

03/75

SUPREME COURT OF VICTORIA

JOHNSON v JOSEPH

Murphy J

29 May 1974

EVIDENCE – DEFENDANT CHARGED WITH BREACH OF A PROBATION ORDER MADE BY THE COUNTY COURT – PROOF OF PROBATION ORDER IN BREACH PROCEEDINGS – EXTRACT OF COURT REGISTER TENDERED IN EVIDENCE – DOCUMENT EXCLUDED BY MAGISTRATE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: JUSTICES ACT 1958, SS86, 142(8); MAGISTRATES' COURT ACT 1971, S24.

An information charging the defendant with a breach of a probation order was dismissed by the Magistrate because a copy of the original Probation order was not produced by the prosecution. Upon order nisi to review—

HELD: Order absolute. Remitted to the Magistrate for rehearing according to law.

1. Sections 142(8) and s86(3) of the *Justices Act* 1958 had the combined effect of making the certified copy extract from the Register which the Clerk of Courts was bound by s86(2) to keep *prima facie* evidence of the 'matters entered therein', including the memorandum of the decision of the County Court, in this case containing detail of the probation order, 'unless the contrary is made to appear'.

2. Whilst the Magistrate was correct in saying that the production and proof of the probation order itself would be the most satisfactory way of proving the terms of the order, he was wrong in not admitting in evidence the certificate in question, tendered pursuant to s86(3) of the *Justices Act*.

MURPHY J: ... As one basic element in the offence charged it was necessary to prove that a probation order had in fact been made. The informant sought to do this by tendering in evidence a certified true extract from a register of convictions in the Magistrates' Court, Hamilton, for the 27th day of March of 1971, bearing amongst other entries the words in red typing 'Ballarat County Court 5.5.71, appeal dismissed, conviction confirmed, sentenced to be released on probation for two year – Not to consume alcoholic liquor during the period of probation'.

The informant intended to identify the defendant as the same person referred to in the certified extract of conviction and to lead evidence to prove that the defendant did consume alcoholic liquor during the period of probation. However, before this further evidence could be led, the Stipendiary Magistrate ruled on the tendering of the extract that it was necessary to produce the probation order itself, and that secondary evidence of the contents of any probation order was insufficient and inadmissible to prove the existence and the contents of the order itself.

Mr Graham, who appeared to move the order absolute, submitted that s142(8) and s86(3) of the *Justices Act* 1958 had the combined effect of making the certified copy extract from the Register which the Clerk of Courts is bound by s86(2) to keep *prima facie* evidence of the 'matters entered therein', including the memorandum of the decision of the County Court, in this case containing detail of the probation order, 'unless the contrary is made to appear'.

Mr Campbell, who appeared to show cause, submitted that the only way to prove a probation order for the purposes of the alleged offence was to produce that order in the form of the Fourth Schedule to the *Crimes Act*. He referred to ss507 to 520 of the *Crimes Act* 1958 and submitted that for a probation order to be proven, you must show that the defendant assented to it, and that the Judge signed the same. I am unable to accept Mr Campbell's submission in this respect.

Whilst it is true that no probation order can be made without the consent of the prisoner, such consent may properly be presumed from the memorandum unless the contrary is shown. The maxim '*omnia praesumuntur*' etc. applies.

Section 86(2) and (3) make the certified extract of the 'register of the Magistrates' Court, including the memorandum of the decision of the County Court entered pursuant to s142(8) *prima facie* evidence of the 'Matters entered therein'. Unless the contrary is made to appear every document purporting to be such an extract and so Certified shall be taken to be such extract. It follows that the document tendered certified by the Clerk of the Magistrates' Court as a certificate of summary conviction or order must be accepted as an extract 'unless the contrary is made to appear'; s86(3). It is also made *prima facie* evidence of the matters entered therein: s86(3).

It follows that it must be admissible as evidence of the matters entered therein, and should have been accepted by the Magistrate as such. Its probative value is another matter, for it could be challenged. The document was not excluded by the Magistrate on this ground, but simply on the ground of admissibility. Such a decision was, in my opinion, wrong, and the order nisi accordingly ought to be made absolute on grounds 1 and 4.

My decision in this matter is based upon interpretation of s86(3) of the *Justices Act* 1958. Whether s142(8) of the *Justices Act* 1958, which does not appear to have been considered by the Court, in combination with s86(2) of the said Act, makes the memorandum of the County Court entered in the Clerk of Magistrates' Court register a minute or memorandum 'of all the convictions and orders of such Court and of such proceedings as are directed by any Rule under this Act to be registered' appears to me to be a separate matter. I was not referred in argument to any relevant rule under the *Justices Act* and at first glance it does appear that the memorandum is a memorandum not of 'such Court' but of the decision of the County Court. However, s142(8) directs that the memorandum of the decision of the County Court be entered by the Clerk of the Magistrates' Court 'in his register'. And it also makes a certificate or copy of such conviction or order containing a copy of such memorandum 'sufficient evidence' of the decision (sic of the County Court) in every case in which the copy or certificate would be sufficient evidence of the conviction or order (of the Magistrates' Court).

It should be noted that s86 and s87 of the *Justices Act* 1958 were repealed by the *Magistrates' Court Act* No. 8184 of 1971, s2 and schedule 1 thereof. And the same Act by s24 enacted a provision analogous to that repealed. This Act was passed on 23rd November 1971. No argument was addressed to me as to whether s86 of the *Justices Act* 1958, or s24 of the *Magistrates' Court Act* 1971, was properly applicable to this matter. The original conviction of the defendant was recorded on 25th March 1971, and the appeal to the County Court at Ballarat was heard on 5th May 1971. The information for breach of the probation order was laid on 14th February 1973, and heard by the Magistrates' Court on 29th March 1973. The facts alleged to constitute the alleged breach of the probation order were said to have occurred on 2nd November 1972.

The *Magistrates' Court Act* 1971 contains a saving clause namely s2(2), and presumably this was assumed to apply to the facts of this case. The defendant pleaded guilty in this case, and in my opinion, seeing that the matter came to an end because of a technicality thought by the Crown to warrant this successful review, the case should be remitted for rehearing according to law. The Magistrate was correct in saying that the production and proof of the probation order itself would be the most satisfactory way of proving the terms of the order. In my opinion he was wrong in not admitting in evidence the certificate in question, tendered pursuant to s86(3) of the *Justices Act* (cf s24 *Magistrates' Court Act* 1971).
