25/92

SUPREME COURT OF VICTORIA

GOODMAN v STAFFORD

Hampel J

25 March, 15 April 1992 — (1992) 15 MVR 145

PROCEDURE – AMENDMENT OF INFORMATION – PLACE OF OFFENCE OMITTED – DEFENDANT APPRISED AFTER 18 MONTHS – ALIBI DEFENCE POSSIBLY LOST – CONDUCT OF DEFENCE POSSIBLY PREJUDICED – WHETHER OMISSION A MERE DEFECT OR FUNDAMENTAL DEFECT – WHETHER DEFECT CURABLE BY AMENDMENT: *MAGISTRATES' COURT ACT* 1989, S50.

On 1 July, 1988, G. allegedly failed to furnish a sample of breath for analysis. An information was laid on 14 July, 1988 however, the place of offence was omitted. After a number of adjournments, the charge was adjourned to a date to be fixed. On 22 February, 1990 the informant issued a fresh summons which included the place of the alleged offence. However, upon its return, it was struck out as having been issued outside the 12-month limitation period. When the original charge came on for hearing, the magistrate allowed an amendment by inserting the place of offence and later found the charge proved. Upon appeal—

HELD: Appeal allowed. Conviction and sentence quashed.
(1) Whilst pursuant to s50 of the *Magistrates' Court Act* 1989 ('Act') a court may amend an information which contains a defect or error in form, the question to be determined is whether what has occurred is a mere misdescription or defect curable by amendment or whether it amounts to a fundamental defect.

(2) In the present case, because of the delay of 18 months in specifying the place of the alleged offence and the fact that breath testing stations are frequently mobile units, it is feasible that the conduct of the defendant's defence (such as alibi evidence) could well have been prejudiced by the failure to specify the place of offence.

(3) Accordingly, the omission did not constitute a defect or error within s50 of the Act and the Magistrate erred in allowing the amendment.
***Kerr v Hannon* [1992] VicRp 3; (1992) 1 VR 43, followed.**
[See also, *Smith v Van Maanen* (1991) 14 MVR 365; MC35/1991. Ed.]

HAMPEL J: [1] This is an appeal on a question of law pursuant to s92 of the *Magistrates' Court Act* 1989. The appeal is against an order made on 16th July 1991 by the Magistrate at Prahran convicting the appellant pursuant to s49(1)(e) of the *Road Safety Act* 1986 for failing to furnish a breath sample for analysis. The matter has a long and an unhappy history. The original information laid on 14th July 1988 by Brent Anthony Stafford alleged that the defendant:

> "On Friday 1 July, 1988, having been lawfully required by a member of the police force to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) did fail to comply with such requirement".

Beneath this was typed the section against which the defendant had offended, namely s49(1)(e) of the *Road Safety Act* 1986. On 14 July 1988, the hearing of the summons was adjourned to 15 August 1988, and, on that subsequent date was further adjourned to 13th December 1988. At the hearing on 13th December 1988, a medical witness was unavailable and the matter was adjourned to a date to be fixed. The appellant's solicitors made enquiries on 16th February 1989 concerning a new date but received no response.

On 22nd February 1990, the informant issued a further summons, one which indicated that the place of the offence was Windsor. This information was heard on 22nd May 1990 and was struck out for having been issued outside the twelve months time period provided by s165 of the *Magistrates (Summary Proceedings) Act* 1975. On 27th May 1990, the original information was further adjourned at the **[2]** request of the respondent who wished to consider his position in relation to any further action. On 16th July 1991 the original information was heard. According

to the affidavit of the appellant dated 14th August 1991, the appellant's counsel submitted that the information should be dismissed for failing to specify the location at which the alleged offence occurred. Before hearing any evidence, the Magistrate rejected the submission made on the appellant's behalf and allowed an amendment of the information by the insertion of the place of the alleged offence. The appellant was duly convicted, fined $600 and disqualified from obtaining any licences for a period of four years.

Only one ground of appeal was argued before me, namely that the Magistrate erred in holding that to amend the information by inserting the place of the alleged offence would not amount to the laying of a fresh information outside the twelve months limit prescribed by s26(4) of the *Magistrates' Court Act* 1989. It was common ground that the Magistrate had to consider the question of amendment under s50 of the *Magistrates' Court Act* 1989 even though at the time of the offence a different and less restrictive section, s157 of the *Magistrates (Summary Proceedings) Act* 1975, applied.

Section 50 of the *Magistrates' Court Act* 1989 provides:

> "(1) On the hearing of a proceeding the Court must not allow an objection to a charge, summons or warrant on account of any defect or error in it in substance or in form or for any variance between it and the **[3]** evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error.
>
> (2) An order must not be set aside or quashed only because of a defect or error in form but the Court may amend the order to correct the defect or error."

On behalf of the appellant, it was argued by Miss Feely of counsel that the omission of the place of the offence in the original information was not merely a defect or error in substance or form as would allow amendment pursuant to s50 outside the time limit. Rather, the insertion of the place would amount to the laying of a fresh information. In this regard, counsel relied on what Nathan J said in *Kerr v Hannon* [1992] VicRp 3; (1992) 1 VR 43 at 45:

> "An amendment to insert the critical date, and also a place of the alleged offences does not amount to varying an information. It amounts to rectifying a fundamental defect in terms not permitted by s165." (of the *Magistrates (Summary Proceedings) Act* 1975.)

Miss Feely submitted that the failure to include the place of the offence was a fundamental defect which had potentially robbed her client of the opportunity to rely on evidence of alibi or other possible defences at the hearing of the information. In the alternative it was said that even if the amendment did not amount to the laying of a fresh information, a discretion should be exercised not to allow the amendment because of the amount of time which has elapsed since the commission of the offence and the failure by the respondent to lay a fresh information stating the place at which the offence is said to have been committed within the twelve month period.

[4] On behalf of the respondent, it was argued by Mr Kemelfield of counsel that the Magistrate was correct in permitting the amendment in all the circumstances in the exercise of his discretion because no evidence was led as to any unfairness which flowed from the omission of the place in the original information. Mr Kemelfield submitted that the object of the new *Magistrates' Court Act* 1989, as evidenced by s1, was to prevent ineffectual court procedures and that the Court no longer had the discretion to allow any defect or error in form or substance to defeat an information. Mr Kemelfield further submitted that the failure to insert the place of the offence was not a fundamental defect the correction of which would constitute the laying of a fresh information. Rather, the defect was merely one of want of particularity which could be cured by the provision of further and better particulars. In this regard, Mr Kemelfield referred to a number of authorities including *Warner v Sunnybrook Ice Cream Pty Ltd* [1968] VicRp 11; [1968] VR 102; (1967) 15 LGRA 135; *Wright v O'Sullivan* (1948) SASR 307; *Woolworths (Victoria) Ltd v Marsh* (unreported, Ormiston J, 12th June 1986); and *R v Magistrates' Court at Heidelberg & Ors; ex parte Karasiewicz* [1976] VicRp 73; (1976) VR 680.

There have been numerous decisions in the past upon which Mr Kemelfield relied in which mis-descriptions have been held to be mere defects curable by amendment (for example, *Cotteril v Johal*, High Court of Justice: Queens Bench Divisional Court: Ormrod LJ and Woolf J,

December 2nd 1981). However, each case must be considered on its own peculiar facts and the question must be determined whether in **[5]** the particular context what has occurred is a mere mis-description or defect curable by amendment or whether it amounts to a fundamental defect.

It is common knowledge that breathalyser testing stations are frequently mobile units at which many people may be tested during the time when the unit is set up. It is of course also feasible that a person may move about the State or move interstate on any particular day and may come across any number of such mobile units. In those circumstances, and particularly because the first indication to the defendant of the place of the alleged offence came 18 months after the laying of the original information, it is feasible that the conduct of the appellant's defence could well have been prejudiced in a number of ways by the failure to specify the place where the alleged offence occurred. I agree with the view expressed in *Kerr v Hannon* that an information must state the nature of the alleged offence, as well as when and where it is alleged to have been committed. This basic principle was endorsed by the High Court in *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104, where Latham CJ said at CLR p479:

> The complaint must show upon its face that what is charged is an offence according to law and it is sufficient if its sets forth the acts which are relied upon as constituting the offence with such a reference to time and place as identifies those acts.

Although s50 of the *Magistrates' Court Act* 1989 is expressed in directive terms, there is still the requirement that a determination be made in the circumstances of a particular case whether the omission is a defect or error **[6]** within the ambit of the section. I find that the omission did not constitute a defect or error within the ambit of s50 and therefore that the Magistrate erred in allowing the amendment. Accordingly, the appeal is allowed, and the conviction and sentence are quashed.

APPEARANCES: For the applicant Goodman: Ms N Feely, counsel. Coadys, solicitors. For the respondent Stafford: Mr R Kemelfield, counsel. Director of Public Prosecutions.
