17A/74

SUPREME COURT OF VICTORIA

AHERNE v FREEMAN (No 2)

Crockett J

25 September 1973 — [1974] VicRp 17; [1974] VR 121

PROCEDURE – DEFENDANT FOUND GUILTY OF TWO TRAFFIC INFRINGEMENTS – DEFENDANT A HOLDER OF A PROBATIONARY LICENCE AT THE TIME OF THE OFFENCES AND AT THE DATE OF THE COURT HEARING – CHARGES FOUND PROVED – CHARGES ADJOURNED FOR A PERIOD BEYOND THE PERIOD OF PROBATION – NO ORDER MADE BY THE MAGISTRATE AGAINST THE DEFENDANT'S LICENCE – WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi discharged.

1. The conclusion was inescapable that the true ground for the adjournment was in order to circumvent the operation of the legislative provision making cancellation of a probationary licence compulsory. That this was so was confirmed by the fact that it was the Magistrate who selected the adjournment date, which not only was more than four months ahead, but also only two days after the probationary licence expired.

2. Ground for conviction for an offence had been shown during the currency of a probationary licence. The clear duty of the Magistrate was to convict and to give effect to the terms of s22B(3) of the *Motor Car Act*, the operation of which removed from the Magistrate any discretion on the question of cancellation. The will of Parliament was clearly shown as requiring compulsory cancellation of such a licence if there was a conviction for a stipulated offence within the period of that licence. Any adjournment that was granted for no other reason than to defeat that will, no matter how harsh in its effect the legislation may have proved to be in a particular case, was one based upon a wrong principle or by resort to extraneous or irrelevant matters.

3. It followed that the order for adjournment was wrong in law.

4. The affidavit of a Magistrate should—

(a) confine itself to a statement of grounds given for the decision under review and the evidence that bears on the issue in question, because that is what s167 of the *Justices Act* 1958 requires.

(b) be free of comment, observation, opinion or critical remark, because if it were otherwise the impartiality of the source from whence it comes is, or may be thought to be, destroyed.

CROCKETT J: The applicant-informant seeks the review of orders of adjournment of two informations made on 11 August 1972 by the Magistrates' Court at Ballan. The informations heard that day by the Court, which consisted of a stipendiary magistrate, each related to a charge that on 8 January 1972 the respondent-defendant in breach of reg 1001(1)(b) of the *Road Traffic Regulations* 1962 drove a vehicle at a speed in excess of that designated by restriction signs.

The two offences occurred during the one journey. The respondent was travelling to Ballarat on the Western Highway. The applicant, a police officer, swore that the respondent drove through Melton at 50 miles per hour. The speed limit for that town is 40 miles per hour. Having been followed to Myrniong, the respondent was seen to drive through that town at 65 miles per hour, according to the applicant's evidence. The speed limit for Myrniong is 45 miles per hour. The respondent gave evidence. He admitted the commission of the offences but asserted that his speed through each town would not have been greater than 50 miles per hour. These two charges were heard at the same time as charges of having driven at a dangerous speed and having exceeded the speed limit of 70 miles per hour. These charges, too, arose out of the same journey. Each of the informations relating to the latter two matters was dismissed—that concerning speed in excess of 70 miles per hour upon a technicality.

The respondent was represented by a solicitor, Mr Wilson. At the conclusion of the evidence Mr Wilson addressed the magistrate on the question of penalty in relation to the offences, the commission of which was uncontested and as to which the magistrate said he found them proved. Reference needs to be made to the substance of that plea. The respondent, at the date of the hearing, held a probationary licence. In fact it was his second such licence. A person to whom is issued his first driving licence receives a probationary licence. He holds this for three years. Conviction for an offence designated in the Fourth Schedule during the currency of a probationary licence renders cancellation of the licence compulsory. Application for another licence cannot be made until three months after the date of cancellation. A successful applicant in such circumstances, however, receives no more than another probationary licence. The provisions dealing with these matters are to be found in s22B of the *Motor Car Act* 1958.

It seems that the respondent had in the past been convicted of some comparatively minor but scheduled offence. He thus suffered cancellation of his first probationary licence. But this occurred only three months before he was due to receive a normal driving licence. In due course he received his second probationary licence. This was granted on 13 December 1969. So, at the date of the hearing at the Ballan Court he was only a little more than four months away from eligibility for a non-probationary licence. But the offence created by reg 1001(1)(b) is also a scheduled offence. So, if convicted on these two charges of excessive speed, not only was cancellation of his licence for three months obligatory, but any third licence that might be issued to him would again be only a three year probationary licence despite the fact that he had by that time been licensed to drive for almost five and a half years. He thus had an understandably vital interest in avoiding a conviction for a relevant motor car offence before 13 December 1972. Additionally, the magistrate was told something of the respondents's background, and in particular a special need for a driving licence was claimed because of various family circumstances in which it was said he was placed.

At the conclusion of these remarks concerning penalty, the magistrate adjourned the informations to 15 December 1972. It is those orders of adjournment about which the applicant feels aggrieved. The grounds upon which orders nisi to review the adjournment orders were granted, when summarized, amount to these:

> (a) that the magistrate should have convicted the respondent on the day of the hearing and forthwith cancelled his probationary licence;
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> (b) that any discretion exercised in making the adjournment orders miscarried in that there was no relevant ground available to justify such discretionary action.

Now, these grounds demand that some examination be made of what transpired at the time of and immediately after the making of the plea. Some difficulty arises in that connexion as there are no less than three different versions of the relevant events. The applicant has sworn and filed an affidavit. So, too, has Mr Wilson on behalf of the respondent, although the respondent did not appear on the return of the orders nisi, nor was he legally represented. Yet a third account is to be found in an affidavit sworn and filed by the magistrate pursuant to s167 of the *Justices Act* 1958.

Each of the three accounts infers, or at least seeks to give an impression as to why the adjournment occurred, and each is different. For reasons which I shall shortly discuss, it appears to me that the three different explanations for the adjournments are these: the clear inference from the applicant's account is that the magistrate adjourned the informations in order that a delayed date of conviction would avoid the operation of the section which renders compulsory a licence cancellation: s22B(3) of the *Motor Car Act*. Mr Wilson's account leaves no doubt that he was seeking to persuade the magistrate to take a course that would avoid cancellation, but all the circumstances suggest that he was seeking to achieve this result by having the magistrate adjourn the informations pursuant to s96(6) of the *Justices Act*. This provision permits adjournment of the further hearing of an information for a period not exceeding 12 months upon the defendant's entering into a recognizance to be of good behaviour, compliance with the terms of such recognizance then leading to dismissal of the charge on the adjourned date. The magistrate's affidavit, sworn the same day as Mr Wilson's, and with neither deponent presumably being aware of the contents of the other's affidavit, created the impression that the adjournment was for the purpose further to consider the question of what penalty was appropriate. Section 91(14) of the *Justices Act*, despite

the terms in which it is couched, undoubtedly permits reservation of a decision including one dealing with the question of penalty: *Williams v Millett* [1900] VicLawRp 94; (1900) 25 VLR 513; 6 ALR 22.

Reconciliation of these accounts is not possible and some resolution of the conflict must be undertaken. There are authorities that refer to principles that may be employed in such a task. The general rule is that an answering affidavit (i.e. a party affidavit) is regarded as conclusive on questions of what occurred in the court below. But it is no more than "a useful working rule (and) is not to be taken too absolutely or it would lend itself to abuse": per Mann CJ, *Thomson v Lee* [1935] VicLawRp 65; [1935] VLR 360 at p362; [1935] ALR 458. "[The practice] ought to be departed from in proper cases. The Court cannot, by a mere practice based on convenience, be relieved of, and still less can it be precluded from, fulfilling its duty to decide where the truth lies": per Sholl J *Thomson v Cross* [1954] VicLawRp 89; [1954] VLR 635 at p636; [1955] ALR 154. Then when there is filed a justice's or magistrate's affidavit (i.e. a non-party affidavit) "the Court in general, unless some clear reason appears for supposing that there is some error or omission in it, accept it and act upon it in preference to the account given on affidavit by an interested party": per Sholl J *Cross's Case, supra*. "The court pays much respect to these communications": per the Full Court, *R v Garside; Ex parte Mouritz* [1885] VicLawRp 36; (1885) 11 VLR 136 at p138. But justices, in swearing affidavits, "must act impartially and not seek to promote the case of one party to the detriment of the other": per Herring CJ, *Scott v l'Anson* [1958] VicRp 34; [1958] VR 204 at p206; [1958] ALR 627. Moreover, such affidavits should, in the absence of special circumstances, confine themselves to the grounds expressed at the time for the decision made, and, if no signed deposition is taken, the facts or evidence given that bear on the question in issue: s167 of the *Justices Act* 1958: *De Iacovo v Lacanale (No. 3)* [1958] VicRp 98; [1958] VR 628 at p642. Indeed, in *R v Mairs; Ex parte Vansuylen* [1881] VicLawRp 56; (1881) 7 VLR (L) 43 at p45, Stawell CJ, with whom Stephen and Higinbotham JJ agreed, went so far as to deprecate the action of a justice in stating in his affidavit that certain things sworn in the applicant's affidavits were not true. On the other hand, Mann, in *Thomson v Lee, supra*, in referring to an affidavit answering an affidavit in which the evidence was set out in detail, remarked that "if the deponent intends to convey that portions of the affidavit are untrue, he ought to say so in categorical language, and he will be in danger of having his affidavit rejected if he confines himself to saying, 'the account given is inaccurate and my account is accurate' and then in a long account he omits the particular passages to which I have referred".

I find some little difficulty in reconciling these two citations even though one was dealing with a justice's affidavit and the other a party affidavit. Doubtless the affidavit of a justice should—

> (a) confine itself to a statement of grounds given for the decision under review and the evidence that bears on the issue in question, because that is what s167 requires.
>
> (b) be free of comment, observation, opinion or critical remark, because if it were otherwise the impartiality of the source from whence it comes is, or may be thought to be, destroyed.

But, after all, the purpose of all affidavits, no matter by whom they are sworn, is to enable the court to determine where the truth lies. If an account that expresses itself as, or by necessary inference must be taken to be, one which the deponent is claiming that the whole of the material facts are as he is asserting they occurred, and that account is wholly or partly contradictory of a sworn version with which the deponent is, or may be taken to be, acquainted, then it is a reasonable conclusion to draw that such deponent must be taken as saying that where any fact in the first account differs from his own it is untrue. If it is possible for a deponent to swear facts from which the inference may be drawn that he is averring that part of another version is untrue, it must surely be permissible, and indeed preferable, positively to assert and particularise what is said by him to be untruthfulness or inaccuracy.

There may be no problem when the version contained in the affidavit sworn later in point of time deals with an identifiable fact or piece of evidence that is referred to in the earlier affidavit, and the later affidavit simply sets out a different account concerning that fact or piece of evidence. Difficulty, however, arises when the facts are set out in detail in both accounts and in the later affidavit some of them are the subject of a different version, but others that appear in the first account are not referred to at all. The deponent of the answering affidavit may abstain from mentioning them in his own account because he knows they are true but he may hope that

in setting out what appears to be a generally full and in some respects contradictory version on certain matters, that version will be accepted as a complete and accurate account of what occurred. In such a way, if accepted, what in reality was unspoken acceptance of facts by such a deponent, would or could be treated in this Court as a rejection of the accuracy of those facts. If those matters are of vital importance then the deception of this Court could, and probably would, lead to injustice.

So it seems to me that in any affidavit that purports to set out the evidence and relevant facts as they occurred in the court below, no matter by whom it is sworn, if it is sworn by a deponent who has read an affidavit already sworn as to such matters, there should be set out that fact and, whether it is strictly to be described as an answering affidavit or not, the deponent in then proceeding to give his version of the facts ought, as to those facts the occurrence of which to his knowledge has been asserted but which he denies, positively state his denial. Failure of an affidavit to comply with such a requirement renders it unsatisfactory in that "it would be extremely difficult to sustain an assignment of perjury in respect of it": per Mann CJ, *Thomson v Lee* [1935] VicLawRp 65; [1935] VLR 360 at p363; [1935] ALR 458. It would be contrary to principle to permit the existence of a special class of deponents to whom might attach some special immunity by reason of the form their affidavits might be permitted to take.

I turn then to look at the various affidavits in the light of these observations. The applicant has sworn that the respondent's solicitor addressed the magistrate on the question of penalty and referred to the respondent's impending marriage. He added that the magistrate then convicted the respondent on the two informations but adjourned them both to 15 December 1972, saying that he would impose fines of $40 on each charge on that date.

Mr Wilson has said that his affidavit was in answer to that of the applicant's which he had read. The material events as recounted by him are that after the close of all the evidence the magistrate announced that he found the two charges proved and inquired if anything was to be said on penalty. A plea was then made and the affidavit sets out in elaborate detail the particulars to the substance of which I have already made reference. Mr Wilson's affidavit, although making it plain that he was seeking to avoid cancellation of the licence, does not suggest that he specifically mentioned to the magistrate in the course of the plea the means by which he hoped that that result might be achieved. His account concludes by simply stating that, following the plea, the magistrate said he would not convict the respondent but would adjourn the charges until 15 December 1972. Now, it will be noted that, although this account does not specifically state that the applicant's account that the magistrate convicted the respondent was inaccurate, no such specific assertion was necessary as a different version of the same matter was given in that Mr Wilson swore that the magistrate said he found the charges proved, he would not convict but adjourn the informations.

Applying the principles that I have discussed, I would accept that no conviction was recorded. Of course, it is also highly probable that this conclusion is correct if, as I shall presently state, it is my view that, whatever course the magistrate was following, it clearly was with the object of avoiding conviction before expiration of the probationary licence. He would in such a circumstance be specially concerned not to announce convictions at the hearing. It is possible that he may have said something to the effect that at the adjourned hearing he was proposing to convict, as doubtless he was. But Mr Wilson has not denied that the magistrate then announced an intention to impose $40 fines in each case. His affidavit is a very full one and so presumably is intended to represent his account of all that transpired—particularly as there is in it repetition of a good deal of non-contentious material. Despite this the suspicion exists that Mr Wilson is aware that the applicant's assertion of this fact is true simply because he has chosen not to deny it—apparently abstaining from doing so because he felt unable to do so. In this respect, because of the competing inferences that could be drawn from it, the affidavit is unsatisfactory. As the applicant positively swears to it I would accept that the magistrate did state in advance the penalty he proposed ultimately to inflict.

Now I turn to the magistrate's affidavit. He does not refer to having read the applicant's affidavit. However, it has been proved that service of that affidavit on the magistrate in compliance with the terms of the orders nisi, occurred prior in time, of course, to the swearing of the magistrate's affidavit. Service of the documents, including the affidavit founding the orders nisi, can only be

required for the purpose of the magistrate's having an opportunity of verifying the accuracy of that material and correcting it by an affidavit of his own, if minded so to do. The magistrate's affidavit also apparently purports to contain a full reproduction of his account of the evidence given and the facts that occurred as all the proceedings are recapitulated in detail regardless of whether what is said (as much of it is) is as the applicant himself has set it out. The magistrate's account of what happened after close of the evidence, and which is material to the present point at issue, is this: Mr Wilson asked if the two charges were found proved and he was told they were, whereupon he said, "He wished to place certain matters before me before I decided whether to record a conviction or otherwise." The various matters upon which the solicitor rested his claim for clement treatment are then detailed in the affidavit. The magistrate continued, "I then said that I would take the matters mentioned by Mr Wilson into consideration and would adjourn the two cases to 15 December 1972 when I would give my decision".

Of that version these observations may be made: The statement as to the solicitor referring to a decision whether or not to record a conviction is simply supplementary to the applicant's affidavit, and coming from the magistrate, I should and do accept it. This remark of the solicitor is consistent only with his seeking to persuade the magistrate to adjourn the charges upon his client's entering into a bond to be of good behaviour leading to ultimate dismissal of the charges should there be compliance with the terms of the bond. There is no suggestion that the magistrate was to be asked without proceeding to conviction to dismiss the informations on the ground that, though proved, they were of a trifling nature: see s75(a) of the *Justices Act* 1958. Nor would such a submission have been tenable in the circumstances. Moreover, it appears to me much more likely that, of the various possible ways that conviction before 13 December 1972 could be avoided that requiring exercise of the powers conferred by s92(6) no matter how hopeless it might seem, is the one which the solicitor would press upon the court. But the magistrate did not require the entry of the respondent into a bond when the hearing was adjourned. Consequently it is plain that he was not purporting to employ the powers found in s92(6). Having "heard what each party has to say and the evidence adduced by each" it was his duty to "consider the whole matter and determine the same: s91(14). Certainly he could reserve his decision to consider penalty, and (unless it was a deliberate ploy designed to delay the date of conviction) I am unable to understand on what other basis the adjournment took place. That it was for just such a purpose seems to be what the magistrate is intending to convey by his use of the words "when I would give my decision". But I am quite unable for a number of reasons to accept that this was the actual ground for what happened. Those reasons are:—

(a) If the magistrate wanted to consider what was the proper penalty and reserved his decision and adjourned the hearing for that purpose, he should have told the parties that that was the reason for the adjournment and unequivocally restated such reasons in his affidavit. This he has not done.

(b) The magistrate's affidavit, like that of Mr Wilson, suffers, for the reasons I have already attempted to explain, from the defect that it does not say that the magistrate did not announce that when the decision was given it would be one whereby a fine of $40 on each charge would be imposed. Since this is not denied in circumstances when I should have expected it to have been if the magistrate considered it untrue, I accept that it was said. It follows that the magistrate could not have been concerned to have time in which to consider what penalty was appropriate. He had already determined it.

(c) It is, in my view, improbable, to say the least, that a stipendiary magistrate would require several months in which to determine what penalty should be imposed in what are obviously two typical and perfectly straightforward traffic offences.

Accordingly, the conclusion is inescapable that the true ground for the adjournment was in order to circumvent the operation of the legislative provision making cancellation of a probationary licence compulsory. That this is so is confirmed by the fact that it was the magistrate who selected the adjournment date, which not only was more than four months ahead, but also only two days after the probationary licence expired. If I am right in this conclusion, then this reason should have been given for the adjournment that was ordered and plainly stated in the affidavit. I can only conclude that it was not as the magistrate was himself conscious that there was more than an element of chicanery inherent in a device designed to defeat the intention of the legislature.

Ground for conviction for an offence had been shown during the currency of a probationary licence. The clear duty of the magistrate was to convict and to give effect to the terms of s22B(3) of the *Motor Car Act*, the operation of which removes from the magistrate any discretion on the question

of cancellation. The will of Parliament is clearly shown as requiring compulsory cancellation of such a licence if there is a conviction for a stipulated offence within the period of that licence. Any adjournment that is granted for no other reason than to defeat that will, no matter how harsh in its effect the legislation may prove to be in a particular case, is one based upon a wrong principle or by resort to extraneous or irrelevant matters. To my mind, the proposition needs only to be stated for its validity to be demonstrated. It follows that the order for adjournment was wrong in law, and it becomes unnecessary for me to consider an alternative argument that the magistrate, in any event, on the proper construction of the relevant provisions of the *Justices Act*, in the circumstances that had occurred, was legally powerless to adjourn the informations.

Should I come to the conclusion that I have, it was conceded by counsel for the applicant that, notwithstanding such conclusion, the only course open to me was to discharge the orders nisi. The material before the Court did not disclose whether the matter was disposed of on the date to which it was adjourned or if the review proceedings had caused a stay of the matter. In any event, any order remitting the matter for it to be dealt with according to law must now, *ex hypothesi*, lead to conviction upon a day beyond the date of the expiration of the respondent's probationary licence. Hence, any cancellation (which would not be obligatory in any event) could only be of a normal licence which it may be assumed the respondent now has. The applicant is concerned to establish the incorrectness of a device aimed at defeating the operation of the legislation and the clear intention of the authors of that legislation. Costs are not sought. Accordingly, in these circumstances, the orders nisi will be discharged. Orders nisi discharged.

Solicitor for the informant: John Downey, Crown Solicitor.
