43/77

SUPREME COURT OF VICTORIA

STOCK v ORCSIK

Dunn J

5 April 1977 — [1977] VicRp 46; [1977] VR 382; 35 LGRA 336

HEALTH – SPECIAL ACCOMMODATION HOUSE – NINE RESIDENTS OVER THE AGE OF 60 – PREMISES NOT REGISTERED – PROPRIETOR CHARGED WITH OFFENCE – *PRIMA FACIE* PROOF OF AGE/ PHYSICAL CONDITION – ADMISSION BY PROPRIETOR THAT NINE RESIDENTS WERE OVER THE AGE OF 60 – WHETHER MAGISTRATE IN ERROR IN DISMISSING CHARGE: *HEALTH ACT* 1958, SS220A, 200B.

Defendant was charged under s220B *Health Act* with being the proprietor of an unregistered "special accommodation house". The latter is defined in s220A be a "boarding house in which not less than 6 of the persons ... lodged or boarded are (a) 60 years or over or (b) physically handicapped ... but whose condition was not ... as would require them to be lodged in a nursing home". It was argued that there was insufficient evidence to prove the age of the boarders. The Magistrate upheld a 'no case' submission and dismissed the charge. Upon Order nisi to review—

HELD: Order absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing and determination according to law.
1. Having regard to the evidence, there was a clear *prima facie* inference that there were nine people boarded in the premises who were over the age of 60 years and that the defendant was, in effect, acquiescing in that position and her explanation, when being asked in effect why she had more than five people over the age of 60 years, was that she intended to move the older ones to other premises and keep 13 The Avenue for the younger ones.

2. Having regard to the other questions that were asked in the proprietor's presence at the time the inmates were interviewed and the only questions apparently put to them related to their ages, the defendant must be taken to have acknowledged that there were nine over the age of 60.

3. There was no suggestion that any of the inmates was incapable of being there or was required to be bedridden. The *prima facie* inference was that they were not in the condition that they were required to be lodged in a hospital or nursing home.

DUNN J: This is the return of an order nisi to review the decision of the learned Stipendiary Magistrate at Prahran when he heard an information on 25 October 1976 against the defendant. The information was "that between 1 August 1976 and 6 August 1976 at Windsor the defendant, being the proprietor of a special accommodation house situate at 13 The Avenue, Windsor, did fail to have such house registered".

That information alleges an offence against s220B of the *Health Act* 1958. For the purposes of that section "special accommodation house" is defined in s220A to mean "a boarding house in which not less than six of the persons, exclusive of the family of the proprietor thereof, who are lodged or boarded are persons (a) who are aged 60 years or over; or (b) who are physically handicapped to the extent that their ability is significantly impaired ..." and then, applying to both (a) and (b) "... but whose condition is not of such a kind as would require them to be lodged in a hospital or a nursing home."

The difficulties that have arisen in this case are undoubtedly due to the unfortunate way in which this investigation was conducted by the informant.

At the end of the evidence it was submitted on behalf of the defendant that there was no *prima facie* case to answer on the basis that the informant had not adduced admissible evidence to prove that any of the inmates was over the age of 60 years. Reliance was placed upon a passage in *Cross on Evidence*, (Australian ed.), which indicated that there were four ways by which age of a person may be proved, none of which was by admission of the person whose age was involved, or of any other person who was not present at the birth.

Mr Halpin, who appeared for the defendant in the Court below and who has appeared before me, has now (with commendable frankness) admitted that the submission he made to the learned Stipendiary Magistrate was based on too narrow a view of the present state of the law, in view of the decision of *Anglim and Cooke v Thomas* [1974] VicRp 45; [1974] VR 363. In passing, I refer to the fact that in *Cross on Evidence*, 2nd ed. (English), at p454, the learned author says that "It is submitted that this kind of evidence of age should be expressly treated as an exception to the hearsay rule", that is, evidence by persons other than those who were present at the birth." As has been well said it may be hearsay, but it is evidence that most people would wish to accept unless authority declares otherwise."

Harris J in *Anglim's Case*, decided that the law did permit such evidence to be received, the weight to be attached to it depending in each case on the basis upon which the person making the admission might have had reasonable grounds for forming belief as to the particular person's age. In this case, the evidence, very shortly stated, is that on 5 August 1976 the informant, with a Dr White, went to premises which were being conducted by the defendant at 13 The Avenue, Windsor, and that there were in those premises 14 people, admitted to be boarding in those premises, each of whom was seen by the informant. When the informant met the defendant the informant explained the purpose of her visit to the defendant and asked to see the inmates. The defendant then left the room in which they were and subsequently returned and escorted the informant into the lounge-room, where 13 of the inmates were then sitting. The informant asked each of them their names and ages, and when any of those persons was not able to give the required information, the defendant gave it. There is no detail in respect of which persons the information was given by the defendant, but the substance of it was that the names of the 13 persons appeared and the ages of 12 of them were given, either by the person concerned or by the defendant. In respect of one of those persons no age was apparently given, either by him or by the defendant which, I suppose, leads to an inference that there was a reasonable basis for the other ages that were provided.

It appeared that there were nine people of that thirteen over the age of 60 and the fourteenth person in the house, who was subsequently seen, was under the age 60. The defendant was present at that interview when these ages were given, and participated in the supplying of the information without protest. It may reasonably be concluded, having regard to the subsequent material that became available, that she was acquiescing in the accuracy of the information that was given. She was subsequently interviewed about the situation in these premises. She was asked "Are there more than five persons, exclusive of the family, lodged or boarded for hire or reward from week to week in these premises?", and she said "Yes". In answer to a question "How many?", she said "Fourteen".

Then she was asked this question: "How many persons, exclusive of the family of the proprietor, that are lodged or boarded are persons (a) who are aged 60 years or over; or, (b) who are physically handicapped?", and she said "Fourteen". Then she was asked about how she was paid and she said she was paid by pension in respect of nine of the people, and that corresponds with the number who were in fact over the age of 60 and in the other five cases the board was paid by the Public Trustee.

Then the final question upon which reliance is placed on behalf of the informant is this. She was asked "Are you aware that it is an offence to carry on the business of a special accommodation house, except in a registered special accommodation house?", and she said "Yes". "Do you have any explanation to offer?", and the defendant said "I intended to make this a boarding-house by having the younger ones here and transferring the older ones to 39 The Avenue."

All that material, it seems to me, leads to a clear *prima facie* inference that there were nine people boarded in those premises who were over the age of 60 years and that the defendant was, in effect, acquiescing in that position and her explanation, when being asked in effect why she had more than five people over the age of 60 years, was that she intended to move the older ones to other premises and keep 13 The Avenue for the younger ones.

The Magistrate upheld the submission that was made that there was not sufficient evidence of the ages of the inhabitants, and he intimated (in substance) that the Crown had not gone far enough in the proof that it had adduced to satisfy the age requirement.

Mr Halpin, before me, has sought to support the order dismissing the information on two grounds. Namely, that the admissions that were made by the defendant were not sufficiently clear as to the number of each kind of person who was present. In other words, the questions that were put were the sort of combination of both (a) and (b), both the age and the physically handicapped being referred to in the same question and, therefore, when she said, for example, that there were 14 who fell within both those classes it was not open to infer that more than six of them were over the age of 60 years.

For my part I think that, having regard to the other questions that were asked in her presence at the time the inmates were interviewed and the only questions apparently put to them related to their ages, the defendant must be taken to have acknowledged that there were nine over the age of 60.

The second ground upon which Mr Halpin sought to support the order was based on the fact that there was no direct evidence led on behalf of the informant to comply with the final requirement of the definition of "special accommodation house", but whose condition is not of such a kind as would require them to be lodged in a hospital or a nursing home". That part of the definition has its problems because of the significance that ought to be attached to the word "require". But for my purposes I think it is sufficient to say that the word "require" means that their physical condition was such that their state of health necessitated them or should necessitate them being lodged in a hospital or a nursing home. In other words, that they were not medically fit to remain in a special accommodation house.

No argument was addressed to the Magistrate on that question and no cross-examination was directed to the informant on that aspect of that matter. But that does not absolve, of course, the informant providing some *prima facie* evidence to satisfy the definition.

In my opinion, there was sufficient evidence arising from the fact that the defendant mustered all the inhabitants who were over the age of 60 into the sitting-room where they were all seated. There was no suggestion that any of them was incapable of being there or was required to be bedridden. I think the *prima facie* inference is that they were not in the condition that they were required to be lodged in a hospital or nursing home.

For those reasons, in my opinion, this order nisi should be made absolute and the matter remitted to the Magistrates' Court at Prahran to be dealt with according to the law. Order absolute.

Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the defendant: Bishop, Trevor and Rinaldo.
