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SUPREME COURT OF VICTORIA

MURPHY v EVANS

Murphy J

30 October 1975

LIQUOR CONTROL – DISPOSAL OF LIQUOR – DUPLEX PARTICULARS OF INFORMATION – MAGISTRATE DECLINED TO PUT INFORMANT TO ELECTION – DEFENDANT CONVICTED – WHETHER MAGISTRATE IN ERROR – WHETHER AMENDMENT OF INFORMATIONS SHOULD BE ALLOWED – WHETHER AMENDMENT SHOULD BE REFUSED BECAUSE OF OVERRIDING GROUNDS OF FAIRNESS: *LIQUOR CONTROL ACT* 1969, S125.

The Magistrate convicted the applicant on two informations of disposal of liquor in a manner otherwise than authorised by his licence. The informations related to alleged separate offences on two separate dates, namely, the 8th August 1974 and the 16th August 1974. Further, the particulars supplied by the Prosecution showed an intention to rely upon several separate instances of alleged disposal to different persons on the same dates. The Magistrate found the charges proved and convicted the defendant. Upon Order Nisi to review—

HELD: Order absolute. Convictions quashed. Not remitted for re-hearing.
1. The Magistrate was wrong in law in holding that it was the responsibility of the applicant to establish on the balance of probabilities or at all that he had a *bona fide* belief that the person to whom he disposed of liquor intended to consume it with or ancillary to a meal on light refreshments. The onus rested on the informant.

2. In relation to the submission that the informations were duplex, having considered all the circumstances of these two cases, it did appear that an amendment of the particulars at this late stage should not be allowed. There were to be found in this case what have been called "overriding considerations of fairness", which suggested that the convictions irregularly obtained should be quashed and the informations not remitted for re-hearing.

MURPHY J: This was the review of two orders nisi No 7100 and 7100A of 1975 to review decisions of a Stipendiary Magistrate made on 15 November 1974, whereby the applicant was convicted on two informations of disposing of liquor in a manner otherwise than authorised by his licence. The informations related respectively to alleged offences on two separate dates namely the 8 August 1974 and the 16 August 1974.

Mr Hooper of counsel appeared to move the order absolute and Mr Larkins of counsel to show cause.

At the outset, Mr Larkins, counsel to show cause, conceded that orders nisi in each case should be made absolute on ground 7 which read,

> "That the Magistrate was wrong in law in holding that it was the responsibility of the applicant to establish on the balance of probabilities or at all that he had a *bona fide* belief that the person to whom he disposed of liquor intended to consume it with or ancillary to a meal on light refreshments".

Mr Larkins conceded that in the light of the authorities, the onus rested on the informant, and that the orders nisi should accordingly be made absolute and the two informations remitted for re-hearing.

Mr Hooper counsel for applicant however, was not content to proceed in this way. He submitted that ground 1 of the orders to review, which was based on duplicity in each information, was also clearly made out. The particulars supplied by the informant clearly showed that the prosecution intended to rely in each case upon several separate instances of alleged disposal to different persons, albeit on the same dates. See *Johnson v Needham* (1909) 1 KB p26; *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; *Davies v Ryan* [1933] HCA 64; (1933) 50 CLR 379 and *Byrne v Baker* [1964] VicRp 57; [1964] VR 443.

Mr Larkins then sought the court's leave to amend the particulars which had been supplied so as to remove the latent ambiguity inherent in them, and to restrict the particulars relating to each information to one defined disposal to one named person.

He referred in support of his application to the statutory provisions in the *Liquor Control Act* and the *Justices Act* relating to the disposal of orders to review and placed emphasis upon the use of the words "on the merits". (See e.g. s125, ss2 of the *Liquor Control Act*.) He also relied upon the decision of the Tasmanian Full Court in *Marshall v Batchelor* (1952) Tas SR p49, in which case the court remitted an information, which had been rendered duplex because of the particulars provided, for re-hearing by the Magistrate, together with a direction that the information was bad and that the informant should be called upon to elect as to the particular act which was to be relied upon.

Mr Hooper rightly submitted that counsel for the defendant in the court below had from the outset and on more than one occasion, submitted that the several particulars provided rendered each information duplex. He had submitted too that the informant should be called upon to elect as to which particular act he intended to rely upon. Nonetheless, the informant had at all material times argued that he should not be called upon to elect as to which matter he intended to rely upon. The Magistrate accordingly declined to call upon the informant to elect. Mr Hooper submitted that the matter should be considered in the same way that it would be considered if the Magistrate had called upon the informant to elect, and if the informant had refused to do so. In such a case, he submitted, it would be the Magistrate's duty to dismiss the information for duplicity.

There is in this State authority to support the submission that the Magistrate could follow this course. Indeed it might be put as strongly as to say that the Magistrate should follow this course in those circumstances.

Further, he submitted that owing to the course which the matter took in the court below, the defendant was now prejudiced in his defence, for he had given detailed evidence and made certain admissions on oath which could hereafter be used against him on issues which might very well be difficult for the informant to prove *aliunde*. (See, for example, the particular matters referred to in ground 7 of the orders nisi.) Other matters related to details of the licence and, as I say, to the defendant's belief.

Next, he said, that fresh informations based on the alleged transgressions or any of them could not now be laid, as the statutory twelve month limitation period had passed, thus, to allow an amendment at this late stage would be, he submitted, to make out a new case and to effect a real injustice on the defendant, if the proposed amendment was allowed. He suggested also that the defendant would be exposed to double jeopardy.

Finally, the defendant had been put to much cost which could never be adequately compensated Mr Hooper submitted because of the statutory limit of $200 awardable as costs on orders to review.

For all these reasons he submitted that the court's discretion should not be exercised, so as to allow any amendment, and that justice demanded that the orders nisi should be made absolute and the convictions quashed; and the informations should stand dismissed, and should not be amended or remitted for re-hearing. Having considered all the circumstances of these two cases, it does appear to me that my discretion ought not to be exercised to allow an amendment of the particulars at this late stage. Any *locus poenitentiae* that the informant had to cure the defects caused by the particulars has in my opinion long since passed. Furthermore, the defendant may well have acted to his prejudice in giving evidence by reason of the persistence of the informant in leading evidence on the several matters contained in the particulars.

In my view there are to be found in this case what have been called "overriding considerations of fairness", which suggest that these convictions irregularly obtained should be quashed and the informations not remitted for re-hearing. Accordingly the orders nisi shall be made absolute. I refuse the application for leave to amend the particulars to each information. I quash the convictions. I refuse the application to remit the matters for re-hearing. Each order nisi shall be made absolute with costs. I refuse the application for an indemnity certificate in each case.