

45/73

SUPREME COURT OF VICTORIA

HILL v KRINGLE

Murphy J

14 December 1973

MOTOR TRAFFIC – DEFENDANT CHARGED EXCEEDING .05BAC – DEFENDANT APPEARED AT COURT – SUBMISSION THAT THERE WAS NO CASE TO ANSWER ON THE GROUND THAT THE PERSON WHO APPEARED IN COURT WAS A DIFFERENT PERSON ALTOGETHER FROM THE PERSON WHO HAD BEEN DRIVING THE MOTOR CAR – SUBMISSION UPHeld BY MAGISTRATE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: JUSTICES ACT 1958, S91(9).

HELD: Order absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing and determination according to law.

The evidence which was led by the police was evidence upon which a Magistrate was properly entitled to act, and in the circumstances in this case evidence upon which he ought to have acted and to have found, notwithstanding the submission of counsel that there was no case to answer. The case was never properly determined. Accordingly, it was remitted for rehearing.

MURPHY J: In this matter I have heard what counsel has said in moving the order absolute, and Mr Kringle, who appears in person, not unnaturally, had nothing to say because he said he knows nothing about the law.

It would appear the procedure which was followed by the Magistrate, at the instigation as it were of counsel appearing for the defendant in the court below, would have been, to my mind – and I have heard no argument on this – a procedure which would have been within his competence to adopt as he had control of the court, but rather than make any ruling on that matter as I have heard no argument on it I would prefer in considering this order nisi to confine my remarks to the grounds raised in paragraphs 4 and 5.

It does appear to me that the tactic in which counsel for the defendant proceeded to engage would have been a tactic of some value had there been evidence led at the conclusion of the Crown case which suggested that Bruce Allan Kringle was a different person altogether than the person who had been driving the motor car on the day of the happening of the events that gave rise to the information, but no such evidence, of course, was led and the Magistrate appears to have proceeded on the basis that it was necessary for the prosecution to identify some person in the court as being the person involved in the incidents of this day.

As I see it, that is not the law. Indeed, the Magistrate had full power to proceed with the hearing of this information in the absence altogether of the defendant from the court. There was no proof led, of course, in the court below that the defendant was in fact present there. The Magistrate appears to have proceeded on false assumptions in this connection also, or assumptions that may well have been false. It appears to me from a perusal of the provisions of the *Justices Act* that the necessity to identify some person in court as being the person in relation to whom the various factual matters set out in the evidence apply, is wrong. That is not necessary at all and, in the event of the failure of the defendant to appear at the court, the Magistrate may of course proceed to hear the matter *ex parte* (See the provisions of s91 of the *Justices Act*, particularly ss9, or what may more properly be termed Rule 9 of that section.)

In this case evidence was led that the person driving the vehicle JRZ 068, who admitted that he had been driving that vehicle gave his name as Bruce Allan Kringle of 105 Miller Street, Thornbury, and he was identified sufficiently in the evidence given by the police witnesses as a person wearing a particular type of pullover. He himself admitted that he had been driving the vehicle. He was the man who went with the police to the police station, notwithstanding exhortations from others that he should not co-operate with them. He did in fact co-operate with the police and provided a sample of breath to a Sergeant Collinson. Sergeant Collinson is identified as the

person on the Schedule 7 certificate which was tendered to the court. The person of who he tested the sample of breath was said to be Bruce Allan Kringle and, of course, the place is the same. Times were identified as being similar with regard to the incidents that are set out – the place, the names, the number of the motor vehicle and so forth.

That evidence which was led by the police was evidence upon which a Magistrate was properly entitled to act, and in the circumstances in this case evidence upon which he ought to have acted and to have found, notwithstanding the submission of Mr Rattray that there was no case to answer. The case was never properly determined. It must be as I see it, remitted for rehearing. I am not in any way prejudging the matter, irrespective of and despite what has been said to me by Mr Kringle here in court. The order of the Magistrate dismissing the information shall be set aside and the case will remitted for hearing. Mr Kringle ordered to pay the sum of \$200 and Mr Kringle will be granted an indemnity certificate pursuant to the provisions of the *Appeal Costs Fund Act*.
