19/93

SUPREME COURT OF VICTORIA

NITZ v EVANS

Hayne J

2, 7 April 1993 — (1993) 19 MVR 55

PROCEDURE – SERVICE OF SUMMONS – COPY SERVED NOT SIGNED BY APPROPRIATE REGISTRAR – WHETHER "A TRUE COPY OF THE SUMMONS" – APPEARANCE 'UNDER PROTEST' – DEFECT IN SERVICE NOT WAIVED – WHETHER SUMMONS PROPERLY SERVED – WHETHER COURT IN ERROR IN HEARING CHARGE: *MAGISTRATES' COURT ACT* 1989, SS34(1), 41(2).

Section 34(1) of the *Magistrates' Court Act* 1989 ('Act') requires service on a defendant of a true copy of the summons to answer to a charge issued and signed by the appropriate Registrar. Where a charge copy served on a defendant did not show the Registrar's signature or title, the summons was not served in accordance with the Act. Accordingly, where the defendant did not waive the defect as to service upon an appearance 'under protest', a magistrate was in error in proceeding to hear and determine the charge.

HAYNE J: [1] On 18th May 1992 Constable Andrew Evans filed with the Registrar of the Magistrates' Court at Heidelberg a charge that Hans John Nitz did on 11th July 1991, within three hours after driving a motor vehicle when it was involved in an accident, have a sample of blood taken which was found on analysis to have more than the prescribed concentration of alcohol present in it contrary to s49(1)(g) of the *Road Safety Act* 1986. The charge was filed on a form of "Charge and Summons" which followed Form 7 of the *Magistrates' Court General Regulations* 1990. It provided that the case would be heard at the Magistrates' Court at Heidelberg on 6th May 1992.

The Registrar signed or stamped with a facsimile signature stamp and printed the title on one or more copies of the document against the printed words on the form "Issued by (Signature)". On 22nd April 1992 one copy of the document was served on Nitz but the copy served did not indicate that it had been signed by the Registrar and did not indicate that the Registrar's title had been noted on the document. On 15th July 1992 the matter came on for mention in the Magistrates' Court at Heidelberg. Counsel announced an appearance under protest on behalf of Nitz and informed the Court that he wished to contend that the summons had not been served properly. After hearing argument, the learned Magistrate ruled that the document which had been delivered to Nitz was not a true copy of the summons that had been issued and he adjourned what he described as "the proceeding" to 3rd August 1992 ordering the informant to serve a notice of adjournment on the defendant at the office of the **[2]** solicitor who had instructed counsel. That notice was served in accordance with the order.

On 3rd August 1992 the matter came on for further hearing but was adjourned to 15th October 1992 when counsel again attended and again announced an appearance under protest on behalf of the defendant. Counsel then contended that the summons not having been served on the defendant the Court had no jurisdiction to hear or determine the matter and the charge should be dismissed or struck out. The learned Magistrate held that he was entitled to proceed with the matter and counsel for the defendant then withdrew. The matter proceeded without the defendant being present or represented and Nitz was convicted of the offence with which he was charged. Nitz now appeals against the conviction, submitting that the summons was never served upon him as required by the *Magistrates' Court Act* and that accordingly the Court below had no jurisdiction to hear or determine the charge.

A criminal proceeding may be commenced in the Magistrates' Court by filing a charge with the appropriate Registrar (*Magistrates' Court Act*, s26(1)(a)) and on filing the charge an application may be made to the appropriate Registrar for the issue of a summons to answer to the charge (s28(1)(a)). The Registrar is bound to issue a summons to answer to the charge if he is satisfied

that the charge discloses an offence known to law (s28(4)(a)). The Registrar issues the summons by signing it or stamping it with a facsimile signature stamp (*Magistrates' Court General Regulations* 1990 Reg.302).

[3] Section 33(1) of the Act provides that:

> "A summons to answer to a charge must direct the defendant to attend at the proper venue on a certain date and at a certain time to answer the charge."

Section 34(1) provides that:

> "Every summons to answer to a charge, except where otherwise expressly enacted—
> (a) must be served at least 14 days before the mention date; and
>
> (b) must be served on the defendant by—
> (i) delivering a true copy of the summons to the defendant personally; or
> (ii) leaving a true copy of the summons for the defendant at the defendant's last or most usual place of residence or of business with a person who apparently resides or works there and who apparently is not less than 16 years of age."

Section 41 deals with cases in which the defendant does not appear. The provisions differ according to whether the summons is a summons to answer to a charge for an indictable offence or is a summons to answer to a charge for a summary offence. So far as presently relevant the section provides:

> "(1) If the defendant does not attend in answer to a summons to answer to a charge for an indictable offence which has been served in accordance with this Act, the Court may issue a warrant to arrest the defendant.
>
> (2) If a defendant does not appear in answer to a summons to answer to a charge for a summary offence, the Court may—
> (a) issue a warrant to arrest the defendant; or **[4]**
> (b) proceed to hear and determine the charge in the defendant's absence in accordance with Schedule 2; or
> (c) adjourn the proceeding on any terms that it thinks fit."

In adjourning the proceeding on 15th July 1992 and ordering the informant to serve notice of adjournment at the office of the defendant's solicitor the learned Magistrate said that he was acting under s41(2). He noted that unlike sub-s(1) which relates to indictable offences sub-s(2) does not speak of a summons "which has been served in accordance with this Act" and he held, in effect, that service in accordance with the Act was not a pre-condition to the exercise of the power given by s41(2) to deal with the matter in the absence of the defendant. Both below, and on the hearing of this appeal counsel for the appellant contended that s41 could not be used to overcome the jurisdictional difficulty presented by the fact that at no time had service been effected in accordance with s34 and contended that unless there had been service in accordance with s34 (or the defendant had waived the requirement for such service – whether by unconditional appearance or otherwise) there could be no hearing of the charge.

There was in this case no doubt that a criminal proceeding had been properly commenced by the filing of the charge. No complaint was made about that step. Further, there was no doubt that a summons to answer to that charge had been properly issued by the appropriate Registrar. Again no challenge was made to this proposition. The only question was whether, given that what was served on the defendant was not a true copy of the summons that had been issued, the **[5]** learned Magistrate was entitled to proceed to hear and determine the charge.

The respondent to the appeal pointed to the fact that what was served on the appellant contained all the material prescribed by s33(1): it directed the defendant to attend at a stated venue on a specified date and at a particular time to answer the charge described in the document. The respondent then sought to argue that because the document served contained all of the information prescribed by s33(1) there had been compliance, or perhaps sufficient compliance, with s34. The learned Magistrate's earlier finding that the document served on Nitz was not a true copy of the summons may be said to be a finding of fact that stands in the way of this submission on behalf of the respondent and indeed it was said to be a complete answer to it.

However this may be, there is a further, and to my mind, fundamental difficulty in the argument. The argument proceeds from the premise that a summons to answer to a charge need contain no more information than that which is prescribed by s33(1). So much may be accepted as a statement of what a summons must contain. But the summons must be issued, and that step is taken, as I have noted above, by the signing of the summons by the appropriate Registrar. Thus when s34 requires the service of a true copy of the summons it requires service of a true copy of the summons that has been issued. It follows in my view that s34 requires the service of a copy which will show to the defendant that fact of issue. Thus it requires service of a copy which will show that it has been **[6]** signed by the issuing authority and what was served in this case did not.

Much of the argument on the appeal was couched in terms of whether in the events that had happened the Court below had jurisdiction. In the end I doubt that it is useful to speak in terms of presence or absence of jurisdiction in the Court below: at least without going on to identify the sense in which the expression is used. (See *Parisienne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; (1938) 59 CLR 369; [1938] ALR 119.) As I have said, there is no doubt that a criminal proceeding had been validly commenced and a summons had been regularly issued. It may be, then, that analogies can be drawn between the charge and summons on the one hand and the information and process spoken of in *R v Hughes* (1879) 4 QBD 614) on the other. In that case Hawkins J said (4 QBD at 625) that:

> "The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid, that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place (unless under special statutory enactment)."

The question at issue in the present matter is whether the defects in service were such as to preclude the Court from proceeding to hear and determine the charge. In my view it is not necessary to decide whether the difficulties about service go to the jurisdiction of the Court or go only to the **[7]** question of whether a "hearing in the nature of a trial could take place" (to adopt the words of Hawkins J). Section 34 is cast in mandatory terms. It says that "Except where otherwise expressly enacted" every summons to answer to a charge "must be served" before a particular time and "must be served on the defendant" by one of two prescribed methods, each of which requires the delivery or leaving of a true copy of the summons.

The informant submitted that if what was served was not a sufficient compliance with the requirement to serve a true copy of the summons, then s41 provided an exception to the otherwise mandatory requirement of s34. At first sight the omission of the words "which has been served in accordance with this Act" from s41(2) dealing with non-appearance in answer to a summons to answer to a charge for a summary offence would suggest that a court dealing with such a charge may exercise its powers in different circumstances from those that govern the case of a summons to answer to a charge for an indictable offence. If this is not so, why include the words "which has been served in accordance with this Act" in sub-s(1) but omit them in sub-s(2)? Yet it is clear that the powers conferred by sub-s(2) are to be exercised only "if a defendant does not appear in answer" to a summons. It would be unthinkable that Parliament should intend that there should be power to hear and determine a criminal charge in a case where a summons has been regularly issued but never served and never brought to the attention of the defendant.

Thus the bare facts that a summons has been regularly issued and that a defendant does not appear cannot, **[8]** without more, ground the exercise of the powers conferred by s41(2). In my view it is implicit in the expression "if a defendant does not appear to answer to a summons" that the defendant has been afforded the opportunity to appear. Clearly the defendant has been afforded that opportunity if the summons has been served in accordance with the Act. Moreover I do not consider that it can be said "that a defendant does not appear in answer to a summons" if there has been no service in accordance with the Act but the defendant is, by some means or other, aware of the fact that a summons has been, or may have been, issued. To read s41(2) as permitting a court to proceed in such a case would be to avoid the otherwise mandatory requirements of s34 and I do not consider that s41(2) is to be read in this way. In particular I do not consider that it is to be read as an "other express enactment" of the kind contemplated by the

excepting words of s34(1). Thus in my view it cannot be said that "a defendant does not appear in answer to a summons" for the purposes of s41(2) unless the defendant has been served with that summons in accordance with the Act. The appellant at no time waived the defect in service of which he complained. The respondent did not contend that the appearances under protest amounted to such a waiver nor would such an argument appear to have been open. (*Pritchard v Jeva Singh* [1915] VicLawRp 74; [1915] VLR 510; 21 ALR 350; 37 ALT 50; *Ray v The Justices of Melbourne and Whitney* [1891] VicLawRp 45; (1891) 17 VLR 186; 12 ALT 208; *Dixon v Wells* (1890) 25 QBD 249; *R v Brentford Justices ex parte Catlin* [1975] QB 455.)

Nor did the respondent contend that any difficulties about service had **[9]** been cured by the order for service of the notice of adjournment. It was not suggested that this order amounted to some order for substituted service pursuant to s34(2) of the Act. It was not expressed to be such an order and it may well be doubted that there was any material before the Court that service could not be promptly effected upon Nitz in the ordinary way. Indeed it was by serving Nitz with a copy of the summons that the difficulties facing the informant might have been cured. Had the informant sought an adjournment of the matter or an extension of the mention date when the difficulties of service were first pointed out and then set about serving on the defendant a true copy of the summons, returnable at a later date, none of the difficulties now encountered would have arisen.

As the respondent submits, s50 of the Act, and for that matter Regulation 1203 of the *Magistrates' Court General Regulations* 1990, exhibit the legislature's intention that formal defects should not be permitted to stand in the way of proceedings And it may also be accepted that the appellant's point is one without merit and one that might be described as opportunistic. However s50 does not deal with objections to the sufficiency of service; it deals with objections to "a charge, summons or warrant". Here the objection was not an objection to a summons; it was an objection to the sufficiency of the steps taken to serve it. (Regulation 1203 deals with non-compliance with the prescribed forms and does not bear upon the present matter.) The Act requires that every summons be served and be served in one of two ways. (In this respect the Act **[10]** differs from that considered by Sholl J in *Davidson v McCarten* [1953] VicLawRp 96; [1953] VLR 697; [1954] ALR 42; cf. *Marshall v Burman* [1960] VicRp 25; [1960] VR 162.) This summons was not served in accordance with the Act. The defendant did not waive the defect. That being so, it follows that the learned Magistrate should not have gone on to hear and determine the charge until the defendant had been properly served as the Act required.

The appeal should be allowed and the orders below set aside. The time for any extension of the date for return of the summons long since having passed it follows in my view that in lieu of the orders below it should be ordered that the charge is dismissed. Given the nature of the objection taken below I consider that each party should bear its own costs of the proceeding below but subject to anything that counsel may say, I consider that the appellant should have his costs of the appeal.

APPEARANCES: For the appellant Nitz: Mr AFA Lindeman, counsel. Devenish & Co, solicitors. For the respondent Evans: Mr SP Gebhardt, counsel. Solicitor for the DPP.
