02/75

SUPREME COURT OF VICTORIA

TODD v SYDES

Gowans J

19 June 1974

CRIMINAL LAW – THEFT OF PROPERTY FROM COMPANY – PROOF OF INCORPORATION OF COMPANY – DIFFERENCE BETWEEN NAME OF COMPANY IN INFORMATION AND CERTIFICATE OF INCORPORATION – EVIDENCE GIVEN BY EMPLOYEE OF COMPANY – WHETHER SUFFICIENT EVIDENCE OF INCORPORATION – 'NO CASE' SUBMISSION – PROCEDURE TO BE FOLLOWED WHERE 'NO CASE' SUBMISSION MADE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR.

The defendant was charged with stealing one Primus gas bottle and attachment the property of Field & Hall Pty Ltd and valued at $22.60. Evidence was given by one Kenny, an employee of Field & Hall Pty Ltd that he had bought the bottle from McEwans and booked it to the company. Later while he was using the bottle on a job site the defendant employed by another firm indicated that the bottle was just what he was looking for and he had better watch it. The same day the bottle was found to be missing. Kenny then challenged the defendant saying that he had been seen to take the bottle. At first the defendant denied possession of the bottle but later admitted possession, taking Kenny to a labourers' lunchroom where the bottle was taken out from beneath clothing. There was a conflict as to whether Kenny in cross-examination said it was a joke or he did not consider it a joke.

A copy of the Certificate of Incorporation had been admitted in evidence which showed the incorporation of a company called Field & Hall Limited on the date of the offence. At the close of the prosecution's case, the Magistrate indicated some doubt in his mind about asportation. A discussion ensued about this point and the case presented by the police generally. Finally defence counsel submitted that the evidence was insufficient for the Magistrate to be satisfied beyond reasonable doubt that there was an intention to steal. The Magistrate then dismissed the information saying that "It would be dangerous to convict". Upon order nisi to review—

HELD: Order nisi discharged.

1. In view of the evidence that the witness was employed by a company called Field and Hall Pty Ltd; that the goods were booked in its name; and that it was carrying on operations at the site, was sufficient evidence of incorporation of the company and that strict proof by production of a certificate was not necessary.

2. Grounds 1 and 2 of the Order nisi failed because there was insufficient to establish that the Magistrate found, as alleged in ground 1, that the defendant did not remove the article from the possession of Field and Hall Pty Ltd, or failed to find, as alleged in ground 2, that the action of the defendant amounted to a removal of the article from the possession of Field and Hall Pty Ltd.

3. The appellant was required to establish that there was no reasonable view of the evidence consistent with the dismissal of the information. In particular, it was necessary to show that there was no view of the evidence which would have permitted the Magistrate to refuse to be satisfied beyond reasonable doubt of the intent to steal. The Magistrate may possibly have been unimpressed by the evidence of the record of interview and of the admissions said to have been made, and he may have entertained a reasonable doubt as to whether the whole matter was a joke. That may have been a surprising conclusion to arrive at, in view of the evidence, but the Supreme Court was quite unable to say that the Magistrate should have been satisfied of the existence of this mental element in a criminal case as this was.

GOWANS J: ... An issue therefore arises as to what the Magistrate is to be regarded as having done. Before turning to that, it is necessary to deal with a submission made by counsel for the defendant in this court. He made a submission which would make it unnecessary to determine the issue on what I have just referred to. He submitted that there was no proof of incorporation of the particular company which is referred to in the evidence and in the information as the owner of the property, i.e. Field and Hall Pty Ltd. There is evidence of ownership in that company so that the observations in *Trainer v R* [1906] HCA 50; (1906) 4 CLR 126; 8 ALR 53 which was relied upon are not directly in point. But the certificate of incorporation which was admitted in evidence referred to "Field and Hall Limited". I do not regard that as denying the existence of a company

called Field and Hall Pty Ltd. It is quite consistent with the certificate of incorporation that the company there referred to changed its constitution and name to that of a proprietary company. Then it is said that there is no positive proof of the incorporation of Field and Hall Pty Ltd in the absence of a certificate of incorporation of that effect. I am of opinion that the evidence that the witness was employed by a company called Field and Hall Pty Ltd; that the goods were booked in its name; and that it was carrying on operations at the site, is sufficient evidence of incorporation and that strict proof by production of a certificate is not necessary. (I refer to the cases set out in *The Australian Digest*, Vol. 7 Criminal Law – Liability in Evidence, p583 col. 164.) I therefore am unable to uphold this submission.

The issue then raised by the affidavit as to what took place at the hearing at the end of the prosecution case, arises for consideration. What is common to both versions as to what took place is that the Magistrate said 'It would be dangerous to convict'. This would only be a permissible observation if the Magistrate were determining the final issue. His functions as to what he should do at the different stages are set out in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at p658; [1955] ALR 671:

> "When at the close of the case for the prosecution the submission is made that there is 'No case to answer' the question to be decided is not whether on the evidence as it stands, the defendant ought to be convicted but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law'. (I leave out some words.) 'After the prosecution has adduced evidence sufficient to support proof of the issue the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether on the whole of the evidence before it it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question, it may in some cases be legitimate as is pointed out in *Wilson v Buttery* (1926) SASR 150 for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear. (Compare *Morgan v Babcock & Wilcox Ltd* per Isaacs J [1929] HCA 25; (1929) 43 CLR 163 at p781; [1929] ALR 313."

I do not think that I should assume that the Magistrate misunderstood his functions. I think I should accept the answering affidavit as establishing that the Magistrate was informed that no evidence would be called. It is possible that after a tentative exploration of the court's reaction to a submission of 'No case to answer', defendant's counsel was emboldened to decide to call no evidence and to base his submission that there was insufficient to establish beyond reasonable doubt that there was the necessary *animus furandi* on the evidence as it stood.

I think I should assume, in view of the Magistrate's remarks, that that was the basis of his conclusion. I cannot imagine his phrasing his conclusion in the way in which he did if he were dealing with the subject of asportation. As to that, the evidence was all one way and the issue was a matter of law. Any movement of the article would have been quite sufficient. (I refer to *Kenny's Outlines of Criminal Law*, 17th Edition at p241). I therefore conclude that grounds 1 and 2 fail because there is insufficient to establish that the Magistrate found, as alleged in ground 1, that the defendant did not remove the article from the possession of Field and Hall Pty Ltd, or failed to find, as alleged in ground 2, that the action of the defendant amounted to a removal of the article from the possession of Field and Hall Pty Ltd. I also conclude that it has not been shown on the material that the Magistrate was concerned with a *prima facie* case as is alleged in the latter part of ground 3. As to the first part of ground 3 — "that on the evidence before him the learned Stipendiary Magistrate should have convicted the defendant' — the position is that his decision must be dealt with as a verdict of a jury. (See *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301).

That being so it would be necessary to establish that there is no reasonable view of the evidence consistent with the dismissal of the information. In particular, it would be necessary to show that there was no view of the evidence which would have permitted the Magistrate to refuse to be satisfied beyond reasonable doubt of the intent to steal. The Magistrate may possibly have been unimpressed by the evidence of the record of interview and of the admissions said to have been made, and he may have entertained a reasonable doubt as to whether the whole matter was a joke. That may be a surprising conclusion to arrive at, in view of the evidence, but I am quite unable to say that the Magistrate should have been satisfied of the existence of this mental element in a criminal case as this is.