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SUPREME COURT OF VICTORIA

GREEN v PHILIPPINES CONSULATE GENERAL

McInerney J

18-19, 22 June, 29 July 1970 — [1971] VicRp 2; [1971] VR 12

PRACTICE AND PROCEDURE – PARKING INFRINGEMENT INCURRED – NOT PAID – INFORMATION ISSUED NAMING THE PHILIPPINES CONSULATE GENERAL (PCG) AS THE DEFENDANT – CONSUL APPEARED AND SAID THAT THE PCG WAS NOT A JURISTIC PERSON AND THAT THE INFORMATION WAS A NULLITY – MAGISTRATE REJECTED THE SUBMISSION AND FOUND THE CHARGE PROVED AND IMPOSED A FINE ON PCG – WHETHER MAGISTRATE IN ERROR: *ROAD TRAFFIC REGULATIONS* 1962, R1101.

HELD: Orders nisi absolute. Information struck out and the conviction and fine set aside.
1. The magistrate was not bound to assume but, on the contrary, was entitled to require proof that the name "Philippines Consulate General" was the name of a legal person. No such proof was furnished to him and there was no juristic person of that name. This being so, the question arose where the information against "Philippines Consulate General" was a nullity, for if it was, the conviction founded on it would also have been null and void.

2. The expression "person" included a corporation unless there was something repugnant to or inconsistent with the interpretation and suggested that an information and summons issue only against a juristic person, and that an information and summons could not issue against some non-existent non-entity such as a "Consulate".

3. Accordingly, when it was asserted to a court that a name which on the face of it, was the name of an office or establishment rather than that of a natural person or was the name of a juristic person, the court was entitled to require proof that legal personality was enjoyed by the owner of that name. Legal personality was assumed in the case of natural persons. It was not assumed, but on the contrary required to be proved in the case of any other kind of legal person.

4. It followed that the magistrate was not bound to assume but, on the contrary, was entitled to require proof that the name "Philippines Consulate General" was the name of a legal person. No such proof was furnished to him and there was no juristic person of that name.

5. Being satisfied that the "Philippines Consulate General" was not a juristic person, the information charging the "Philippines Consulate General" as a defendant was a nullity, and that the conviction recorded thereon was also a nullity.

McINERNEY J: This is the return of an order nisi granted 11 March 1970 to review an order made by the Court of Petty Sessions, Melbourne, on 5 December 1969, on the hearing of an information dated 29 August 1969, laid by the informant, Francis Green, charging Philippines Consulate General of 100 Exhibition Street, Melbourne, as defendant, that on 30 May 1969 at Melbourne a motor car of which Philippines Consulate General was the owner was left parked in a "No Parking" area in Exhibition Street, contrary to r1101 of the *Road Traffic Regulations* 1962 and that by virtue of s11 of Act No. 6359 (*Road Traffic Act* 1958) as amended by Act No. 6559 (the *Road Traffic (Infringements) Act* 1959) the said defendant was deemed to be guilty of an offence against the said regulations.

On the hearing of the information before Mr Walsh, Stipendiary Magistrate, the defendant was convicted and fined $6 with $50 costs and in default of payment distress.

An order nisi to review was granted on three grounds: –

(A) That the learned Stipendiary Magistrate should have dismissed the said information because no person was named therein as defendant.

(B) That the learned Stipendiary Magistrate should have dismissed the said information because there was no evidence before him that any person was the owner of the motor car, registered No. CC-027.

(C) That the learned Stipendiary Magistrate was wrong in law in holding that the defendant was not immune from prosecution and/or conviction by reason of diplomatic privilege.

The order nisi and both the affidavits of Grever Clifton Molyneux and Michael O'Brien on which it was made are intituled (so far as relevant): –

"In the matter of an information in respect of a breach of Reg 1101 of the *Road Traffic Regulations* heard in the Court of Petty Sessions at Melbourne on Friday the fifth day of December, 1969. Wherein:

FRANCIS GREEN was Informant
and
PHILIPPINES CONSULATE GENERAL was Respondent"

Order 38, r10, requires that there be endorsed on every affidavit a note showing on whose behalf it is filed and that no affidavit shall be filed or used without such note unless the court or a judge shall otherwise direct. Each of the affidavits on which the order nisi was made is endorsed with a note "This affidavit is filed on behalf of the applicant" – without stating who the applicant was.

The deponent Grever Clifton Molyneux deposes that he is the Consul-General (*ad honorem*) of the Republic of the Philippines at Melbourne and that the "Philippines Consulate General is not a juristic person". He further deposes that he is aggrieved with the decision of the Court of Petty Sessions at Melbourne and is desirous of having the same reviewed by this Court, but does not state any facts which might serve as a basis for the proposition that he is a person aggrieved. The order nisi does not, however, recite that it was made on the application of Mr Molyneux or of the Consul-General of the Republic of the Philippines at Melbourne; it merely states that it was made upon hearing Mr Storey of Counsel for the defendant" – which I take to mean the "Philippines Consulate General", shown in the title as defendant. Mr Storey is unable to recollect whether or not he announced to the Master that he appeared on behalf of the Philippines Consulate General but believes that he did not state that he was appearing on behalf of Mr Grever Clifton Molyneux the Consul-General (*ad honorem*) of the Republic of the Philippines at Melbourne. If the application for the order nisi was not made on behalf of Mr Molyneux, any application by him now for an order nisi would be out of time: *Justices Act* 1958, s155(1).

When the case was called on, I inquired of Mr Storey for whom he appeared. He stated that he appeared for the Philippines Consulate General to move the order absolute. When I pointed out that if, as Mr Molyneux had deposed, there was no such juristic entity I could not accept such an appearance, Mr Storey intimated that he would seek leave to appear for Grever Clifton Molyneux as the Consul-General *ad honorem* for the Republic of the Philippines at Melbourne as a party aggrieved by the conviction, sought to be reviewed and set aside.

The expression "person aggrieved" refers not to the state of mind of the party alleged to be aggrieved but to his legal position: see *Egerton v Middleton* [1953] VicLawRp 32; [1953] VLR 191; [1953] ALR 497, at p499, per Dean J.

A person who is not a party to the proceedings may be a person aggrieved by the order sought to be reviewed if he has a real and direct interest in the order made and is dissatisfied with it. The words "do not include, of course, a mere busybody who is interfering in things which do not concern him but they do include a person who has a genuine grievance because an order had been made which prejudicially affects his interest": *Attorney-General of the Gambia v N'jie* [1961] AC 617, at p634; [1961] 2 All ER 504. See *Dentry v Stott* [1947] VicLawRp 69; [1947] VLR 462; [1947] ALR 587; *Day v Hunter* [1964] VicRp 109; [1964] VR 845, at pp847-9; *Johnstone v Hicks* [1948] VicLawRp 38; [1948] VLR 213; [1948] 2 ALR 52.

Where the applicant for an order nisi is a party to the proceedings below the fact that he is a "person aggrieved" is deducible from the mere existence of the order complained of and the legal position of the applicant if that order is allowed to stand. But where the applicant was not a party to the proceedings below, it will normally be necessary to depose to the existence of facts

which establish that he is a "person aggrieved" unless those facts can be otherwise inferred from the material before the court. The oath of a deponent that he is a party aggrieved will, therefore, seldom, if indeed ever, be of any assistance: see *Day v Hunter* [1964] VicRp 109; [1964] VR 845, at pp848, 849. The statement by Mr Molyneux, without assigning reasons therefore, that he is a party aggrieved is insufficient to establish that conclusion.

Mr Storey submitted that if the informant sought by warrant distress to enforce payment of the fine imposed, it was likely that property of the Consul-General for the Republic of the Philippines at Melbourne would be taken in execution and, therefore, the Consul-General (Mr Molyneux) was a person aggrieved by the conviction. As already stated, those considerations are not adverted to in any way in Mr Molyneux's affidavit.

After hearing some argument on these matters I intimated to Mr Storey that if I were not satisfied that Mr Molyneux as Consul-General *ad honorem* for the Republic of the Philippines at Melbourne was a person aggrieved, I would be disposed to permit him (Mr Storey) to appear as *amicus curiae* to assist the Court. Thereupon, Mr Buckner – whether fortified by that intimation or not, I do not know – stated that he would concede that Mr Molyneux was a person aggrieved by the conviction the subject of the order nisi. On that concession I thereupon passed to consideration of the grounds of the order nisi.

At the outset, a certain Gilbertianism is apparent in the problem before the Court.

"Consulate" is defined by the *Oxford English Dictionary* as "Consular Government; the office, dignity or position of the Consuls" and as "The office or establishment of a Consul".

On the face of it, therefore, "Philippines Consulate General" is not a juristic person and it is somewhat surprising (to say the least) that an information was issued against and a conviction recorded against the "Philippines Consulate General". Furthermore it is difficult to understand how any application to the Court could be made by or on behalf of the "Philippines Consulate General" either for the grant of an order nisi or to move that the order nisi be made absolute. A similar difficulty presented itself to the mind of Isaacs J in *Bishop v Chung Bros* [1907] HCA 23; (1907) 4 CLR 1262, at p1278; 13 ALR 412, at p418.

This Gilbertian legal situation comes about in consequence of the facts that at 1 p.m. on Friday, 30 May 1969, the informant Francis Green, an authorized officer of the Melbourne City Council, saw a motor car registered No. CC.027 parked on the left side of Exhibition Street between Collins and Little Collins Street. He observed that the car remained in that position until 3.45 p.m. on the same day. It was standing in a position marked "No Parking – Loading Zone 7.30 a.m. to 5.00 p.m. Monday to Friday". The leaving of the vehicle standing in this zone constituted a contravention of r1101 of the *Road Traffic Regulations* 1962 made under Pt I of the *Road Traffic Act* 1958 and, therefore, constituted a "parking infringement", as defined in s9 of the *Road Traffic Act* 1958, for the purposes of Pt II of that Act. Upon observing this parking infringement, the informant affixed a parking infringement notice in a position conspicuous to the driver: see subs(1), subs(2)(b), subs(3), subs(5) and subs(6) of s11A of the *Road Traffic Act* and *Road Traffic (Infringements) Regulations* 1960, reg2, reg3, reg4, especially reg4(4), and the First Schedule.

Section 11(1) of the *Road Traffic Act* 1958 provides (so far as is material) that where any parking infringement occurs in relation to any vehicle, the person who at the time of occurrence of the infringement is the owner of the vehicle shall be and be deemed to be guilty of an offence (in this instance, against the regulation) as if he were the actual offender guilty of the infringement. Under s9 of the *Road Traffic Act* "owner" in respect of motor car means the person in whose name the motor car is registered under the *Motor Car Act* 1958 (whether the property in the motor car is vested in him or not).

It may be assumed that the penalty specified in the parking infringement notice was not paid: see *Road Traffic Act* 1958, s11(7), s(8), s(9) and s(10). At all events, the information and summons herein were issued on 29 August 1969 attendable at the Court of Petty Sessions Melbourne, on 17 October 1969. Pursuant to s12 of the *Road Transport Act* the summons was accompanied by two copies of "Form of Election to Appear" and a sworn statement by the informant: see s12(2)(a) and s12(2)(b). The summons was served by post in a certified letter addressed to

"Philippines Consulate General, 100 Exhibition Street, Melbourne" (see *Road Traffic Act*, s12(2)) and was received on or about 30 August 1969. The forms of election, completed by the then solicitors for the Consul-General, were forwarded (as required by the form) to the Chief By-Laws Officer, Town Hall, Melbourne and to the clerk of petty sessions, Melbourne, respectively: see *Road Traffic Act*, s12(2)(a) and s12(3). The contents of the forms of election do not appear in the material filed in support of the application for an order nisi.

The information eventually came on for hearing on 5 December 1969, before Mr Walsh SM. Mr Buckner, of counsel, announced his appearance for the informant. His Worship directed that "the Philippines Consul-General" be called – whereupon Mr Willshire, of counsel, announced that he appeared on behalf of the defendant under protest. When pressed to state on whose behalf he appeared, Mr Willshire said he appeared on behalf of "the Philippines Consulate General". The magistrate appears to have accepted that appearance. Mr Willshire then invited the magistrate to take judicial notice of the fact that Australia has diplomatic relations with the Philippines State and that there was in fact a consular representative in Victoria; he argued further that the property of a foreign sovereign was immune from the jurisdiction of the Victorian courts. He invited the magistrate to take judicial notice (which the magistrate declined to do) of the fact that the registration No. CC.027 referred to in the information showed that the subject vehicle was a Consular Corps vehicle. He next submitted that the vehicle was not owned by any legal entity that it was not the consul who was sued (? prosecuted) but the Consulate General and that, therefore, the court had no jurisdiction.

Counsel for the informant undertook to prove that the Philippines Consulate General was a person. Alternatively, (he said) it was the name of a person and that was sufficient for the purpose of the Act. He contended that there was nothing wrong in the summons itself. Mr Buckner referred to *Justices Act* 1958, s219, and to *Diplomatic Privileges and Immunities Act* 1967 (Com.).

The Magistrate intimated that he would require proof that the defendant named, the Consulate General, was protected by diplomatic immunity, and that he was prepared in the first instance to allow Mr Buckner to go as far as showing that the Consulate General was subject to the jurisdiction of the court.

Mr Buckner then opened his case, tendered the *Road Transport Regulations* 1962, referred to s4(1), s9, s11(1) and s12 of the *Road Traffic Act* 1958. He then produced the certified copy of the minutes of a meeting of the Melbourne City Council relating to the authority of the informant as a traffic officer. He then called as witnesses the informant and one Desmond Thomas O'Brien. The informant gave evidence of the parking infringement and Desmond Thomas O'Brien produced the certificate of registration of the motor car registered No. CC-027 showing that the said car was on 30 May 1969 (the date of the parking infringement) registered in the name of the Philippines Consulate General and he produced the application for registration. He gave evidence, in cross-examination, that "CC" was a series reserved for the Consular Corps.

The application for registration tendered in evidence shows that on 20 December 1968 application for registration of a Jaguar motor car engine No. 7D/57140/8 Chassis No. GID/54620/BW was signed (as the applicant) by GC Molyneux, Consul-General for the Philippines. The application was made in form 419 and is in a form which differs in some respect from that in form A of the First Schedule to the *Motor Car Regulations* 1966 (see Reg4). The application form reads: -

"I...of...being a person over the age of 18 years hereby apply for the registration of a motor car described hereunder...." The vehicle was described as subject to a hire-purchase agreement, bill of sale or like instrument, and the proprietor was shown as Mer Credits Finance Ltd. The application form shows that the car was allotted registration No. CC-027. No registration fee was charged in respect thereof. The certificate of registration tendered in evidence shows that the Jaguar car the subject of the application was registered in the name of "Philippines Consulate General, 100 Exhibition St., Melbourne 3000" for the period ending 20 December 1969.

On this evidence Mr Buckner submitted to the magistrate that s9 and s13 of the *Road Traffic Act* do not require a person to be stated as the owner of the car but merely that the name of a person be stated, so that the point was not whether the Philippines Consulate General was

a person but whether it was the name of a person. A name did not have to be an actual name but merely a name with which the defendant associated itself. In support of that proposition he referred to *Peters v Oscar Meyer Pty Ltd* [1963] VicRp 54; [1963] VR 390.

Mr Buckner further urged that on the evidence Philippines Consulate General was a name – not a natural name – but a name for the purpose of the *Road Traffic Act*; it was the name of the owner of the car.

He invited the Stipendiary Magistrate to apply the presumption of innocence (applied in *R v Arrowsmith* [1950] VicLawRp 17; [1950] VLR 78; [1950] ALR 264) and to presume that Philippines Consulate General must be the owner because it had applied for registration. He referred to s6(5) as showing that the application for registration was required to be made by the owner.

Mr Buckner also invited the Stipendiary Magistrate to act on the principle of *R v Hughes* (1879) 4 QBD 614, that a court had jurisdiction to deal with the defendant actually before the court even though appearing under protest. No matter how a defendant was before the court, the court could deal with that defendant in relation to the charge. He cited also *R v Carr: Ex parte Ah Ying* [1879] VicLawRp 177; (1879) 5 VLR (L) 391, and submitted that the court could amend the information under s200 of *Justices Act*. He did not formally apply for leave to amend but said he would do so if it were necessary. In fact he never did so.

In his final submission, Mr Willshire submitted that the Consulate General was not a person, but merely a position and that there was no entity known to the law as the Consulate General. That was (he said) a short and simple answer to the whole matter.

The magistrate, however, ruled that there was a *prima facie* case against the Philippines Consulate General, and on Mr Willshire intimating that he called no evidence, the magistrate, in response to Mr Buckner's request for a conviction to be recorded against the Philippines Consulate General, announced that the defendant would be convicted and fined $6 with $50 costs.

The first and second grounds of the order nisi may, I think, be taken in conjunction. In substance they raise the point that "Philippines Consulate General" is not a juristic person.

In *Bishop v Chung Bros* [1907] HCA 23; (1907) 4 CLR 1262, at p1267; 13 ALR 412 at p414, Griffith CJ stated that

> "the general rule with respect to prosecutions is that the criminal law affects natural persons only. This must be so since the criminal law is ordinarily enforced by imprisonment. It is obvious that this is so in general, since the criminal law is ordinarily enforced by imprisonment".

The references in s18(1) of the *Justices Act* 1958 to "the place at which the defendant is to appear", in s18(2) to "the attendance of any person to answer to an information", in s18(3) to "the apprehension of any person informed against", in s20(1) to a summons to answer to an information being" "directed to the person in such information named as the person against whom it is laid", and to the summons requiring "him to appear at the time and place therein mentioned" to answer to such information, in s21(1) to the summons "naming or otherwise describing the person against whom it is issued", and in s23(1) to service of the summons "upon the person to whom it is directed" by delivering a true copy to such person himself or by leaving the same for him...", taken in conjunction with the provisions of s17 of the *Acts Interpretation Act* 1958, whereby, in all Acts in force after 2 October 1857, the expression "person" includes a corporation unless there is something repugnant to or inconsistent with the interpretation – all suggest that an information and summons issue only against a juristic person, and that an information and summons cannot issue against some non-existent non-entity such as a "Consulate".

"So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not": *Salmond on Jurisprudence* (10th ed., ed. by Dr Glanville Williams), (1947), p318. See also *Taff Vale Ry Co v Amalgamated Society of Ry Servants* [1901] UKHL 1; [1901] AC 426 at p429. Legal theory distinguishes between two kinds of legal persons – natural and legal. Legal persons recognized by our system of law include corporations – corporations sole, corporations aggregate

– companies, institutions (e.g. universities), created either by charter or by Act of Parliament (e.g. companies under the *Companies Act*), and organizations (e.g. trade unions, employers' associations) incorporated e.g. under the *Conciliation and Arbitration Act*: see *Williams v Hursey* [1959] HCA 51; (1959) 103 CLR 30, at pp51-3; [1959] ALR 1383, at pp1390, 1391; (1959) 33 ALJR 269, per Fullagar J. Of course, Parliament can and frequently does impose criminal liability on corporations and companies. Furthermore, as Griffith CJ pointed out in *Bishop v Chung Bros*, *supra*: "There is no doubt that Parliament can authorize firms to be sued or prosecuted and convicted and punished under the criminal law." Indeed, as is pointed out in *Smith and Hogan on Criminal Law* (2nd ed., p109) Parliament can enact, and in England has recently enacted, legislation (*Prices and Income Tax Act* 1966) whereby unincorporated associations of employers may be made criminally liable. This, of course, is a result which only Parliament can achieve.

In the present case Mr Buckner's argument seemed to me to go to the length of saying that Parliament had in the *Road Traffic Act* evinced an intention to impose criminal liability for parking infringements against the "owner" in whose name the relevant car was registered – whether that "owner" was or was not a juristic person.

Mr Buckner contended that on its proper construction s11 of the *Road Traffic Act* empowers the Court of Petty Sessions to receive and hear an information for a parking infringement and record a conviction in respect thereof against "the owner of the vehicle" concerned, and that means "the person, in whose name the [relevant] motor car" is registered. The motor car CC-027 was proved to have been registered in the name shown in the information as the defendant, namely, "Philippines Consulate General", and, therefore the court was entitled to receive an information and record a conviction against the "Philippines Consulate General".

This requires consideration of certain provisions of the *Motor Car Act*. Section 6(1) of the *Motor Car Act* 1958 (as amended) requires that every motor car be registered under Pt II of the *Motor Car Act*. Section 6(5) provides that application to register a motor car may be made by or on behalf of the owner in the prescribed manner and that the motor car if registered shall be registered in the name of the person by or on whose behalf the application is made as owner thereof.

The words "if registered" suggest that the Chief Commissioner is not bound to register in accordance with the application to register – indeed s6(5C) empowers him to require such evidence as may be prescribed of the identity of the owner and of the truth of any matter contained in the application.

Under s3(1) of the *Motor Car Act* 1958 "owner" in respect of a motor car is defined as including any person who is the sole owner, joint owner or part owner thereof and any person who has the possession and use thereof under or subject to a hire-purchase agreement or a bill of sale or like instrument. In the *Motor Car Regulations* 1966 (SR 1966 No. 144) made pursuant to s39 of the *Motor Car Act*, a definition in identical terms is contained in reg3(1) thereof.

In certain cases the Act precludes registration from conforming exactly with the ownership – e.g. under s6(5A).

Where the car is owned by more than one person, the registration must be effected in the name of the owners nominated by all the owners. Where the owners are members of an unincorporated body, s6(5B) precludes registration in the name of the unincorporated body. In such a case the car must be registered in the name of one of the owners (i.e. members) nominated by the governing body of that unincorporated association.

Furthermore, under s6(5B) registration of a motor car shall not be effected under a business name. These provisions suggest strongly that the requirement that registration of a motor car be effected in the name of the person by or on whose behalf the application for registration is made as owner thereof imports that the "owner" must be a juristic person. There is nothing in the Act or regulations to warrant a car being registered in a name which is not the name of a juristic person, whether natural or artificial. The registration effected of the car CC-027 is under the name "Philippines Consulate General" is, in my view, not authorized by the provisions of the *Motor Car Act*.

I am fortified in this view by the provisions in Pt V of the *Motor Car Act* as to compulsory third-party insurance. The scheme of that Act is that every owner of a motor car must insure against any liability which may be incurred by him or any person who drives such motor car in respect of the death of or bodily injury to any person caused by or arising out of the use of such motor car, and for that purpose the owner must enter into a contract of insurance under the Act: s40(1). Such insurance must be effected before or upon the registration or renewal of registration of the motor car: s42(1) and s42(7). The contract of insurance will ordinarily commence on the registration or renewal of registration of the motor car: s42(1) and s42(7). Furthermore, the contract of insurance will ordinarily commence on the registration or renewal of registration of the car: see s42(8)(a).

The proposition that a non-existent juristic person could be a party to a contract of insurance is one which would require very clear statutory authority. I do not find any provisions in the *Motor Car Acts* which would warrant the proposition that a valid and enforceable contract or policy of insurance could be made with or issued to the "Philippines Consulate General".

If, as appears probable, there exists, in relation to car CC-027 a policy of insurance against the risk required by s46 to be covered by such a policy, it is to be hoped that it has been issued to and in the name of the Consul-General rather than to or in the name of the "Philippines Consulate General". If in fact, the car being registered in the name of the "Philippines Consulate General", the policy purports to have been issued to the "Philippines Consulate General", it is, to say the least, doubtful whether there exists a valid insurance policy in respect of that car.

Mr Buckner contended, however, that the word "name" in the statutory definition (in s9 of the *Road Traffic Act*) of "owner" included not only the actual name of the owner but also any name or identifying words or description with which the owner of the car was associated.

"Philippines Consulate General" was, he suggested, the identifying description with which Mr Molyneux, the Consul-General, was associated and, therefore, the car should be treated as having been owned by Mr Molyneux as Consul-General, and registered by him under the identifying words or description "Philippines Consulate General". The information and summons was, therefore, to be treated as an information and summons against Mr Molyneux, and by corollary Mr Molyneux was to be treated as the person convicted.

As to this, I observe that, on that view, Mr Molyneux could legitimately be regarded as a "person aggrieved" by the conviction.

In support of this contention Mr Buckner relied on *Cameron v Tyler* [1899] 2 QB 94; *Peters v Oscar Meyer Pty Ltd* [1963] VicRp 54; [1963] VR 390 at pp394, 395, and *Hines v Winnick* [1947] 2 All ER 517; 63 TLR 520. But in each of these cases there was an actual legal person who (in the first and second cases) carried on a business or (in the third case) practised the profession of a musician, under a business or professional name, as the case may be. Those decisions afford no warrant for concluding that the same legal consequences follow if the name is not one attached to or associated with some natural or artificial juristic person. In any event, the principle of those cases could have been invoked by the informant only if there had been evidence before the court – which there was not – that the words "Philippines Consulate General" were words identified with or descriptive of Mr Molyneux.

The prohibition (contained in s6(5B) of the *Motor Car Act* 1958) of registration under a business name suggests that the principle of the cases referred to above ought not to be applied to the case of the registration of a car.

Mr Buckner pointed out that in the interpretation of wills the courts have often treated a donee as sufficiently designated by a nickname or erroneous name proved to have been used by the testator, or by a name gained by reputation and known to the testator: see *Halsbury*, 1st ed., vol.28, para.688 at p1309; 3rd ed., vol.39, para.1008, at p1527. But in such cases the court is satisfied that the inaccurate description does signify some actual juristic person and I do not find those authorities of assistance in the present case.

There is, I think, a further difficulty about this argument. The informant is here relying on the criminal liability imposed by s11 of the *Road Traffic Act* on the "owner" as defined in s9 of

the same Act. That criminal liability is imposed on the person in whose name the motor car was registered at the relevant time. There is nothing in s11 which would warrant or justify the court going behind the registration to inquire what actual person or persons is or are the owners of the vehicle.

In a case falling within s6(5A) of the *Motor Car Act* the liability created by s11 of the *Road Traffic Act* is imposed, in my view, on that one owner in whose name registration has been effected: it is not, in my view, imposed on all the persons by whom the vehicle concerned was, at the relevant time, owned. Those who seek to impose on a defendant, irrespective of whether or not he is the actual offender, the notional liability created by s11 of the *Road Traffic Act* 1958 and who desire to take advantage of the simplified procedure made available by s11, s11A and s12 of the *Road Traffic Act*, must take that liability and that procedure with such limitations as are therein inherent, and cannot complain if in the process of using that legislative pit they fall into it.

Mr Buckner properly urged that a court should never approach the matter with any pre-conceived notion that in the title to the information the name shown as that of the defendant could not be the name of a juristic person.

By way of illustration, he referred to *Brew v Whitlock* [1967] VicRp 49; [1967] VR 449; 43 ALJR 122, where the name of the defendant was "Palmsun Day Whitlock". Mr Buckner contended, therefore, that in the absence of evidence showing that "Philippines Consulate General" was not the name of an actual or artificial legal person, the court was bound to proceed to record a conviction in that name whether the hearing took place in chambers pursuant to s12(4) or in court (as in the present case) under s12(3) of the *Road Traffic Act* 1958.

It is, however, one thing to say that a court should not close its mind to the possibility that a name in the title to legal proceedings – whether criminal or civil – which does not appear to be the name of a juristic person, may nevertheless prove on inquiry to be such. No doubt a court may and should in such a case make inquiry and if necessary receive evidence to satisfy the inquiry. It is, however, quite another thing to assert that a court is bound, in the absence of such an inquiry or of any evidence tending to negative the inference which would otherwise be drawn, to receive an information and record a conviction when the name of the alleged defendant is a name which, on the face of it, is not the name of a juristic person.

Would a court, in the absence of some statute imposing criminal liability on an unincorporated body and in the absence of any evidence as to the existence of a juristic nature of the alleged defendant be bound to receive an information against "The Potsmokers' Club"? – On the face of it the name of the alleged defendant suggests that there is no natural legal person of that name. In the case of a natural (human) person, legal personality is presumed to be owned by that person. But where the alleged legal person is not a human person, the attribute of legal personality is not presumed – it is always a matter to be proved.

Accordingly, when it is asserted to a court that a name which on the face of it, is the name of an office or establishment rather than that of a natural person, is the name of a juristic person, the court is entitled to require proof that legal personality is enjoyed by the owner of that name. Legal personality is assumed in the case of natural persons. It is not assumed, but on the contrary required to be proved in the case of any other kind of legal person: cf *Moldex Ltd v Recon Pty Ltd* [1948] VicLawRp 15; [1948] VLR 59; [1948] 1 ALR 115; *Union Bank of Australia Ltd v Lambell* (1898) 24 VLR 509; 4 ALR (CN) 81. Such proof is not furnished by showing that property is described as owned in that name, or that a car is registered in that name – especially having regard to s6(5B) of the *Motor Car Act*. No such proof was here forthcoming and it was for the informant to provide it, not for the "defendant" to negative it.

It follows, in my opinion, that the magistrate was not bound to assume but, on the contrary, was entitled to require proof that the name "Philippines Consulate General" was the name of a legal person. No such proof was furnished to him and I am satisfied that there is no juristic person of that name. This being so, the question arises where the information against "Philippines Consulate General" was a nullity, for if it was, the conviction founded on it must also be null and void: see *Macfoy v United Africa Co Ltd* [1962] AC 152 at p160; [1961] 3 All ER 1169.

In *Re Pritchard deceased* [1963] Ch 502, at p517; [1963] WLR 685, at p693; [1963] 1 All ER 873, Lord Denning MR (whose dissent from the majority decision in that case does not affect the proposition about to be cited), speaking in relation to the distinction between proceedings which are a nullity and proceedings which though affected by an irregularity are nevertheless not null and void, said: "The only true cases of nullity that I have found are when a sole plaintiff or sole defendant is dead (see *Tetlow v Orela Ltd* [1920] 2 Ch 24; [1920] All ER Rep 419) or non-existent (see *Lazard Bros and Co v Midland Bank Ltd* [1933] AC 289 at p296; 49 TLR 94; [1932] All ER Rep 571).

In the last-mentioned case, Lord Wright said ([1933] AC 289 at p296; 49 TLR 94, at p95) that

> "it is clear law, scarcely needing any express authority, that a judgment must be set aside and declared a nullity by the Court in the exercise of its inherent jurisdiction if and as soon as it appears to the Court that the person named as the judgment debtor was at all material times at the date of writ and subsequently non-existent".

Mr Buckner submitted, however, that if I should be of the view that the provisions of the *Motor Car Act* and the *Road Traffic Act* did not authorize an information and conviction against the "Philippines Consulate General", I should, in the exercise of the powers conferred by s160 and s200 of the *Justices Act* 1958, amend the information and record a conviction against Mr Molyneux as the Consul-General *ad honorem* of the Republic of the Philippines at Melbourne.

In support of these submissions he relied on the decisions in *Bishop v Chung Bros* [1907] HCA 23; (1907) 4 CLR 1262; 13 ALR 412, and *Dangerfield v McDonald and Co* [1914] VicLawRp 47; [1914] VLR 35; 20 ALR 217.

In *Bishop v Chung Bros.* [1907] HCA 23; (1907) 4 CLR 1262; 13 ALR 412, an information under the *Factories and Shops Act* 1905 was laid against "Chung Bros.". It appeared that two individuals, Chung Foon and Chung Tun, carried on business at the relevant factory as "Chung Bros.".

Two members of the Full Court of the High Court (Isaacs and Higgins JJ) considered that the information could go in the firm's name; two others (Griffiths CJ and Barton J) held (as also in the Supreme Court did Chomley A-J (12 ALR 477)), that the information should be against the individual members of the firm. A majority of the High Court (Griffiths CJ, Barton and Isaacs JJ) held (as had Chomley A-J, in the Supreme Court) that the conviction should not have been recorded against the firm but could be recorded against individual members of the firm only. But Griffiths CJ, Barton and Isaacs, JJ, held that the Court of Petty Sessions had power, under s187 of the *Justices Act* 1890 (now s200 of the *Justices Act* 1958), to amend the information for any defect in substance or in form, and that, therefore, the case should be remitted to the Court of Petty Sessions with a direction to convict such persons as were shown on the evidence to be members of the firm.

In *Dangerfield v McDonald and Co* [1914] VicLawRp 47; [1914] VLR 357; 20 ALR 217, an information (also under the *Factories and Shops Acts*) was laid against "McDonald and Company". The magistrates, applying *Bishop v Chung Bros*, *supra*, held that a defendant could not be convicted under a firm name, and, accordingly, dismissed the information. Cussen J remitted the information to the magistrates with a direction that they should ascertain who were the individuals represented by (i.e. signified by) "McDonald and Company", and if the magistrates found that there was an offence, those individuals should be held liable.

It is observed that in each of these cases, there was an actual business being carried on under a "firm name", which "firm name" was merely the name under which certain natural persons carried on business in partnership. The relevant statute imposed criminal liability on the persons doing or causing or permitting the prohibited acts to be done but did not authorize proceedings against those persons under their firm or business name.

Such natural persons, being members of the firm as had been guilty of the prohibited acts, were amenable to the processes of the criminal law and each and all of the members of the firm were capable of appearing either in person or by their legal representatives on the hearing of

the information laid in the firm's name. Accordingly, if any such members of a firm appeared at the hearing, there was jurisdiction under s200 of the *Justices Act* 1958 to amend the information and to record a conviction against such members of the firm as were found to have committed the offence: see *R v Carr; Ex parte Ah Ying* [1879] VicLawRp 177; (1879) 5 VLR (L) 391; *Dring v Mann* (1948) 112 JP 270, and *Pearlman (Veneers) SA (Pty) Ltd v Bernhard Bartels* [1954] 1 WLR 1457; [1954] 3 All ER 659. Here, however, there was neither evidence that the Consul-General was the person who had actually committed the parking infringement the subject of this information, nor any evidence establishing that he was the person in whose name the car was at the relevant time registered.

Wide as are the powers of amendment conferred by s200 of the *Justices Act*, I do not think that they are applicable to an information and summons which is a nullity because it names a non-existent person as defendant.

In *Bishop v Chung Bros*, *supra*, and *Dangerfield v McDonald and Co*, *supra*, there was (in each case) an actual business being carried on under a firm name and there were actual persons carrying on that business under that name. Clearly, they or some of them were the persons who were the actual offenders and the evidence adduced before the court established who the actual offenders were. But in the present case, the information proceeds on a statutory fiction that the person in whose name the car was registered at the time of the parking infringement is to be deemed the actual offender guilty of the infringement unless he satisfies the court that the vehicle was stolen or illegally taken or used (s11(1)) or he satisfies one or other of the conditions in s11(3)(a). The resort had to the procedures of s12 necessarily means that so long as the registration stands, the information must be dismissed whoever might be named as defendant or defendants.

The informant's case could only be established by resort to evidence of a different character – e.g. by admissions from the Consul-General that he himself was the person who left the vehicle in the no-parking area or that he caused or instigated or aided or abetted the parking infringement.

Furthermore to permit the information to be amended so as to name the Consul-General as the defendant, might, and I think would, deprive him of a defence which might otherwise be open to him under the *Justices Act* 1958, s215, if a new information were issued against him – cf. the well-established rule, on the civil side, that leave to amend a statement of claim to add a new cause of action ought not to be granted if the effect of such an amendment would be to deprive the defendant of a defence of the statute of limitations: *City of South Melbourne v Black* [1964] VicRp 53; [1964] VR 403, at p414. I do not think it would be a proper exercise of my discretion in the present case to amend the information – all the more since, very likely, if the matter went to evidence, an altogether different issue, namely, diplomatic immunity, would have to be considered. A further factor influencing me in deciding not to take the course suggested by Mr Buckner is that the present objection was taken in the court below and the informant's counsel declined, at that stage, to amend the information. I do not think the informant can eat his cake and have it, or that having eaten one cake below, he should now be sent back to have a different cake.

Being satisfied that the "Philippines Consulate General" is not a juristic person, the consequence appears to me that the information charging the "Philippines Consulate General" as a defendant was a nullity, and that the conviction recorded thereon was also a nullity.

But if the Philippines Consulate General does not exist, how could an application be made on its behalf for an order nisi to review and how can anyone now appear on behalf of the Philippines Consulate General to move that order absolute: see per Isaacs J, in *Bishop v Chung Bros* [1907] HCA 23; (1907) 4 CLR 1262, at p1278; 13 ALR 412, at p418. Indeed it would have been open to the respondent to have applied on summons to the Master or to a judge in chambers for an order setting aside the order nisi: *City of Chelsea v Flint* [1934] VicLawRp 62; [1934] VLR 303; [1934] ALR 402.

It was said in *Chelsea v Flint*, *supra*, that application to set aside the order nisi may be made at any time before the order nisi is made absolute, but that it was necessary for the respondent to have taken out a summons to set aside the order nisi: otherwise it would not be open to the respondent, on the hearing of the order to review, to object that the order nisi should not have been granted. In *Tulk v Pritchard* [1951] VicLawRp 14; [1951] VLR 99; [1951] ALR 337,

Sholl J suggested that it was open to the court, on the return of the order nisi, to grant leave to the respondent to issue a summons *nunc pro tunc* and to have such summons treated as argued before him that day. But, very recently, in *Brudenell v Nestle Co. (Australia) Ltd* [1971] VicRp 27; [1971] VR 225; (1970) 22 LGRA 277 Menhennitt J held that an application to set aside an order nisi ought to be made to a Master, and can only be made to a judge by special leave.

In the present case, however, informant's counsel did not seek to have the order nisi set aside. He contended that I could not make the order nisi absolute, and that I should merely strike out the order nisi, and make no order with respect to the information and conviction, leaving the informant to take such risk as might be involved if he sought to recover the fine and costs.

This does not strike me as a proper course to pursue. On the other hand, Mr Storey urged that I should follow the course taken by the Court of Appeal in *Deutsche Bank und Disconto Gesellschaft v Banque des Marchands de Moscou* (1932) 107 LJ (KB) 386; 158 LT 364, in which case, the Court having ascertained that the so-called appellant was not in existence at the date of the judgment appealed from, proceeded, of its own motion, to set aside that judgment.

In *Deutsche Bank und Disconto Gesellschaft v Banque des Marchands de Moscou* (1932) 107 LJ (KB) 386; 158 LT 364, the plaintiff (whom I shall refer to as "the Deutsche Bank") issued a writ claiming the sum of £266,079 odd and interest from the defendant (whom I shall call the "Moscow Bank") which was described in the writ as of Moscow and as being a corporation registered in accordance with Russian law. On the application of the Deutsche Bank, McCardie J made an order giving the plaintiff leave to serve notice of the writ out of the jurisdiction and to do so by way of substituted service by sending two letters, each enclosing a copy of the writ and a copy of his order, to one Czamanski at addresses in London and Paris respectively and by sending a copy of the notice of the writ and of his order to the Moscow Bank at Moscow. The order appears to have been complied with, and Czamanski instructed a firm of solicitors to enter an appearance to the writ on behalf of the Moscow Bank. An appearance having accordingly been entered in the name of the Moscow Bank, the action proceeded in the normal way, with the result that on 17 June 1931 judgment was entered for the Deutsche Bank against the Moscow Bank for £286,389 17s 3d., Csmanski then instructed the solicitors who were purporting to act for the Moscow Bank to appeal from this judgment on the grounds that the whole debt was barred by the Statute of Limitations and that in any event the judgment entered should be reduced in what it wrongly included a large sum for compound interest.

Throughout the proceedings culminating in the entry of the judgment, it appears to have been tacitly assumed that the Moscow Bank was an existing entity and that Czamanski had authority to direct an appearance to be entered on its behalf. But when the appeal came on for hearing, the Court of Appeal became aware of facts which caused the Court to entertain a strong suspicion that there was or might be no foundation for either of the assumptions referred to. In addition, as a result of the proceedings which had recently been before the court in *Lazard Bros and Co v Midland Bank* [1932] 1 KB 617; 146 LT 240 – affirmed an appeal by the House of Lords [1933] AC 289; 148 LT 242; [1932] All ER Rep 571 – the Court of Appeal had become aware of certain decrees made under the revolutionary regime which affected all Russian banks, from which decrees the conclusion could be drawn that the Moscow Bank had been dissolved in Russia at some date which was certainly no later than 1924, and that it had, therefore, ceased to exist prior to the institution of proceedings the subject of the appeal.

In those circumstances, the Court of Appeal, having heard argument on the grounds of appeal, and having held (by a majority) that the plaintiff's claim was barred by the Statute of Limitations and (unanimously) that compound interest could not be recovered after a certain date, nevertheless, of its own motion, directed the official solicitor to obtain evidence from an expert in Russian law as to whether the Moscow bank had been dissolved in Russia prior to the institution of the proceedings in which the judgment had been entered.

For reasons which it is unnecessary here to state, neither party desired to raise any doubts as to the existence of the defendant. In those circumstances, Scrutton LJ pointed out (107 LJ (KB) 386, at p389; 158 LT 364 at p366):

"It must be remembered that the Court is not a mere machine to decide such issues, genuine, fictitious

> or collusive, as the parties choose to put before it, ...without any power of enquiry into the truth of the matters and of investigating whether the judgment is to be used for purposes for which it could not be used if the real facts were known."

Greer LJ said (107 LJ (KB) 386 at p391; 158 LT 364 at p367):

> "It is obvious that in such circumstances the Court has inherent power to prevent an abuse of its processes, and to make such order as it deems necessary to ascertain the truth on these essential points."

Romer LJ commented (LJ (KB) at p391; LT at p367):

> "We are being asked to treat a defendant as being alive and properly represented before the Court when we have strong grounds for suspecting that he may be neither one nor the other. This is not a position which any litigant is justified in asking the Court to assume, and, in my opinion, we are not only entitled, but, in the interests of the proper administration of justice, we are bound to take steps to see that we do not so stultify ourselves."

Accordingly, when, subsequently, the official solicitor adduced evidence (as also did the plaintiff) from which the Court held that the Moscow Bank had been non-existent since at least the year 1924 – and in all probability from an earlier date – the Court of Appeal struck out the action as having been brought against a non-existent defendant, and also as having been founded on service obtained by representations to the court which were not accurate. The plaintiffs had contended that the result of the Court's finding was that there was no appeal before the court and that, therefore, they were entitled to hold their judgment, although they admitted that they might not be able to enforce it by way of garnishee proceedings. The Court of Appeal rejected this argument, Scrutton LJ, describing it as "an impossible limitation of the power of the court to protect itself against an improper use of its procedure." The Court held that the judgment was *coram non judice* and a nullity. There being no existing defendant, no order for costs was made for or against the named defendant.

Mr Storey, therefore, urged that if I were satisfied that there was no juristic entity or person named "Philippines Consulate General" and were, therefore, of the view that the order nisi was a nullity, it having been obtained on the application of a non-existent person, I should, nevertheless, following the example of the Court of Appeal, of my own motion set aside the information and the conviction, fine and order for costs.

I am disposed to think that the Master in granting the order nisi ought to be assumed to have done so on a proper application – that is, not on the application of a non-existent juristic person but on the application of Mr Molyneux, the Consul-General, as a "person aggrieved".

Indeed, the terms of Mr Molyneux's affidavit suggest that it was intended that the application for an order nisi should be made on behalf of him as a person aggrieved rather than on behalf of the "Philippines Consulate General", and that the statement in the order nisi as signed by the Master that it was made "upon hearing Mr Storey of Counsel for the defendant" does not accurately record what happened. It may be that the Master's order could, if the evidence so warranted, be amended under the "slip rule" (O 28, r11). But the material before me and inquiries I have made of the Master satisfy me that there has not been any "accidental slip" in the drawing up of the order. In any event, if the application for the order nisi was not made on behalf of Mr Molyneux, I think that I am precluded by s155 of the *Justices Act* from now granting him an order nisi.

I think it would have been open to this Court, on proceedings for *certiorari* and prohibition to have quashed the conviction herein and prohibited the informant from proceeding further with the information: see *R v Chairman of General Sessions at Hamilton; Ex parte Atterby* [1959] VicRp 101; [1959] VR 800; [1959] ALR 1449. Section 160 of the *Justices Act* empowers the court on the return of order to review to set aside or quash the conviction and to make such order as to the court seems just, and to exercise all or any of the powers which the court possesses or might exercise upon *certiorari* or prohibition. I think the section is wide enough to enable this Court, of its own motion, to strike out the information and to set aside the order made convicting and fining and ordering costs against the "Philippines Consulate General", to strike out the order nisi, and to prohibit the informant from taking any further proceedings in respect of the information or the

conviction. There being no existing defendant and no party applying to move the order absolute, there will be no order as to the costs of these proceedings made for or against the informant.

I do not consider that it is proper to grant the informant any indemnity certificate under s13 of the *Appeal Costs Fund Act* 1964. It ought from the inception to have been clear to the informant that the "Philippines Consulate General" was not and could not be a juristic person and that the information against the Philippines Consulate General was, therefore, a nullity. The point that the so-called defendant had no existence was clearly – if perhaps belatedly – taken before the magistrate. The informant contended to the contrary and has sought to sustain that contention here. Having persuaded the magistrate into error in the court below the informant ought not, in my view, to be granted any indemnity certificate in respect of its own costs.

On the view I take it is unnecessary to express any views as to the matter raised by the third ground of the order to review, namely, whether diplomatic privilege protects the Consul-General of the Republic of the Philippines at Melbourne. As at present advised I am disposed to the view that the entitlement of the Consul-General to immunity from prosecution is a matter to be proved by the defendant rather than negatived by the informant. I am also of the view that the question whether the Consul-General has been accepted and recognized by Her Majesty in right of the Commonwealth as a person of a diplomatic character and so entitled to immunity from prosecution (whether in terms of s11 of the *Diplomatic Privileges and Immunities Act* 1967 (Com.) and art.36 of the *Vienna Convention* or otherwise) is one to be resolved by the Court on information received, on inquiry from, the Minister for External Affairs: see *Engelke v Musman* [1928] AC 433; [1928] All ER 18.

If it be the fact that the Consul-General has diplomatic immunity from prosecution in respect of parking infringements, that may be a good reason for observing, in relation to parking restrictions, the precept of the first paragraph of art.41 of the *Vienna Convention*, which provides: "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State."

The formal orders of the Court are, therefore: –

Order nisi struck out. Order that the information dated 29 August 1969 by the above-named informant against the Philippines Consulate General be struck out and that the conviction recorded at the Court of Petty Sessions on 5 December 1969 against the Philippines Consulate General at Melbourne on the hearing of the said information be set aside. Order that the informant be prohibited from taking any further proceedings in respect of the information or the conviction. No order as to the costs here or below. No order for any certificate under the *Appeal Costs Fund Act* 1964.

Solicitors for the informant: Mallesons.
Solicitors for the Consul-General of the Republic of the Philippines: Mahoney, O'Brien and Duggan.
