28/71

SUPREME COURT OF VICTORIA

FENN v KREICBERGS

Smith J

10 December 1971

MOTOR TRAFFIC – NO TAIL LIGHTS ON MOTOR VEHICLE – CHARGE LAID UNDER THE *MOTOR CAR REGULATIONS*, R98(1)(a) INSTEAD OF THE *ROAD TRAFFIC REGULATIONS*, R1203(2)(a) – NO APPLICATION MADE FOR AN AMENDMENT – MAGISTRATE FOUND THE CHARGE PROVED – WHETHER MAGISTRATE IN ERROR

HELD: Order nisi absolute. Conviction and order set aside.
1. On the evidence, it was not open to the Magistrate in law for him to convict.

2. This was not a case in which the amendment of the Regulations should have been made. To do so would have involved the introduction a new offence involving quite different elements. The reason why the Magistrate decided as he did is that he plainly made an error of law.

3. Having regard to the lapse of 18 months since the events in question, the fact that the defendant may have had a perfectly good answer to a charge of the kind now sought to be introduced, that this was a case which fell within what was said in *McCann v Blake* [1920] VicLawRp 16; [1920] VLR 89; 26 ALR 186; 41 ALT 158, the amendment sought should not be made.

SMITH J: I have had the advantage of an interesting and forceful argument here, but the case to my mind is clear and does not call for elaboration on my part.

The affidavits show, in my view, that there was no evidence to support a conviction on the charge laid. There was indeed, as has been pointed out, an expression used by one of the witnesses "no tail lights" which is in popular speech ambiguous and which if taken in one sense might have provided technically evidence to support a conviction.

It is clear, however, from the evidence given by the informant himself and from the argument and the Magistrate's observations that no one understood that impression in the sense now suggested. I think that in those circumstances probably the strict view is that in law there was no evidence, but if that be not so then at least this much is clear; that on the facts found by the Magistrate it was not open in law for him to convict and accordingly I would have allowed any necessary amendment of the order nisi to cover that aspect had I thought it necessary to do so.

I have been asked then, on behalf of the respondent, to amend the information to charge an offence under the *Road Traffic Regulation* in lieu of the offence under the *Motor Car Regulations* which was in fact charged. I do not think that this is a case in which such an amendment should be made. To do so would involve introducing a new offence involving quite different elements. The reason why the Magistrate decided as he did is that he plainly made an error of law. The reason why the informant below did not ask for an amendment is not clear. I do not know why he did not initially lay a charge under the other regulations in addition to the charge laid, nor do I know why no amendment was sought. For all I know there were perfectly good reasons.

It is now getting on for 18 months since the events in question and for all that I know the defendant may have a perfectly good answer to a charge of the kind now sought to be introduced. I think this is a case which falls within what was said in *McCann v Blake* [1920] VicLawRp 16; [1920] VLR 89; 26 ALR 186; 41 ALT 158 and I do not think that I should make the amendment sought.

The result is that the order nisi is made absolute and the conviction and the order for

costs below are set aside and there will be an order that the respondent pay to the appellant $200 costs of these proceedings.

APPEARANCES: For the informant Fenn: Mr MJ Dowling, counsel. John Downey, State Crown Solicitor. For the defendant Kreicbergs: Mr M Shatin, counsel. I Dizgalvis & Co, solicitors.
