

32/72

SUPREME COURT OF VICTORIA

SCOTT v BUBAT: *ex parte* A-G of VICTORIA

McInerney J

22 September 1972

PROCEDURE – ADULT PERSON CONVICTED OF CHARGES UNDER THE MOTOR CAR ACT 1958 – PERSON'S SON DEALT WITH IN THE CHILDREN'S COURT ON THE SAME DAY – CLAIM BY THE POLICE PROSECUTOR THAT THE CHARGES AGAINST THE FATHER WERE HEARD AND DETERMINED IN THE CHILDREN'S COURT – WRIT OF CERTIORARI ISSUED – WHETHER MAGISTRATE IN ERROR: JUSTICES ACT 1958, SS91(4), 164.

HELD: Order nisi discharged.

The Order Nisi was granted on the footing that the conviction was made in the Children's Court, or alternatively in a sitting of the Children's Court and the Magistrates' Court. The Supreme Court was not satisfied that it was so made. The *prima facie* presumption of regularity and propriety which arises from the production of the certificates of the copies of the entries in the register of the Magistrates' Court, had not been rebutted by the evidence established. On the face of it those convictions stood as convictions of the Magistrates' Court at Kyneton and were properly enforceable if it became necessary to enforce them.

McINERNEY J: This is the return of an Order Nisi for *certiorari* granted by Newton J on 25 February 1972 on the application made on behalf of the Attorney-General by Mr Graham of counsel, and directed to Mr Alan E Scott, Stipendiary Magistrate, the Magistrates' Court at Kyneton, the Children's Court at Kyneton and Horst Alfred Kurt Bubat, calling on each of them, to show cause why a writ of *certiorari* should not be issued directed to Mr Alan E Scott, the Magistrates' Court and the Children's Court or one or more of them to bring up to this court the record and all other proceedings concerning certain orders made by Mr Scott whereby Horst Alfred Kurt Bubat was, on 26 January 1972, convicted of two charges for offences against the *Motor Car Act* 1958 and whereby a charge against Horst Alfred Kurt Bubat for an offence against the said Act was dismissed, together with all such other things touching the said orders, so that such orders may be further dealt with by this court and to show cause by further or other relief should not be granted on the following grounds;

- (a) That the said orders, and each of them, were void and of no effect having been made by the said Alan E Scott while constituting the said Children's Court in respect of the said Alfred Kurt Bubat, who was not a child as defined by the *Children's Court Act* 1958, at the time when such orders were made.
- (b) That the said orders, and each of them, were void and of no effect having been made by the said Alan E Scott while purporting to constitute the said Children's Court and the said Magistrates' Court simultaneously.
- (c) That the Magistrates' Court has failed to hear, and refused to hear and determine the said charges against the said Horst Alfred Kurt Bubat, either according to law or at all.

The application for an order nisi for *certiorari* was made on an affidavit of Sergeant James Roger Taylor who had appeared to prosecute on the day in question, both in the Children's Court in respect of a charge brought against Frank Bubat the son of the respondent Horst Alfred Kurt Bubat, and who was also apparently the prosecutor in respect of the charges brought against Horst Alfred Kurt Bubat.

On the return of that Order Nisi, it having been adjourned from the date originally named as the return date, to 12 April 1972 before Anderson J, an order was made by Anderson J referring to that order nisi into this list and giving directions as to the filing of further affidavits, directions which fixed a time for the filing of those affidavits, but which did not, in my view, direct the parties to file affidavits.

The order made by Anderson J has been understood by Mr Scott, who appeared in person on the 12 April, as directing him to file affidavits. Accordingly he has filed an affidavit sworn by himself, an affidavit of John Francis Slattery the Clerk of Courts at Daylesford who on the 26 January 1972 was assisting the Clerk of Courts at Kyneton, acting as Bench Clerk, an affidavit of the respondent Horst Alfred Kurt Bubat and an affidavit of Peter Sinclair Pearce the informant.

A conflict of evidence as to what took place on the 26 January emerges from that material. There has been annexed to the affidavit of Peter Sinclair Pearce a plan of the Court House at Kyneton. Opening off the main Court room is a small room called "The Judge's Room," and to the rear of and immediately behind the main Court room is a room shown on the plan under the name "Magistrates' room". I have, earlier today, ruled that I will not permit cross-examination of Mr Scott on his affidavit and Mr Scott did not, in the result, persist with an application which he adumbrated yesterday that he would seek leave to cross-examine Sergeant Taylor on his affidavit. In the result I am left in the position of endeavouring to reconcile the affidavits which are undoubtedly in conflict on certain points.

The affidavits of Mr Scott, and indeed of the other deponents whose affidavits he filed, are open to the criticism that they do not comply with the rules properly applicable to answering affidavits as laid down by Mann CJ in *Thomson v Lee* [1935] VicLawRp 65; [1935] VLR 360 at pp362-39; [1935] ALR 458. That was a case which raised the problem, by now far too familiar, of the answering affidavit which conflicts with the affidavit in reliance on which the Order Nisi was obtained. The argument was put to Mann CJ that the rule that the answering affidavit was conclusive. Chief Justice Mann said as to that:

"The rule that answering affidavits are regarded as conclusive on questions of what occurred in the Court below, though a useful working rule, is not to be taken too absolutely or it would lend itself to abuse. I make this observation that when in an affidavit founding Order Nisi evidence is set out in detail and certain portions of the evidence are of capital importance as to the proof of the charge in question, then in an answering affidavit if a deponent tends to convey that those portions of the affidavit are untrue, he ought to say so in categorical language. And he will be in danger of having his account rejected if he confines himself to saying 'the account given is inaccurate and my account is accurate', and then in a long account he omits the particular passages to which I have referred. The reason such an affidavit is unsatisfactory is that it would be extremely difficult to sustain an assignment of perjury in respect of it."

I would advance a further reason, viz, that it becomes doubly difficult from the Court's point of view to arrive at firm conclusions as to what occurred in the court below when the answering affidavit is silent as to certain matters in the original affidavit, but one nevertheless collects the overall impression that the original account is contradicted. That is an observation which I think is most applicable in the present case. If I were to accept, entirely, Sergeant Taylor's affidavit, the situation that would emerge was that on the morning of 26 January 1972 Mr Scott, as constituting the Kyneton Children's Court, sat in the "Magistrates' Room", the room identified on the plan annexed to Mr Pearce's affidavit under the name "Judges Room", that the son of the respondent Horst Alfred Kurt Bubat, namely one Frank Bubat, appeared before the Children's Court and was charged with a breach of s22C sub-section (1)(a) of the *Motor Car Act*. The deponent, Peter Sinclair Pearce, was the informant and the deponent Sergeant James Roger Taylor was the prosecutor. The charge was apparently read to the defendant Frank Bubat, he pleaded not guilty and the informant then proceeded to give evidence.

At a stage which is not susceptible of precise definition, but which – reconciling the affidavits as best I can – seems to have been after Senior Constable Pearce had been sworn as a witness and had stated his rank, the attention of the Stipendiary Magistrate was drawn to the fact that the defendant's father was in court. Sergeant Taylor informed the Magistrate that the father had also been charged with offences arising out of the same set of circumstances. According to Sergeant Taylor's affidavit, the Magistrate then asked Mr Bubat Senior if he would like the charges against him heard at the same time to which Bubat Senior replied: "That's all right" and was then charged with the offences of being the owner of an unregistered car and of an uninsured car. A further charge of permitting his son to drive an unregistered car was about to be put to him when the Magistrate intervened saying to him: "I won't convict you of that" and told the Prosecutor that what was charged was not an offence under the section. After some discussion the informant then gave his evidence, the substance of which is set out in para 6 of Sergeant Taylor's affidavit.

It is to be observed that the informant's evidence included material which was admissible in criminal proceedings against Bubat Senior but was not admissible in proceedings against the son. According to Sergeant Taylor, after that evidence had been given Horst Alfred Kurt Bubat was asked by Mr Scott whether he had any questions to ask and he made some submissions that he did not think it was a street and said that on some other occasion when his son had been in the hobby car being towed by a car, he had been seen by a policeman who took no action, whereupon Mr Scott then dismissed the information under s22C(1)(f) against the respondent Horst Alfred Kurt Bubat but convicted him of the other two informations as well as convicting the defendant Frank Bubat of the information under s22C(1)(a) of the *Motor Car Act*. Immediately afterwards, the Children's Court was closed.

If that account were correct it would be clear, I would have thought, beyond any doubt that either the Magistrate had in a sitting of the Children's Court, convicted a person who was not a child and not amenable to the jurisdiction of the Children's Court, or that he had held a conjoint sitting of the Children's Court and the Magistrates' Court. In either view there would have been the gravest of irregularities and a want of jurisdiction. In the first view, a Children's Court having jurisdiction to deal only with children would have convicted an adult. On the second view two Courts whose attributes are irreconcilable would have been combined into one. The Children's Court is required to sit as a closed court, there are the severest of restrictions on the persons who are permitted to be present in it, whereas the Magistrates' Court is required to be an open court.

As I observed in the course of argument "crabbed age and youth cannot live together", and certainly the two Courts cannot function in the same room and at the same time without the infraction of a number of provisions of the *Children's Court Act* and indeed of the *Justices Act*.

Had the evidence been left in that condition there is, I think, no doubt that this court would have had to find that the convictions were made either by the Children's Court acting beyond its jurisdiction or by the Magistrates' Court purporting to sit at the same time as the Children's Court and in circumstances of such irregularity that it could hardly be disputed that the conviction was not a nullity. However, the material filed by Mr Scott puts a different complexion on the matter.

Mr Graham has suggested that when the two affidavits are set down side by side it still emerges that at least one matter was dealt with in the Children's Court, namely the charge against Horst Alfred Kurt Bubat, under s22C(1)(f) of the *Motor Car Act*. Mr Graham suggests that the hearing of that charge and the conviction took place in the Children's Court although the entry in the register was made at a later stage.

I do not think that is a proper inference to be drawn from the evidence. I think that marrying these sets of affidavits together, what occurred was this; that when the Children's Court had commenced the hearing of the charge against Frank Bubat and the respondent Horst Bubat, his father, was present as he was entitled to be under the provisions of the *Children Court Act*.

The Magistrate having satisfied himself as to the identity of the respondent Horst Bubat, and that he was the father of the defendant Frank Bubat and as such entitled to be present, the Sergeant, having called the informant as a witness, drew the Magistrate's attention to the fact that Senior Constable Pearce's evidence would relate to the matters charged against Horst Bubat. Mr Scott, according to his affidavit, asked Bubat senior if he had any objection to his hearing facts which would concern his case. Mr Scott deposes that had Bubat senior objected he would have heard the case against him first. In reply to the Magistrate's question, Bubat senior said he had no objection. If I may say so that seems to have been an entirely proper question for Mr Scott to have asked. He appears to have been sensible of the possibility of prejudice to the respondent Bubat senior which might have ensued as a result of evidence having been given in the Children's Court which disclosed an offence against him.

Of course it could be said that another way of dealing with the matter would have been to confine Senior Constable Pearce in his evidence, strictly to matters which were admissible against Frank Bubat and not to allow him to give evidence of conversations with Bubat senior which were not admissible against Bubat junior in the Children's court proceedings. It does not appear, however, that this course was taken: on the contrary it appears if one accepts Sergeant Taylor's affidavit, the accuracy of which is not challenged in this respect, that the greater part of

the evidence of Senior Constable Pearce before the Children's Court related to the case against, and liability of, the respondent Horst Bubat.

It also appeared from the evidence of Senior Constable Pearce, before the Children's Court, that the vehicle in question in that case was a yellow racing car of the kind apparently known as a 'Hobby Car' or a 'Go-Kart' that it was about nine feet long and four feet wide and powered by a motor cycle engine. It may be assumed, in the light of what Mr Scott has said to me, and in the light of the penalty he has imposed, that there must have been evidence or some material which satisfied him that it was a vehicle having only two axles. I have not seen any reference to that in the material in Sergeant Taylor's affidavit.

According to Mr Scott's affidavit every opportunity was offered to the informant, to the defendant and to Bubat senior to put all their facts before him and ask him questions. No doubt sitting in the Children's Court, Mr Scott was bound to accord and certainly did not act improperly in according, Bubat senior the opportunity of putting before him any material affecting the guilt or otherwise of his son as well as any material relevant to the question of penalty in relation to the son. Mr Scott's affidavit, however, suggests to my mind that he permitted submissions from Bubat senior directed solely to the question of his own liability. It is quite clear that during the hearing in the Children's Court there was a discussion about the charge laid against Bubat senior of permitting his son to drive without a licence and that it was in the Children's Court that Mr Scott informed the police, certainly once, that that particular information would probably be disallowed as he had dismissed such a case at Kilmore on a submission by counsel that no offence of this nature was covered by the section which dealt with endorsed licences only.

It is not suggested that the conviction against the child Frank Bubat was not made or recorded in the Children's Court. Mr Scott's affidavit – and in this respect he is supported, I think, by the affidavit of Mr Slattery, the Bench Clerk at the time – indicates that after the decision had been entered in the decision column of the Children's Court register, the Children's Court rose, that the informant and the prosecutor and the Bubats then left the Magistrate's Room, that the Magistrate and the Bench Clerk immediately went into the Court room where the Bench Clerk opened the Magistrates' Court. Bubat senior was there and also the informant, but there appears to be some doubt as to whether the prosecutor Sergeant Taylor was there at the time. There appears to be also some reason for thinking that the informant, Senior Constable Pearce, was engaged in conversation with a reporter for the Kyneton Newspaper for some part of the time during which the proceedings in relation to Bubat senior took place.

The Magistrate, Mr Scott, in his affidavit says that he spoke to Bubat senior, who stood before him on the floor of the Court, and explained the nature of the charges against him, namely; being the owner of a motor car driven by his son on a roadway without that car being registered or being covered by third party insurance, that he took the pleas of Bubat senior to these charges and asked him whether he wished to say anything further or give any evidence. The affidavit of the Bench Clerk indicates that the charges were not formally read to Bubat senior in the Magistrates' Court, but that the Magistrate asked Bubat senior how he pleaded to the charges.

It appears to me that what happened was something which is contemplated by s91 sub-section (4), namely that the substance of the informations were stated to Bubat senior, and that either there was an immediate plea followed by a discussion ending up in Bubat senior saying: "What more can I say, I suppose I am guilty", or that after the substance of the charges had been explained to him there followed a discussion, at the end of which Bubat senior said something to the effect, "What more can I say, I suppose I am guilty."

Evidently Mr Scott accepted that as a formal plea of guilty. If it was a formal plea of guilty then what is prescribed by the *Justices Act* appears in s91 sub-section (4) as follows:

"The substance of the information or complaint not being in respect of any civil debt recoverable summarily or any cause of action determinable summarily, shall be stated to the defendant and he shall be asked if he has any cause to show why he should not be convicted or why an order should not be made against him, as the case may be. And if he thereupon admits the truth of such information or complaint and shows no sufficient cause why he should not be convicted or why an order should not be made against him, as the case may be, the Court shall after hearing such evidence as it thinks fit with respect to the subject matter of such information or complaint, convict him or make an order against him accordingly."

It appears to me that this was a case where the substance of the information was put to Bubat senior and that either immediately, by way of formal plea, or after a somewhat informal discussion between himself and the Magistrate, who states that he was trying to help the defendant who was a new Australian and did not understand the proceedings, in which discussion the Magistrate explained to him the nature of the charge and what was involved, at the end of which discussion, in which the defendant raised some queries as to which the Magistrate finally satisfied Bubat senior, he later said, in substance "Well what more can I say, I suppose I am guilty." If the Magistrate, in so acting, was acting informally – and I am not to be taken as necessarily deciding that – nevertheless he seems to have been activated by a proper concern to see that the defendant understood the position and to satisfy himself that the defendant knew whether or not he should plead guilty. The Magistrate evidently was satisfied to accept the defendant's remarks as a plea of guilty.

It is trite law that a plea of guilty amounts to an admission of all the facts material to the charge and dispenses with the need of such proofs. It is also clear from the affidavit that no proof of the matters charged against the defendant was given in evidence before the Magistrates' Court. Mr Scott does not suggest that the informant Pearce was sworn in the Magistrates' Court. But if the defendant pleaded guilty to the charges no evidence was required to prove his guilt. It is, of course, common practice that when a defendant pleads guilty evidence is led – often in a fairly summary form, it must be said 'a skeletal form' – of sufficient material relating to the charge to enable the tribunal to determine the appropriate penalty.

The examination which I have conducted of the sections under which Mr Scott was acting, or in respect of which he was called on to assess a penalty, indicate that in his affidavit he has used the phrase: "Minimum penalty" loosely, that there is in neither case a minimum penalty fixed by law, and that to some extent the question of penalty is in each case discretionary. I say 'to some extent' because in relation to the charge under s17(1)(a) and under (1)(b), there is a minimum element dependent on the number of axles to the vehicle: otherwise there is only a maximum fixed. It is clear that in fixing the penalty Mr Scott must have been acting on the basis of the evidence which had emerged in the Children's Court. Unless it can be inferred that the defendant accepted that evidence and indicated his acceptance in some way before the Magistrates' Court, it would follow that the Magistrate had imposed a penalty without any evidence before him as to the nature of the offence. But while there is, in law, no minimum in respect of either of these penalties, it is clear that the amounts fixed as penalties by Mr Scott were, in each case, from a practical point of view, minimum penalties. It does not appear to me that the formation of a discretionary judgment by the Magistrate as to the appropriate penalty, would be the ground for the issue of a writ of *certiorari*, having regard to the privative provisions of s164 of the *Justices Act* 1958.

With some doubt, I have come to the conclusion that there must have been material before Mr Scott, sitting as the Magistrates' Court, of an acceptance by the respondent Bubat senior, of so much of the facts as had been testified to in the Children's Court to warrant the Magistrate imposing the penalties he did. If I am wrong on that the penalties are so close to the minimum that I would consider that this was a case of error by the Magistrate in the exercise of his discretion as to penalty rather than a case of acting without jurisdiction or in excess of jurisdiction and that s164 of the *Justices Act* therefore prescribes the issue of a writ of *certiorari*.

One other information was before Mr Scott on the same day, namely the charge permitting his son to drive the vehicle. That information was dismissed by the Magistrate and the correctness of his decision on that respect is the subject of the review which is next for hearing in this list. I have heard no argument on that matter and beyond such material as is advanced by the Magistrate in his answering affidavit, I do not know as yet how the argument will be put. Consequently I say nothing as to that matter at present.

It follows from what I have said that the Order Nisi for *certiorari* should be discharged. The Order Nisi was granted on the footing that the conviction was made in the Children's Court, or alternatively in a sitting of the Children's Court and the Magistrates' Court. I am not satisfied that it was so made. The *prima facie* presumption of regularity and propriety which arises from the production of the certificates of the copies of the entries in the register of the Magistrates' Court, has not, in my view, been rebutted by the evidence established. On the face of it those convictions

stand as convictions of the Magistrates' Court at Kyneton and would be properly enforceable if it became necessary to enforce them.

It has, however, emerged in the course of discussion this morning that the fines imposed have been paid and indeed it has appeared that the fines — the money for the fines was provided by the Magistrate himself who says he was concerned that it should be thought for a moment that Subat senior, a new Australian, should have been fined by him when he was acting without jurisdiction.

The conclusions I have expressed make it altogether unnecessary for me to consider the matter which Mr Scott, I think, was anxious I should determine, namely the question whether there is jurisdiction in this Court in any circumstances to grant a writ of *certiorari* to a Magistrates' Court. I refrain from saying anything further on that matter but that is not to be taken as indicating that I have so far any doubts about the matter. No doubt if the matter were fully argued a different situation might arise.

The Order Nisi is therefore discharged. (Discussion ensued) No order as to costs.
