04/93

SUPREME COURT OF VICTORIA

DERWENT v SE DICKENS PTY LTD and ANOR

Beach J

10 September, 19 November 1992 — [1993] VicRp 39; [1993] 1 VR 557

HEALTH – FOOD UNFIT FOR HUMAN CONSUMPTION – FOOD ANALYSED – INFORMATIONS SERVED ON SELLER OF FOOD – ANALYST'S CERTIFICATE NOT SERVED WITH INFORMATIONS – OMISSION TO SERVE NOT WAIVED – WHETHER OMISSION FATAL TO PROSECUTION – "ANY ANALYST'S CERTIFICATE" – WHETHER INCLUDES ALL CERTIFICATES MADE - WHETHER LETTER FROM ANALYST AN ANALYST'S CERTIFICATE – COSTS – WARRANTOR BROUGHT IN BY DEFENDANT – INFORMATIONS AGAINST DEFENDANT DISMISSED – NO FAULT ATTRIBUTED TO WARRANTOR – WHETHER INFORMANT SHOULD BE LIABLE FOR WARRANTOR'S COSTS: *FOOD ACT* 1984 SS8, 9, 16, 31, 45(6), 63; *FOOD (MISCELLANEOUS) REGULATIONS* 1985, 4th Sched.; *FOOD (MISCELLANEOUS)(CERTIFICATE OF ANALYSIS) REGULATIONS* 1987, R21; *MAGISTRATES' COURT ACT* 1989, S131.

Section 45(6) of the *Food Act* 1984 ('Act') provides:

"A copy of any analyst's certificate obtained on behalf of the informant shall be served with a summons in a prosecution for an offence against this Act in respect of any food."

1. The word "any" in s45(6) of the Act is to be read literally in the sense that it means every analyst's certificate in respect of the food sample which is the subject matter of the information. If the prosecution has obtained more than one analyst's certificate in respect of the food sampled which is the subject matter of the prosecution, copies of all such certificates (whether favourable or unfavourable to the prosecution) must be served with the information. Unless the omission to serve a copy of the analyst's certificate is waived by the defendant, the defect is fatal to the prosecution case.

2. A letter addressed to a Chief Health Surveyor which contained the results of an examination of a sample of food seized was not an analyst's certificate within the meaning of s31(c) of the Act. Accordingly, a magistrate was in error in dismissing informations on the ground that the letter constituted a certificate which the informant failed to serve on the defendant with the informations.

3. Where in a prosecution under the Act a defendant is discharged pursuant to the provisions of s16 of the Act, generally speaking, an order for the warrantor's costs would not be made against the informant. Where an information is dismissed without any fault or blame being attributed to the warrantor, the warrantor's costs would be met by the informant.

BEACH J: [1] This is an appeal pursuant to the provisions of s92 of the *Magistrates' Court Act* 1989 against the decision of the Prahran Magistrates' Court delivered on 25 February 1991 whereby the Magistrate dismissed a number of informations laid by the appellant against the respondent SE Dickens Pty Ltd ("Dickens") alleging various breaches of the *Food Act* 1984. The background to the appeal may be summarised as follows. Dickens conducts a large supermarket at premises at 303 Chapel Street, Prahran. On 18 May 1990 the appellant, who is a health surveyor employed by the City of Prahran, seized a quantity of rabbit meat being offered for sale by Dickens. A notice of seizure and detention of the form of the Second Schedule of the *Food (Miscellaneous) Regulations* 1985 was given to an employee of Dickens at the time of the seizure stating as the grounds for the seizure, "S21(1)(a)(v) *Food Act*, s8(3) and s8(1)(a) *Food Act*". Section 21(1)(a)(v) is the sub-section in the Act empowering an authorised officer to seize and detain any article in relation to which he believes on reasonable grounds any provision in the Act has been contravened or not complied with. Section 8(1)(a) of the Act makes it an offence for any person to sell food that is unfit for human consumption and s8(3) makes it an offence for any person to sell, prepare for sale or pack any food that is damaged deteriorated or perished.

[2] In the present case the appellant seized the rabbit meat because he had formed the opinion, no doubt quite accurately, as events transpired, that the meat was bad. On the day he seized the rabbit meat, the appellant submitted it to an analyst approved by the Commission of

the Public Health for analysis. On 1 June 1990, the appellant received the following letter from the analyst:-

> "GRAEME PERRETT M App. Sci, Araci, Dip. Microbiol, AAIFST, MASM Analyst Approved by the Commission of Public Health
> "1st June 1990
> Chief Health Surveyor, City of Prahran
> Town Hall Chapel Street
> PRAHRAN VIC 3181
> Dear Sir,
> We have examined a sample labelled:
> "City of Prahran
> No 60 18/5/90
> Skinned Rabbits
> M DERWENT"
> As submitted on the 18th May with the following results:
> The sample consisted of a number of uncooked rabbit carcasses which, although of normal colour and firmness, were slimy on the surface and had a strong, penetrating, unpleasant odour.
> A direct microscopic examination of the surface slime revealed the presence of prolific numbers of bacteria including Gram negative and Gram positive rods and Gram positive diplococci. That these organisms were generally viable was confirmed by microbiological analysis on surface muscle, thus
> Standard Plate Count (30^{o} C, 3 days) 1 400 000 000 micro organisms per gram
> Anaerobic Plate Count (30^{o} C, 3 days) 37 000 000 micro organisms per gram
> Psychrotrophic Organisms (7^{o} C, 10 days) 1 300 000 000 per gram
> Coliforms (30^{o} C, 1 day) 140 000 000 per gram
> **[3]** These bacterial numbers are excessive for uncooked rabbit and confirm the deteriorated condition of this sample. As such it is unfit for human consumption and must not be sold or exposed for sale (refer Section 8, *Food Act* 1984). Yours faithfully
> BERNARD HEATH & ASSOCIATES //S// GRAEME R PERRETT"

On 13 July 1990, Dickens was charged with breaches of ss8(1)(a), 8(1)(b), 8(3) and 9(3) of the *Food Act*. Section 8(1)(b) makes it an offence for a person to sell adulterated food; s9(3) makes it an offence for a person to sell to the prejudice of the purchaser food that is not of the nature, substance or quality of the food that is demanded by the purchaser. In due course, the informations were served on Dickens. However, at the time they were served Dickens was not provided with a copy of the letter of 1 June 1990. That did not occur until 1 October 1990, when as a matter of courtesy, the appellant handed a copy of the letter to Dickens' solicitor. I say as a matter of courtesy because the appellant did not intend to rely upon the letter at the hearing of the informations and did not intend to call the analyst to give evidence on the appellant's behalf. After it was served with the information, Dickens gave a notice of Reliance on Warranty to the second-named respondent Boldridge Pty Ltd pursuant to the provisions of s16 of the Act. The relevant provisions of that section read:

> **[4]** "(4) If the defendant in any proceedings under this Act in respect of any food proves to the satisfaction of the court that—
> (a) he sold the food in question in the same state as it was in at the time he purchased it; or
>
> (b) if he sold the food in question in a different state from the state it was in at the time he purchased it, that change in state did not cause any contravention of this Act in relation to that food—
> he shall be discharged from the prosecution.
>
> (5) Sub-section (4) shall not apply unless the defendant within 7 days after the service of the summons has—
> (a) given to the informant a written notice stating that he intends to rely on the warranty and specifying the name and address of the person from whom he purchased the food in question; and
>
> (b) given to the person from whom he purchased the food in question a written notice stating that he intends to rely on the warranty.
>
> (6) The person from whom the defendant purchased the food in question shall be entitled to appear at the hearing of the summons and to give evidence and the court may, if it thinks fit, adjourn the hearing to enable him to do so.
>
> (7) Where the defendant has been discharged from a prosecution under sub-section (4) then, notwithstanding anything in section 45(2), a prosecution may within 28 days after the discharge of the defendant be instituted against the person from whom the defendant purchased the food in question and for the purposes of that prosecution that person shall be deemed to have sold that food."

On 25 February, 1991, the informations came on for hearing before the Prahran Magistrates' Court. Before any evidence was called in the matter, counsel for Dickens contended that the appellant had failed to comply with the procedure he was obliged by the Act to follow in prosecuting the offences and in that situation, the proceedings were a nullity. The basis for that proposition is to be found in the provisions of s45(6) of **[5]** the Act, which read:-

> "(6) A copy of any analyst's certificate obtained on behalf of the informant shall be served with a summons in a prosecution for an offence against this Act in respect of any food."

In a nutshell, what was said was that as a copy of the letter from the analyst had not been handed to Dickens' solicitor until 1 October 1990, there had been a breach by the appellant of the provisions of s45(6) of the Act and in that situation, the informations laid against Dickens should be dismissed. After hearing submissions in relation to the matter, the Magistrate acceded to Dickens' application, dismissed the informations and ordered that the appellant pay Dickens' and Boldridge's costs of the proceeding. It is against those orders that the appellant appeals to this court. Before dealing with the issues I am required to determine it is convenient at this stage to note the following matters:-

> (1) The solicitor for Dickens appeared at the call-over of this proceeding and informed me that his client did not wish to take any further part in the hearing of the matter. There was no appearance at the call-over or at the hearing of the appeal on behalf of Boldridge.
>
> (2) Counsel for the appellant stated at the conclusion of the hearing of the appeal that if the appeal was successful, the only order sought by the appellant would be an order that the appeal be allowed and the decision of the Magistrates' Court quashed.

[6] Counsel for the appellant submitted during the hearing of the appeal that the case raises the following points for determination:-

> 1. Is the word "any" where used in s45(6) to be read literally?
>
> 2. If 'Yes' to question 1, what is the consequence of non-compliance?
>
> 3. Was the letter of Perrett an "analyst's certificate"?
>
> 4. On the dismissal of an information, can an order for the costs of a warrantor be made against the informant?

I am content to content to deal with the matter by answering the questions posed. I was referred to a number of authorities dealing with analyst's certificates and provisions similar to s45(6) during the course of the hearing. It is unnecessary to refer to all of them in these reasons for judgment. In *Sherwood v Cox* (1945) 1 KB 549 the Court of Appeal dealt with a case in which the respondent had been charged with selling milk which was not of the nature, substance and quality demanded by the appellant in that it was deficient in milk fat. At the hearing before justices, the following facts were proved as admitted:-

> "When the summons was served on the respondent on August 14, 1944, there was also served on him a copy of the certificate of the public analyst (numbered 7582) of his analysis of the sample, the subject of the information, taken on July 17, in accordance with s80, sub-s.3, of the *Food and Drugs Act* 1938. The sample had duly been divided into three parts as required by the statute, and certificate No. 7582 related to that sample. On July 19, 1944, two days after the aforesaid sample was taken, the appellant, in order to meet a possible defence that the contravention was due to the act or default of **[7]** another person under s83, sub-s.1, took a further sample of the respondent's milk, in accordance with s70, sub-s.2. A copy of the certificate of the public analyst relating thereto (numbered 386) was not served on the respondent with the summons, but was sent to him by registered post on August 21, 1944, by the appellant's solicitor with a covering letter, saying that he proposed to adduce the certificate in evidence at the hearing. At the hearing the prosecution solicitor having stated that he proposed to adduce in evidence both certificates 7582 and 386, the solicitor for the respondent objected that the respondent had not been served with a copy of certificate 386 with the summons and that consequently the information was bad."

The justices agreed with that submission and dismissed the information. On appeal Atkinson J said at p551:-

"*Prima facie*, the sample under s70, sub-s.2, taken on July 19, 1944, is one which does not affect the respondent, but is more concerned with the original supplier. Both samples were sent to the public analyst, and on July 25 he issued two certificates. The certificate relating to the milk in respect of which Cox was prosecuted was certificate No. 7582, and it certifies that there was only 2.85 percentage of fat. The certificate of the sample taken on July 19 was No. 386. I do not know that anything really turns on upon what precisely happened at the hearing, but the solicitor for the prosecution opened the case, and stated that he proposed to adduce in evidence both the certificates. At once the respondent objected that he had not received a copy of the second certificate numbered 386, with the summons, and the justices took the view that he was entitled to, and ought to have been served with a copy of that certificate along with the summons, and on that ground dismissed the information.

The contention of the respondent is that "any" in s80, sub-s.3, means "every" certificate of analysis. There the submission ends. Analysis of what, and within what limitation, I know not. The appellant says that the obvious meaning of that word is: "any certificate of analysis of the article "sampled, of that which you are speaking about, the subject-matter of the information." And in my view the argument of the appellant is unanswerable. It seems to me that some limitation must be put upon the words "any certificate of analysis". If it is not limited in that way, where is the line to be drawn? Is it any certificate of analysis of any milk at any time purchased, however irrelevant to the article sold and sampled? If it had been meant **[8]** to go beyond the analysis relating to the article sampled, surely there would have been some words indicating the class or the limits within which the certificates to be served must come."

Wrottesley J said at p553:-

"I agree that what is meant by the words "any certificate of analysis" is any certificate of analysis of the article sampled, and therefore to that extent of the article which is the subject of the information."

Tucker J said also at p553:-

"I agree, although I do not think the point is perhaps quite so clear as to the other member of the court, for this reason, that, in my opinion, some words have to be read into s80, sub-s. 3, whatever interpretation is placed on the sub-section. I think it would suffice Mr Quass's argument if one read in the words "any certificate of analysis obtained on behalf of the prosecutor for the purposes of such proceedings." On the other hand, if Mr Hutton is right, I think the words which have to be read in are "in respect of the article which is the subject matter of the prosecution." And the question to my mind is which of those alternative sentences should be read in. On the whole, I have come to the conclusion that the words which should be read in are "in respect of the article which is the subject-matter of the prosecution." When one reads the whole of s80, I think that is what is envisaged. Generally speaking, what is envisaged is the taking of one sample, no doubt for the purpose of the prosecution, although there may conceivably be cases in which two samples might be taken in respect of the article which is the subject-matter of the prosecution. If that were so, then, no doubt, service of both analyses would have to be made on the seller."

And later, His Honour continued:-

"It seems to me, therefore, to follow that if a prosecutor has an analysis made and obtains a certificate afterwards which he intends to use at the proceedings, he does so at his peril if he has not served a copy on the defendant in sufficient time to enable the defendant to comply with the requirements of sub-s.3. If he does not, the court will no doubt grant an adjournment and the prosecution very likely will be penalised in costs."

In *Vautier v Hall*, an unreported decision of Gobbo J bearing the number O/R 8323, His Honour was considering the provisions of s304(d) of the *Health Act* 1958, which read:-

[9] "304. In any prosecution or proceeding under this Part—
(d) where the prosecution or proceeding relates to any food drug or substance the summons shall not be made returnable in less than 14 days from the day on which it is served; and there shall be served with the summons a copy of any analyst's certificate (if any) obtained on behalf of the prosecutor."

At p2 of the judgment, His Honour said:-

"Though there is no authority on the precise matter before me, there is some authority illustrating the strict view taken of the provisions of s304(d)) or its equivalents. In *McQueen v Jackson* (1903) 2 KB 163 the Court was considering a section in almost identical terms. The summons had been

> served too soon, that is not fourteen clear days before the return day and the defendant had objected to the short service. The Court upheld the dismissal of the informations. A similar decision on the predecessor to s304(d) was made by Irvine CJ in *Downes v Freshney* [1928] VicLawRp 11; [1928] VLR 64; 34 ALR 6; 49 ALT 130. The same view was also implicit in the decision in *Tassie v Scott* [1930] VicLawRp 22; [1930] VLR 138; 36 ALR 60.
>
> In *Batt v Mattinson* (1900) 64 JPR 615 the Court treated short service under the equivalent English provision as not capable of being cured by amendment under the *Summary Jurisdiction Act* 1848. It was said that it was a matter that can never be put right and it was held that it was not a case of insufficiency of particulars as in *Neal v Devenish* (1894) 1 QB 544.
>
> In *Grimble & Co. v Preston* (1914) 1 KB 270 there had been a failure to serve the analyst's certificate with the summons but no objection had been taken at the hearing. The Justices proceeded on the basis – and the Divisional Court on appeal by way of case stated held – that the failure was an informality capable of waiver. It is to be noted that Atkin LJ described the informality as one which "no doubt could not have been cured", and would have entitled the appellants to have the case dismissed if the objection had been taken at once."

With those authorities and the other to which I was referred on this point in mind, I return to the first question posed. In my opinion, the word "any" in s45(6) is to be read literally in the sense that it means every analyst's certificate in respect of the food sample which is the **[10]** subject matter of the information. One of the purposes of requiring service of an analyst's certificate with the summons is to enable a person prosecuted to have an opportunity before he is tried of examining and testing the accuracy or otherwise of the certified analysis obtained by the prosecution and upon which it may propose to rely. (See *Ex parte Odgers; re Bowry* [1957] SR (NSW) 457; (1957) 74 WN (NSW) 245; (1957) 2 LGRA 127.

In my opinion, fairness dictates that where the prosecution has obtained more than one analyst's certificate in respect of the food sampled which is the subject matter of the prosecution, then copies of all such certificates must be served with the information. As Gobbo J pointed out in *Vautier's* case the courts have consistently taken a strict view of provisions similar to s54(6) and have done so because proceedings brought pursuant to the provisions of s45 or its equivalents are criminal proceedings. Just as the Crown in a criminal trial is obliged to make available to the defence all evidentiary material in its possession relating to the offence – whether favourable or unfavourable to the Crown case – so too an informant in a prosecution under s45 should be required to provide to the defendant any analyst's certificate in respect of the food sampled which is the subject matter of the information, whether or not such certificate is favourable or unfavourable to the informant's case. To that extent, I consider the sub-section must be given a literal interpretation.

I move to the second question posed. In *Vautier's* case, Gobbo J was required to determine whether short service of the summons was fatal to the **[11]** prosecution. His Honour said at p3 of his judgment:-

> "I have come to the view that failure to comply with the direction in s304(d) requiring service as there stipulated is one that, in the absence of waiver, is incapable of being cured."

And later, on that same page:-

> "The defect in service was not capable of being remedied and the view expressed by Atkin LJ in *Grimble v Preston* (1914) 1 KB 270 and adopted in *Haynes v Davis* (1915) 1 KB 332 still applies."

In *Grimble's* case, the Court of Appeal was required to consider the effect of non-service of an analyst's certificate with the summons. At p277, Rowlatt J said:-

> "Here the summons was perfectly good, but the prosecutor neglected to comply with the provision of s19, sub-s.2, requiring that service of it shall be accompanied by service of a copy of the analyst's certificate. That is an omission which, if the party summoned takes the objection as soon as the case is called on, cannot be got over by adjournment."

On the same page *et seq.*, Atkin J said:-

> "I also think that the neglect to serve the copy of the analyst's certificate with the summons did not

> deprive the justices of jurisdiction. It was an informality in the procedure which no doubt could not have been cured, and would have entitled the appellants to have the case dismissed if the objection had been taken at once, but it was one which was capable of being waived; and I think that a person who, knowing of the informality, waits until after the cross-examination before taking it waives it. Mr Macmorran goes the length of saying that if the appellants had allowed the case to be heard out without complaint they could still take the objection even after conviction. With that I do not agree."

Further authority for the proposition that unless waived by the defendant the omission to serve a copy of the analyst's certificate with the summons is fatal to the prosecution case is to be found in the judgment of Lush J in *Haynes v Davis* (1915) 1 KB 332. **[12]** Although His Honour's was a dissenting judgment (but not on this point), His Honour had this to say, at p339 concerning the decision in *Grimble's* case:-

> "We have been referred to the case of *Grimble v Preston* and no doubt one of the members of the court there used language which may be thought to mean that a person is in peril if charged under this Act although the analyst's certificate has not been served with the summons. In my opinion, however, the decision in that case only comes to this – that the person charged before a Magistrate may, if he chooses, waive the right which the statute gives him to have the analyst's certificate served with the summons and thus the informality, if he insisted upon it, would be fatal to the adjudication, is got rid of."

In my opinion, it is clear from that passage that Lush J approved of the decision in *Grimble's case*. I consider the correct answer to question 2 is that unless the omission to serve a copy of an analyst's certificate with the summons is waived by the defendant, the defect is fatal to the prosecution case. I should say, however, that I do not agree with the views of the majority of the court in *Haynes' case* that if a second summons and copy analyst's certificate were served on the defendant, the defendant would be entitled to plead *autrefois acquit*. In my opinion, the dismissal of the first summons would not be an acquittal on the merits and the defendant could be properly convicted upon the hearing of a second summons. In that regard, I prefer the reasoning of Lush J in the matter to the other members of the Court. I move then to the analyst's letter of 1 June 1990. Was that an analyst's certificate within the meaning of s45(6)?

[13] Section 31 of the Act provides:-

> "Every analyst shall—
> (a) make an analysis of any article submitted to him pursuant to this Act for analysis or supervise the analysis of the article by any other person;
>
> (b) make or supervise the analysis in premises accredited by the body known as the National Association of Testing Authorities;
>
> (c) supply to the person submitting the article a certificate in the prescribed form setting out the result of the analysis; and
>
> (d) where any apparatus to be used or method to be observed has been prescribed – use that apparatus and observe that method accordingly and declare in his certificate that he has done so."

The relevant regulation-making power is set out in s63(1)(z)(i) of that Act, which reads:-

> "63. (1) The Governor in Council may make regulations for or with respect to any matter or thing that is required or permitted to be prescribed for the purposes of this Act or is necessary to be prescribed for carrying this Act into effect and, without limiting the generality of the foregoing, for or with respect to-
>
> (z) prescribing—
> (i) forms to be used for the purposes of this Act and the particular purposes for which those forms shall respectively be used;"

Sub-Section (4) of s63 provides that:-

> "Where any form is prescribed by a regulation made under this Act, any form in or to the like effect of the prescribed form shall be sufficient in law."

The appropriate regulation dealing with the analyst's certificate is Reg 21 of the *Food*

(Miscellaneous) (Certificate of Analysis) Regulations 1987 which reads:-

> **[14]** "Duties of Analyst
> 21. (1) Every analyst must include in the certificate of analysis whenever practicable the proportions of the constituent parts of the sample by weight, measure of volume as appropriate.
>
> (2) It is not necessary for the analyst to set out the proportions of all such parts where the analytical results disclosed in the certificate are sufficient to prove that the sample is or is not adulterated.
>
> (3) Where a standard is prescribed, the analyst must state in the certificate whether the sample complies with the standard and if it does not so comply, where it differs from the standard.
>
> (4) Where no standard is prescribed, the analyst must state in the certificate whether the sample is adulterated and, if adulterated, the nature and extent of the adulteration."

The certificate of analysis is set out in the Fourth Schedule to the *Food (Miscellaneous) Regulations* 1985. It reads:-

> "CERTIFICATE OF ANALYSIS
> I, the undersigned, of (a)
> being a person authorized under the *Food Act* 1984 to undertake such kind of analysis certify that on the day of ,19 , I received from (b)
> a sample
> (c) sealed with seal intact and bearing the impression
> (c) with seal broken
> (c) unsealed
> and marked ; that I
> have analysed the sample and that the result of my analysis is as follows;
> (d)
> (e) I further certify that in making the analysis I observed the prescribed method. **[15]**
> (f) I am of the opinion that no change has taken place in the constitution of the sample which would affect the proportion of any constituent set out above.
> Signature of analyst Laboratory Dated 19 "

In my opinion, the letter of 1 June 1990 was not a certificate in the prescribed form, nor was it in or to the like effect of the prescribed form. I say that for the following reasons:-

> "1. The letter did not state that Perrett was authorised under the *Food Act* 1984 to undertake the kind of analysis undertaken. It is not to the point that the letter had the words "Analyst Approved by the Commissioner of Public Health" printed in the top left-hand corner. I say that for the reason that an authority given to an analyst by the Chief General Manager pursuant to s31 of the Act may only be in respect of a particular type of analysis. (See s30(2)). The analyst must state in the certificate that he is authorised to undertake the kind of analysis he in fact undertook.
>
> 2. The letter did not state whether the sample analysed was adulterated and if adulterated, the nature of and extent of the adulteration.
>
> 3. The letter did not contain the required statement as to sealing.
>
> 4. The letter did not state that in making the analysis, Perrett had observed the prescribed method. **[16]**
>
> 5. The letter did not contain any opinion of Perrett that no change had taken place in the constitution of the sample which would affect the proportion of any constituent referred to in the letter.

In my opinion, there was no evidence before the Magistrate which entitled the Magistrate to form the view that the letter of 1 June 1990 was an analyst's certificate within the meaning of s31(c) of the Act. The answer to the third question posed by counsel, therefore, is – No.

The short answer to the fourth question posed, that is, whether on the dismissal of an information can an order for the costs of a warrantor be made against the informant, is that in certain circumstances it can.

Section 131(1) of the *Magistrates' Court Act* 1989 provides that the costs of and incidental to all proceedings in the court are in the discretion of the court and the court has full power to

determine by whom, to whom and to what extent the costs are to be paid. It is clear from the provision that a Magistrate has a complete discretion in the matter.

If a defendant charged with an offence under the *Food Act* and able to avail himself of the provisions of s16 of the Act is ultimately successful in his defence of the proceeding he will normally be entitled to his costs of the proceedings. As to whether or not the warrantor will be entitled to an order for costs against the informant will depend on the basis upon which the information is dismissed.

[17] If the information is dismissed because the defendant has proved that he sold the food in question in the same state as it was in at the time he purchased it (from the warrantor) or that if he sold the food in question in a different state from the state it was in at the time he purchased it (from the warrantor), that change in state did not cause any contravention of the Act in relation to the food, then generally speaking an order in respect of the Warrantor's costs would not be made against the informant. I say that for the reason – and once again, speaking generally – that the warrantor would be the guilty party and could himself be expected to be charged pursuant to the provisions of s16(7).

If, however the information is dismissed for other reasons including technical reasons, as in the present case, it would be open to a Magistrate to order that a warrantor's costs be paid by the informant on the basis that the warrantor had been brought before the court by the defendant pursuant to the right given to the defendant in that regard by the section and that as the defendant had been successful in having the information dismissed without any fault or blame being attributed to the warrantor, justice dictated that the warrantor's costs be met by the informant rather than the defendant.

But as I said a moment ago, costs are in the discretion of the Magistrate. It would be quite wrong to attempt to delineate the cases in which they should or should not be paid to a warrantor. The appeal will be allowed and the decision of the Magistrates' Court at Prahran is quashed.

Solicitors for the appellant: Mallesons Stephen Jaques.
