**37/86**

## SUPREME COURT OF VICTORIA

# *CIURLINO v THATCHER*

**Murphy J**

**18 July 1986 — [1986] 4 MVR 233**

**PRACTICE AND PROCEDURE – APPLICATION FOR RE-HEARING OF MOTOR TRAFFIC OFFENCES – ONE YEAR'S DELAY AFTER CONVICTION – WHETHER PREJUDICE LIKELY TO BE SUFFERED BY INFORMANT – MATTERS TO BE CONSIDERED IN EXERCISE OF DISCRETION: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S152.**

C. was convicted in his absence of offences involving the use of a motor car. When C. applied for a setting aside of the convictions and a re-hearing of the offences, he said he had lost the informations and mistook the date of hearing. He further said that he later paid part of the fine and completed a 12-month period of disqualification from driving. He said he was unaware of his right to apply for a re-hearing until a year after the hearing when he attended upon a solicitor in connection with another matter. The Magistrate refused the application upon the grounds that the applicant had been personally served with the information and made no attempt to appear on the return date nor make further inquiries in the matter. Upon order nisi to review the refusal—

**HELD: Order absolute. Remitted to the Magistrate for further hearing and determination.**
**In determining the application, the Magistrate should have considered the following matters:**
**(a) whether any prejudice would be suffered by the Informant by the granting of the application;**

**(b) whether there was any undue delay between the date of the applicant's learning of the conviction and the date upon which he applied for the re-hearing; and**

**(c) the merits of the applicant's proposed defence and whether it may reveal the likelihood of prejudice to the informant.**
***Grimshaw v Dunbar* (1953) 1 QB 408, applied.**

**MURPHY J: [1]** This was the return of the order nisi to review the decision of a Magistrate at the Magistrates' Court at Broadmeadows, when the Magistrate refused an application for a re-hearing, the application therefor having been made on 29 July 1985.

That application related to convictions that had been recorded against the applicant on 28 May 1434. Informations that had been laid against him were heard by the Magistrates' Court at Coburg, for offences which were alleged to have occurred on 12 October 1983. It appeared, from the material before me, that the applicant, Luigi Ciurlino, was served with informations **[2]** prior to 28 May 1984. He had deposed in the affidavit that he has filed before me, which is sworn 22 August 1985:

> "From the time of receipt of the informations I intended to appear and to defend the same. I had formed the belief that the hearing date in respect of the informations was the 28th of June 1984. I did, however, in the meantime mislay the informations. Because of my mistake as to the date fixed for the hearing of the informations neither I nor any person on my behalf appeared at the Magistrates' Court at Coburg on the 28th May of 1984. On the 28th June 1984, I did attend at the Magistrates' Court at Coburg for the purpose of defending the information."

The applicant deposes that it was on that date, 28 June 1984, he learned that the informations had been heard on 28 May 1984, and that he had been convicted. He swears that he was not advised that he had a right to apply to have the convictions set aside and the charges re-heard, and he swears also that he did not learn that he had such a right until a year later when he attended upon a solicitor in connection with another matter.

He then instituted these present proceedings seeking a re-hearing. By this time he had paid certain moneys in connection with the payment of a fine of $1,500 which had been imposed upon him and he had completed the 12-month period of disqualification which had also formed

part of the conviction which has been imposed. On the application for the re-hearing the applicant gave evidence of these matters to which I have referred and stated that he did not know that he could have appealed from the convictions and that he had not been informed of this.

He had only learned of any of his rights, he said, when he went to see his solicitors shortly before he made the application for a re-hearing. No other evidence, apparently, was called before the Magistrate either for the applicant or for the respondent who had been the informant in these matters in relation to the charges laid against the applicant. **[3]** The Magistrate, if one is to take material in the affidavit which has been filed before this court as containing a review of what he said, stated that the applicant "had been personally served, and not served by post", that he did not bother to appear on the date of the hearing and he could have made further enquiries and he refused the application for a re-hearing. Counsel appearing for the applicant before the Magistrate asked the Magistrate then whether he had applied s152 of the *Magistrates (Summary Proceedings) Act*, for it was clear, from what the Magistrate had said, that he appeared to have been concerned with the question of service upon the applicant. The Magistrate told counsel that he had already given his reasons and that the matter was in counsel's hands, and that is why he had given what are referred to in the affidavit of Mr Ciurlino as "detailed reasons".

An order to review was granted by Master Barker on 23 August 1985, and was granted on several grounds, which at this stage I do not intend to set out in detail. Mr Redlich, one of Her Majesty's Counsel who appears with Mr Scarfo before me, submitted that the order should be made absolute, and that the proper principle to be applied by a tribunal invested with discretionary powers to order re-hearing in circumstances such as those with which we are here dealing are found contained in the decision of the Court of Appeal in *Grimshaw v Dunbar* (1953) 1 QB 408 at p416 where Lord Justice Jenkins stated:

> "Be that as it may, a party to an action is *prima facie* entitled to have it heard in his presence; he is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. *Prima facie* that is his right, and if by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without **[4]** injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the court and present his case."

That this was the correct principle to bear in mind when determining whether or not to order a re-hearing has been accepted by the Full Court of Victoria in *Rosing v Ben Shemesh* [1960] VicRp 28; (1960) VR 173 p176. The principle which this court applies on an order to review a discretionary judgment such as that with which we are here dealing has often been quoted, and the principle is contained in the statement by Mr Justice Kitto in *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at p627, and I do not intend to set that out again.

The applicant in the present case gave in the court below his reasons for his non-attendance upon the hearing of the charges against him. Those reasons from this distance certainly do appear to have been ascribable to his own fault, although not having seen the applicant, nor been made aware of his ability to understand English or our court procedures, it would be rash of me to make a judgment in this respect, seeing that the Magistrate himself has not apparently done so. However, in his affidavit it is made clear by the applicant, as Mr Elliott of counsel who appeared to show cause has pointed out, that there is a real degree of serious blame attributed to the applicant in his failure to appear on the hearing of the charges. He was personally served with the informations. He lost the information, he mistook the date upon which the hearing was to occur and then, after he had heard of his conviction he did nothing for a year to disturb the conviction or to seek a re-hearing.

**[5]** Mr Elliott submits that it was material for the Magistrate to take into account the degree of personal blame involved in the circumstances which led to the failure of the applicant to be present on the hearing of the charges, and it was also relevant to take into account the delay which had occurred between the date when the applicant became aware that he had been convicted, and the date when he made his application for a re-hearing. In my view, Mr Elliott is correct in that respect. However, it does not appear to me that the Magistrate disbelieved, or found that he did not believe the applicant in giving the explanation that he gave as to his failure

to attend court. It is not for this court to conjecture or speculate what the Magistrate may have had in mind in refusing the application other than the reasons he gave, which are set out in the applicant's affidavit. No material has been filed in this court by the Magistrate, and no answering material has been filed by the respondent, which material might indicate that any prejudice is likely to be suffered by the respondent in the event of the grant of a re-hearing of the charges.

It appears to me that the Magistrate did err in the exercise of his discretion in that he failed to take into account matters that he ought reasonably to have given weight to, (see *Grimshaw v Dunbar*, above) and that he does appear to have over-emphasized the weight attaching to the mistake made by the applicant himself by emphasizing that he had been personally served and not served by post. He has failed to take into account perhaps because they were not raised, any question of prejudice that might have been likely to occur or the absence of any such prejudice, should a re-hearing be ordered. Nor has he mentioned **[6]** as I understand it, the question of whether or not the delay between the date that the applicant learned of his convictions and the date upon which he applied for a rehearing was undue in the proper sense of that word.

In my view, the order nisi should be made absolute. However, although Mr Redlich has urged me, in the first place, to order that there should be a re-hearing of the charges in question, I am not prepared to make such an order on the material before me. The cases to which reference has been made satisfy me that there may be a further material matter for the Magistrate to consider, namely, the question of the merits of the applicant's proposed defence to these informations. If the defence is one which on being revealed contains within it the likelihood of prejudice, then no doubt the informant, upon being made aware of it, would file material or lead evidence in this regard against an order for a re-hearing. Nothing of this sort has been put before me by either party, but from the Bar table it appears that one defence could possibly be that it was not the applicant who was driving the motor car at the time when it was alleged that the car was driven in a dangerous manner. If this was so, then, of course, the materiality of the delay in bringing these matters against before the court might become, depending upon the circumstances, of some real significance.

As I say, it is not for me to speculate on the matter, but nonetheless to consider the possibilities, and, if the informant is a motor traffic policeman, one could appreciate that he may, between the date of the alleged offences on the 21st October 1983 and the date of the application for re-hearing, have dealt with literally hundreds of cases of this sort, and if an issue of identification is to be involved, it may be that he **[7]** would have something to say upon this matter which would bear upon the issue of justice in connection with the application for a re-hearing. In those circumstances, I am loathe to order that there should be a re-hearing, but I am prepared to order that the matter should be remitted to the Magistrates' Court at Broadmeadows to be heard and determined according to law. And I so order. I trust that on this occasion when the application for re-hearing is heard, that counsel will refer the magistrate to the appropriate cases for his guidance, as well as to my judgment.

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