74/80

SUPREME COURT OF VICTORIA

DAVITT v MANN

Tadgell J

25 July 1980

PRACTICE AND PROCEDURE – MOTOR TRAFFIC – DANGEROUS DRIVING – DRIVING OCCURRED AT BAIRNSDALE AND THE OUTSIDE LIMITS OF BAIRNSDALE – CHARGE DISMISSED BECAUSE COURT NOT SATISFIED THAT DRIVING OCCURRED AT BAIRNSDALE – WHETHER INFORMATION SHOULD HAVE BEEN AMENDED – WHETHER PLACE OF OFFENCE WAS AN ESSENTIAL INGREDIENT OF THE OFFENCE – WHETHER COURT IN ERROR IN DISMISSING CHARGE – VARIANCE – CHARGES OF ASSAULT WITH A WEAPON – NO CASE SUBMISSION MADE – UPHELD BY COURT – CHARGES DISMISSED – WHETHER COURT IN ERROR.

M. was the driver of a timber jinker with a large load of logs. M. was directed to a weighbridge however, the jinker did not stop and the police were asked to intercept the jinker and bring it back to the weighbridge. From that point on a single protracted incident occurred over a distance from near Bairnsdale to Maffra. One incident involved the jinker being driven at the police car and another involved crossing over double lines. When the jinker was finally intercepted, M. produced a plastic bottle which contained liquid which the police said was petrol and it was thrown over one of the police officers. A total of 14 charges were laid against M. and at the subsequent hearing, following a no case submission and without M. being called upon to answer the charges or call evidence, all charges were dismissed. Upon appeal—

HELD: Order absolute. All charges remitted for hearing by a Court differently constituted.
1. In this case the place at which it was alleged that the offence occurred was not to be taken as an essential ingredient of the offence save in exceptional circumstances where the offence depended on its having been committed at a particular place. There was evidence upon which it was open to the Court to have concluded that the journey by the defendant from the weighbridge near Bairnsdale to Maffra involved him in conduct upon which he could have been convicted of the offence charged. It was not right that the Court should have dismissed the charge against him without considering whether an amendment of the information would have been appropriate.

2. In relation to the charge of crossing double lines, the evidence for the informant was, if believed, sufficient to establish that the defendant did, contrary to *Road Traffic Regulation* 508, cross double longitudinal lines on part of the Princes Highway in the course of his journey from Bairnsdale. The Court must be taken in the circumstances to have dismissed the charge because there was a variance between what the information alleged and what the informant's evidence was designed to prove. That being so, the basis for dismissal was wrong.

3. In relation to the charges of assault with a weapon to wit a motor car, which were dismissed upon a no case submission, there was evidence on which the defendant could have been convicted of those charges. That is, there was a case to answer at the end of the informant's case. The court could only have properly dismissed the charges if they had refused to accept the uncontradicted evidence of the informant's witnesses. Accordingly, the court was in error in dismissing the two assault charges, either because the court did not turn its mind to them, or, if it did, it did not purport to dismiss them because the necessary ingredients had not been proved beyond reasonable doubt. Therefore, each of the orders to review relating to these two charges should be made absolute and the charges remitted for re-hearing.

4. In relation to the charges alleging assault with a weapon to wit petrol, the court was wrong to dismiss them on the ground that the prosecution had not proved that the substance thrown at each of the two policemen in question was petrol. In those circumstances the court should not have dismissed the charges without considering whether there were charges made out of common assault.

TADGELL J: On 1st August, 1979 a Bench of two Honorary Justices sitting at the Magistrates' Court at Sale heard fourteen charges which had been preferred by Senior Constable Davitt against the defendant, Glenn Robert Mann. In reliance on sub-section 2 of section 6 of the *Magistrates (Summary Proceedings) Act* 1975 all the charges were joined in one information. The defendant pleaded not guilty to all charges and they were heard together.

The defendant was convicted on four of the charges and the other ten were dismissed. I have before me six separate orders to review in respect of six of the ten charges which were dismissed. I am not concerned, at all events directly, with the remaining four charges which were dismissed. Each of the fourteen charges arose out of what may be described as a series of related incidents or, perhaps, a single protracted incident.

The relevant facts may be summarised as follows. The informant, Senior Constable Davitt, is attached to the Traffic Operations Group at Bairnsdale. At about 6.45 pm on 31st May 1979 he was patrolling in his police car in the Bairnsdale area. He happened to be talking to the operator of the weighbridge which is situated on the Princes Highway some little distance west of Bairnsdale, that is to say between Bairnsdale and Melbourne, when he observed the lights of a vehicle approaching from Bairnsdale. As the lights drew closer, he observed that they were those of a prime mover to which was attached a timber jinker loaded with a large load of logs. The weighbridge officer, Mr Bryant, apparently considered that the timber jinker looked overloaded. It did not stop at the weighbridge and, so far as appears, there was no reason why it should have done.

Mr Bryant, however, apparently asked the informant to intercept the timber jinker for the purpose of bringing it back to the weighbridge to weigh it. The informant then pursued the timber jinker in his police car in a westerly direction and intercepted it. He asked the driver, the defendant, to produce a licence, which he did, and asked him to return to the weighbridge to have his vehicle weighed. Somewhat reluctantly, the defendant did that and pursuant to a direction he placed the drive wheels of the truck on the weighbridge where a weight was taken. Mr Bryant then is alleged to have said, "Move up, please, driver," and to have indicated to the defendant that he wished him to place the rear axle of his truck on the weighbridge, The defendant apparently either misunderstood that direction or did not hear it. At all events he drove off again along the Princes Highway in a westerly direction.

The informant and the weighbridge officer pursued him in the police car and for the second time he was intercepted, not far west of the weighbridge – how far west does not appear from the evidence. There was then a conversation between the informant and the defendant. The informant requested the defendant to produce his log book and his permit to drive a vehicle and load the length which was measured at 15.5 metres. The defendant, in colourful language, indicated that he did not intend to do either of those things or to return to the weighbridge to have the rear of his truck weighed, which he was also asked to do. He said that he had been weighed once and that was all that he was obliged to submit to. The informant, according to his evidence, attempted to turn the ignition of the truck off with a view to preventing the defendant from proceeding on his journey. According to the informant the defendant pushed him in the chest with his right arm and hand, forcing him, the informant, to lose balance, and he was forced to jump from the truck clear of the drive wheels and the load. Again the defendant drove off along the Princes Highway in a westerly direction. Again the informant and the weighbridge officer, Mr Bryant, pursued him. The blue flashing lights and sirens of the police car were operating and what appears to have been a spirited chase ensued.

According to the evidence of the informant, he endeavoured to overtake the defendant's vehicle on a number of occasions and indicated to him, by signs, that be wished him to pull over. According to the informant, each time he drew up alongside the rear axle of the timber jinker, the defendant swerved the vehicle very sharply to the right. The rear off-side dual wheels on some occasions narrowly missed the passenger side door of the police car, which was forced over on the gravel shoulder on the northern (right-hand) side of the Princes Highway – on the right-hand side as one is travelling towards Melbourne. On one occasion, the informant said he had to brake sharply to avoid the defendant's vehicle and as he did so the overhanging logs at the rear of it, which overhung by, I think, between two and three metres, narrowly missed the bonnet of the police car. Various other attempts were made by the informant to cause the defendant to pull his vehicle into the left of the road. There were other occasions described in the evidence of the informant when the truck swung out sharply to the right to its incorrect side of the highway as the informant endeavoured to overtake it. At length the informant and the weighbridge officer did overtake the defendant's vehicle and travelled in front of it for some distance, again indicating that it was required to stop. At a place described as Redcourt Lane – there is no evidence of where that is in relation to Bairnsdale – the informant parked the police car across at right-angles to

the Princes Highway with a view to halting the advance of the defendant's vehicle. The informant directed Mr Bryant, the weighbridge officer, to alight from the police car and to move well away, which he did. The informant said that when the defendant's vehicle was about 100 metres from the police car, so parked, he heard the vehicle change down a gear and heard the motor accelerate. The informant said he kept his police car stationary until it appeared that the defendant was not going to stop. He said that he had previously engaged reverse gear and, when the defendant's vehicle was some two or three car's lengths away from the police vehicle, he reversed his car very rapidly. The defendant's truck, according to the informant, did not alter course and narrowly missed the police vehicle. After that the informant and Mr Bryant continued their pursuit, but without the blue flashing lights operating, and at length they took up a position in front.

The informant called on the radio for assistance and some other police vehicles later joined in the pursuit of the defendant. The informant swore that at a place just west of Tom's Creek – which again is not described by its proximity to Bairnsdale or, for that matter, anywhere else – there is a set of double white lines on an uphill climb consisting "of both two continuous white lines and one continuous white line with a broken line to the right of the continuous line". The informant said he again tried to stop the defendant by slowing down in front of him, and the defendant tried to overtake the police car but in doing so was on the incorrect side of the double lines for some one hundred metres,

The informant, preceding the defendant in the police car, then passed through Stratford, but it appears that the defendant turned off the Princes Highway some little distance beyond Stratford and travelled along the Stratford-Maffra Road. There was another police vehicle by that time following the defendant. At length the informant executed a U-turn and began to pursue the defendant along the Stratford-Maffra road. The defendant's vehicle continued along the Stratford-Maffra road to Maffra and, on reaching Maffra, travelled up the main street, according to the informant in the centre of the road. At Maffra the defendant halted his vehicle near the gate of a timber yard and turned off the motor.

The informant and a number of other police officers approached the truck and endeavoured to extract the defendant from it. The defendant refused to move. At last the police broke both the right and left windows of the truck's cabin and were prepared, with a crowbar, to open the doors with a view to removing defendant. At one stage, according to the evidence of the informant, the defendant produced a plastic bottle which contained some kind of liquid. He endeavoured in effect, so it was said, to throw some liquid at a policeman with a view to hitting him, but the policeman, Senior Constable Bakker stepped clear and the liquid did not strike him. The defendant threw some more of the liquid at another policeman, Constable Pollard, and he hit him with it. According to the evidence, the defendant also produced some matches and indicated that he would burn himself and the truck and some of the police if he were not left alone. Constable Pollard, who received the liquid thrown by the defendant on the face, some getting into his mouth, and on the front of his uniform, swore that the liquid tasted like petrol.

The defendant was ultimately removed from his vehicle and, after what is described as a short scuffle, he was arrested and charged with the fourteen offences which were heard by the justices on 1st August last. The first of the six charges which were dismissed and which is the subject of an order to review was:

> "That the defendant on the 31st May 1979 at Bairnsdale did drive a motor car on a highway, to wit Princes Highway, in a manner which was dangerous to the public."

The offence charged is created by s80A(1) of the *Motor Car Act* 1958. According to the affidavit in support of the order to review, having heard evidence from and on behalf of the informant and from the defendant, the justices adjourned to consider their decision on this and other charges. Having done so they said in respect of this charge that they intended to dismiss it "because the information stated that the offence occurred at Bairnsdale and they were not satisfied that the defendant drove dangerously at Bairnsdale".

The affidavit in support, which was sworn by Inspector Stewart, the prosecutor, goes on to say: "In answer to my query for more detail as to their decision, the justices said that they felt the defendant had driven dangerously on parts of the highway but they were not satisfied that

this driving occurred in Bairnsdale." No doubt encouraged by that statement in the affidavit, the legal advisers of the informant sought and obtained from the Master an order to review on the following two grounds:

> (1) That the honorary Justices, having found that the respondent on the 31st day of May 1979 did drive a motor car on a highway in a manner which was dangerous to the public, should have proceeded to convict the respondent.
>
> (2) That upon the evidence, having found that the respondent drove in a manner which was dangerous to the public, the Honorary Justices were bound by such evidence to have found that the said dangerous driving did occur at Bairnsdale regardless of whether it also occurred outside the limits of Bairnsdale.

There was, however, an affidavit sworn in opposition to the order to review by the solicitor for the defendant. Referring to the statement in the affidavit in support which I have just read, the answering affidavit said: "... the justices indicated that the information alleged the dangerous driving occurred at Bairnsdale. On the whole of the evidence they could not be satisfied that at any time whilst in Bairnsdale the respondent had driven dangerously although they did say that it was possible that his driving on other parts of the highway could or might be dangerous. At no time did they state as a proposition that the respondent had on any part of the highway driven dangerously." That statement in the answering affidavit of course contradicts a premise on which each of the grounds of the order to review was based.

Counsel for the informant, on the return of the order to review, acknowledged the general but not invariable rule that, when an answering affidavit contradicts an account given in the affidavit in support as to what occurred in the court below, the answering affidavit will usually be preferred. Counsel for the informant did not urge any reason upon me why the account referred to in the answering affidavit should not be preferred in this case and recognised that he was in a degree of difficulty in supporting either of the grounds of the order to review as they stood. In the event, counsel did not address me on ground 1 as it was phrased in the order and in effect abandoned it. Counsel did, however, seek an amendment to ground 2 so that, if amended, it would read in these terms:

> "The Honorary Justices were wrong in dismissing the information on the ground that they were not satisfied that the respondent had driven dangerously in Bairnsdale."

Counsel relied, of course, upon the power granted to this court by section 91 of the *Magistrates' Courts Act* 1971 to amend the ground of the order to review as granted. The section, while not expressly imposing limits upon the power to grant an amendment, recognises that there should be limits; and there are decisions of this court which indicate that no new ground may be added under the guise of an amendment.

I consider therefore that I can allow amendment. Whether I should allow it or not involves an exercise of discretion. I have come to the conclusion that it would involve a proper exercise of my discretion to allow it and I do so as a matter of justice between the parties. The ground will be amended accordingly. An initial question, then, is whether the assumption which is made by the ground as amended is justified, namely that the justices did dismiss the charge on the ground that they were not satisfied that the respondent had driven dangerously in Bairnsdale. I understood counsel for the defendant to concede in effect that if the justices are properly to be taken to have dismissed the information only on the basis set out in the amended ground, they were in error.

Counsel for the defendant contended that the justices should be regarded as having made a finding that there was no conduct at all by the defendant which was sufficient to sustain a conviction upon the charge laid under section 80A(1) of the *Motor Car Act* – the charge of dangerous driving. As I follow it, the argument took this form in effect. The justices had concluded as a fact that they were not satisfied that the defendant drove dangerously at Bairnsdale. The most glaring example of bad driving by the defendant was on the occasion described by the informant when the overhanging logs on the defendant's vehicle narrowly missed the bonnet of the police car. That occasion, it was said, must have been at Bairnsdale, and it provided the only evidence of bad driving at Bairnsdale or thereabouts. The justices must, therefore, have characterised

that particular occasion as not having involved dangerous driving on the part of the defendant sufficient to support a conviction under section 80A(1) of the *Motor Car Act*. The contention was that, having concluded that the occasion in question could not sustain a charge of dangerous driving in the circumstances most favourable to the informant, the justices must be regarded as having dismissed the charge on the merits. They did not simply conclude that there was no offence of dangerous driving at Bairnsdale, it was argued, and it should be taken to have been found that there was no dangerous driving by the defendant at all.

I am unable to accept that argument. It assumes, in my opinion unwarrantably, that the justices must have concluded that the occasion when the logs on the defendant's vehicle narrowly missed the police car was an occasion which occurred at or near Bairnsdale. But even if that incident should be taken to have occurred at or near Bairnsdale, the argument overlooks the statement in the answering affidavit that the justices said that it was possible that the defendant's driving on other parts of the highway could or might be dangerous. That statement acknowledges, I think, that the justices contemplated that the defendant's driving on parts of the highway otherwise than in or near Bairnsdale might have been sufficient to sustain the charge but that they avowedly disregarded it because it had not taken place in or near Bairnsdale.

In my opinion it follows that it cannot be assumed that the justices did conclude that there was no relevant conduct on the part of the defendant sufficient to sustain the charge. In reasoning as it appears they did I think the justices fell into error. I refer to the decision of the Divisional Court in *Molder v Judd* which is reported in a note in (1974) *Criminal Law Review*, 111. In that case the defendant was seen to be driving between 80 and 85 miles per hour on the M1 motorway. He was stopped and informations were preferred against him charging "that he at Bushey on the southbound carriageway of the M1 drove at a speed in excess of 80 mph" contrary to the relevant legislation. At the hearing of the information the prosecutor adduced evidence that the defendant travelled at the speed alleged for a mile from marker post 2442, which is just south of Friar's Wash, but that no part of the speed check took place within the Parish of Bushey, which was the place where the information alleged the offence occurred. The defendant submitted to the justices who heard the information that because the evidence did not substantiate the allegations in the information, and no application for an amendment having been made by the prosecutor, it should be dismissed.

The justices did dismiss the information but they did so without considering section 100 of the *Magistrates' Courts Act* 1952, which is in material respects similar in operation to section 157 of the *Magistrates (Summary Proceedings) Act* of this State. An appeal to the Divisional Court was allowed. The Court, which consisted of Lord Widgery CJ and Ashworth and Melford Stevenson JJ, observed that the words of section 100 of the *Magistrates' Courts Act* are very wide. On the safe assumption that the incident occurred within the jurisdiction of the Bench, the Court held that the words of the section amply justified the continuation of the proceedings notwithstanding the error in stating that the place of the occurrence was Bushey. The fact that the location was not accurately expressed was a perfect example, said the Court, of the kind of difficulty which section 100 was intended to render irrelevant. It was pointed out that there was further safeguard in sub-section 2 of the section whereby, if there had been the slightest reason for thinking the defendant had been misled by the reference to Bushey he would have been entitled to an adjournment, but it was inconceivable that he was misled. The Divisional Court accordingly held, that the defendant's submission was ill-founded and remitted the case to the justices with a direction to continue the hearing. There is also a right, of course, for a defendant to obtain an adjournment pursuant to section 157 of the *Magistrates (Summary Proceedings) Act* of this State if it appears that he is misled by any difference between what is alleged in the information and what is proved by the evidence.

The decision of the Supreme Court of South Australia in *Wright v O'Sullivan* (1948) SASR 307 also indicates, I think, that in a case like this the place at which it is alleged that the offence occurred is not to be taken as an essential ingredient of the offence save in exceptional circumstances where the offence depends on its having been committed at a particular place. In my opinion there was evidence upon which it was open to the justices to have concluded that the journey by the defendant from the weighbridge near Bairnsdale to Maffra involved him in conduct upon which he could have been convicted of the offence charged. It was not right that the justices should have dismissed the charge against him without considering whether an amendment of the information would have been appropriate.

It is also perhaps appropriate to refer to the decision of Mann CJ in this court in *Thomson v Lee* [1935] VicLawRp 65; [1935] VR 360; [1935] ALR 458. That was a case in which the defendant was charged at a Court of Petty Sessions of illegally betting in a street, to wit a thoroughfare, between Saxon Street and Sydney Road in Brunswick. The evidence was to the effect that the place where the activity of the defendant in question was carried on was not a thoroughfare, but was enclosed. The justices dismissed the information upon the ground that what had been made out by the evidence was not as charged in his information. Sir Frederick Mann held, by reason of the forerunner of the present section 157 of the *Magistrates (Summary Proceedings) Act* 1975 that the Court of Petty Sessions had power to amend the information by deleting reference to a street and a thoroughfare, and adding, if it thought necessary, the words "enclosed land". Mr Gorman KC, who appeared for the defendant on the order to review, protested that the informant should not be entitled to more than one run. As to that, the learned Chief Justice said:

> "I quite appreciate what Mr Gorman has said about its being fair to allow only one 'run', but it is not part of the duty of the Bench to regard the matter as a sporting contest; it must use its powers in a proper way to uphold the law; and as the magistrates have full power to amend, upon or without application, and ought, as I think, to have made the amendment, the order of the court below will be set aside, and the case will be remitted for re-hearing."

In my opinion I should reach a similar conclusion here. The first of the orders to review will be made absolute and the charge with which it is concerned, will be remitted for re-hearing. It is convenient next to refer to the charge:

> "That the defendant at Maffra on the 31st day of May 1979, being the driver of a vehicle on a carriageway of Princes Highway, such carriageway being marked with a double longitudinal line comprising two continuous lines, did permit his vehicle to travel to the right of such longitudinal line."

That charge was laid under Regulation 508 of the *Road Traffic Regulations*. According to the affidavit in support of the order to review which has been obtained in respect of the dismissal of that charge the justices dismissed the charge "... because the information listed Maffra as the area of the offence when in fact the Princes Highway is not part of Maffra." The affidavit in answer said much the same. The deponent said "... the justices then dismissed the motion (and I take that to mean "the charges") on the basis that to their knowledge the Princes Highway does not run through Maffra. And is not on the Princes Highway."

The grounds of the order to review in respect of the dismissal of that charge are these:

> 1. (not relevant)
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> 2. That the Honorary Justices were wrong in law in so far as they purported to hold that it was an ingredient of the offence that the Princes Highway should be part of Maffra."

The evidence for the informant was, if believed, sufficient to establish that the defendant did, contrary to *Road Traffic Regulation* 508, cross double longitudinal lines on part of the Princes Highway in the course of his journey from Bairnsdale. The defendant gave evidence in denial of a very general kind. All that he said which touches the matter of this charge is that he travelled on the left hand side of the highway and that he drove in a normal fashion and that he committed no offence as all. That appears from the affidavit in support and it is not, I think, sought to be qualified by the affidavit in answer.

Counsel for the defendant argued, however that the reasons assigned by the justices for their dismissal of this charge was consistent with a finding on their part that they were not satisfied beyond reasonable doubt that there were double longitudinal lines in a position described by the evidence led on behalf of the informant, or that if there were such double lines, the defendant crossed them. Counsel for the defendant argued that this was especially so in view of the defendant's contradictory evidence. The argument was that what the justices said in dismissing the charge was no more than a shorthand way of finding that, since it is common knowledge that the Princes Highway does not run through Maffra and does not go near that town, there were no double longitudinal lines where the informant alleged that the offence occurred.

In my opinion that is an unrealistic appreciation of what the justices decided, judged by

what they said. It was, of course, open to the justices not to accept the evidence of the informant but, if they did not do so, the remarks they made as to their reason for dismissing the charge were, at best, unnecessary and, at worst, quite misleading. I do not think I should attribute to the justices any cryptic or quixotic characteristic to their approach in explaining why they dismissed the charge. In my opinion they must be taken in the circumstances to have dismissed it because there was a variance between what the information alleged and what the informant's evidence was designed to prove. That being so, the basis for dismissal is wrong and counsel for the defendant did not contest the point if I so found. In my opinion then, this order to review should also be made absolute and the charge to which it relates should be remitted for re-hearing.

The remaining four charges which are the subject of orders to review all involve allegations of assault of one kind or another. There were in fact a total of seven charges against the defendant involving assault and all were dismissed, but only four of those directly concern me. The four fall into two groups of two: the first two are these:

> that the defendant at Hillside on the 31st May 1979 did assault Denis Douglas Davitt, a member of the Victoria Police in the execution of his duty, and that the defendant at Hillside did assault Denis Douglas Davitt with a weapon, to wit a motor car.

The second group of two consists of these charges:

> that the defendant at Maffra on the 31st May1979 did assault one William Bakker with a weapon, to wit petrol; and that the defendant at Maffra on the 31st May 1979 did assault one Rex Pollard with a weapon, to wit petrol.

At the conclusion of the evidence for the informant Counsel for the defendant made a submission. According to the affidavit in support, this is what happened. Mr Toal, who was counsel for the defendant, " ... then made a submission in relation to the assaults. Mr Toal submitted that the substance had not been identified as petrol and that the substance could not be classed as a weapon. That the justices then had a conversation between themselves. That the two justices left the bench and returned and announced that all assault matters were dismissed."

The answering affidavit does refer to that part of the affidavit in support which I have just read, although it wrongly describes the paragraph in which it is contained. In para 10 of the answering affidavit, this is said; "That as to paragraph 28" (which I take it to be a mistake for either paragraph 26 or paragraph 27 or both of the affidavit in support) "Mr Toal of counsel, in relation to the charges of assaulting with a weapon to wit petrol submitted (I suppose that is meant to say) that the onus was on the prosecution to prove all the elements of the offence charged. That in this case there was a legitimate way to prove that part of the cases dealing with the allegations of petrol and that this had not been done despite the fact that the container was in the possession of the Prosecution." Moreover, if they were satisfied as to this element – I am interpolating words here to make sense of it – they could not be satisfied that petrol was a "weapon" used to assault. The affidavit as sworn is a little garbled.

It seems to me to be at least doubtful whether counsel for the defendant before the justices made any submission supported by argument with respect to the alleged assaults which did not involve the allegation that petrol was used. The justices nevertheless dismissed all the charges of assault. So far as appears, they gave no reasons except that, when the prosecutor asked the reason for the dismissal of the assault charges, he was informed that "the prosecution had not proved that the substance was petrol."

Before me, counsel for the defendant argued that the justices' decision should be regarded as a decision on the facts. He submitted that it was open to the justices to dismiss any of the informations at the conclusion of the informant's case if they regarded the facts necessary to be proved as not having been proved beyond reasonable doubt. He submitted that it is a matter of mixed fact and law as to whether they were satisfied beyond reasonable doubt. He submitted further that it was apparent that the justices had gone beyond considering the submission of no case, as it had been made by counsel for the defendant, and they were not bound not to do so. It was not necessary, counsel argued, that the justices should wait to receive the defendant's evidence before they could acquit. He argued that it was open to the justices to say at the end of the informant's case that they did not accept the evidence for the prosecution. It was submitted that the fact that

the justices did not say that they did not accept the evidence for the prosecution does not mean that one should not find that that was what they held because, in order to succeed, the informant would have had to have shown that, as a matter of law, it was not open to the justices to acquit. In my opinion that argument is not right. In the case of *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654, 658; [1955] ALR 671, the High Court, consisting of Sir Owen Dixon CJ and Webb, Fullagar, Kitto and Taylor JJ, in a very well-known passage, said this:

> "When, at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law."

And then a little lower down, Their Honours said: "

> "After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact."

I perfectly well admit that it is open to any bench, be it a bench of honorary justices or a Magistrate or a judge of this or the County Court, to stop a case at the end of the evidence for the informant or the complainant or the plaintiff and to find for the other side without calling on him. If that course is taken it may involve one of two things. First, it may involve a ruling (made either by the tribunal of its own motion or following a submission by the defendant of "no case") that, taking the evidence at its face value, nothing had been shown which could in law amount to that which it is incumbent upon the propounding party to prove. Secondly, to take such a course may mean no more than that, the court having heard the evidence put forward in support of the allegations against the defendant, did not think that there was any substance in it. If justices are purporting to dismiss an informant's case at the end of the informant's evidence, following a submission of "no case", on the basis that as a matter of fact the informant's case had not been proved, beyond reasonable doubt – and I emphasise that *May O'Sullivan* has indicated that it is a matter of fact – then I should ordinarily expect the justices so to indicate. At least, if no such indication is given, the defendant was have no cause to complain if on an appeal such as this an inference is drawn that the justices were purporting to make an impermissible ruling of law where the nature of the decision suggests some error.

In the case of *Smith v Lenz* (1951) ALR (CN) Lowe ACJ, said in passage which was cited by counsel for the informant in this case:

> "The true principle, I think, must be, not that everything relevant which a Magistrates' Court does not refer to has to be taken to have been overlooked, or on the other hand, that it is to be taken to have been considered, but that, if something which should have been considered is not referred to, and the nature of the decision suggests some error, which may have been due to the matter not having been considered as it should have been, the appellate tribunal may properly draw that inference, and the Magistrate will have no cause to complain if it does so."

That passage was referred to by Sholl J in *Yendall v Smith, Mitchell & Co Ltd* [1953] VicLawRp 53; (1953) VLR 369, 379; [1953] ALR 724. Sholl J, thought that it was appropriate for the Supreme Court on an order to review also to take into account the question whether, if the Magistrate's observations indicate, on a comparison of what he said with what he did not say, the matter in question has not been considered as it should have been.

Here, I think the nature of the justices' decision does indicate an error in the cases of the assault charges with which I am concerned. I deal first with the two charges which do not involve petrol. In the case which charged that the defendant assaulted Senior Constable Davitt in the execution of his duty the ground of the order to review is:

> "That upon the uncontradicted evidence of the applicant that the respondent had pushed him in the chest with his right arm and hand the Honorary Justices were wrong in law in dismissing the information without calling upon the respondent to answer the Prosecution case."

In the case which charged that the defendant assaulted Davitt with a weapon, to wit a

motor car, the ground of the order to review is:

> "That upon the evidence of the witnesses for the prosecution that the respondent drove his truck at the police car on a number of occasions the Honorary justices were wrong in law in dismissing the information without calling upon the respondent to answer the Prosecution case."

There was in my opinion evidence on which the defendant could have been convicted of those charges. That is to say, there was a case to answer at the end of the informant's case. There was no submission by counsel for the defendant below which appears to have been supported by argument in respect of those charges. The justices could only have properly dismissed the charges if they had refused to accept the uncontradicted evidence of the informant's witnesses. When asked for a reason by the prosecutor why they had dismissed the assault charges the justices or their chairman replied, as I have indicated, that the reason was that the prosecution "had not proved that the substance was petrol".

Judging from what the justices or their chairman said, I am of opinion that the justices did not purport to dismiss these two charges on the ground for which counsel for the defendant before me contends that they did. I conclude, therefore, that the justices were in error in dismissing the two assault charges which did not involve petrol, either because they did not turn their minds to them, or, if they did, they did not purport to dismiss them because the necessary ingredients had not been proved beyond reasonable doubt. In my opinion, therefore, each of the orders to review relating to these two charges should be made absolute and the charges should be remitted for re-hearing.

I have already indicated the nature of the two remaining charges which involved allegations of an assault with a weapon, to wit petrol. The grounds as contained in the orders to review which were signed by the Master were wrong, apparently because of a clerical error, and I allowed them to be amended so that they read respectively —

O/R 7742
"1. That the Honorary Justices were wrong in law in that they did not accept the uncontradicted evidence of Senior Constable William Gerald Bakker and the other Police Officers that the liquid substance thrown at and over them by the Respondent was petrol.
2. That the Honorary Justices wore wrong in law in dismissing the Information charging the Respondent that he did assault William Gerald Bakker with a weapon to wit petrol without having called upon the Respondent to answer the Prosecution's case.
3. That if the Honorary Justices had not been satisfied that the liquid substance was a weapon then in the alternative they should have found that the Respondent had a case to answer of common assault.

O/R 7744
"1. That the Honorary justices were wrong in law in that they did not accept the uncontradicted evidence of Senior Constable Rex Pollard and the other Police Officers that the liquid substance thrown at and over them by the Respondent was petrol.
2. That the Honorary Justices were wrong in law in dismissing the Information charging the Respondent that he did assault Rex Pollard with a weapon to wit petrol without having called upon the Respondent to answer the Prosecution's case.

3. That if the Honorary Justices had not been satisfied that the liquid substance was a weapon then in the alternative they should have found that the Respondent had a case to answer of common assault.

Counsel for the informant did not seek to support ground 1 and he did not lay much stress, I thought, on ground. 2. Ground 3 was in effect supported by counsel for the informant and opposed by counsel for the defendant by arguments similar to those which were addressed to me upon the other assault charges. I took it to be common ground that if the justices came to their decision on the assault charges as I have found they did, then they were wrong to dismiss them as they did on the ground which they assigned, namely, that the prosecution had not proved that the substance thrown at each of the two policemen in question was petrol. It is clear in my opinion – and there was no argument on behalf of the defendant to the contrary – that in those

circumstances the justices should not have dismissed the charges without considering whether there were charges made out of common assault. In my opinion, therefore, the remaining two orders to review should also be made absolute and the charges to which they refer should be remitted to the Magistrates' Court at Sale for further hearing. There will be an order in each case, therefore, in these terms: ORDER. Order absolute with costs. Order that the charge be remitted to the Magistrates' Court at Sale for further hearing by a Bench constituted otherwise than by Messrs Hamlyn and Phillips JPs, or either of them.
