear on the adjourned date, and to be of good behaviour in the meantime. The two charges of obscene exposure were dismissed, the magistrate saying that he could not be satisfied beyond reasonable doubt that B. had the necessary intent. The magistrate's decision on these two charges involved the upholding of a defence of lack of intention resulting from drunkenness. Upon appeal against the adjournment of two of the charges and the dismissal of the two obscene exposure charges—

HELD: Order Nisi absolute. Remitted to the Magistrate for further determination.
1. The adjournment of the informations should only have been granted concurrently with B. entering into a recognizance conforming with the requirements of the *Magistrates (Summary Proceedings) Act* 1975, s80(1). If the Magistrate decided to exercise the power under s80(1) of the Act to allow B. to go at large, he had to require B. to enter into a recognizance for a reasonable amount and with or without sureties. In failing to take this course the Magistrate was in error.

2. In respect of the charges of obscene exposure, the Crown had to prove beyond reasonable doubt that B's act in exposing himself was a conscious and voluntary act on his part – a product of his will to act. To do this the prosecution had to exclude beyond reasonable doubt any question of accident, of sleep-walking, of hypnosis or automatism.

3. The evidence in the case showed clearly that not only was B. acting voluntarily and consciously when he exposed his penis on each of the two occasions, but also that, having regard to the words uttered by him at the time, he was not performing the act in question as an automaton, but for the express purpose of shocking the persons concerned. The fact that his inhibitions were removed by over-indulgence in alcohol simply meant that having formed the necessary intent he was simply the more ready to implement it.

4. There is no question but that B's unchallenged conduct was, objectively considered, obscene. It clearly transgressed the bounds of decency. Further, there was no possible construction to be placed on B's conduct, associated with the words he used, other than that he intended by his indecency to shock those to whom he exposed himself. His words used throw clear light upon his intention at the time of each exposure. His drunkenness went to explain his obscene conduct. It could not create any doubt whether his acts were conscious and voluntary or whether he intended to act obscenely.

5. It follows that the Magistrate erred in that he must wrongly have applied the law of drunkenness as a defence to these charges. There was no evidence upon which the Magistrate might as a reasonable man have come to the conclusion to which he did come.

LUSH J: On 8th March 1979 the respondent dined at a restaurant in the eastern part of central Melbourne with some fourteen or fifteen friends, to mark the occasion of his approaching marriage. On leaving the restaurant, the members of the party made their way on foot westward through

the central part of the city. By the time they reached an office area which may have been their destination, events had occurred which resulted in the laying by a police officer of five charges against the respondent – one of using indecent language one of behaving in an offensive manner in a public place, one of being drunk and disorderly in a public place, and two of wilfully and obscenely exposing his person in a public place (*Vagrancy Act* 1966, s7(1)(c)).

The charge of using indecent language was dismissed. The charges of offensive behaviour and being drunk and disorderly were adjourned for twelve months, the Stipendiary Magistrate saying that he did not require the respondent to enter into a recognizance to appear on the adjourned date, and to be of good behaviour in the meantime. The two charges of obscene exposure were dismissed, the Stipendiary Magistrate saying that he could not be satisfied beyond reasonable doubt that the respondent had the necessary intent. These two charges were the subject of the debate before us and will require further treatment: the Stipendiary Magistrate's decision on them involved the upholding of a defence of lack of intention resulting from drunkenness.

The informant sought and on 30th July 1979, obtained orders nisi to review all the decisions except that dismissing the charge of using indecent language. The orders were made returnable before the Full Court. The reasons for this were not sought by the Court at the hearing, and are not apparent, but it may be observed that the position of this Court in relation to the problems in the law relating to drunkenness said to be raised by *DPP v Majewski* [1976] UKHL 2; [1977] AC 443; [1976] 2 All ER 142; (1976) 62 Cr App R 262; [1976] 2 WLR 623 had been defined on 30th April 1979, by the judgment in *R v O'Connor* [1980] VicRp 60; [1980] VR 635. The resulting array, with the Solicitor-General appearing for the informant, may appear out of proportion to the original charges.

Counsel for the respondent did not attempt to show cause against the orders sought in respect of the charges of offensive behaviour and being drunk and disorderly. It was conceded that the adjournment of those informations should only have been granted concurrently with the respondent's entering into a recognizance conforming with the requirements of the *Magistrates (Summary Proceedings) Act* 1975, s80(1).

The grounds of the orders nisi relating to the two obscene exposure charges which were argued were that, "there was insufficient evidence upon which the Stipendiary Magistrate could determine whether the respondent had failed to have the necessary *mens rea* to commit the offence", and that the Stipendiary Magistrate wrongly applied the law "as to the defence of drunkenness".

The Solicitor-General conceded the verbal defects of those grounds, but contended in relation to the first ground that there was nothing in the evidence capable of raising a doubt of the existence of the necessary intention, and that the Stipendiary Magistrate's resulting error could be corrected by this Court, and in relation to the second ground that the Stipendiary Magistrate had equated evidence of drunkenness with evidence of lack of intention, which involved error of law because to raise the issue of lack of intention something more than evidence of drunkenness was required. He argued that the fact that the respondent had not given evidence supported his first submission and illustrated his second. He referred to *May v O'Sullivan* [1955] HCA 38; [1955] 92 CLR 654 at 659; [1955] ALR 671.

Mr Graham and Mr Redlich for the respondent, argued that while intoxication was not of itself inconsistent with intention, in a specific case the question was whether the degree of intoxication was sufficient to raise a doubt of the existence of the necessary intention, and that was a matter of fact to be determined by the Stipendiary Magistrate: if the Stipendiary Magistrate made an erroneous decision it could not be corrected on order to review. The difficulty facing the applicant's argument appeared from the fact that it required the sending back of the cases with a direction that the Magistrates' Court should be satisfied that the respondent was guilty of the offences – i.e. that the necessary facts were proved.

In *R v Towe* [1953] VicLawRp 54; (1953) VLR 381; [1953] ALR 502, the intention which was an element of the common law offence of unlawfully, wilfully and publicly exposing his naked person was defined by Lowe J, who in delivering the only judgment given in that case said at p382:

> "I think for myself that at least there is involved in the commission of the crime an intention on the part of the person charged to behave indecently, to expose himself indecently, and, unless that intention is present, then the conduct would not amount to an offence of the kind charged. When I speak of an intention to behave in an indecent manner, of course I mean behave in a manner which an ordinary person would regard as indecent."

It was common ground that this description of the required intention was equally applicable to the present statutory offence. On the evidence given in this case, the inference that the intention existed would have been inevitable unless the Court, because of the evidence of the respondent's drunkenness, entertained a doubt whether he was aware of what he was doing.

A submission was made that there was no case to answer in respect of these two charges. *R v O'Connor* (above) was referred to, and it seems that the Stipendiary Magistrate rejected an argument that the result of the case was to make drunkenness a defence in cases where what has been described an a general intention only, as compared with a specific intention was required. He was informed that no evidence would, if the submission of no case were rejected, be called on these two charges, and he then said that there was a case to answer on all the charges, but that as no evidence was to be called on these two he would dismiss them "because he could not be satisfied beyond reasonable doubt that the defendant had the necessary state of mind". The point of the Stipendiary Magistrate's observation seems to be that he considered that the evidence of the respondent's condition was such as to raise the doubt that he might have been drunk to a point at which he was not aware of what he was doing or of its significance or quality.

The first question logically, but the second of the grounds of the order nisi to which I have referred above, is whether this involved a wrong approach to the legal basis of the decision, the argument being that to raise an issue of the existence of intention something more than mere evidence of drunkenness was necessary. I am unable to accept this argument. When lack of the necessary intention resulting from voluntary drunkenness is available as a defence, it must be possible for that defence to be established by evidence of drunkenness. It may be true that some such evidence might be so slight as not to justify, in a jury trial, directing the jury upon the question of drunkenness and intention, but generally the observation of the Judicial Committee in *Broadhurst v R* (1964) AC 441 at 463; [1964] 1 All ER 111 will be relevant:

> "Before the Board the Crown conceded that it is not for an accused to prove incapacity affecting the intent and that if there is material suggesting intoxication the jury should be directed to take it into account and to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent. Their Lordships approve this consideration."

If the Stipendiary Magistrate in the present case be regarded as directing himself that he should consider whether the evidence indicated such a degree of drunkenness as to create a reasonable doubt about the existence of a guilty intention, he was in my opinion correct in doing so. This leads on to a second question, the ground of the order nisi to which I have referred as the first ground. When the Stipendiary Magistrate had so directed himself, was there any evidence capable of raising the doubt which the Stipendiary Magistrate finally expressed? If there was none, was the resulting error one which can be corrected on order to review?

The question whether there was any evidence capable of raising the doubt must be approached with an awareness of the rule that the burden of proving intent lay on the informant. The evidence showed that the respondent was very drunk. Apart from the evidence of the offences when the police overtook the party they arrested the respondent for being drunk and disorderly almost at once. He was described as very unsteady on his feet at the time, and the immediate disorderly element of his conduct was that he was trying to climb an ornamental tree in a tub. Further, the police officers considered him to be unfit for questioning for some hours after his arrest. There can be no precise definition of a point at which evidence of drunkenness is capable of raising doubt as to the existence of a necessary intention, but there will be situations in which it is possible to say that the evidence falls short of the capacity to raise any such doubt.

I shall return to this matter at a later stage, but at the present point I say that if I had constituted the tribunal of fact considering what was essentially uncontradicted evidence as to the respondent's condition, I would have been satisfied to the necessary degree that the respondent formed the intention necessary for these two offences. The party, including the respondent,

proceeded in an exuberant, and in some matters offensive, manner through the city. No doubt things were done which would not have been done by the respondent when sober, but I would have had no doubt that he was aware at the time of what he was doing and of its significance or quality.

There remains, however, the final question whether what I regard as the Stipendiary Magistrate's error is capable of correction upon order to review. Procedure by order to review is dealt with in the following terms in *Magistrates' Courts Act* 1971, s88(1): *[After referring to this provision and a number of decided cases, His Honour continued]* ... These authorities establish and illustrate the proposition that an order to review is not to be granted because this Court would reach a different conclusion upon the evidence from that reached by the Magistrates' Court. It must be possible to say that the decision sought by the applicant for the order is the "only possible decision that the evidence on any reasonable view can support". In a case in which it is said that proved drunkenness throws a doubt on the existence of intention, it may well be that the evidence of drunkenness is such that it may be possible for some minds to take one view and some another.

The difficulty which I have had with this case, and to which I have already referred, lies in saying that the only reasonable view of the evidence was that it established the existence of the necessary intention. In the end, this is a matter of decision which is not capable of useful elaboration in words and I have come to the conclusion that the evidence required, in the relevant sense, the conclusion that the respondent had the necessary intention at the material times. Accordingly, in my opinion the orders to review in respect of these two offences should be made absolute, and the two informations remitted to the Magistrates' Court with a direction that the charges should be found to have been proved and appropriate orders made.

MURPHY and BROOKING JJ: This was the return of four Orders Nisi to Review orders of the Magistrates' Court at Melbourne constituted by Mr BM Gillman, Stipendiary Magistrate, on the 9th day of May 1979. For some reason, not readily apparent to us, Master Barker ordered, when granting the Orders Nisi on the 30th July 1979 that they be returnable before the Full Court. We are unable to see, on the material before the Court, any good reason why such an order was made. It was not suggested that conflicting views have been expressed on the matters arising herein whether by single Judges of this Court or in judgments delivered by different Full Courts. Nor, on their face, are the matters raised, matters of such moment or importance that on the return of the Orders Nisi it would appear that a decision of the Full Court concerning them would be warranted.

Orders to Review No 7702 and No 7703 related to two charges brought by information against the defendant Charles Baillieu, the one alleging that he did behave in an offensive manner in a public place, and the other that he was found drunk and disorderly in a public place. On both of those charges the Magistrate found the offences proven and having ordered the defendant to pay $100 into the Poor Box in the Court and $30 costs, adjourned each case until 7th May 1980 without requiring the defendant to enter into a recognizance pursuant to s80 of the *Magistrates (Summary Proceedings) Act* 1975. The informant now seeks to review those orders. On these two Orders Nisi, the Solicitor-General, Mr D Dawson, one of her Majesty's counsel, who with Mr Perry of counsel, appeared for the informant before us to move the orders absolute, found it necessary to argue only one ground, namely:

> "The learned Stipendiary Magistrate erred in the law in adjourning the case without requiring the Defendant to enter into a recognizance pursuant to Section 80 of the *Magistrates (Summary Proceedings) Act* 1975."

It is unnecessary to dilate further on these two Orders Review, for it was conceded by counsel for the respondent (defendant) that the Magistrate was purporting to exercise his power under s80 of the said Act, and that he was permitted in the exercise of that statutory power to adjourn the further hearing to a time and place to be fixed and to release the defendant only "upon his entering into a recognizance for reasonable amount and with or without surety or sureties at the discretion of the Court conditioned for his appearance at the time and place" to which the further hearing was adjourned for his good behaviour in the meantime and for the observance of any special conditions the Court thinks proper to impose. See s80(1) *Magistrates (Summary Proceedings) Act* 1975; *Timothy v Munro* [1970] VicRp 69; (1970) VR 528; *Pittaway v Bassett*

(unreported, Gillard J, 24 July 1973); *Forbes v Graham* (unreported, Lush J, 16 September 1975).

Mr Graham, one of her Majesty's counsel, who with Mr Redlich of counsel appeared for the respondent (defendant), to show cause invited the Court to make these two orders Nisi absolute, and to order that the matters be remitted to the Magistrates' Court at Melbourne constituted by Mr BM Gillman, Stipendiary Magistrate with an indication that if the power of the Magistrate under s80(1) of the *Magistrates (Summary Proceedings) Act* 1975 to adjourn the further hearing is to be exercised and if the defendant is to be allowed to go at large he must require the defendant to enter into a recognizance for reasonable amount and with or without sureties at the discretion of the Court conditioned as set out above.

In our opinion, these Orders Nisi should be made absolute, and these cases should be remitted to the Magistrates' Court at Melbourne with a direction to Mr BM Gillman, Stipendiary Magistrate, to make such orders as in the circumstances and in the light of the matters referred to herein appear to him to be appropriate.

Orders to Review No. 7704 and No 7705.

The defendant had also been charged in the said Court on two counts that on the 8th March 1979 at Melbourne in the State of Victoria he "did wilfully and obscenely expose his person in a public place, to wit, 'Little Bourke Street,' contrary to s7(1)(c) of the *Vagrancy Act* 1966. The informations were heard together.

The facts are material and were as follows: On Thursday night the 8 March 1979 the defendant, a young man aged 26 years, and a number of his friends enjoyed a dinner together at a restaurant in Little Bourke Street. The occasion of the dinner was to celebrate the defendant's forthcoming marriage. As may be considered traditional at "bucks' parties", a good deal of alcohol was consumed by the defendant, the guest of honour. It was common ground that at all material times with which we are concerned he was "very drunk".

After the dinner, at about 11.45 pm, the defendant, with a group of approximately fourteen other males, was seen in Little Bourke Street dressed in dinner jacket. The defendant had a red and white bib tied around his neck. He walked up to a couple, male and female, who were walking west in Little Bourke Street, and with his trousers undone exposed his penis to them, saying, "Have a bit of this, it's great."

At a somewhat later stage, still in Little Bourke Street, the defendant approached another couple, including a woman, and called out to the woman, "Get a load of this", and as he said those words he "faced the woman and exposed his penis to her."

Having heard all of the evidence led by the informant, the Magistrate listened to submissions by counsel for the defendant. He submitted on these informations that the defendant was drunk, and that there was no case to answer on these charges. He submitted that on the authority of *R v Towe* [1953] VicLawRp 54; [1953] VLR 381; [1953] ALR 502, where the charge was that the defendant did "unlawfully, wilfully and publicly expose his person", an intent to expose one's person indecently must be proven, and that, having regard to the uncontested evidence that the defendant was at the time "very drunk", the Magistrate could not be satisfied beyond reasonable doubt that the defendant at the time he exposed himself had this necessary intent. Reliance was placed upon the decision in *R v O'Connor* [1980] VicRp 60; [1980] VR 635 (Young CJ, Starke and Gray JJ decision delivered 30 April 1979), a copy of which was handed up to the Magistrate and apparently read by him.

The Magistrate found that there was a case to answer. The defendant's counsel announced that he would call no evidence on those charges. Having heard further submissions on the matter the Magistrate dismissed the charges that the defendant "did wilfully and obscenely expose his person in a public place" on the ground that "he could not be satisfied beyond reasonable doubt that the defendant had the necessary state of mind".

The grounds upon which the Orders nisi were granted are, as the learned Solicitor-General stated, less than satisfactory. They read:

1. That there was insufficient evidence upon which the learned Stipendiary Magistrate could determine whether the respondent had failed to have the necessary *mens rea* to commit the offence.

2. That the learned Stipendiary Magistrate erred in dismissing the information in that he wrongly applied the law to the defence of drunkenness.

The third ground set out in the Order nisi was not relied upon, and we do not set it out here. The first ground is, in form, clearly defective. If it has any meaning at all, it appears to us to assume that there was some onus on the respondent (defendant) to adduce evidence of drunkenness sufficient to enable the Magistrate to determine that the respondent did not have the necessary intent inherent in the crime charged.

In our opinion, this is not so. The onus rests always upon the prosecution to prove the guilt of the defendant beyond reasonable doubt. If there was, as the ground suggested "insufficient evidence", to "determine" whether the defendant had the necessary *mens rea* to commit the offence", then the duty of the Magistrate was to dismiss the offence, as he did.

The main argument submitted to us by the applicant on these orders nisi related to the second ground. It was submitted that on the admitted facts of this case drunkenness was only relevant if it raised a reasonable doubt whether the defendant knew what he was doing or whether he was acting, as it were, as an automaton. This submission did not distinguish between the element of general intent and the element of specific intent in the crime charged. In the first place the Crown had to prove beyond reasonable doubt that the act of the defendant in exposing himself was a conscious and voluntary act on his part – a product of his will to act. To do this the prosecution had to exclude beyond reasonable doubt any question of accident, of sleep-walking, of hypnosis or automatism. Drunkenness may be a very relevant matter to consider, if the acts alleged to constitute the *actus reus* are performed in circumstances which are consistent, for example, with accident.

The evidence in the case, it was submitted by the applicant, showed clearly that not only was the defendant acting voluntarily and consciously when he exposed his penis on each of the two occasions, but also that, having regard to the words uttered by him at the time, he was not performing the act in question as an automaton, but for the express purpose of shocking the persons concerned. As the learned Solicitor-General put it, "he was anything but an automaton'' and the fact that his inhibitions were removed by over-indulgence in alcohol simply meant that having formed the necessary intent he was simply the more ready to implement it. This reference to the intent of the defendant at the time that he exposed himself is a reference to the specific intent which the applicant conceded, on the authority of *R v Towe* (above), is an element of this offence which the prosecution must prove.

Whether that concession was well-founded, we are not called upon to consider, and we proceed on the basis that the Crown had to prove not only that the act complained of was a voluntary and conscious act of the defendant but also that at the time the defendant performed the acts in question, he intended to expose himself obscenely that is to say, in this context, in a manner that transgressed the bounds of decency. The learned Solicitor-General submitted that the only view open on the uncontradicted facts was that the defendant consciously and voluntarily exposed his person to people and that having regard to his uncontradicted words spoken at the time, the only possible view open was that he did so intending to shock those to whom he exposed himself. An intention to shock is not a necessary ingredient of the offence of wilful and obscene exposure. It does, however, go to prove the intention to expose himself obscenely.

Mr Graham was unable to suggest any plausible explanation for the defendant's conduct and words which was consistent with innocence, other than to opine that what he did may have been done to amuse. In our view, to entertain a doubt whether this might perhaps be so, would be to fly in the face of the uncontradicted evidence. There is no question but that the defendant's unchallenged conduct was, objectively considered, obscene. It clearly transgressed the bounds of decency. Further, there is, in our view, no possible construction to be placed on the defendant's unchallenged conduct, associated with the words he used, other than that he intended by his indecency to shock those to whom he exposed himself. His words used on the first occasion upon which he exposed himself, "Have a bit of this, it's great", and on the second occasion, "Get a load of this", in our opinion, throw clear light upon his intention at the time of each exposure.

His drunkenness in these circumstances simply went to explain his obscene conduct. It could not, in our opinion, create any doubt whether his acts were conscious and voluntary or whether he intended to act obscenely. The learned Magistrate apparently thought that it did, and he apparently thought so because of the decision of this Court in *O'Connor's Case* to which counsel for the defendant referred, and a copy of which judgment he tendered to the Court.

It is not possible to know precisely what doubts the Magistrate entertained. The affidavit of John Madden Baillieu, sworn the 15th October 1979 states that he said that he dismissed these informations because he could not be satisfied beyond reasonable doubt that the defendant had the necessary state of mind. He relied, he said, on *Towe's Case*. (Paragraph 8.)

The affidavit of Daryl William Johnson sworn the 4th day of June 1979 states:

> "The Magistrate then ruled to the following effect: There is sufficient evidence to establish the identity of the Defendant. However, I am satisfied the Defendant couldn't possibly have had the necessary intent in relation to the charges of wilful exposure because I am satisfied he was drunk. I place reliance on the decision of the Full Court in the case of Mark Norman O'Connor. Those two informations will be dismissed."

Whichever version of the matter is the more favourable to the defendant, it was not in our opinion open on the uncontradicted facts of this case to entertain any reasonable doubt as to the intention of the defendant at the time he performed each obscene act in question and spoke the words in question. Clearly drunkenness probably provided an explanation for the defendant's conduct but equally clearly in our view it threw no doubt on his intent. There is, in our opinion, nothing in the judgments in *O'Connor's case* which leads to any different conclusion.

There will be cases where, no doubt, the allegedly incriminating act is performed by the accused in circumstances giving rise to ambiguity, or at the least giving rise to a reasonable doubt whether the act itself was a conscious and voluntary act or whether it was performed with a specific intent in mind. In such circumstances, the self-induced intoxication of the accused, which must be considered along with all the other circumstances, may be all important in determining whether the Crown has proved beyond reasonable doubt that the act complained of was a voluntary and conscious act of the accused or that it was performed with particular intent by the accused man in his state of intoxication.

However, in the instant case, where the facts were uncontested and the relevant acts and relevant statements of the defendant were uncontradicted and not inherently improbable, and he himself chose not to give evidence on any of those matters, it does not appear to us to be open to say that the magistrate, considering this evidence, could entertain a reasonable doubt whether "the defendant had the necessary state of mind" or could say, "I am satisfied the defendant could not possibly have had the necessary intent".

It follows that the Magistrate did err in that he must wrongly have applied "the law of drunkenness as a defence" to these charges. There was in our view no evidence upon which the Magistrate might as a reasonable man have come to the conclusion to which he did come: *Taylor v Armour* [1962] VicRp 48; (1962) VR 346, 351; (1961) 19 LGRA 232; *Spurling v Development Underwriting* [1973] VicRp 1; (1973) VR 1, 11; (1972) 30 LGRA 19; *Hardy v Gillette* [1976] VicRp 36; (1976) VR 392, 395-7; *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at p659; [1955] ALR 671; *Morgan v Babcock and Wilcox Ltd* [1929] HCA 25; (1929) 43 CLR 163, 178; [1929] ALR 313. In our opinion, these two Orders Nisi should be made absolute. The matters should be remitted to the Magistrate. For the reasons already advanced he should be advised that in the circumstances it was not open to him to find other than that the offences charged were proved.
