44/73

SUPREME COURT OF VICTORIA

HINTON v COSWAY

Dunn J

14 December 1973

MOTOR TRAFFIC – DEFENDANT CHARGED WITH RIDING A MOTOR CYCLE WHILST LICENCE CANCELLED AND FAILING TO COMPLY WITH A RED LIGHT IN NOVEMBER 1970 – DEFENDANT APPEARED IN THE MAGISTRATES' COURT ON 2 JULY 1973 – DEFENDANT NOT SERVED WITH THE INFORMATIONS UNTIL HIS ARREST IN FEBRUARY 1973 – DEFENDANT ANNOUNCED THAT HE WOULD NOT PLEAD TO THE INFORMATIONS AS THE SUMMONSES HAD LAPSED – SUBMISSION UPHELD BY MAGISTRATE – INFORMATIONS DISMISSED WITHOUT ANY EVIDENCE BEING GIVEN – WARRANT RELATING TO THE CHARGE OF DRIVING WHILST LICENCE CANCELLED ISSUED ON 9 FEBRUARY 1973 – WHETHER MAGISTRATE IN ERROR: *JUSTICES ACT* 1958, SS18(2), 31(1), 36, 215; *MOTOR CAR ACT* 1958, S22C.

HELD: Order nisi absolute. Orders of dismissals set aside and remitted to the Magistrates' Court to be heard and determined according to law.

1. There was before the Magistrate a warrant issued on 9 February 1973 in respect of the Information relating to the offence of driving the motor cycle while the defendant's licence to drive was cancelled. That warrant was issued by the same Justice of the Peace before whom the original Informations were laid.

2. The Magistrate was in error in dismissing the Informations on the ground that they were barred by s215 of the *Justices Act*. It was necessary to keep in mind the distinction between the Information and the summons or warrant consequent thereon.

3. It was important to bear in mind that the warrant did not in any sense validate the Information, but it merely provided a means of bringing the defendant before the court so that the court had jurisdiction to dispose of the matter. In this particular case there was a warrant in respect only of the alleged offence relating to driving the car after his licence had been cancelled, but the fact that there was no warrant relating to the offence of failing to observe the traffic control signal did not justify the magistrate in refusing to deal with that Information.

DUNN J: This is an Order to Review a dismissal of two informations in the Magistrates' Court at Moonee Ponds on 2 July 1973. The informations were that the defendant:

> "(a) On the 3 November 1970 at Flemington, did drive a motor cycle on a highway to wit Smithfield Road, after his licence to drive a motor cycle had been cancelled; and
> (b) on the 3 November 1970, being the driver on the carriageway of Smithfield Road, did fail to observe and comply with the instructions of a traffic control signal displaying a red circle alone, erected at or near the intersection of Epsom Road and applicable to him."

When the Informations were called for hearing, the defendant appeared and was represented by his solicitor. His solicitor immediately announced that the defendant would not plead to the Informations because the offences were alleged to have been committed on 3 November 1970, the defendant had not been served with any process until his arrest on 2 February 1973, that such summonses demanded his appearance before the Magistrates' Court on 2 June 1971, that such summonses had lapsed and the Informations were "dead" by virtue of s215 of the *Justices Act* 1958. He contended they could only have been saved by the issue of a warrant within the twelve month period imposed by s215 of the *Justices Act* 1958.

The learned Stipendiary Magistrate upheld this contention and thereupon dismissed the Informations without any evidence being given. The Information in respect of each offence was laid and sworn on 6 April 1971. The summonses in respect of the Informations were issued on the same day and made returnable on 2 June 1971, but the Informations were not served until 12 February 1973 by which time the summonses had lapsed.

There was before the learned Stipendiary Magistrate a warrant issued on 9 February 1973 in respect of the Information relating to the offence of driving the motor cycle while the defendant's licence to drive was cancelled. That warrant was issued by the same Justice of the Peace before whom the original Informations were laid.

In my opinion, the learned Stipendiary Magistrate was in error in dismissing the Informations on the ground that they were barred by s215 of the *Justices Act*. It is necessary to keep in mind the distinction between the Information and the summons or warrant consequent thereon. Section 215 of the *Justices Act* is in the following terms:

> "Where a magistrates' court or justices are authorised by law to make an order in respect of any offence or where any offence or act is punishable by summary conviction, if no time is specially limited for laying an information in the Act of Parliament relating to such case, such information shall be laid within twelve months from the time when the matter of such information arose and not afterwards."

In respect of these Informations there was no special provision specifying a time within which an Information could be laid for either of the offences, and therefore s215 was applicable. But that section deals with the laying of the Information which, if no time is otherwise fixed, must be laid within twelve months from the time when the matter arose. The Informations in these matters were laid with oath (see the *Justices Act* 1958 ss18(2), 31(1)) within the period of twelve months required by s215. The summonses issued thereon had clearly expired (see the *Justices Act* 1958, s21) and could form no basis for bringing the defendant before the court in 1973, but s36 of the Act does provide an additional means of doing so. It is in these terms:

> "The following rules shall be observed for the purpose of enforcing the appearance of any person against whom any information or complaint has been received by any justice:–
>
> (1) The Justice may issue his summons directed to such person requiring him to answer to such information or complaint;
>
> (2) In all cases where an information is laid for any indictable offence or offence punishable on summary conviction, the Justice before whom such information is laid (if the information is on oath) may (if he thinks fit) instead of issuing such summons as aforesaid issue in the first instance his warrant, or may if he thinks fit issue his warrant at any time before or after the time mentioned in such summons for the appearance of such person, to apprehend such person and to cause him to be brought before such justice or some other justice or some magistrates' court (as the case may be) to answer to such information and to be further dealt with according to law."

In this case the provisions of sub-s(2) of that section were complied with. The Informations were originally laid on oath. The same justice issued the warrant as had received the Informations after the time mentioned in the summons which he had issued for the appearance of such person. Section 215 has no application to the time in which such a warrant may be issued. That section deals only with the time within which an Information may be laid, not the time within which it must be heard, the time within which the defendant must be served with a summons or arrested on warrant.

I respectfully agree with the expression of opinion by Sholl J, as he then was, in *Hargreaves v Bourdon* [1963] VicRp 13; [1963] VR 89 at p95, and I quote from the judgment:

> "But it is important that I should state in certain particulars the limits of what I am here deciding: (1) If the original information is on oath, then, even if a summons issued in the first instance thereon, which (whether with or without extension) has failed to be served, the original justice, though he cannot, even within the 12 months fixed by s215, issue a second summons without a fresh information, can, in his discretion, before or after the end of the 12 months fixed by s215 – and, as far as I can see, at any time thereafter – issue his warrant upon the original information, under the express provisions of s36(2) of the *Justices Act*."

This conclusion is also supported in my opinion by the reasoning in *Brooks v Bagshaw* [1904] 2 KB 798. Mr Chernov also relied upon the principle to be drawn from the case of *Ex parte Findlay; re James* (1958) SR (NSW) 174 at p177; (1953) 70 WN 115 where Owen J, as he then was, speaking for the Full Court of New South Wales said this:

> "Where a person is in fact before the Court, whether brought there by summons or by warrant or

> being there for any other reason, an information, oral or written, by any person may thereupon be laid, and if this be done there is jurisdiction to try the offence."

And later:

> "Where a person is in fact before a magistrate, and no matter how he may have come there, he may object that no information has been laid, in which case he is entitled to go free unless an information is then and there laid, thus providing the court with the necessary basis for the exercise of jurisdiction ..."

Mr Chernov would apply the principle of those passages in the judgment to the cases where the Information has in fact already been laid and the defendant is for some reason in fact before the court, either brought there by warrant under s36(2), or by a summons or warrant in respect of some other matter or if he just happened to be fortuitously present before the court.

I am disposed to accept that argument as being correct. It is important to bear in mind that the warrant does not in any sense validate the Information, it merely provides a means of bringing the defendant before the court so that the court will have jurisdiction to dispose of the matter. In this particular case there was a warrant in respect only of the alleged offence relating to driving the car after his licence had been cancelled, but in my opinion the fact that there was no warrant relating to the offence of failing to observe the traffic control signal does not justify the magistrate in refusing to deal with that Information.

Accordingly, for these reasons, it is my opinion the Magistrate should have proceeded to hear the Information and dispose of it as he thought fit in the light of the evidence that was given. The order nisi will be made absolute with $200 costs. The orders dismissing each of the informations will be set aside and there will be an order that the Magistrate hear and dispose of the Informations according to law.
