18/98

SUPREME COURT OF VICTORIA

BAYNE v MARTIN

Hampel J

2, 28 April 1998

PROCEDURE – ERROR IN CHARGE – WRONG YEAR IN DATE OF OFFENCE – APPLICATION FOR AMENDMENT –- WHETHER ERROR CAPABLE OF AMENDMENT: *MAGISTRATES' COURT ACT* 1989, S50.

A charge and summons dated 21 May 1997 alleged that the offence occurred on 20 November 1997. At the hearing in December 1997, the magistrate granted the prosecutor's application to amend the date of offence to 20 November 1996. Upon appeal—

HELD: Appeal dismissed.
Section 50 of the *Magistrates' Court Act* 1989 deals with errors of substance and form and provides a mechanism by which such errors may be corrected. In the present case it was clear from the charge that the date was a temporal impossibility and was clearly an error as to the year. The amendment did not amount to the laying of a fresh information and the magistrate was not in error in making the amendment.

HAMPEL J: **[2]** This appeal arises from the order of Magistrate Couzens ("the Magistrate") wherein the appellant was found guilty of the charge of exceeding the speed limit and fined. The Magistrate allowed the prosecution to amend the charge pursuant to section 50(1) of the *Magistrates' Court Act*. Section 50(1) of the *Magistrates' Court Act* provides:

> "50(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 evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error.
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> (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."

The background of this matter may be summarised briefly. The defendant was charged with exceeding the speed limit. The charge and summons was dated 21 May 1997, however the offence was alleged to have occurred on 20 November 1997, a temporal impossibility. The hearing was held on 3 December 1997 and the defendant pleaded not guilty. An application was made by the prosecution pursuant to section 50(1) of the *Magistrates' Court Act*, to amend the charge to allege the date of the offence as being 20 November 1996. This was opposed and legal argument followed. The Magistrate allowed the amendment and following his ruling, the defendant pleaded guilty. The defendant has appealed, arguing that the Magistrate should not have allowed the amendment to the charge.

Mr Lavery, who appeared on behalf of the appellant submitted that the Magistrate had no jurisdiction to allow the amendment. He argued that such an amendment amounted to the laying of a fresh charge and, as 12 months had expired, this would infringe section 26(4) of the *Magistrates' Court Act* which requires that proceedings for summary offences must be commenced within 12 months of the date of the alleged offence. **[3]** Mr Lavery relied on *Kerr v Hannon* [1992] VicRp 3; [1992] 1 VR 43 at 45 for the proposition that:

> "where an information must be laid within a specified time from the date upon which it is alleged the offence was committed, it must contain that date or other particulars which would enable the defendant to ascertain the date. In the event of an information failing to do so, an amendment to insert the missing particulars made after the expiration of the time limit cannot be permitted. It would amount to the laying of a fresh information outside the time limit and thus be invalid."

He further relied on *Hackwill v Kay* [1960] VicRp 98; [1960] VR 632 for the proposition

that the date of the offence is an essential part of the information, and argued that in the present case, there is no other information in the charge by which the appellant could have known the date of the offence.

Mr Horgan, who appeared on behalf of the informant, referred to *Kerr v Hannon* and argued that the case is distinguishable from the present case because it is an instance in which no date or place of the alleged offence was disclosed. It is not a case of an incorrect date being inserted. He argued that in the present case, it is clear that the "1997" was an error, and it was apparent that it should have been a reference to "1996". Mr Horgan referred to *Hackwill v Kay* and argued that, although the charge was not amended in that case, it contemplated that an amendment may occur. Mr Horgan referred to *Goodman v Stafford* [1992] 15 MVR 145 a case in which the police failed to include the place at which the offence occurred. I held, on appeal, that the failure to specify the place of the offence did not constitute a defect or error within the ambit of section 50. Mr Horgan relied on my comments that each case must be considered on its own peculiar facts, and that the question to be asked is whether, in the relevant context, what has **[4]** occurred is a mere misdescription or defect curable by amendment or whether it amounts to a fundamental defect. He submitted that in the present case, the error was not fundamental and is curable by amendment.

Mr Horgan also relied on *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367 in which a driver was required to undergo a preliminary breath test at Prahran Police Station, rather than at Elwood where he was initially stopped by the Police. The information alleged that the offence occurred at Elwood. Counsel argued that the information was defective because the offence should have been alleged to have occurred at Prahran. Ormiston J was of the view that such an error was simple and understandable in that the informant had chosen the place of driving rather than the place of testing. His Honour said that "the original information was not defective. There was a mere variance. That variance was and is capable of correction pursuant to s50 of the *Magistrates' Court Act* 1989 and the point is wholly without merit." Mr Horgan argued that in the present case, the error is simple and understandable in that the wrong year was inserted, the year alleged being a temporal impossibility. Finally, Mr Horgan relied on Dixon J in *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583; [1947] ALR 27 at CLR 601 –

> "An offence may be clearly indicated in an information, but, in its statement, there may be some slip or clumsiness, which, upon a strict analysis results in an ingredient in the offence being the subject of no proper averment...yet it would seem to be a fit case for amendment, if justice is not to be defeated."

His Honour, Mr Horgan submitted, then went on to distinguish this with a case in which no information is available to identify the charge, and where amendment may not be available. Mr Horgan argued that the present case is clearly of the former kind, because there is other information to identify the offence, the error in the date being clearly a slip. **[5]** In my view, section 50(1) should be interpreted broadly. It deals with errors of substance and form, and provides a mechanism by which such errors may be corrected.

I think the present case is distinguishable from the cases relied on by Mr Lavery, in that it is clear from the information that the date alleged is a temporal impossibility, and that this must be an error. As this was clearly an error as to the year, the date of the alleged offence was otherwise sufficiently identified and had to be 20 November 1996. All other required elements of the charge were stated. It is not a case such as *Kerr v Hannon* in which no date or place of the alleged offence was disclosed. I do not think this is a fundamental defect that is incurable by amendment: *Goodman v Stafford* (1992) 15 MVR 145. In my view, this analysis is consistent with the reasoning of Ormiston J in *DPP v Webb*, and of Dixon J in *Broome v Chenoweth*.

For these reasons, I do not think that an amendment of the kind sought in the present case amounts to the laying of a fresh information. I find that it was open to the Magistrate to amend the date of an alleged offence on the Charge and Summons to a date being more than 12 months before the order for amendment. The appeal must therefore be dismissed with costs.

APPEARANCES: For the appellant: Mr J Lavery, counsel. Tony Danos solicitors. For the respondent: Mr G Horgan, counsel. Solicitor for Public Prosecutions.