12/93

SUPREME COURT OF VICTORIA

HENDERSON v READ

Nathan J

15, 30 October 1992 — [1993] VicRp 37; [1993] 1 VR 537; (1992) 16 MVR 403

MOTOR TRAFFIC – DRINK/DRIVING – ADMISSIBILITY OF CERTIFICATE – 'NO CASE' SUBMISSION MADE – MATTER ADJOURNED – LAW CHANGED - WHETHER APPLICABLE TO PART-HEARD CASE – LAW CLEAR AND UNAMBIGUOUS – WHETHER RECOURSE TO PARLIAMENTARY DEBATES IMPROPER – RIGHT TO AN ACQUITTAL – SUBSTANTIVE RIGHT – WHETHER EXTINGUISHED BY AMENDING ACT – "EXPRESSED": *ROAD SAFETY ACT* 1986, S49(1)(f); *ROAD SAFETY (DRIVERS) ACT* 1991; *INTERPRETATION OF LEGISLATION ACT* 1984, SS14, 35.

1. Even though the language of an Act may be clear and unambiguous, it is not improper for a Court to have recourse to the Parliamentary Debates in order to ensure that in applying the ordinary and grammatical meaning of the words used will not give the statute an obviously unintended meaning.
***Humphries v Poljak* [1992] VicRp 58; [1992] 2 VR 129; (1991) 14 MVR 1, applied.**

2. Whilst the *Road Safety (Drivers) Act* 1991 ('Act') may contain procedural provisions so far as pending drink/driving cases are concerned (inferring retrospective operation) the situation is different where a case is partheard or the prosecution evidence is completed and a 'no case' submission is made. In such a case, the defendant's right to an acquittal is a substantive one. Accordingly, in the absence of an express provision in the Act extinguishing this right, a magistrate was in error in ruling that the Act operated retrospectively in relation to a case which was partheard and finding the charge proved.

NATHAN J: [1] A policeman (Read) who is the respondent, administered a breath test to ascertain the blood alcohol levels of the appellant (Henderson) whom he had apprehended driving his car in Cranbourne on 31 January 1988. He then handed a copy of a certificate (a, or the, certificate) to Henderson which stated the result of the test displayed, a blood alcohol level in excess of that proscribed by the *Road Safety Act* No. 127, 1986 (the Act). An information alleging this breach of the Act was, after a number of adjournments, heard before a magistrate on 17 December 1990. During the hearing, counsel for Henderson carefully structured his cross-examination around the certificate. When it was sought to be tendered, objection was taken. The ground of that objection cannot be succinctly summarized, they turn upon the Act s54(4) and s58 of the Act. However the pith of the objection was that all the requirements to render the certificate admissible pursuant to the Act and its Regulations had not been satisfied. The same objection was also taken by the same counsel in another case in a different Magistrates' Court shortly after this one. That case, *Curmi v Matthews* (*Curmi's case*) (MC4/1991) found its way on appeal to the County Court where the very same objection to admissibility was upheld. Judge Shillito delivered a judgment on 7 April 1991, the effect of which rendered certificates inadmissible in respect of the offence for which Henderson was charged. *Curmi's* case has since been upheld in this court in *Entwistle v Parkes* per Hedigan J [1991] VicRp 24; [1991] 1 VR 317; (1990) 11 MVR 105, 25 September 1992.

The magistrate said he would consider the objection at the conclusion of the Crown case. This was **[2]** done and by way of a no-case submission Henderson's counsel contended that, as the certificate was the only evidence of breach, and as it was inadmissible, Henderson should be acquitted. The magistrate adjourned to consider these submissions and in the meantime *Curmi v Matthews* was decided, on an identical point of law in favour of the car driver. In a matter of days after that decision an amendment to the Act was passed by the Parliament. It is the *Road Safety (Drivers) Act* No. 19 1991. Amongst other things it purports to retrospectively validate certificates back to 23 December 1986 (the date of the principal Act, but more of the "Drivers" Act later). On 27 March 1992 the magistrate re-listed the adjourned matter for hearing. That is some 15 months after he had first heard the no-case submission. He then heard further argument as to the purported retrospective effect of the *Drivers Act* of 1992, and objections thereto put by Mr Hardy for Henderson based upon the ground that Henderson had an established, and accrued, substantive right to an acquittal based on the law at the time he sought to rely upon it. He argued this right could not be abrogated by a subsequent criminal Act purporting to have retrospective

reach. This argument was rejected, the magistrate convicted Henderson. This is an appeal from his order of conviction. The grounds of appeal, as edited, are:

> (1) Did the *Drivers Act* (No. 19 of 1991) render the certificate admissible?
>
> (2) Did the magistrate have power to order the proceedings be heard *de novo* (that is on the **[3]** day of judgment was given in 27 March 1992) and whether as a matter of procedural fairness he should have done so?

This recitation of the questions leads me to reproduce those parts of the *Drivers Act* as are relevant. Its purpose as stated in s1(1) is: "To make sure that certificate evidence as to the proper operation of a breath analysing instrument is admissible in evidence." By s2 **[3]** it is expressed that s22 must be taken to have come into operation on 23 December 1986. This leads one to s22 which has the effect of overcoming the inadmissibility argument by deeming that at the time of testing, the breath analysing instrument being used was being operated properly; it also modifies and corrects details on the forms of the certificates. By its ss(4) it reads:

> "The amendments made to the Principal Act by this section do not affect the rights of the parties—
>
> (a) in the proceeding known as *Curmi v Matthews* in the County Court: or
>
> (b) in any proceedings determined in the Magistrates' Court on or before 24 April 1991."

Whether I should look to the Parliamentary Debates or other extrinsic materials in interpreting this section and particularly whether it operates retrospectively, was a question not argued before me, but is subject to some differing views in this Court. *Accident Compensation Commission v Zurich Australian Insurance Ltd* [1992] VicRp 52; (1992) 2 VR 1 concerned, amongst other things, the *Accident Compensation Act* 1985 and whether the parliamentary debates surroundings its introduction and those of former similar Acts should be considered in interpreting its provisions. The **[4]** *Interpretation of Legislation Act* 1984 s35 which permits access to this type of material was called in aid by the plaintiff. Ashley J examined the High Court authorities on the point particularly *Catlow v ACC* [1989] HCA 43; (1989) 167 CLR 543; 87 ALR 663; (1989) 63 ALJR 619, *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257 and *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514; (1987) 70 ALR 225; 61 ALJR 190; 25 A Crim R 90. He concluded, and his opinion on this point was not dissented from by Crockett and Southwell JJ, as follows: (at p12):

> "... it appears that s35 can at least have some operation where the meaning of a statutory provision remains doubtful after orthodox methods of statutory interpretation have been exhausted. The reliability of any extraneous material to which recourse is had must itself be carefully considered. I have concluded that in this case it is not improper, at the invitation of the parties, to have recourse to extraneous materials. Where, however, the legislation can be adequately construed independently of consideration of such materials I shall make my opinion in that respect clear in the course of my judgment."

However, in the following month a court considering a similar Act, the *Transport Accident Act* 1986 and consisting of two of the judges, Crockett and Southwell JJ whom sat in the *Zurich Case*, arrived at a different point of emphasis: *Humphries v Poljak* [1992] VicRp 58; [1992] 2 VR 129; (1991) 14 MVR 1. The majority, Crockett and Southwell JJ, also applying *Mills v Meeking*, considered that even if the language of the statute appears to be clear and unambiguous it is not improper for a court to have recourse to parliamentary debates and other material relating to the history of the legislation to ensure that, applying the ordinary and grammatical meaning of the words, it does not give the statute an obviously unintended meaning. They said: (at p136):

> **[5]** "However, s35(a) of that Act requires a construction to be given to legislation 'that would promote the purpose or object underlying the Act'. That 'purpose or object' may not be ascertainable without reference to the parliamentary debates. Accordingly, the better view would appear to be that, even if it may be thought that the language of the Act is clear and unambiguous, it was not improper to have had recourse to the parliamentary debates in order to ensure that to apply the ordinary and grammatical meaning of the words used would not give the statute a meaning which obviously was not intended: *Mills v Meeking* (1990) 169 CLR 214 at p223. We should add that no counsel sought the rejection of the extrinsic material. Each in fact relied upon it to a greater or lesser degree."

McGarvie J dissented from this view holding that it was first necessary to discern an ambiguity in the statute before having access to extrinsic material. He relied on the High Court authority already referred to. I consider myself bound by the more recently expressed views of the majority of this court, which were given in the light of previous High Court authorities. These authorities do state the reservations and caution a court should have in attempting to discern and interpret an Act by having recourse to extrinsic material. *Catlow v ACC* did deal with the Victorian *Interpretation of Legislation* provisions. There Brennan and Gaudron JJ although dissenting on other issues, stated without disapproval from the majority that it would be erroneous to look at extrinsic material before exhausting the application of the ordinary rules of construction. In the face of this apparent difference in views between the High Court and the Full Court of this court, I feel constrained to comply with the approach of this court. I do so because the most recent opinions of the High Court were expressed in a minority decision, but the Full Court put its mind more recently and **[6]** directly to the issue. In the event, as I go on to find, examination of the parliamentary material has been useful but not decisive, in determining whether the *Drivers Act* has a retrospective reach which encompasses part heard cases, or those, in which the prosecution evidence has been completed.

The Parliamentary Debates reveal the *Drivers Act* was in the process of being passed through the Parliament when *Curmi's Case* was decided. Amendments in the form of s1(1) and s22 were then attached to other amendments being debated. The Minister responsible for introducing the relevant amendments stated, on 24 April 1991, that is, three weeks after *Curmi's Case*, "their purpose is to make sure the certificate evidence as to the proper operation of a breath analysing instrument is admissible in evidence". The minister continued:

> "The amendment is to overcome the effect of a County Court decision of 7 April 1991 in *Curmi v Matthews*. On that date His Honour ruled that police certificates issued since March 1987 were invalid. If the decision stands the correct procedure has not been used in obtaining breath samples."

(See Parliamentary Debates "Assembly" 51st Parliament, 1st Session No. 6 p1688.)

In respect of the amendments, a legislative councillor said:

> "The opposition is able to approve the late amendments, but I make the point that the approval is given is with the usual reluctance the opposition has in passing retrospective legislation. In this case it is prepared to do it on the basis of its importance and the fact that the person who took his case to court and won is not having his victory taken from him. He remains with his victory, which he deserves because he took the case to court and was proved to be right. On those grounds the opposition is prepared to allow the amendments to proceed in this somewhat unusual fashion."

[7] In my view the Debates throw into relief the issue of retrospectivity. Mr Henderson's case was not pending before the magistrate, when the *Drivers Act* was passed nor was it adjourned merely awaiting hearing. The *Curmi v Matthews* point had been argued and presented to the magistrate upon a no-case submission and Mr Henderson was merely waiting for the magistrate to rule upon that objection. The magistrate's tardiness in delivering a ruling, and not doing so until the day of, or immediately after the *Drivers Act* being assented to, has created the retrospectivity issue. It is a paradox and worth observing that had the magistrate delivered a ruling promptly it might have been this case referred to in the *Drivers Act*, rather than *Curmi v Matthews*.

I do, however, consider the specific saving of Mr Curmi's acquittal to be of significance. The legislature pointedly safeguarded his legal right because one can assume they knew about it. It is equally fair to assume that had the legislature known of Mr Henderson's right, claimed on exactly the same ground as that of Mr Curmi, then his too, would have been specifically safeguarded. It is fortuitous they did not and it can be attributed to the tardiness of the magistrate. As I go on to elaborate, Mr Henderson's right to an acquittal was one he had invoked prior to the purported retrospective extinguishment of it and before Mr Curmi did. I can assume from the statements in the Parliament, that had it known of Mr Henderson's case, his right to an acquittal would also have been preserved. **[8]** It is now appropriate to refer to a similar dilemma arising out of another amending Act to the principal Act, that is, the *Road Safety (Certificates) Act* 1990. That Act assented to on 30 November 1991 is a consequence of the Full Court's decision of *Bracken v O'Sullivan* [1991] VicRp 94; [1991] 2 VR 573; (1990) 13 MVR 91 which it effectively overrules. In that case a certificate was also held to be inadmissible because the section under which the

driver was being prosecuted (s49(l(f) of the Principal Act) was not encompassed by s58(1) which permitted the certificates to aver the blood alcohol reading. The "Certificate" Act was also expressed to be for the purpose of making sure that certificate evidence is admissible in all drink-driving cases and was said by its s2(2) to have come into operation on 1 March 1987. By its s4 the rights of the parties in the proceedings known as *Bracken v O'Sullivan* were reserved.

This Act was on the aspect of retrospectivity, passingly referred to in *Reeves v Beaman*, unreported, 31 August 1992. Of the retrospective amendments to the *Certificates Act* Brooking J said:

> "At the time of the tender of this certificate the decision of Judge Keon-Cohen which led to the statement of the case in *Bracken v O'Sullivan* [1991] VicRp 94; [1991] 2 VR 573; (1990) 13 MVR 91, had been given, and before the hearing of the prosecution was concluded the Full Court had given its decision on the case stated. In fact the magistrate did not receive the certificate in evidence. After he had reserved his decision on a no case submission, and before he ruled that there was a case to answer, the *Road Safety (Certificates) Act* 1990, received the Royal assent. This Act, passed in consequence of *Bracken v O'Sullivan,* by s3, inserted the words 'or if a result of a breath analysis' into s58(1) of the *Road Safety Act* 1986, and provided by s2(2) that s3 must be taken to have come into operation on I March 1987."

[9] However in that case there was supplementary evidence, other than a certificate upon which the conviction could be supported and it also considered other offences. The court did not really have to decide any question of retrospectivity. Brooking J also said:

> "In these circumstances it is unnecessary to consider the effect of the amendment to s58 already mentioned and the effect in this case of ss(5) of that section and of the magistrate's willingness, had it been necessary, to receive the certificate in evidence."

I am in a markedly different position, the core issue is whether the *Drivers Act*, "must be taken to have come into operation on 23 December 1986". Whatever might be its effect elsewhere I am satisfied these words do not operate to deprive Henderson of his accrued substantive right to have had his case dismissed prior to the enactment of this amendment on 30 April 1991. An intention to exclude Henderson and anybody else who might be within his class is necessarily implied into the amendment. The consequence is that the certificate upon which his conviction was founded, should have been ruled inadmissible. A similar issue confronted Hedigan J of this Court, also sitting alone but on an appeal relating to the *Certificates Act*, viz *Carter v Ried* [1992] VicRp 22; [1992] 1 VR 351; (1991) 13 MVR 229. In that case the magistrate had admitted an impugned certificate and the driver was convicted. Following that conviction the Full Court held in *Bracken v O'Sullivan* [1991] VicRp 94; [1991] 2 VR 573; (1990) 13 MVR 91 that such certificates were inadmissible. After that, as I have noted, the *Certificates Act* was passed for the purposes of overcoming that decision, and given, purportedly, retrospective effect. The driver had in the meantime lodged an appeal against conviction, before Bracken **[10]** and the *Certificates Act*.

Hedigan J determined the appeal should be upheld. He considered the law the magistrate should have applied was that which operated at the time of hearing, and the law which should not be applied is that which pertained at the time of the appeal. He considered the *Certificates Act* to be procedural, as dealing with the method by which Certificates could be tendered. Such Acts must be taken to be prospective unless a contrary intention was manifest. He relied upon, as I do, *Rodway v R* [1990] HCA 19; (1990) 169 CLR 515 at 518; (1990) 92 ALR 385 at 387; (1990) 64 ALJR 305; 47 A Crim R 426 where the High Court said;

> "The rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure. Indeed, strictly speaking, where procedure alone is involved, a statute will invariably operate prospectively and there is no room for the application of such a presumption. It will operate prospectively because it will prescribe the manner in which something may or must be done in the future, even if what is to be done relates to, or is based upon, past events. A statute which prescribes the manner in which the trial of a past offence is to be conducted is one instance."

Hedigan J went on to observe (at p359):-

> "The alteration effected by the amending Act in the mode of proof works no injustice to those whose cases have not been heard. The same cannot be said with respect to a situation where the case has been determined, and wrongly determined, on the very point of the procedure by which certain facts may be proved."

The *Drivers Act*, so far as it purports to cite a retrospective date of operation is in the same terms as the *Certificates Act*. I consider it to be a procedural **[11]** provision, incapable of compromising a substantive legal right already accrued. As a matter of comity I should follow *Carter v Ried*, but in any event the correctness of that decision is apparent when it is applied to this case. Here the magistrate delayed in ruling until the *Drivers Act* came into force. In *Carter* the magistrate ruled incorrectly and then the *Certificates Act* purportedly attempted to rectify the error. I do not think the fortuitous and unexplained lapse here of 15 months, between the no-case submission and the enactment of the *Drivers Act* deprives Henderson of his rights. He is just as entitled to have his case dispatched according to the law, at the time he invoked it, as Carter was entitled to have his appeal heard in accord with the law at the time of conviction.

Courts when interpreting an Act which purports to have retrospective effect commence from a position that such an effect cannot be intended unless stated in express terms, or, that to give effect to the intention of parliament retrospective operation is necessary: *Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261; [1957] ALR 231; (1957) 31 ALJR 143; *Mills v Meeking*. This principle finds legislative form in the *Interpretation of Legislation Act* 1984 s14(2), which edited for the purposes of this judgment reads: "Where an Act is amended ... the amendment shall not, unless the contrary intention expressly appears ... affect any right ... accrued ... under that Act." I can, therefore, consider the common law and statutory provisions contemporaneously (as was done in *Sutton v Bradshaw* [1988] VicRp 83; [1988] VR 920; (1987) 6 MVR 257.)

First, I consider Henderson had a right, which personally inured to him, to have his no-case submission **[12]** dispatched upon the basis of the law applicable, at the time it was put. I consider that *Newell v R* [1936] HCA 50; 55 CLR 707; [1936] ALR 457 dictates this conclusion and properly states the right of an accused to have the case heard in accordance with the law at the time charged. Sir Owen Dixon said at p712:

> "Issues were joined between (Newell) and the Crown. Under s361 his plea amounted to a demand that he be tried by a jury and he became entitled to be tried accordingly ... they (the statutory provision which substituted summary hearings retrospectively) should not be construed as depriving a prisoner standing in peril at the time of their enactment of so important a thing as his protection from conviction except upon a unanimous verdict."

In my view the principle applies here. Henderson stood to lose his driver's licence together with being fined and if he were to commit the same offence a second time he would become menable to imprisonment (the Act s49(2)(b)). The certificate was the instrument which would lead, one might say, inexorably toward conviction, therefore his right to challenge it was absolutely fundamental to his defence. Without the certificate he would have been acquitted, with it, as subsequently occurred, he was convicted. *Curmi's case* and then *Entwistle's case* have established that the certificate was inadmissible at the time when Read sought to rely upon it. Thus it appears now, rather than at the time, that Henderson's no-case submission was compelling. However I do not think that observation affects the substantive right which had accrued to Henderson at the time he chose to exercise it. I say "accrued" because the right to a defence does not become choate until it is invoked. (See also *Sutton v Bradshaw* [1988] VicRp 83; [1988] VR 920; (1987) 6 MVR 257). For example, there were undoubtedly many other cases involving certificates which were heard and disposed of **[13]** before this one. Cases in which counsel or the defendants did not perceive they had good grounds to challenge the certificates and convictions probably followed. But when Henderson's counsel took hold of the submission based upon the law, and structured the defence case around it, the legal right to an acquittal upon them became attached to the submission that is inured or accrued to Henderson. (The past participles are synonymous.) The *Drivers Act*, is not, as it applies to Henderson's no-case submission a procedural enactment. I make this observation because it has been suggested that the courts will more easily arrive at retrospective operation if an amendment addresses itself to procedure rather than to the extinction of a substantive right. Nevertheless *Maxwell v Murphy* is authority for the proposition that where a procedural

amendment compromises substantive rights a court is not likely to infer a retrospective intent. It may well be the *Drivers Act* is merely procedural so far as pending cases are concerned. However that is not so in a part heard case or where a no-case submission has been made. In these cases an inchoate right has taken substantive form and attaches to its claimant. I have already stated the crucial nature of the submission in the context of Henderson's licence to drive. In *Maxwell v Murphy*, Dixon CJ adopted the views of Mellish LJ in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 at 69 and Fullagar J while acknowledging that if a substantive right is traced back far enough its nascence will be found "secreted in the interstices of procedure", nevertheless thought the distinction was now a legally recognised principle. In my **[14]** view Henderson's right to an acquittal cannot be anything other than substantive.

I turn to the approach I should adopt when interpreting a purported retrospective amendment which visits criminal consequences upon a person. In my view, heightened caution in giving retrospective effect to such an amendment, is required. The path to be taken is that set out by Fullagar J in *Nicholas v Commissioner for Corporate Affairs* [1988] VicRp 40; [1988] VR 289 at p301; (1987) 11 ACLR 801; (1987) 5 ACLC 673:

> "But the point to be made, which is I think of fundamental importance in the present case, is that the so-called rule against retrospectivity is neither more nor less than a rule of construction, with its fundamental concomitant that the doctrine can have no application at all where the words used are such that they simply do not admit of a construction which will avoid retrospectivity. In all the decided cases which have been brought to our attention in the present case, where the question arose whether the statute was to be permitted to have a retrospective effect, the statute was couched in language which was readily susceptible of a construction which avoided retrospectivity. In my opinion the statute in the present case is couched in language which is not readily susceptible of the last-mentioned construction, with the result that the 'rule against retrospectivity' has no application."

The Privy Council was even more forthright; *Liyanage v R* [1965] UKPC 1; [1966] 1 All ER 650; [1966] 2 WLR 682; [1965] AC 259, a case which concerned Acts, which secured *ex post facto* convictions and punishment for political opponents of the government. The Judicial Committee advised:

> "It (the purported retrospective Act) legalized their imprisonment whilst they were awaiting trial. It made admissible their statements inadmissibly obtained during that period ... the intended effect is fatal to validity."

Henderson, although not the equivalent of a Sri Lankan politician, nevertheless was a citizen susceptible to penal sanctions if an inadmissible certificate was rendered admissible by a subsequent amendment. If I were to **[15]** interpret the *Drivers Act* retrospectively this would be the result. The consequences of giving an enactment retrospective operation is one of the considerations I must take into account.

Finally I deal with the phrase in the *Interpretation Act* "unless a contrary intention is expressed". The past participle "expressed", is not restricted to actual words. The word has been described as being adjectival. In *New South Wales v The Commonwealth* [1990] HCA 2; (1990) 169 CLR 482; 90 ALR 355; (1990) 8 ACLC 120; (1990) 64 ALJR 157; 1 ACSR 137 Deane J gathered previous authority and discussed the meaning of the past participle "formed" and its relationship to corporations formed within Australia. Of that word he said this (at ALR p364):

> "In the contest of the use of the phrase 'formed within the limits of the Commonwealth' in contradistinction to 'foreign' the word 'formed' is properly to be understood as representing a use of the past participle as part of an adjectival phrase which is without temporal significance."

Stephen J had also pointed out in *Mikasa (NSW) Pty Ltd v Festival Stores* [1972] HCA 69; (1972) 127 CLR 617 at 660; (1971) 18 FLR 260; [1972-73] ALR 921; (1972) 47 ALJR 14 that a merely descriptive use of the past participle is "common enough", it "is not the past tense ... it is neutral in temporal meaning and applies equally to the future as to the past". I cannot find words in the *Drivers Act* which state in the above sense of the word "expressed" an intention to divest Henderson of his accrued right. In my view Henderson was entitled to have his no-case submission adjudicated upon and decided in accordance with the law as it was, when the submission was made. Any change in the law to divest him of this entitlement would have compelled expression in actual terms or so pellucidly **[16]** as to be beyond question. In my views the *Drivers Act* does

neither. The magistrate was wrong in applying it to Henderson. The question of law must be decided in Henderson's favour.

I have been informed from the Bar table that no other evidence was available to support his conviction; that and the effluxion of time since the alleged offence i.e. more than four years, dictates that no further judicial time should be consumed by this case. It would be pointless, in my opinion to refer this case back to a magistrate. Exercising my power under the *Magistrates' Court Act* 1989 I order that the appeal be upheld. The conviction of Henderson be quashed. The respondent pay the appellants costs and I will hear counsel as to any other costs.

Solicitor for the applicant: E Einsiedel.
Solicitor for the respondent: JM Buckley, Solicitor to the Director of Public Prosecutions.
