33/02; [2002] VSC 531

SUPREME COURT OF VICTORIA

PLATZ v BARMBY

Byrne J

26 November 2002 — (2002) 135 A Crim R 571

PRACTICE AND PROCEDURE – BRIEF OF EVIDENCE – DRINK-DRIVING CHARGE – SERVICE OF SUMMONS TO ANSWER CHARGE SHORT-SERVED – NO APPEARANCE OF DEFENDANT ON HEARING OF CHARGE – MATTER DEALT WITH *EX PARTE* – CERTIFICATES WITH RESPECT TO BLOOD SAMPLE ADMITTED INTO EVIDENCE – DEFENDANT CONVICTED: WHETHER MAGISTRATE IN ERROR IN ADMITTING CERTIFICATES INTO EVIDENCE – WHETHER MAGISTRATE IN ERROR IN FINDING CHARGE PROVED: *MAGISTRATES' COURT ACT* 1989, SS34, 41(2); *ROAD SAFETY ACT* 1986, S57(5).

A summons to answer charges laid under the *Road Safety Act* 1986 ('Act') and a brief of evidence containing certificates were served on P. Pursuant to s34(1)(a)(ii) of the *Magistrates' Court Act* 1989, service of the process had to be effected "at least 14 days before the mention date". In P.'s case, the summons was served 7-8 days before the mention date. When the charges came on for hearing, P. did not attend court. The magistrate admitted the certificates as to the taking of the blood sample and the result of the analysis and convicted P. Upon appeal—

HELD: Appeal allowed. Orders set aside.

1. Section 34(1) of the *Magistrates' Court Act* 1989 prescribes in para (a) the time within which service is to be effected and in para (b) the mode of service. Each commences with the expression "must be served". These statutory procedures must be strictly complied with and accordingly, the magistrate fell into error in proceeding to deal with the charges where the summons was not served in accordance with s34.

***Nitz v Evans* (1993) 19 MVR 55, and**

***Brereton v Sinclair* [2000] VSCA 211; (2000) 2 VR 424; (2000) 118 A Crim R 366, followed.**

2. *Obiter*. Section 57 of the Act sets out the evidentiary provisions with respect to blood tests for certain driving offences. Section 57(5) of the Act provides that a certificate must not be tendered in evidence unless a copy of the certificate is proved to have been personally served on the accused more than 10 days before the day on which the certificate is tendered in evidence. Compliance with the service requirement is a pre-condition to admissibility of a certificate under this section. A certificate which has been short-served in terms of the date of its tender into evidence is inadmissible. Accordingly, the magistrate fell into error in admitting the certificates in evidence and finding the charges proved.

BYRNE J:

1. At 9.15 pm on Sunday 23 December 2001, the appellant, Patricia Platz, sometimes called Patricia Davis, was driving her car in a southerly direction along Brighton Road, Elwood. It was, according to the witnesses, a dry clear night and traffic was light. Ms Platz's car for some reason struck the tram safety zone and overturned. Later that night, at about 10.20 pm at the Alfred Hospital, a sample of her blood was taken which upon analysis was found to contain .155 grams of alcohol per 100 millilitres of blood.

2. On 14 May 2002, the respondent, Senior Constable Shayne Barmby, as informant, filed three charges against her:

> "1. Driving with a blood alcohol content in excess of .05 grams per 100 millilitres, contrary to s49(1)(b) of the *Road Safety Act* 1986.
>
> 2. Having a blood alcohol content in excess of .05 grams per 100 millilitres within three hours after driving, contrary to s49(1)(g) of the *Road Safety Act* 1986.
>
> 3. Careless driving, contrary to s65 of the *Road Safety Act* 1986."

He caused to be issued a summons for her attendance to answer these charges at 10.00am on 21 June 2002 at the Melbourne Magistrates' Court. The informant sought to serve this process on

the 2nd and again on 3 June 2002. On each occasion Ms Platz declined to accept service saying that she would do so only through her solicitors. A remarkable feature of this case is that the informant appears to have accepted this.

3. The solicitor to whom she was referring appears to have been Mr Sean P Hardy of counsel who wrote to the informant a letter dated 6 June 2002 but which, according to the fax header, was not sent until 12.28pm on the following day. Mr Hardy observed on the letter, apparently incorrectly, that no attempt had been made to serve his client and invited the informant to effect service upon him, Hardy. He enclosed his client's authority for this.

4. Meantime, time was passing. Pursuant to s34(1)(a)(ii) of the *Magistrates' Court Act,* service of the process had to be effected "at least 14 days before the mention date" unless this date were extended prior to service pursuant to s33(2). As a matter of arithmetic, service of the unextended process was required by 7 June or possibly 6 June, about the time of Mr Hardy's letter. This difficulty appears to have escaped the attention of the informant, for he contacted Mr Hardy as soon as he received the letter with a view to effecting service the following day as Mr Hardy proposed. Unfortunately, counsel's commitments were such that this was not possible before 13 June 2002, that is seven or eight days before the mention date, not 14 days as the statute argued. As will be seen, pursuant to s57(5) of the *Road Safety Act* 1986, a copy of certain certificates upon which the informant might rely had to be served more than 10 days before the original certificate was put in evidence.

5. And so, at 9.30am on 13 June 2002, the informant served Ms Platz with the charges and the summons and a brief of evidence pursuant to s37 of the *Magistrates' Court Act*. These documents included two certificates with respect to the blood sample to which I will refer. This passage of time before service gave rise to a further potential difficulty in the event that the certificates were to be tendered on the mention date.

6. Neither Ms Platz nor any lawyer on her behalf appeared on 21 June to answer the charges. The magistrate then proceeded to hear and determine them in her absence pursuant to s41(2) of the *Magistrates' Court Act*. The s37 brief was read and acted upon to convict her of exceeding the permitted blood alcohol content within three hours of driving and of careless driving for which she was fined an aggregate sum of $750. Her licence was cancelled as from 13 February 2002 and she was disqualified from driving for 15 months. The first charge was withdrawn and struck out.

7. On 10 July 2002, Ms Platz appealed pursuant to s92 of the *Magistrates' Court Act* against these final orders made against her. Two questions of law have been certified by the Master on 26 August 2002:

> "(a) did the learned Magistrate err in determining the charges laid against the Appellant in circumstances where the charge and summons were served less than 14 days before the mention date specified in the summons?
>
> (b) was there admissible evidence before the learned Magistrate which entitled him to find that the Appellant's blood alcohol content was in excess of the prescribed concentration of alcohol within 3 hours after driving a motor vehicle in circumstances where the brief of evidence was served less than 10 days before the hearing date".

I am satisfied that the first question should be answered in the affirmative. Section 34(1) prescribes in para (a) the time within which service is to be effected and in para (b) the mode of service. Each commences with the expression "must be served".

8. Section 41(2) permits the court to proceed to hear and determine a charge where the defendant does not appear in answer to a summons to answer a charge for a summary offence. I note the disparity between the verbiage of this sub-section and s41(1). In the latter case the statute prescribes this summons as one "which has been served in accordance with this Act", words which were omitted from sub-s(2).

9. I feel obliged to follow two decisions of very eminent judges of this Court which show that the requirements of s34 are mandatory. In *Nitz v Evans*[1], Hayne J so held in a case where the document served was not a true copy of the summons which had been issued. His Honour also

concluded that there was no significance in the different terminology used in sub-s(1) and (2) of s41. In *Sinclair v Magistrates' Court of Victoria at Ringwood*[2], Warren J concluded that the procedures for the extension of the return date must also be strictly complied with. I should mention as to this latter case that leave to appeal was sought from the Court of Appeal.[3] The Court of Appeal was of opinion that her Honour's decision that the statutory procedures be strictly complied with was "not attended with the necessary degree of doubt" to warrant the granting of leave to appeal. [4] With respect, I agree.

10. I was referred too to two decisions which were said to point in the opposite direction. In *Sammassimo v Franich*[5], O'Bryan J held that service less than 14 days before the mention date should be treated as an irregularity only. A good deal of his Honour's consideration of this matter turned on whether this affected jurisdiction or was merely a procedural matter. For the reasons given in *Nitz v Evans,* I think this is beside the point for my purposes. In that case, too, the case had been adjourned and actually proceeded before the magistrate well after the mention date. In *Gahan v Frahm*[6], Hedigan J was also concerned with jurisdiction in a case where the charge was said to have been filed with the registrar in the wrong Magistrates' Court. Again, this is far from the present case.

11. I conclude therefore that the magistrate fell into error in proceeding pursuant to s41(2) where the summons was not served in accordance with s34. The appeal should therefore be allowed on that ground and orders set aside.

12. It is therefore not necessary for me to consider the second question. Nevertheless, in case the matter should go further and in deference to the arguments presented, I will venture my views.

13. Section 57 of the *Road Safety Act* 1986 sets out the evidentiary provisions with respect to blood tests for certain driving offences. The informant is permitted to rely upon a certificate as to the taking of a blood sample and a certificate as to its analysis. Sub-section (5) then provides a condition for admissibility of these certificates, and I quote:

> "A certificate given under this section must not be tendered in evidence at a trial or hearing referred to in sub-section 2(a), (ab), (b) or (c) without the consent of the accused unless a copy of the certificate is proved to have been personally served on the accused more than 10 days before the day on which the certificate is tendered in evidence".

To my mind, the intent of parliament is clearly expressed. Compliance with the service requirement is a pre-condition to admissibility of a certificate under this section. There is an evident policy underlying this that the defendant should have the opportunity of considering the content of the certificate well before trial. A certificate which has been short-served in terms of the date of its tender into evidence is inadmissible. The second question therefore should also be answered in the affirmative.

14. I propose therefore that the appeal should be allowed and that the orders of the Magistrates' Court at Melbourne made on 21 June 2002 be set aside.

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[1] (1993) 19 MVR 55.
[2] [1998] VSC 170.
[3] *Brereton v Sinclair* [2000] VSCA 211; (2000) 2 VR 424; (2000) 118 A Crim R 366.
[4] [2000] VSCA 211; (2000) 2 VR 424 at 432 [25]; (2000) 118 A Crim R 366.
[5] Unreported, SC (Vic) 11 March 1994.
[6] [1999] VSC 410.

APPEARANCES: For the appellant Platz: Mr P Reynolds, counsel. Keogh & Co, solicitors. For the respondent Barmby: Mr K Armstrong, counsel. Solicitor for Public Prosecutions.
