36/75

SUPREME COURT OF VICTORIA

FORBES v GRAHAM

Lush J

16 September 1975

SENTENCING – MOTOR TRAFFIC – DEFENDANT CHARGED WITH EXCEED .05% – "MATTER PROVEN" – DEFENDANT HAD PRIOR CONVICTION FOR A SIMILAR OFFENCE – MATTER ADJOURNED FOR 52 WEEKS – MONEY TO BE PAID INTO THE COURT POOR BOX – WHETHER COURT IN ERROR: *MOTOR CAR ACT* 1958, S81A; *JUSTICES ACT* 1958, S92(6).

On a charge of blood alcohol exceeding .05 (S81A *Motor Car Act* 1958), no evidence having been called on the issue by the defence, the Justices announced they had "found the charge proven". The defendant admitted four prior convictions, one of these being a conviction for .05. The defence called two character witnesses. After hearing the character evidence the Magistrate ordered that the information should be adjourned for fifty-two weeks conditionally on the defendant paying $50 into the poor-box. Upon order nisi to review—

HELD: Order absolute. Matter remitted to the Magistrates' Court for determination in accordance with the law.
1. As no conviction was recorded by the Magistrates' Court, the question which arose from that conclusion was whether the adjournment which the Court ordered was correctly granted.

2. This adjournment took place not during a hearing but at the end of it after the cases of both parties had been completely heard. The effect of it was to deny the informant a decision to which he was entitled, leaving all the issues still open. The adjournment was not for the better or more convenient hearing of the case. That was over. It was not an adjournment to enable the Justices to consider what was an appropriate penalty. For that purpose it was far too long an adjournment, and in any case, if that was the purpose of it a conviction should have been recorded. Its purpose in one way or another was to avoid the recording of a conviction, and if this was to be done it should have been done by reference to s92(6) of the *Justices Act* 1958, and it was a miscarriage of the discretion to attempt to do it by any other means.

3. The order made involved a miscarriage of the discretion. The discretion miscarried because the Justices did not advert to the right of the informant to a decision nor to their statutory power with its specific requirements.

LUSH J: ... The grounds of the order nisi to review are these:-

> "(1) That in the circumstances of this case the Justices of the Peace, having found the offence charged proven, should have convicted the Defendant and imposed the penalty prescribed by law, namely s81A(3)(ii) of the *Motor Car Act* 1958 except insofar as the question of discretion related to the monetary penalty provided by s81A(1) of the *Motor Car Act*.
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> (2) That the Justices of the Peace, by conditionally adjourning the hearing of the Information, erred in that they failed to determine it and wrongly exercised their discretion to adjourn the Information or alternatively exercised their discretion upon a wrong principle."

Ground (1) referred to the penalty provisions of s81A of the *Motor Car Act*. Sub-section (3) of that section provides that in addition to imposing a fine or term of imprisonment a court convicting a person for an offence against sub-s(1) shall 'notwithstanding anything to the contrary in this Act or in any other Act' cancel the licence of such person to drive a motor car, and in the case of a second or subsequent offence the court is directed to disqualify him if the evidence shows a count of .15 per cent or more for not less than two years.

Mr Batt who appeared for the informant argued that a proper interpretation of events at the hearing led to the conclusion that the defendant had been convicted and in consequence, the convicting court was under a mandatory obligation to impose the cancellation and disqualification required by sub-s(3).

The validity of this argument is then the first matter for consideration. The solution, I think, emerges clearly from authority. To find a matter proved is not the same thing as to record a conviction and the fact that a court announces that it finds a charge proved does not of itself bring that court within the description of a court convicting the person of that charge.

A conviction requires a decision to give formal effect to a finding of fact. I refer to what was said by Martin J in *Baptist v Scott* [1954] VicLawRp 61; (1954) VLR 431 at p434; [1954] ALR 703. What was said there was quoted with apparent approval by Hudson J, in *Bond v Mitchell* [1959] VicRp 67; [1959] VR 465; [1959] ALR 998.

In two other cases in this Court it has been assumed that an announcement by a Magistrates' Court that it finds a matter proved or even that a defendant will be convicted does not necessarily import a conviction. Those cases are *Pittaway v Bassett*, an unreported decision of Gillard J given on 24th July 1973, and *Timothy v Munro* [1970] VicRp 69; [1970] VR 528, a decision of Anderson J.

The practical desirability of drawing a distinction between announcing that a court finds a matter proved and announcing that the defendant will be convicted or recording a conviction appears upon a consideration of s92(6) of the *Justices Act* 1958. That section authorises the adjournment of the further hearing of a matter to a time and place to be fixed not more than twelve months thereafter and authorises the Court to allow the person charged to go at large upon his entering into a recognizance conditioned for his appearance at the time and place fixed and for his good behaviour in the meantime. The sub-section contemplates that if there is a breach of the recognizance the hearing will be resumed by the original court or there will be a hearing *de novo* for another court or a differently constituted court. No court will have recourse to the powers of s92(6) unless, to say the very least, the defendant was in imminent danger of being convicted and in the ordinary situation the Court will be satisfied that the charge was proved before it has recourse to that sub-section. Yet, the sub-section itself contemplates that there will he no conviction. It would be absurd to place the Magistrates' Court under a ban of silence in respect of its view of the prosecution case when to everyone it is obvious that that view underlies the making of an order under s92(6).

Other authorities on the meaning of the word "conviction" and on the concept of conviction which were cited to me were *S v Recorder of Manchester* (1971) AC 481; *Ramcharan v R* [1972] Crim LR 581; [1972] 3 WLR 599; [1972] UKPC 9; [1973] AC 414. The matter is also extensively discussed in the judgment of Windeyer J in *Cobiac v Liddy* [1969] HCA 26; (1969) 119 CLR 257; [1969] ALR 637; (1969) 43 ALJR 257. In view of decisions of the High Court and of this Court in an area directly relevant to the present case it is, I think, unnecessary for me to discuss the House of Lords decisions except to say that I find nothing in them inconsistent with the view which I have expressed.

My opinion therefore is that no conviction was recorded by the Magistrates' Court and the question which arises from that conclusion is whether the adjournment which the Court ordered was correctly granted. In *Lee v Saint* [1958] VicRp 25; [1958] VR 126; [1958] ALR 545, Herring CJ said that a Magistrates' Court had three distinct powers to adjourn cases. One was the power under s92(6) to which I have referred and which can be put aside at this stage of the case because it was not exercised in fact by the Justices. They did not require the defendant to enter into a recognizance and such a requirement is mandatory under that sub-section. The second power is to be found in s92(2) of the *Justices Act* and the third is a common law power.

I shall not quote s92(2) at length. The power to adjourn is given to cover cases where 'it appears advisable.' and the power is to adjourn the matter or the further hearing of the matter to a certain time and place to be then and there appointed and stated in the presence and hearing of the party or parties or their respective counsel, solicitors, *et cetera*. The Magistrates in this case did not specifically say that the adjournment was an adjournment to the Warrnambool Court but those present could have had no possible doubt about what was being done and Mr Batt indicated that he did not wish to argue that any informality in the actual words used by the Justices was significant. That being so, I think that I can consider the order made was made either under s92(2) or under the common law power without differentiation.

Mr Batt argued that in this case the adjournment was a device to avoid a conviction and so avoid the mandatory penalties and to do so without complying with s92(6). Mr Gillard who appeared for the respondent argued that the adjournment was a legitimate means of giving the defendant a trial period before finally dealing with the offence. At the end of the fifty-two weeks, he submitted, it would have been open to the Justices to make an order under s92(6) if they then thought fit. I doubt the factual validity of Mr Gillard's submitted interpretation. It seems hardly consistent with tho terms of the plea although, of course, I recognise that the terms of the plea do not express the thoughts of the Justices. However, I am content to accept his argument that it is not shown that the goal that he suggested was not that which was aimed at by the Justices.

It remains to consider whether what was done was a proper exercise of the Justices' powers or a misuse of them. In considering what adjournments can properly be made by a Magistrates' Court it is necessary to bear in mind that it is a statutory court and it has statutory discretions in the discharge of its duties, as well as statutory discretions to mitigate the rigidity of the rules imposing those obligations. In particular, it is necessary to bear in mind that under s91(2) and (14) of the *Justices Act*, a Magistrates' Court is placed under an express duty to determine the matters brought before it. I have already dealt with s92(6) and in the present context I add that that is a statutory power or discretion given to a court to be used in a situation where it does not wish to record a conviction. The existence of the two duties and the discretion to which I have referred is in my opinion relevant in a consideration of the propriety of the exercise of any general discretion to adjourn.

This adjournment took place not during a hearing but at the end of it after the cases of both parties had been completely heard. In my opinion, the effect of it was to deny the informant a decision to which he was entitled, leaving all the issues still open. In the context with which I am now dealing such a denial can only be justified by reference to some statutory authority, a statutory authority which is to be found in sub-s(6), which was not exercised here. The adjournment was not for the better or more convenient hearing of the case. That was over. It was not an adjournment to enable the Justices to consider what was an appropriate penalty. For that purpose it was far too long an adjournment, and in any case, if that was the purpose of it a conviction should have been recorded. Its purpose in one way or another was to avoid the recording of a conviction, and in my opinion if this was to be done it should have been done by reference to s92(6), and it was a miscarriage of the discretion to attempt to do it by any other means. In my opinion, the order made involved a miscarriage of the discretion. The discretion miscarried because the Justices did not advert to the right of the informant to a decision, but I think that they did not advert to their statutory power with its specific requirements.

The grounds of the order nisi raised the question whether on a prosecution under s81A the power of adjournment given by s92(6) is available at all, and it is necessary for me to say something about this. In the end, it was not seriously contended that s92(6) was not applicable to a prosecution launched under s81A. As a matter of authority this conclusion, I think, is established by *Cobiac v Liddy*, *Pittaway v Bassett* and *Timothy v Munro* to all of which I have referred.

In *Aherne v Freeman* [1974] VicRp 17; [1974] VR 121 Crockett J dealt with a case of an offence under the *Motor Car Act* under a different but similar section, similar in the respect that it provided mandatory penalties. In relation to that offence he held that an adjournment order in fact made was not made under s92(6) but he did not say that that sub-section was not available in relation to the offence with which his case was concerned, and indeed was content to assume that, in an appropriate case, it was.

My view, accordingly, is that as a matter of authority s92(6) is available in relation to a prosecution under s81A, and as a matter of principle the short reason why it is so available is that the mandatory penalties imposed by s81A(3) follow upon conviction. Section 92(6) is a power to adjourn before conviction. The two provisions, as *Cobiac v Liddy* shows, are thus not in conflict.

Mr Batt argued that if I considered that the Magistrates' order was bad I should either deal with the matter myself or send it back with a direction to convict and impose penalties upon the basis that upon no possible view of the evidence given in the Warrnambool Court could this be a case for the application of s92(6). I do not propose to act upon that argument. I propose to send the matter back to be dealt with according to law and it will be the responsibility of the Court

dealing with it to take into consideration all the matters proved. That Court will be faced with the initial situation that on first impression this is an unlikely case for the exercise of the power given by s92(6) and they will be faced with the fact that this is a second offence.

On the other hand, they have heard, or if the Court is differently constituted, it will hear, the evidence of the character witnesses and it will have to take into consideration the interval between the offence charged in these proceedings and the last of the defendant's convictions.

It will have to take into consideration what the witnesses have said or will say about him and it will have to take into consideration the weight which it attaches to the opinions of those witnesses. In my opinion, it would be wrong for me sitting here with no personal contact with the case to shut out the possibility that an adjournment order requiring the defendant to enter into a recognizance might be made. Whether it is to be made, I stress, is the responsibility of the Warrnambool Magistrates' Court and it is a responsibility which, in this decision, I leave to them.
