20/97

SUPREME COURT OF VICTORIA

PILKINGTON v ELLIOTT and ANOR

Coldrey J

11 June, 27 September 1991

MOTOR TRAFFIC – USE OF UNREGISTERED VEHICLE – WHETHER OFFENCE OF STRICT LIABILITY – WHETHER DEFENCE OF HONEST AND REASONABLE MISTAKE AVAILABLE – DISMISSAL AS TRIFLING – CIRCUMSTANCES WHERE APPROPRIATE – CONSIDERATION OF DEFENDANT'S ANTECEDENTS – WHETHER APPROPRIATE CONSIDERATION UPON WHICH TO BASE A FINDING OF TRIVIALITY: *ROAD SAFETY ACT* 1986, S7(1)(b); *PENALTIES AND SENTENCES ACT* 1985, S81.

E. was charged pursuant to s7(1)(b) of the *Road Safety Act* 1986 (Act) with being the owner of an unregistered motor vehicle used on a highway. At the hearing, E. submitted that as he held an honest and reasonable belief as to the registration of the vehicle, the charge should be dismissed. The magistrate agreed with this submission and dismissed the charge. The magistrate also said that if he was wrong in making that determination, he would have dismissed the charge as trifling having regard to the fact that E. had been operating for 20 years running trucks and this was E.'s first time before the court. Upon appeal—

HELD: Appeal allowed. Remitted for further hearing.
1. The courts have considered a number of factors in determining whether an offence is one of strict liability. These include firstly, that the penalty imposed is monetary; secondly, that there is no stigma attaching to a conviction; and thirdly, that the defendant is able to comply with the provision with relative ease. All of these features adhere to s7 of the Act. The words of s7 simply prohibit a person owning a motor vehicle or trailer which is used on a highway and is unregistered. On its face the clear and concise language in which the provision is couched, together with its objective form, clearly indicate a legislative intention to impose strict liability upon the owner of an unregistered vehicle used on a highway. Having regard to the purpose, wording and characteristics of s7, honest and reasonable mistake is not a defence to a charge under s7(1)(b) of the Act.

2. In order to dismiss a charge as trivial, the court must ascertain the triviality by reference to the conduct which constitutes the offence and to the actual circumstances in which the offence is committed. In the present case, the magistrate was in error in basing the finding of triviality on the fact that this was E.'s first court appearance for an offence pertaining to his trucking business in 20 years of operation.
***Walden v Hensler* [1987] HCA 54; (1987) 163 CLR 561; 75 ALR 173; (1987) 29 A Crim R 85; 61 ALJR 646, applied.**

COLDREY J: [1] This is an appeal brought pursuant to s92 of the *Magistrates' Court Act* 1989 by Leon Gavin Pilkington Investigating Officer of the Roads Corporation of Victoria (the appellant) against the decision of a Magistrate made on 5th March 1991 at Wodonga dismissing two informations brought against Stan Elliot and one information brought against Jennifer Elliot, (the respondents). The first information charged that Stan Elliot, "on 9th day of January 1990 at Hume Freeway, Benalla was the owner of a motor vehicle used on a highway without such motor vehicle being registered as required by Part 2 of the *Road Safety Act* 1986 as applied by s52 of the *Interstate Road Transport Act* 1985 (Cth.)" A further information alleged a similar offence on the 12th January, 1990 at Melrose Drive Wodonga and a third information charged the same offence against Jennifer Elliot on the 18th day of January, 1990 at Hume Freeway Broadford.

The provision requiring the registration is found at s7(1)(b) of the *Road Safety Act* 1986. It reads as follows:

> "A person must not—
> (b) own a motor vehicle or a trailer which is used on a highway—
> unless that motor vehicle or trailer is registered under this Part or exempted from registration under the regulations or is used as specified in a registration permit granted in accordance with the regulations."

[2] It was common ground that the motor vehicles the subject of these prosecutions (which vehicles were used for the carriage of goods) were owned by the respondents and were unregistered in Victoria. It was also undisputed that each of the vehicles carried a Commonwealth registration acquired in accordance with the provisions of the *Interstate Road Transport Act* 1985 (Cth.).

It was accepted before me that, by a delicate interplay of legislative provisions (see for example ss4, 8 and 52 of the *Interstate Road Transport Act*) vehicles registered under the Commonwealth legislation were permitted to engage in interstate trade without having to obtain registration in each State or territory that they travelled between or through. Further, it was not contested that, if such vehicles engaged in intrastate trade, this was outside the ambit of the federal legislation and thus required registration in accordance with s7(1)(b) of the *Road Safety Act.*

An examination of the affidavits sworn by the appellant on the 3rd April, 1991 and Kevin Richard Keating, the solicitor for the respondents, sworn on the 3rd June, 1991, as to the proceedings in the Magistrates' Court, reveals an acceptance by the parties that the vehicles had been engaged in intrastate trade. In each case the relevant intercepting Roads Corporation officer and the appellant gave evidence, the former as to the circumstances surrounding the interception of the drivers of the Elliot vehicles and the latter as to **[3]** interviews held with the respondents on the 2nd February, 1990.

The course of events thereafter is conveniently set out in the affidavit of Mr Keating. After the respondents had each given evidence, he made a submission,

> "on behalf of Elliot that the wording of the scheme of the Act by virtue of s5 was intended to safeguard the public against dangers in design, construction or safety of vehicles and impose an independent liability upon the owner. It was submitted that Elliot held an honest belief on reasonable grounds that the load was to be delivered to the Gadsdens Albury depot and that the evidence afforded that contention. It was submitted that the informant had an obligation to prove the information beyond reasonable doubt and had not negated the defendant's wholly and honest and reasonable belief as to the use of his vehicle such that the principles of *Proudman v Dayman* (1941) 67 CLR 536 applied..."

The affidavit continues:

> "His Worship said that the evidence was not sufficient evidence to satisfy him beyond reasonable doubt that the informations had been proven. He also said that had he been wrong in that determination and having regard to the fact that the family had been operating for 20 years running trucks and this was their first time up he would consider the transgression as minimal and would have dismissed them as trifling."

It was clear from the affidavit material that this submission encompassed all three informations. On the 4th April, 1991 an ex parte application by way of appeal came before Master Wheeler of this Court who, in ordering the respondents to show cause why the appeal from the order of the Magistrate should not be allowed, formulated the following questions of law:

> (a) Was it open to the Magistrate to hold that on the evidence there was any reasonable doubt which justified him in dismissing the information?
>
> **[4]** (b) Did the Magistrate err in holding that the defence of honest and reasonable mistake was open to the defendant?
>
> (c) Did the Magistrate err in determining to dismiss the charge on the basis that the offence was trivial, in that he took an irrelevant matter into consideration?
>
> (d) Was it open to the Magistrate to dismiss the information as trivial in any event?

A similar order was made in each instance. Although it is not spelled out in His Worship's reasoning, (as contained in the various affidavits), it appears that his decision was based upon the application of the principles enunciated in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536. The basic proposition is stated simply by Dixon J. (at p540):-

> "As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendants' act innocent affords an excuse for doing what would otherwise be an offence."

I should interpolate that the question of whether *mens rea* is a requisite ingredient of an offence (often designated by such terms as "knowingly" or "wilfully" in the description of an offence) should not be confused with the question as to whether the defence of honest and reasonable mistake (to use a compendious description) is a ground of exculpation. (See for example *Kain and Shelton Pty Ltd v McDonald* (1971) 1 SASR 39 at p40; *Welsh v Donnelly* [1983] VicRp 79; (1983) 2 VR 173 at 177; *Proudman v Dayman* (ibid) at p540.) The cases indicate that whilst positive knowledge or intent may not be a necessary ingredient of an offence an **[5]** honest and reasonable mistake of fact may, nonetheless, be a ground for exculpation.

The imprecise ambit of the concept of *mens rea* is adverted to by Gibbs CJ in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523 at p533; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. After an examination of such cases as *R v Tolson* [1886-90] All ER 26; (1889) 23 QBD 168; 9 WR 709; *Bank of New South Wales v Piper* (1897) AC 383; *Maher v Musson* [1934] HCA 64; 52 CLR 100; [1935] ALR 80; 89 P 7; *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279; [1938] ALR 37 and *Proudman v Dayman* (*ibid*) he stated:

> "These cases establish that if it is held that guilty knowledge is not an ingredient of an offence, it does not follow that the offence is an absolute one. A middle course, between imposing absolute liability and requiring proof of guilty knowledge or intention, is to hold that an accused person will not be guilty if he acted under an honest and reasonable mistake as to the existence of facts, which, if true, would have made his act innocent."

Having made that general statement the Chief Justice posed a number of questions one of which was whether

> "the absence of an honest and reasonable belief in the existence of facts which would have made the act innocent is a form of mens rea or whether, on the other hand, an honest and reasonable mistake affords the accused a defence only when he is charged with an offence of which mens rea is not an element."

Ultimately the Chief Justice remarked: (at p534)

> "It may be that little turns on the question whether honest and reasonable mistake should be regarded as a special defence available only in cases not requiring mens rea, or as something the absence of which constitutes mens rea. The matter is largely one of words. On either view the words of the statute and the nature of the offence must be considered in deciding what mental state is required, and whether an objective test of reasonableness is to be applied together with the subjective test of whether there was a mistaken belief."

[6] It is now beyond argument that where the defence relied upon is honest and reasonable mistake there is no burden cast upon the accused of establishing such a defence on the balance of probabilities. The proposition is put succinctly by Dawson J. in *He Kaw Teh* at CLR p593 –

> "The governing principle must be that which applies generally in the criminal law. There is no onus upon the accused to prove honest and reasonable mistake upon the balance of probabilities. The prosecution must prove his guilt and the accused is not bound to establish his innocence. It is sufficient for him to raise a doubt about his guilt and this may be done, if the offence is not one of absolute liability, by raising the question of honest and reasonable mistake. If the prosecution at the end of the case has failed to dispel the doubt then the accused must be acquitted." (See also *Kidd v Reeves* [1972] VicRp 64; (1972) VR 563; *Mayer v Marchant* (1973) 5 SASR 567; (1973) 30 LGRA 246 and *R v Strawbridge* (1970) NZLR 909).

In this passage Dawson J refers to offences of absolute liability. This term is used interchangeably with that of strict liability. What then are the criteria to be applied in determining whether an offence is one of absolute or strict liability? In *He Kaw Teh* Dawson J. remarked: (at p594)

> "Attempts have been made to categorize those offences which have been regarded as absolute, but the result is only helpful in a broad sense and the recognized categories cannot be regarded as exhaustive. It is generally accepted that statutes which create offences for the purpose of regulating social or industrial conditions or to protect the revenue, particularly if the penalty is monetary and not too large, may more easily be regarded as imposing absolute liability. This approach may be displaced if to regard an offence as one of absolute liability could not promote the object of the

> legislation by making people govern their conduct accordingly; see *Lim Chin Aik v R* (1963) AC 160; [1963] 1 All ER 223; (1963) 2 WLR 42. Conduct prohibited by legislation which is of a regulatory nature is sometimes said not to be **[7]** criminal in any real sense, the prohibition being imposed in the public interest rather than as a condemnation of individual behaviour. On the other hand, if a prohibition is directed at a grave social evil, the absolute nature of the offence may more readily be seen, particularly if proof of intent would be difficult and would represent a real impediment to the successful prosecution of offenders."

In *Proudman v Dayman*, after articulating the general rule that honest and reasonable mistake of facts affords an excuse for that which would otherwise constitute an offence, Dixon J. went on to say:

> "The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one.
>
> Indeed there has been a marked and growing tendency to treat the prima facie rule as excluded or rebutted in the case of summary offences created by modern statutes, particularly those dealing with social and industrial regulations." (per p540).

It was not sought to be argued before me that *mens rea*, in the sense of demonstrating positive knowledge or intent, was a requisite element of the offence requiring proof by the prosecution. The issue between the parties was whether this offence attracted absolute liability or whether the respondents could avail themselves of the defence of honest and reasonable mistake. **[8]** In submitting that the instant offence was one of absolute liability, Mr Radford, who appeared on behalf of the appellant, referred me to the article of Professor Sayre entitled *"Public Welfare Offences"* (1933) 33 Columbia LR 55 which identifies a number of categories of offences attracting the doctrine of strict liability. These are, illegal sales of intoxicating liquor; sales of impure or adulterated food or drugs; sales of misbranded articles; violations of anti-narcotic Acts; criminal nuisances; violations of traffic regulations; violations of motor vehicle laws and violations of general police regulations passed for the safety, health or well-being of the community.

It must however be recognised that the categories of offences said by Professor Sayre to attract the principle of strict liability cover a broad spectrum and must be considered by the courts, not only in the light of the purported purposes of individual statutes, but also having regard to the specific scope of individual sections within such statutes. Mr Radford contended that the *Road Safety Act* 1986 had as its purpose public health and safety and consequently the legislature had either expressly or implicitly excluded a defence of honest and reasonable mistake in the public interest. He referred to *Welsh v Donnelly* [1983] VicRp 79; (1983) 2 VR 173 where at p177 Young CJ referred to the predecessor to the *Road Safety Act* in these terms:

> "The nature of the matters with which the *Motor Car Act* is concerned is peculiarly public safety. The notorious dangers of travel on modern highways and the necessity for strict control of the handling of motor vehicles on those highways **[9]** suggest that if ever the intention to be imputed to Parliament is to impose strict responsibility, it is likely to be in statutes dealing with the control and handling of motor vehicles."

In the instant case the section creating the offence is preceded by s5 which sets out the purposes of registration. These are:

> "(a) to ensure that the design, construction and equipment of motor vehicles and trailers which are used on a highway meet safety and environmental standards; and
>
> (b) to enable the use of motor vehicles and trailers on highways to be regulated for reasons of safety, protection of the environment and law enforcement; and
>
> (c) to provide a method of establishing the identity of each motor vehicle or trailer which is used on a highway and of the person who is responsible for it."

Similarly, in the *Road Safety (Vehicles) Regulations* 1988 Regulation 102 sets out the following objectives:

> "(a) to establish a registration and permit system for motor vehicles and trailers used on highways, and a registration system for motor vehicles used in public places—
> (i) which ensures that the vehicles comply with reasonable safety standards before they are used on highways or in public places; and
>
> (ii) which records the identity of each vehicle and the person responsible for it; and
>
> (b) to ensure that when vehicles are used on highways or in public places they are safe for use and are used in a safe manner."

These regulations require (in certain circumstances) the production of a current Certificate of Roadworthiness to accompany any application for registration (202(i)(e)); the inspection of a vehicle by the Roads **[10]** Corporation (204) and, in respect of motor vehicles carrying goods for hire or in the course of trade details on the certificate of registration of carrying capacity, tare mass and the mass limit permitted in respect of the vehicle as prescribed by Regulation 712 (209).

In my view, it is beyond argument that the *Road Safety Act* is concerned with public safety. Nonetheless Mr Jackson, who appeared on behalf of the respondents, submitted that the defence of honest and reasonable mistake could not be excluded merely by reference to the categorisation of an Act as being for public safety and health. Each provision must be examined individually. In support of that proposition Mr Jackson cited the case of *Cumming v Melbourne Towing Service Pty Ltd* (1984) 2 MVR 157. In referring to the categories of legislation which tended to favour the presumption of honest and reasonable mistake being rebutted, Marks J remarked:

> "... there is much imprecision about the delineation of the categories and one way or another it might be thought that all legislation, subordinate or otherwise, is within the reach of one or more of those identified. On the other hand, the authorities appear to provide little or no guidance as to the kind of legislation thought to leave the presumption intact. It seems that each statutory provision has to be considered on its own and interpreted according to such common sense and intuition as the judicial mind can bring to bear on it."

As I have previously indicated I respectfully agree with His Honour's approach. In developing his submission, Mr Jackson pointed to the fact that in *Kidd v Reeves* [1972] VicRp 64; (1972) VR 563, which related to an offence of driving whilst disqualified, **[11]** contrary to the provisions of what is now s30 of the *Road Safety Act*, Menhennitt J. held that the defence of honest and reasonable mistake was available to the defendant. I would have no doubt that *Kidd v Reeves* remains good law in this State, one reason for this defence remaining intact being the provision of a mandatory prison sentence for a second offence. Consequently, and in the light of the comments of Marks J, I do not believe that by some parity of reasoning that same defence must apply to s7(1)(b) of the *Road Safety Act*.

Mr Jackson referred me to Part 5 of the *Road Safety Act* which relates to offences involving alcohol or other drugs. He argued that the purposes of that part of the Act, enumerated in s47 as being (inter alia) to reduce the number of motor vehicle collisions in which alcohol or other drugs are a cause, are more intimately linked to public safety than the purposes relating to registration. Consequently it was put that whilst the presumption of a defence of honest and reasonable mistake may be rebutted in relation to drink driving offences, it should not be regarded as precluded in relation to the less safety orientated registration provisions. However, in the context of provisions, all of which are directed towards aspects of road safety, I do not see the distinction sought to be drawn by Mr Jackson as being of sufficient significance to enable the acceptance of the proposition for which he contends. It was also submitted by Mr Jackson that the purposes of public safety sought to be achieved by s7 of the **[12]** *Road Safety Act* were in fact met by Commonwealth registration under the *Interstate Road Transport Act* 1985. This may well be so. However, in my view, it is not relevant in construing s7 of the *Road Safety Act* to have regard to the parallel Commonwealth legislation albeit that it may be aimed at achieving the same result. It is solely the meaning of the Victorian provision which falls for consideration.

On the other hand the fact that a person may have registered a vehicle in accordance with Commonwealth requirements is a factor to take into account in determining the seriousness

of the breach of the Victorian legislation. It was argued by Mr Radford that the absence of any exculpatory provisions in s7 further evinced the legislative intention that the offence should be one of strict liability. In reply, Mr Jackson submitted that the absence of exculpatory provisions reinforced the presumption that the defence of honest and reasonable mistake was not excluded. In support of this argument, he pointed to the fact that in *Welsh v Donnelly* (which concerned a vehicle carrying weight in excess of that for which it was licensed and consequently breaching s35 of the *Motor Car Act* 1958) all the members of the Full Court were influenced in reaching a decision that the offence was one of absolute liability, by the existence of a proviso which mitigated the imposition of any additional penalty if the defendant could establish the difficulty or impossibility of avoiding the carriage of excess weight.

[13] Similarly, in *Franklin v Stacey* (1981) 27 SASR 490, a case in which the South Australian Full Court held that sections 9 and 102 of the *Motor Vehicles Act* 1959/1981 (SA) imposed strict liability for driving an unregistered and uninsured vehicle, the court was influenced in its conclusion by the existence of "special reasons" in s102(2) of the Act which allowed for the reduction of both the monetary penalty and the period of disqualification from obtaining a licence. In *Burnett v Jeffries Nominees* (1983) 33 SASR 124, a case of driving an overloaded vehicle contrary to s147 of the *Road Traffic Act* 1961/1981, the Full Court held that the defence of honest and reasonable mistake was available and distinguished *Franklin v Stacey* (ibid) on the basis of the "special reasons" defence relating to the driving of an uninsured vehicle.

It should be noted however that the so called distinction referred to in *Burnett's case* could relate only to the driving of an uninsured vehicle since no "special reasons" defence existed in relation to driving an unregistered vehicle. The distinction therefore is more apparent than real. Although in *Welsh v Donnelly* (*ibid*) each member of the Court took into account the existence of the proviso, it cannot be suggested that its presence in the section was regarded as conclusive by them in reaching their decision. Indeed, Southwell J quotes with approval the statement by Walters J in *Franklin v Stacey* (*ibid*):

> "There can be no doubt that the object which the *Motor Vehicles Act*, read as a whole, is designed to achieve is to secure the public welfare and **[14]** promote safety of the public ... I think ... the legislature must be taken to have subordinated the interests of individuals to the interest of the public and to have intended that any hardship resulting to an individual by the application of the ordinary rule of interpreting a statutory provision in accordance with its natural and literal meaning and by the imposition of strict liability for infringement of the particular section, is to give way to the public interest."

And Southwell J further remarked:

> "I respectfully agree with that statement and I see no reason to differentiate between that part of the Act relating to registration and insurance, and the part now under consideration."

Moreover an indication of legislative intention in the instant case may be gleaned by comparing s7 of the *Road Safety Act* with its predecessor s17 of the *Motor Car Act* 1958. That section read:

> "17(1) If a motor car or trailer was used on a highway—
> (a) without being registered as required by this Part; ...
> the person driving the motor car ... and the owner of the motor car ... shall severally be guilty of an offence against this Act unless—
> (iii) in the case of a prosecution for using a motor car ... without being registered ... —
> he satisfies the Court that he has had no reasonable opportunity of having the motor car ... registered ... and that at the time of the alleged offence it was his intention to have the motor car ... registered ... at the first reasonable opportunity;"

No such exculpatory provisions are contained in s7 of the *Road Safety Act.* Further, sub-s2 of s7 states:

> "A person must not—
> **[15]** (a) use a motor vehicle or trailer in breach of any condition of its registration; or
>
> (b) being the registered owner of a motor vehicle or a trailer permit or allow to be so used or employ a person to so use it."

It should be noted that the reference to permitting or allowing, which may arguably import a defence of honest and reasonable mistake, (see *Collett v Bennett* (1986) 21 A Crim R 410; (1986) 3 MVR 141), does not appear in sub-s1 of s7 of the Act. All of the factors to which I have referred would tend to support the operation of the section for which Mr Radford contends.

The words of s7 simply prohibit a person owning a motor vehicle or trailer which is used on a highway and is unregistered. On its face the clear and concise language in which the provision is couched, together with its objective form, clearly indicate, in my view, a legislative intention to impose strict liability upon the owner of an unregistered vehicle used on a highway. Are there, however, any other indicia which would support or, indeed erode, such a conclusion?

Mr Radford drew attention to a number of factors which the courts have considered in determining whether an offence is one of strict liability. These include firstly, that the penalty imposed is monetary; secondly, that there is no stigma attaching to a conviction; and thirdly, that the defendant is able to comply with the provision with relative ease. (See for example *Kain and Shelton v McDonald* (*ibid*)). All of these features adhere to the section under consideration.

[16] In *Lim Chin Aik v R* [1963] AC 160; [1963] 1 All ER 223; (1963) 2 WLR 42 Lord Evershed, delivering the judgment of the court, said, (at 174):

> "It is pertinent ... to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which would promote the observance of the regulations." (See also *Kain and Shelton v McDonald* (ibid) p43; *Welsh v Donnelly* (ibid)).

An owner (and specifically owners in the circumstances of the respondents) will usually be in such a position.

In the course of argument Mr Jackson placed some reliance upon *Cumming v Melbourne Towing Service Pty Ltd* (*ibid*) where Marks J. found that Regulation 25 of the *Transport Consolidated Regulations* 1977 should not be seen as excluding the defence of honest and reasonable mistake. It is not, I think, necessary for me to discuss that case other than to note that it dealt with circumstances which were, to quote his Honour's words,

> "so rare that there is little cause to read a legislative intent to exclude their consideration in the genuine case."

Finally, in relation to this aspect of the case, it was submitted by Mr Jackson that the fixing of an owner with strict liability could create hardship if, for example, his unregistered vehicle was stolen and driven on a highway.

I think the answer to that proposition is that if, by some miscarriage of the prosecutorial discretion, an owner faced with this unique circumstance was to find himself **[17]** before the court, any charge could be dismissed as trifling or adjourned without conviction upon the defendant entering into a bond. (See Sections 81 and 83 of the *Penalties and Sentences Act* 1985). Similar provisions are contained in the new *Sentencing Act* 1991.

Accordingly having considered the purpose, wording and characteristics of the section I am of the view that honest and reasonable mistake is not a defence to a charge under s7(1)(b) of the *Road Safety Act*. It follows from this conclusion that it was not open to the Magistrate to hold that there was a reasonable doubt founded upon the discharge by the defendants of the evidentiary onus cast upon them of raising the issue of honest and reasonable mistake of fact.

I turn now to the question of whether it was open to the Magistrate to dismiss these informations as trivial pursuant to s81 of the *Penalties and Sentences Act* 1985. That section, insofar as it is relevant, reads as follows:

> "... if upon the hearing of a charge for an offence punishable on summary conviction ... the Magistrates' Court thinks that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment—
> (a) the court without proceeding to conviction may dismiss the information ..."

The leading Victorian case is *Farrelly v Little* [1970] VicRp 2; (1970) VR 18 in which the operation of a similarly worded provision, being s75 of the *Justices Act* 1958, was considered. **[18]** The case of *Farrelly v Little* involved offences of using obscene language in a public place. The language was uttered by a number of actors during a theatrical performance and the Magistrate dismissed the information as trifling. It was held by Little J. that the offence of using obscene language in a public place could not be regarded, in itself, as an offence of a trifling character. In order to attract the operation of s75 of the *Justices Act* it was necessary to find some special circumstances, something marked about the circumstances accompanying or surrounding the commission of the offence.

In more recent times, the relevant principles have been considered by the High Court in the case of *Walden v Hensler* [1987] HCA 54; (1987) 163 CLR 561; 75 ALR 173; (1987) 29 A Crim R 85; 61 ALJR 646. At ALJR p653 of the judgment Brennan J stated:

> "Triviality must be ascertained by reference to the conduct which constitutes the offence for which the offender is liable to be convicted and to the actual circumstances in which the offence is committed. It was erroneous to ascertain the triviality of the offence by reference simply to the statutory provision which prescribes the maximum penalty."

Similarly, Dawson J remarked: (at ALJR p661)

> "... it is sufficient to say that the offence to be considered in determining triviality is clearly the offence committed by the offender and not the offence in the abstract."

The submission by Mr Radford was that this type of offence, aimed as it is at ensuring road safety, cannot of itself be trivial, but in any event the facts taken into account by the Magistrate were not appropriate to the issue of triviality.

[19] According to the affidavit material the Magistrate stated that:

> "Having regard to the fact that the family had been operating for 20 years running trucks and this was their first time up he would have considered the transgressions as minimal and would have dismissed them as trifling."

In my view the basis for the finding of triviality, namely that this was the respondents' first court appearance for offences pertaining to their trucking business in 20 years of operation, (that is, a consideration of the respondents' antecedents) does not constitute an application of the relevant principles. Consequently, insofar as the Magistrate purported to dismiss the informations on this ground his discretion miscarried.

I should add however that I do not regard s7 of the *Road Safety Act* as creating offences which cannot, under any circumstances, be the subject of a dismissal by a court because of their trifling nature. A decision as to whether this mode of disposition was available in the instant case would depend upon a consideration by the court of all of the factors falling within the ambit of the principles enunciated. Whilst the course the proceedings took obviated any submissions as to penalty, there is no doubt that the antecedents of the respondents would have been a relevant factor in any submission on their behalf in seeking to attract the operation of s83 of the *Penalties and Sentences Act* or as to the quantum of any penalty under s7(3) of the *Road Safety Act*. **[20]** In light of these conclusions, the questions posed by Master Wheeler should be answered as follows: (a) No; (b) Yes; (c) Yes; (d) Yes, such a dismissal is not legally prohibited. As a consequence of these answers I remit each of these cases to the Magistrates' Court for rehearing in accordance with the law.

APPEARANCES: For the Appellant: Mr AE Radford, counsel. MA Pollard, Solicitor for the Roads Corporation. For the Respondents: Mr A McL Jackson, counsel. Solicitors: Trivett Keating Price Penwill.
