42/69

SUPREME COURT OF VICTORIA

TIMOTHY v MUNRO

Anderson J

16, 17, 24 April 1970 — [1970] VicRp 69; [1970] VR 528

PRACTICE AND PROCEDURE – DEFENDANT FOUND GUILTY OF A DRINK/DRIVING OFFENCE – MAGISTRATE ANNOUNCED THAT THE DEFENDANT WAS "CONVICTED" – THE HEARING WAS ADJOURNED TO ENABLE CHARACTER WITNESSES TO BE CALLED FOR THE DEFENDANT – AFTER HEARING THE WITNESSES THE MAGISTRATE WITHDREW THE CONVICTION AND RELEASED THE DEFENDANT ON A BOND TO BE OF GOOD BEHAVIOUR – WHETHER OPEN TO THE MAGISTRATE TO WITHDRAW THE CONVICTION – MEANING OF "AT ANY TIME AFTER THE COMMENCEMENT OF" – "DURING" – WHETHER MAGISTRATE IN ERROR: *JUSTICES ACT* 1958, S92(6).

HELD: Order nisi discharged.

1. It is difficult to escape the impression that Parliament in substituting the expression "at any time after the commencement of" for the word "during", did so because of the interpretation by Martin J in *Green v Sergeant* of the phrase "during the hearing" as "meaning up to but not including the determination of a case".

See *Baptist v Scott* [1954] VicLawRp 61; [1954] VLR 431, at p433; [1954] [1954] ALR 703.

2. The true reason for the amendment emerging from a consideration of the history of the section was that Parliament intended that the justices were to be empowered to exercise the prescribed clemency even after they had found the charge proved.

3. It is necessary to give to s92(6) of the *Justices Act* 1958 ('Act') an interpretation which enables the justices at any stage at which they are dealing with the case, that is during the time they are determining how they will finally dispose of the information, to exercise the powers given by s92(6) of the Act if they deem it expedient to do so. A more extensive, or different, power is now given to the justices under s92(6) of the Act than was possessed by the justices in the cases referred to by Counsel.

4. Whatever may have been the position prior to the amendment as to the irrevocability of a conviction, and whatever the position may be in other jurisdictions, the present position in Victoria is that a Magistrates' Court, after it has concluded that the defendant is guilty of the offence charged and has indicated that he is convicted of the offence, may, in the exercise of its powers under s92(6) of the Act, adjourn the case and release the defendant on a recognizance.

5. Accordingly, the Magistrate was acting within the powers conferred upon him by s92(6) of the Act as amended when he "withdrew" the conviction he had earlier announced and adjourned the case upon the defendant entering into a recognizance.

ANDERSON J: This is an order nisi to review an order made by the Court of Petty Sessions at Warrnambool on 22 July 1969, dismissing an information under s80B of the *Motor Car Act* 1958, charging the defendant, William Donald Munro, with having driven a motor car whilst under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of the motor car.

The Court of Petty Sessions, constituted by a Stipendiary Magistrate, being satisfied that the defendant had committed the offence alleged, made an order purporting to act under s92(6) of the *Justices Act* 1958, whereby it adjourned the further hearing of the information to 21 July 1970 and permitted the defendant to go at large conditional upon his entering into a recognizance in the sum of $200 to attend at the Court of Petty Sessions at Warrnambool on 21 July 1970 and to be of good behaviour in the meantime. Only one point arises for determination in this order to review and the order nisi was obtained on one ground only, namely,

"that the Stipendiary Magistrate, having on 15 July 1969 announced that he found the defendant

> convicted, had no power to make the order adjourning the said information which he made on 22 July 1969, and ought to have made an order in conformity with s80B(1) of the *Motor Car Act* 1958 cancelling the defendant's licence to drive a motor car, or, alternatively, disqualifying him from obtaining any such licence for a period of at least 12 months".

The situation giving rise to this order nisi developed in the following way: The information in question came on for hearing at the Court of Petty Sessions at Warrnambool on 15 July 1969. The prosecution called evidence and the defendant, who pleaded "not guilty", also called evidence. At the conclusion of the defendant's case the magistrate announced: "I find the defendant convicted on the charge of driving under the influence." He asked if there were any prior convictions and was informed that there were none. The solicitor for the defendant then informed the court that he had a number of character witnesses to call on behalf of the defendant and, due to the lateness of the hour, requested an adjournment for seven days. The magistrate granted the adjournment.

On 22 July 1969, the adjourned date, evidence was given by a number of persons as to the good character of the defendant and as to the detrimental effect which a conviction with all its consequences would have upon his business as a farmer and his reputation. The magistrate then said:

> "At the previous hearing I convicted the defendant. After hearing lengthy evidence as to his character and the effect that the conviction would have on his character and general reputation I have decided to withdraw the conviction. Instead I find the charge proven and adjourn the hearing of this matter to 21 July 1970; the defendant is to go at large on the condition that he enters into a recognizance for a sum of $200 to attend at the Court of Petty Sessions at Warrnambool on 21 July 1970, and that in the meantime he will be of good behaviour."

The submission made before me by Mr Ormiston, who appeared for the informant, was that, upon the magistrate stating on 15 July that he found the defendant convicted on the charge of driving under the influence, he thereupon became *functus officio* except that he was then required to impose an appropriate penalty which was a fine or imprisonment and an order cancelling the defendant's licence and disqualifying him from driving for the statutory period. Mr Ormiston submitted that once the magistrate had announced that the defendant was convicted, the defendant was as a matter of law convicted and it was not competent for the magistrate at any time thereafter to recall or set aside the conviction thereby effected; and in support of this proposition he referred to and relied on several cases, for example *R v Sheridan* [1937] 1 KB 223; [1936] 2 All ER 883; *R v Campbell; Ex parte Hoy* [1953] 1 QB 585; [1953] 1 All ER 684; *R v Manchester Justices; Ex parte Lever* [1937] 2 KB 96; [1937] 3 All ER 4; *R v Essex Justices; Ex parte Final* [1963] 2 QB 816; [1962] 3 All ER 924; *R v Guest; Ex parte Anthony* [1964] 3 All ER 365; [1964] 1 WLR 1273; *Kimlin v Wilson* [1966] Qd R 237; *Cobiac v Liddy* [1969] HCA 26; (1969) 119 CLR 257; [1969] ALR 637; (1969) 43 ALJR 257. All these cases do to a greater or lesser extent support the proposition advanced by Mr Ormiston; but the most significant case—and in my opinion the only case with which I am really directly concerned in this particular order to review, a decision on which Mr Ormiston strongly relied—is *Green v Sergeant* [1951] VicLawRp 72; [1951] VLR 500, a decision of Martin J upon facts which closely parallel the facts in this case.

In *Green v Sergeant* the defendant was charged before a Court of Petty Sessions with killing game on a proclaimed sanctuary. After the close of the defendant's case the court announced that it proposed to convict the defendant, but thereafter it heard a submission on behalf of the defendant and then adjourned the proceedings, purporting to act pursuant to s89(6) of the *Justices Act* 1928, which was the forerunner of s92(6) of the *Justices Act* 1958. Section 89(6)(a) of the *Justices Act* 1928, which had been introduced by Act No. 5379 in 1949, was in the following terms:

> "(6)(a) Where during the hearing of an information for an offence it appears to the justices to be expedient to do so, it shall be lawful for the justices to adjourn the further hearing to a time and place to be fixed (such time being not more than six months thereafter) and allow the person charged to go at large upon his entering into a recognisance for a reasonable amount and with or without surety or sureties at the discretion of the said justices conditioned for his appearance at the time and place so fixed and for his good behaviour in the meantime."

On review of the order which the Court of Petty Sessions had made, Martin J held that the *Justices Act* drew a distinction between the "hearing" and the "determination" of a case, and that,

where an information is the basis of proceedings, the determination means a finding of guilty or not guilty and is complete without sentence; thus, he held that the court, having announced that it proposed to convict the defendant, had made a determination and this determination had been made after the hearing had concluded, and, therefore, it had been too late for the court to exercise its powers under s89(6) because it had not done so "during the hearing" of the information. In so holding, Martin J relied upon cases which included *R v Sheridan, supra*, and *R v Manchester Justices, supra,* to which Mr Ormiston has referred me.

The decision in *Green v Sergeant* was distinguished but approved in *Baptist v Scott* [1954] VicLawRp 61; [1954] VLR 431; [1954] ALR 703. In *Baptist v Scott* the magistrate at the close of the evidence announced what his finding of facts was but did not then announce that he found the defendant convicted or any words to that effect. He said, however, that in his opinion his finding of the facts which he had announced was equivalent to conviction and, because of *Green v Sergeant*, he expressed the view that he now had no power to exercise the clemency allowed by s89(6) of the *Justices Act* 1928. He then proceeded to record a conviction, but said that if he had had the power to do so he would have applied the provisions of s89(6). The defendant sought to review the magistrate's order and, by a coincidence, the order nisi was returnable before Martin J. His Honour considered that the magistrate was in error and had taken too narrow a view of the operation of the section. At (VLR) p433; (ALR) p705, his Honour pointed out:

> "It is seldom, if ever, that the matter of the application of s89(6) will be considered by the presiding magistrate until he makes up his mind that the defendant is guilty, for—until then—the presumption that he is innocent until proved guilty prevails. This will generally not happen until the close of the case for the defence and if the magistrate can then say nothing of the conclusion to which he has come on the evidence if the conclusion be unfortunate to the defendant without coming to a determination, the scope of the section is very restricted."

Martin J thereupon gave to the section a practical interpretation by holding that, though the magistrate had made known what his findings of fact would be or were, he had not at that point reached the stage of determining the information. At (VLR) p433; (ALR) p705, he said:

> "No one hearing what the Magistrate said in this case could have any doubt that he had made up his mind to convict the defendant, but I do not think he had gone beyond the point of no return."

I think that it is evident that in principle *Green v Sergeant* and the present case are indistinguishable, and, unless something has transpired to modify the operation of s89(6)(a) of the *Justices Act* 1928, the magistrate at Warrnambool was in error and I should follow the decision of Martin J (with which, may I say with respect, in the state of the law at that time, I agree), and I would then be required to set aside the order and send the matter back to the magistrate at Warrnambool for the imposition of the appropriate penalties.

It becomes, therefore, necessary to follow the history of s89(6) to ascertain whether there is any reason for departing from the meaning which Martin J assigned to the section. With only a slight amendment by the addition of some words which are not material to the problem under consideration, s89(6)(a) of the *Justices Act* 1928 found its way into the consolidating *Justices Act* 1958 as s92(6) in the same terms in which it was originally enacted in 1949.

In 1963 s92(6) was amended by s2 of the *Justices (Adjourned Proceedings) Act* 1963. By this amendment the expression "at any time after the commencement of" was substituted for the word "during" at the beginning of s92(6)(a), and some other changes were also made in that paragraph. Other amendments were made to the succeeding paragraphs of s92(6), but these do not, in my opinion, affect the matter under consideration. With the amendments of paragraph (a) made, s92(6)(a) now reads:

> "(6) (a) Where at any time after the commencement of the hearing of an information for an offence it appears to the justices to be expedient to do so, it shall be lawful for the justices (whether or not the defendant has pleaded guilty) to adjourn the further hearing to a time and place to be fixed (such time being not more than twelve months thereafter) and allow the person charged to go at large upon his entering into a recognisance for a reasonable amount and with or without surety or sureties at the discretion of the said justices conditioned for his appearance at the time and place so fixed and for his good behaviour in the meantime, and for the observance of such special conditions (if any) as the justices think proper to impose."

Mr Cooney, who appeared for the defendant to show cause why the order nisi should not be made absolute, submitted that because of the amendment effected by the Act of 1963 *Green v Sergeant* was no longer applicable. He argued that when the operation of s89(6) was shown by the decisions in *Green v Sergeant* and *Baptist v Scott* to be unduly limited and of little practical effect, Parliament extended the period during which the justices were able to deem it expedient to exercise clemency, and that it was during such extended period that the magistrate had acted in the present case.

It is difficult to escape the impression that Parliament in substituting the expression "at any time after the commencement of" for the word "during", did so because of the interpretation by Martin J in *Green v Sergeant* of the phrase "during the hearing" as "meaning up to but not including the determination of a case": see *Baptist v Scott* [1954] VicLawRp 61; [1954] VLR 431, at p433; [1954] [1954] ALR 703.

The expression "during the hearing" comprehended, in my opinion, the period from the commencement of the hearing until the end of the hearing. I think that the purpose of the amendment was to alter the temporal limits imposed by the expression "during the hearing" as revealed by *Green v Sergeant*. Since the substituted expression cannot alter the point in time when the hearing commences to an earlier point in time, it follows that the change in the time limitation effected by the substituted expression must, therefore, be at the other end of the period. The substituted phrase does not make sense unless its purpose is to extend the period during which the justices may deem it expedient to show clemency, that is, beyond the hearing, or after it has concluded. I cannot see any other sensible meaning that can be given to the substituted phrase; the new words must mean something different from their predecessor, and what I have indicated is, to my mind, the only reasonable meaning which I have been able to find, or which was put to me in the course of argument. Mr Ormiston suggested that a possible explanation was merely a desire on the part of Parliament to express in more elegant language the same idea as formerly. I do not think that considerations of elegance prompted the amendment. I think Parliament had a reason, and one evident reason exists when one considers the severe limitation which *Green v Sergeant* placed upon the section as previously enacted.

Mr Ormiston submitted that the substituted words did not have the effect which Mr Cooney sought to attribute to them, because such an operation was inconsistent with the rest of s92(6). In a detailed examination of s92(6), he pointed out that when the justices applied s92(6)(a) what they did was to adjourn "the further hearing" of the information; that if the defendant observed the conditions of the recognizance then on the adjourned date the justices were directed by s92(6)(b) to dismiss the defendant "without proceeding further with the hearing or determination of the information"; that s92(6)(c) referred to "the day to which the hearing was adjourned as aforesaid" and that s92(6)(d) authorized the justices on the adjourned date, in the circumstances set out in the proviso thereto, to "proceed with the further hearing of the information." These repeated references to the hearing, he contended, meant that a necessary requirement for the valid operation of s92(6)(a) was that the hearing (that is, that part of the procedure of trying of the case prior to the determination) must still be in being and must not have come to an end; and that, therefore, the substituted words were to be governed and read down accordingly. As I have already indicated, such an argument involves giving no effect at all to the amendment of s92(6)(a) by the replacement of "during" by the phrase "at any time after the commencement of", and the section would have no greater or different operation than it had when it was interpreted in *Green v Sergeant*. With what I believe to be the true reason for the amendment emerging from a consideration of the history of the section, I think that Parliament intended that the justices were to be empowered to exercise the prescribed clemency even after they had found the charge proved.

In arriving at this conclusion, I am not ignoring the several decisions to which Mr Ormiston referred me. I do distinguish them, however, for they deal with situations different from what now obtains under s92(6). I think it is necessary to give to s92(6) an interpretation which enables the justices at any stage at which they are dealing with the case, that is during the time they are determining how they will finally dispose of the information, to exercise the powers given by s92(6) if they deem it expedient to do so. In my opinion, a more extensive, or different, power is now given to the justices under s92(6) than was possessed by the justices in the cases to which Mr Ormiston referred.

The authority of the decisions referred to and all the learning on what a conviction is and whether or not a particular court has power to recall its finding or to set aside a conviction which it has pronounced remain unimpaired. I do not propose to examine at length the powers of amendment of orders which courts of record may possess; though I may say in passing that the decision of the Full Court in *Carroll v Price* [1960] VicRp 101; [1960] VR 651, contains much to suggest that what I am indicating is my view of the meaning of s92(6) is consistent with authority. As Martin J, in *Baptist v Scott*, *supra*, at (VLR) p434, pointed out, this is remedial legislation and should be construed liberally. All I am determining is that, whatever may have been the position prior to the amendment as to the irrevocability of a conviction, and whatever the position may be in other jurisdictions, the present position in Victoria is that a magistrates' court, after it has concluded that the defendant is guilty of the offence charged and has indicated that he is convicted of the offence, may, in the exercise of its powers under s92(6), adjourn the case and release the defendant on a recognizance.

As a general rule, of course, it may be said that a word is to be considered as used throughout a statute in the same sense (*Halsbury's Laws of England*, 3rd ed., vol. 36, p396), and on this basis it may be said that the view I am taking of the operation of s92(6), as amended, involves assigning to the word "hearing" in the sub-section a meaning which is at variance with the meaning of that word in other sections of the *Justices Act*, and that such a liberty should not be taken. As pointed out in *Halsbury*, however, at the same place, it may happen that the same word is used in different senses in the same section and in different sections in the same statute. Thus, in *Doe d Angell v Angell* [1846] EngR 385; (1846) 9 QB 328; 115 ER 1299, it was said that the word "rent" was used in two different senses throughout the Act there under consideration.

In *R v Allen* (1872) LR 1 CCR 367, where the court was considering the meaning of the word "marry" in a statute dealing with bigamy, and it had been submitted that the word, when referring to the alleged second marriage, must refer to a marriage equally as efficacious as the first, Cockburn CJ, in delivering the judgment of the court, said, at pp373, 374;

> "It is at once self evident that the proposition as thus stated cannot possibly hold good; for if the first marriage be good, the second, entered into while the first is subsisting, must of necessity be bad. It becomes necessary therefore, to engraft a qualification on the proposition just stated, and to read the words 'shall marry' in the latter part of the sentence, as meaning 'shall marry' under such circumstances as that the second marriage would be good but for the existence of the first. But it is plain that those who so read the statute are introducing into it words which are not to be found in it, and are obviously departing from the sense in which the term 'being married' must be construed in the earlier part of the sentence. But once it becomes necessary to seek the meaning of a term occurring in a statute, the true rule of construction appears to us to be not to limit the latitude of departure so as to adhere to the nearest possible approximation of the ordinary meaning of the word, in the sense in which it may have been used before, but to look to the purpose of the enactment, the mischief to be prevented and the remedy which the legislature intended to apply."

So, in *Re Smith* (1883) 24 Ch D 672, at p678, North J said that the word "property" which appeared more than once in s54 of the *Bankruptcy Act* 1869 (Eng.) was used in that section in two totally different senses, and was there to be given its two different meanings in the manner he then indicated.

If it is appropriate or proper on occasions to attribute to a word which occurs more than once in a section different meanings in order to produce the practical and intended effect of the section, its operation should not be hamstrung by an insistence on a more restricted meaning which the word may have been given in the section which has been subsequently amended for the purpose, so it seems to me, of overcoming the restricted operation of the word as originally used. This, I think, is what has been done by the amendment effected by the Act of 1963. I am of the opinion that though in other statutes, and in other sections of the *Justices Act* and, indeed, even formerly in s92(6), the word "hearing" may bear or have borne the limited meaning attributed to it by Martin J, in *Green v Sergeant*, it is now proper to modify its meaning in s92(6) to allow this provision to operate in the manner I have indicated. If such a view involves an enlargement in the meaning of what was formerly comprehended by the expression "hearing" in various parts of s92(6), then the meaning of "hearing" is s92(6), in my opinion, is *pro tanto* enlarged, in order to give to the sub-section, and in particular to paragraph (a), the operation I believe is intended. This relaxation of meaning does not affect the meaning of the word elsewhere in the Act.

I have not lost sight of Mr Ormiston's submission that though the magistrate may have had power to adjourn the hearing and release the defendant on a recognizance, nevertheless, because the magistrate had announced that the defendant was convicted, the defendant remained convicted so that the consequences of being a convicted person must necessarily follow and the penalties which are attendant upon the conviction for the offence charged, including the forfeiture of the defendant's licence, must follow. I do not think that this view is tenable, for the obvious purpose of s96(2) is to avoid a conviction and its consequences in a proper case. It is clear that the magistrate considered that this was a proper case for the application of s92(6), and he did all that was appropriate to ensure that the defendant obtained the benefit which s92(6), in its amended form, was designed to bestow at the time when the magistrate deemed it expedient to make the order now under review.

In my opinion, therefore, the magistrate was acting within the powers conferred on him by s92(6), as amended, when on 22 July 1969 he "withdrew" the conviction he had earlier announced and adjourned the case upon the defendant entering into a recognizance. For the foregoing reasons, the order nisi is discharged and the informant is ordered to pay the defendant's taxed costs of these proceedings.

Solicitor for the applicant: Thomas F Mornane, Crown Solicitor.
Solicitors for the respondent: D Madden and Co, Warrnambool.
