

23/84

SUPREME COURT OF VICTORIA

MACDONALD v LA PASTRIER

Nicholson J

23 May 1984

PROCEDURE – SUMMONS POSTED TO DEFENDANT – INFORMATION HEARD EX PARTE AND DEFENDANT CONVICTED – APPLICATION BY DEFENDANT FOR RE-HEARING TWO MONTHS AFTER BECOMING AWARE OF CONVICTION – WHETHER APPLICATION MUST BE MADE WITHIN CERTAIN TIME LIMIT: MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975, S11, PART XVII.

Notwithstanding that s11 of the *Magistrates (Summary Proceedings) Act 1975* provides that an application to rehear must be made within 7 days of the applicant's becoming aware of his being convicted, a magistrate may nevertheless exercise his discretion as to whether or not the application will be granted, pursuant to the provisions of Part XVII of the Act.

NICHOLSON J: [1] This is the return of an order nisi to review a decision of the learned Magistrate at Alexandra, who refused an application for a re-hearing of an information made on behalf of the applicant. It appears that the applicant was convicted of careless driving in the Magistrates' Court at Alexandra, on the 17th December 1982, and was then fined \$150 and his licence to drive a motor car was suspended for one month. The applicant did not appear on the hearing of the information and in an affidavit sworn by him in support of his application, he deposed to the fact that he was not served with the relevant information and summons and did not become aware that he had been charged and convicted of any offence, until being so informed by his solicitor in February 1983, some months after the conviction.

[2] It appears that notice of an application for a re-hearing was given by the applicant's solicitors by notice dated the 18th April 1983. The matter came on for hearing before the learned magistrate on the 6th May 1983, at which time the applicant was represented by counsel and a Police Prosecutor appeared on behalf of the informant. It appears that the learned Magistrate took the view that because the application had not been made within 7 days of the applicant becoming aware of the conviction, s11(5) of the *Magistrates (Summary Proceedings) Act 1975*, operated to prevent him from granting the application and he accordingly refused it. Neither counsel for the applicant, the Police Prosecutor nor the learned Magistrate, appear to have paid any regard to the provisions of sub-section (8) of s11, or to the provisions of Part XVII of the Act.

When the matter came on before me, counsel for the informant indicated that he had no submissions to make in opposition to the grant of the order absolute, and this decision was clearly correct. Section 11(5) of the Act provides as follows:

"In any case in which a copy of a summons posted, pursuant to the provisions of this section, does not in fact come to the notice of the defendant prior to his being convicted by the court, he shall be entitled within 7 days after his becoming aware of his conviction, to serve personally or by registered post upon the Clerk of the Magistrate's Court, by which he was so convicted, a notice that he desires a re-hearing of the information referred to in the summons."

It would appear that applications pursuant to this [3] section, are confined to cases where service of the relevant information and summons, are effected by post, as was apparently the case in the present proceedings. It also appears that s11 operates to grant a right of re-hearing unless the court otherwise orders, (see sub-section 7) provided that the notice of application is given within the period required by sub-section 5.

Sub-section 8 of s11 provides as follows:

"The provisions of sub-sections (5), (6) and (7) shall be in addition to and shall not in any way derogate from the provisions of Part XVII with respect to the re-hearing of informations."

Part XVII commences with s152, which section enables applications for re-hearing to be made in relation to any *ex parte* order of a Magistrates' Court. Subsequent sections provide for notice to be given to the court and informant and I gather that these provisions have been complied with in the present case. [4] This part of the Act makes it clear that the court has a discretion as to whether or not it will grant the application. Normally, I should have thought that an application of this nature would be granted, in the circumstances as outlined in the affidavit.

However, this is, of course, a matter for the Magistrate and not for this court to consider. What is apparent about the present case is, that the learned Magistrate did not exercise his discretion at all, pursuant to Part XVII, because he thought that the applicant was precluded from succeeding by reason of the time limit contained in s11(5).

I therefore have no alternative but to set aside the order of the learned Magistrate, refusing the application for a re-hearing, on the grounds set out on grounds 1, 2, 3 and 4 of the order nisi. Ground 5 will be discharged and the matter will be remitted to the Magistrates' Court at Alexandra, to be dealt with according to law. I order that the costs of the applicant of and incidental to this matter be taxed and when taxed, paid by the respondent/informant.

APPEARANCES: For the applicant Macdonald: Mr JD Philbrick, counsel. Needham O'Haire & Partners, solicitors. For the respondent La Pastrier: Mr R Gorrie, counsel. State Crown Solicitor.
