15/01; [2001] VSCA 4

SUPREME COURT OF VICTORIA — COURT OF APPEAL

GIGANTE v HICKSON

Tadgell, Callaway and Batt JJ A

7 December 2000; 23 February 2001

[2001] 3 VR 296; (2001) 33 MVR 51; (2001) 120 A Crim R 483

PROCEDURE – CHARGE AND SUMMONS – DRINK/DRIVING CHARGE – APPLICATION BY PROSECUTOR TO AMEND PLACE OF ALLEGED OFFENCE – APPLICATION GRANTED – WHETHER PLACE OF OFFENCE AN ESSENTIAL INGREDIENT IN OFFENCE – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, S49(1)(f); *MAGISTRATES' COURT ACT* 1989, S50(1).

A charge alleged that G. at Deer Park within 3 hours of driving furnished a sample of breath in excess of the prescribed concentration. The sample of breath was furnished at a breath testing vehicle in Yarraville. At the hearing of the charge the magistrate allowed an amendment of the charge by substituting the word "Yarraville" for the words "Deer Park" and convicted G. On appeal to the County Court the judge found the offence proved, imposed the same orders but stated a case for the Court of Appeal. The question reserved was whether the magistrate acted in accordance with the law in allowing the amendment of the charge.

HELD: Question declined to be answered on the ground that to answer the question would be of no practical value.
The offence under s49(1)(f) occurs at the place where the sample was furnished which, in the present case, was Yarraville. The place of offending in the charge under s49(1)(f) of the *Road Safety Act* 1986 is not an essential element of the offence and was not a material allegation. However, this does not mean that the place of offending was not an important particular to which G. was entitled as a matter of procedural fairness. The charge in the present case merely named a suburb which the evidence to be led would show to be erroneous. Since the suburb was not essential to the offence, the substitution of a different suburb did not amount to charging a different offence. The offence remained the same though a particular in the charge was altered. Justice, which is a two-way street, required either amendment or (on proof in due course of the necessary facts) conviction on the unamended charge.
***Kerr v Hannon* [1992] VicRp 3; [1992] 1 VR 43; and**
***Goodman v Stafford* (1992) 15 MVR 145, disapproved.**

TADGELL JA:
1. Having had the advantage of reading in draft the reasons prepared by Batt JA, I agree with all that his Honour has said.

CALLAWAY JA:
2. I, too, agree in the judgment of Batt JA.

BATT JA:
3. The court has before it a question of law reserved by a judge of the County Court pursuant to s446(1) of the *Crimes Act* 1958 and the case stated by him pursuant to s447(1). The material facts set forth in the case are given in the following paragraphs.

4. At approximately 7.15pm on Friday 31 May 1996 Sante Gigante, whom I shall call "the appellant", was intercepted by Sergeant Kevin David Hickson of the Victoria Police, whom I shall call "the respondent", in a service lane of the Western Highway near its intersection with Station Road at Deer Park. The respondent administered a preliminary breath test to the appellant and, being of opinion as a result that the appellant's blood contained alcohol, required the appellant to accompany him to a breath testing vehicle situated in Geelong Road, Yarraville. There the respondent required the appellant to undergo a breath test pursuant to s55 of the *Road Safety Act* 1986. At 7.55pm the appellant furnished a sample of breath, which was analysed by a breath testing instrument and gave a reading of .110%.

5. The appellant was charged with an offence under s49(1)(f) of the *Road Safety Act* and that charge was heard by the Magistrates' Court at Williamstown on 26 August 1997. As typed, the charge read:

> "The defendant at Deer Park on 31/05/96 did within 3 hours after driving a motor vehicle furnish a sample of breath for analysis by a breath-analysing instrument pursuant to s55(1) of the *Road Safety Act 1986*, and (1) The result of the analysis recorded or shown by the breath-analysing instrument indicated that more than the prescribed concentration of alcohol was present in his/her blood; and (2) The concentration of alcohol indicated by the analysis to be present in his/her blood was not due solely to the consumption of alcohol after being in charge of the motor vehicle."

At some stage, which the judge could not determine[1], the word "Footscray" was printed by hand immediately after the words "Deer Park".

6. On 26 August 1997 the magistrate amended, or allowed the amendment of, the charge by the deletion of the words "Deer Park Footscray" and by the substitution therefor of the word "Yarraville". The magistrate found the offence proved and, with conviction, fined the appellant $420 with $48.50 statutory costs. He further ordered that the appellant's licence be cancelled and that the appellant be disqualified from driving in Victoria for a period of 11 months. It was ordered that there be a stay to 23 September 1997[2]. On 26 August 1997 the appellant lodged an appeal to the County Court against the orders of the Magistrates' Court.

7. That appeal came on for hearing by the County Court judge on 29 June 2000. Notwithstanding submissions to the contrary by counsel for the appellant, he held that the County Court did not have jurisdiction to determine whether the magistrate was correct, as a matter of law, in amending, or allowing amendment of, the charge as above. He then proceeded to hear the appeal. He found the offence proved, set aside the orders of the Magistrates' Court as required by s86(1)(a) of the *Magistrates' Court Act* 1989, and then made orders virtually identical to those made by the magistrate save that the 11 months' period of disqualification was to run from 29 June 2000. On 30 June he ordered that the execution of those orders be postponed until the question of law stated by him should be considered and determined by this Court.

8. The question which his Honour reserved is as follows:

> "Did the County Court on the hearing of the above appeal have jurisdiction to determine whether the learned magistrate had acted in accordance with law in amending, or allowing the amendment of, the charge on 26 August 1997?"

9. The answer to the question reserved depends on the meaning and effect of the relevant provisions relating to appeals to the County Court, and in particular ss83(1)[3], 85 and 86(1)(b) and (c) of the *Magistrates' Court Act* and s29(1) of the *Road Safety Act.*[4]

10. Mr Gillespie-Jones for the appellant informed the court that, if he succeeded in obtaining an affirmative answer to the question, he proposed to submit to the County Court judge on remitter of the matter to him that the magistrate[5] had been bound to refuse the amendment, and so had not acted in accordance with law in making or allowing it, because the amendment had the effect of impermissibly substituting a different offence and did so outside the time limit prescribed by s26(4) of the *Magistrates' Court Act.* (Counsel made it clear that the challenge to the magistrate's decision on amendment was not that the magistrate had mis-exercised his discretion in some way.) Accordingly, he proposed to submit to his Honour that he should dismiss the information since the evidence did not support the unamended charge. Indeed the outline of argument for the appellant sought a direction from this Court to the judge under s447(1) of the *Crimes Act* that he should find in favour of the appellant.

11. Section 26(4) of the *Magistrates' Court Act* provides:

> "(4) A proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence is alleged to have been committed, except where otherwise provided by or under any other Act."

It was not suggested that another time was provided by or under any other Act. By sub-s.(1) "[a] criminal proceeding must be commenced by filing a charge" with, relevantly, a registrar.

12. By s447(1) of the *Crimes Act* this Court is *empowered* to hear and finally determine a question reserved; but it is not *bound* to determine the question or questions in every case. A well recognised ground for declining to do so is that of inutility. In my opinion, to answer the present question will be of no practical value and the court should accordingly decline to answer it. I say this because, if his Honour had jurisdiction, he must, for the reasons set out below, have upheld the magistrate's decision on amendment[6], there being no suggestion of countervailing discretionary considerations. Thus, even if the question is answered affirmatively, the appellant will not achieve any practical success: the charge will stand amended and his conviction on it will remain.

13. One other provision must be set out. Section 50(1) of the *Magistrates' Court Act* provides:

> "(1) On the hearing of a proceeding the [Magistrates'] 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."

14. The offence under paragraph (b) of s49(1) of the *Road Safety Act* of driving with more than the prescribed concentration of alcohol present in the blood clearly occurs at the place of driving. Equally clearly, the presently relevant offence, that under paragraph (f) of s49(1), occurs at the place where the sample is furnished[7]. In the present case that place was undoubtedly Yarraville. But the place of offending ordinarily at least[8] is not, and in the present case in particular was not, an essential element of the offence under paragraph (f) and so ordinarily is not, and here was not, a material allegation.[9] Offences where the place of offending is an essential element or a material allegation are exemplified by that of dangerous driving on a public street and that of conducting a noxious business, say, in a town or on land zoned for residential use or within so many kilometres of the principal post office in the City of Melbourne. But, as *Parmeter v Proctor*[10] shows, even the identity of the street where the dangerous driving allegedly occurred is not material.[11] Offences such as I have instanced are quite different from the offence here in question.

15. That the place of offending was not essential or material in the instant case does not mean that it was not an important particular to which the appellant was entitled as a matter of procedural fairness. But he did not need to ask for it as it was supplied in the amendment. If he had been misled by the original charge or if the amendment had caught him by surprise, he would, other things being equal, have been entitled to an adjournment, but no such prejudice or embarrassment was suggested.

16. This is not a case where the original charge was defective in that it failed to allege an offence known to the law or was incomplete, or where it contained a latent ambiguity or duplicity. It merely named a suburb which the evidence to be led would show to be erroneous. Since the suburb was not essential to the offence, the substitution of a different suburb did not amount to charging a different offence. The offence remained the same, though a particular (included in the charge) was altered. Since the offence alleged in the amended charge was accordingly that alleged in the original charge (whose filing commenced the proceeding) and since the latter had been filed no later than 12 months after the date on which "the offence" was alleged to have been committed (31 May 1996)[12], there was no infraction of s26(4) of the *Magistrates' Court Act*[13]. Nor, contrary to the outline of argument for the appellant, had the power of amendment been used to overcome a time limit.

17. Rather, what occurred before the magistrate was that the prosecutor, to avoid an anticipated variance between the charge and the evidence presented in the proceeding (to use the language of s50(1) of the *Magistrates' Court Act*), applied for and was granted an appropriate amendment. That course accords entirely with the opinion expressed by Ormiston J in *DPP v Webb*[14]. Authorities on cognate legislation show that, because the place of offending in the present case was a non-essential particular, there would have been a mere variance when the evidence was led before the magistrate. Thus, in *Felix v Smerdon*[15] Latham, CJ is reported as stating that a variance exists where an offence which is charged is established with some variation or difference in detail, but that where the offence is really a different offence, then the term "variance" is not applicable. Similarly, in *Hackwill v Kay*[16] the Full Court, considering the meaning of "variance" in a forerunner of s50(1), quoted the statement of Crompton J in *Martin v Pridgeon*[17], a case in which time was not of the essence of the offence charged, that the variance meant was –

> "a difference between the mode of stating and the mode of proving the same thing *in substance*. ... Variance points to some distinction between the allegation of time or place and the proof of it."

The Full Court continued:

> "'Variance' in this section, therefore, does not cover every divergence between the evidence and the information. The principle appears to be that if the offence proved is essentially different from the offence charged, the latter part of [the forerunner section] has no operation. The learned author of *Paul on Justices of the Peace* (1936), says that variances in this section are limited to variances in non-essential particulars: see pp509-510."

18. It may well be that under the modern s50(1), as opposed to the section considered in *Hackwill v Kay*, amendment was not necessary and that the appellant could have been lawfully convicted on the unamended charge; for, as regards mere variance, the subsection simply prohibits the allowance of objection "for" it (that is, on the ground of it), and the power conferred to amend is confined to the correction of "any defect or error in [the charge] in substance or in form" [18]. But the appellant cannot complain that he had the benefit of correct particularisation of the offence. Justice, which is a two-way street, required either amendment or (on proof in due course of the necessary facts) conviction on the unamended charge. As regards the application for amendment, the only right exercise of discretion was to amend, to borrow the language of Brooking JA in *McMahon*[19].

19. Finally, several cases, of varying kinds, were relied on for the appellant in support of the submission intended to be made to the judge and it is necessary to consider them. In my view, for reasons which follow, none of them does support the proposed submission. All are distinguishable as being concerned with different points from the present one. *Dicta* in two of them that favour the appellant are, in my view, incorrect. I shall discuss them individually. *Hackwill v Kay*[20] concerned time, not place, where the relevant section, a forerunner of s26(4) but in more emphatic terms, made the date of offending of the essence of the offence. *Kerr v Hannon*[21] was decided principally at least on the question of the date of offending, on which *Hackwill v Kay* was followed. The date had been omitted from the three informations laid for driving offences, so that they were defective. Two of the informations also did not allege the place of offending.[22] In remarks which can be read as being *obiter* Nathan J said[23] that justice demanded that a defendant be apprised of the place of commission of the offence, in his view, and that amendment to insert the place amounted to rectifying a fundamental defect, and later[24] his Honour said that the prosecution must provide sufficient particulars to identify the place or location.

So far as those remarks relate to the supplying of particulars of the place of offending they are unexceptionable; but, in one place at least, they seem to suggest (and were understood in the case next to be discussed as suggesting) that the place of offending was an essential element of the offences under s49(1)(b) and (f) of the *Road Safety Act* (not the *Road Traffic Act* 1958, as stated in the judgment). That, as appears from what I have earlier said, is, in my view, incorrect. *Goodman v Stafford*[25] was concerned with the place of offending. The place had not been stated in an information under s49(1)(e) of the *Road Safety Act* for failing to furnish a sample of breath for analysis. Hampel J held that the magistrate erred in allowing an amendment to insert the place. His Honour's decision can be upheld as turning on discretionary considerations. But in addition his Honour agreed "with the view expressed in *Kerr v Hannon* that an *information must* state ... where [the offence] is alleged to have been committed"[26] and concluded[27] that the omission of the place did not constitute a defect or error within the ambit of s50. As is apparent from what I have already said, in my view neither of those propositions is correct. (I assume for present purposes in the case of the second proposition that the omission from the information was wrong.) I should say that I do not consider that in the passage from *Johnson v Miller*[28] cited by Hampel J for the first proposition Latham CJ meant that the place *must always* be stated in an *information* in order for it to be valid.

20. Mr Gillespie-Jones returned time and again to a passage in the judgment of Dixon J in *Johnson v Miller*[29], where, citing the decision of the Divisional Court in *Smith v Moody*[30], his Honour said that describing the offence in the words of the relevant section related only to the nature of the offence and did "not dispense with the necessity of specifying the time, place and manner of the defendant's acts or omissions". In *Johnson v Miller* the complaint did in fact state the day, place and circumstances of the offence, but the facts or alleged facts disclosed a latent

ambiguity in the complaint. Dixon J said that latent ambiguity might have been removed by making an amendment *or by giving particulars*. I do not consider that his Honour's statement as to the necessity of specifying the time, place and manner of the defendant's acts or omissions was intended to mean that those matters, and in particular the place, must always be stated in the information or charge itself. That they might be notified to the defendant in particulars is shown by his Honour's statement as to how latent ambiguity might have been removed. In *Smith v Moody*[31] Channell J spoke of "the usual necessity for specifying time and place and matter", though he later said that there must be facts relating to "the particular matter such as the time when and the manner in which the offence was committed"[32].

In that case the necessary ingredients of the offence had been omitted from the conviction as drawn up and, since the conviction had to be as precise as the summons or indictment, it was bad. Subsequent cases show that the better view of *Smith v Moody* is that, like *Johnson v Miller*, it is really concerned with particulars, as indeed McTiernan J had treated it in *Johnson v Miller* itself[33]: *Davies v Ryan*[34]*; Ex parte Lovell*; *Re Buckley*[35] per Jordan CJ*; De Romanis v Sibraa*[36], a passage cited with approval by Mason CJ and Deane and Dawson JJ in *John L Pty Ltd v Attorney-General (NSW)*[37]*;* the judgment of Brennan J (dissenting) in the last-mentioned case[38]; *R v Magistrates' Court at Heidelberg; Ex parte Karasiewicz*[39]*; Day & Riggs v Rugala*[40] and *Lillyman v Pinkerton*[41].

21. *John L Pty Ltd v Attorney-General (NSW)* was itself one of the cases relied on for the appellant. But there the information was defective because an essential factual ingredient of the offence in question was omitted, and it was held in the particular statutory context in which the proceeding occurred that none of the statutory provisions which might have operated to cure the defect was applicable. Finally, *Felix v Smerdon* was cited and an example given in *Parmeter v Proctor* was called in aid. In the first case and in the example the offence proved was a different offence from that charged. In *Felix v Smerdon* an offence at Clermont in New South Wales on 5 December 1942 was alleged. The evidence showed an offence at Comet, 90 miles away in Queensland, not earlier than 16 December 1942. In addition, under the relevant National Security Regulation the time of absence from work was an essential element of the offence. Latham CJ seems to have regarded that as decisive against the applicability of the New South Wales section roughly equivalent to s50(1) of the *Magistrates' Court Act*. Starke J held that because the offences charged and proved were different there was no variance and no defect in substance within the meaning of the New South Wales section. The reasons of the other three justices are not given in the note of the case. In *Parmeter v Proctor* Herron J said[42]:

> "It must be observed of course that a variation in date and place may so grossly misrepresent the position as to charge in effect a different offence altogether. One can easily understand that if A is charged with stealing in Dubbo on 1st January ... this would by no means warrant a conviction for his stealing in Grafton on 30 June. Such a case was that of *Felix v Smerdon* ..."

It is sufficient to say that the present case is simply not of the same kind as that example or as *Felix v Smerdon*.

22. For the foregoing reasons I have concluded that the proposed submission has no prospect of success: it is as devoid of substance as it is of merit. Since nothing will be served by answering the question reserved the Court should decline to do so[43].

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[1] The printing on the charge sheet looks the same as that of the word "Yarraville", substituted as referred to below, suggesting that a slip was initially made in making the amendment. But, somewhat unusually, the charge sheet was not annexed to or incorporated in the stated case.

[2] It appears from the amended summary provided for this Court that, upon the filing of notice of appeal to the County Court, the appellant was granted a further stay in respect of the order for cancellation and disqualification pursuant to s29(2) of the *Road Safety Act*.

[3] Read with the definition of "sentencing order" in s3(1).

[4] As to which, see s90 of the *Magistrates' Court Act*.

[5] On another view of the appeal provisions, which is suggested by the outline of argument for the appellant though it does not underlie the question reserved, it would be the County Court judge, starting with the charge before its amendment and re-hearing the "whole matter", who would be bound, on the appellant's argument, to refuse the amendment.

[6] Or, on the other view noted earlier, himself have allowed or made the amendment.

[7] *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403 at 417; (1992) 16 MVR 367.

[8] It might, extraordinarily, be essential where the defendant had furnished samples of breath at more than one place on the same day, at least if several charges were laid.
[9] This is apparent from the text of the paragraph and is confirmed by reference to the list of ingredients of the offence set out in *Smith v Van Maanen* (1991) 14 MVR 365 at 371; and *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403 at 407; (1992) 16 MVR 367; cf. *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365, a decision of the Court of Appeal.
[10] (1948) 66 WN (NSW) 48; cf. *Moulder v Judd* [1974] Crim L R 111.
[11] In *Wright v O'Sullivan* [1948] SASR 307 the majority of the South Australian Full Court held that the averment of place of the offence of carrying on business as a bookmaker otherwise than in accordance with relevant statutory provisions was not an essential element in the description of the offence.
[12] Although the case does not explicitly state that the filing occurred within the period of 12 months, that seems to be implied, and a court dealing with a stated case may rely on implications as opposed to inferences: *R v Rigby* [1956] HCA 38; (1956) 100 CLR 146 at 151-152 and cases there cited. That the original charge had been filed within time was, moreover, an implied postulate of Mr Gillespie-Jones's argument. Reference to the charge sheet already mentioned shows it to be dated 29 November 1996. In the light of the foregoing it is unnecessary to send the case back for amendment under s448 of the *Crimes Act*.
[13] Compare *McMahon v DPP* (unreported, Court of Appeal, 20 June 1995), which exemplifies the proposition that a charge may be amended outside the 12 months' period where the offence remains the same.
[14] At 417, citing *Warner v Sunnybrook Ice Cream Pty Ltd* [1968] VicRp 11; [1968] VR 102; (1967) 15 LGRA 135.
[15] (1944) 18 ALJ 30 at 30.
[16] [1960] VicRp 98; [1960] VR 632 at 636-637.
[17] [1859] EngR 488; (1859) 1 E & E 778; (1859) 23 JP 630; 120 ER 1102; (1859) 28 LJMC 179.
[18] *Parmeter v Proctor* (1949) 66 WN 48 at 49; cf. *Hedberg v Woodhall* [1913] HCA 2; (1913) 15 CLR 531 at 534-535; 19 ALR 95 and *McMahon v DPP* at p4.
[19] At p5.
[20] At 634 and 637.
[21] [1992] VicRp 3; [1992] 1 VR 43.
[22] The headnote is erroneous on this point.
[23] At 45.
[24] At 46.
[25] (1992) 15 MVR 145.
[26] At 147 (my emphasis).
[27] At 150.
[28] [1937] HCA 77; (1937) 59 CLR 467 at 479; [1938] ALR 104.
[29] At 486.
[30] [1903] 1 KB 56 at 61, 63; [1900-3] All ER Rep Ext 1274.
[31] At 63.
[32] The word "matter" where first appearing might be thought a misreporting by the authorized reports of his Lordship's extemporary reasons, but I am grateful to Tadgell JA for pointing out to me that all but one of the seven other contemporary reports of the decision also have "matter". In the report in (1902) 72 LJKB 43 at 47 the word "circumstances" appears instead.
[33] At 501.
[34] [1933] HCA 64; (1933) 50 CLR 379 at 386; [1934] ALR 98.
[35] (1938) 38 SR (NSW) 153 at 169-170; 55 WN (NSW) 63.
[36] [1977] 2 NSWLR 264 at 291.
[37] [1987] HCA 42; (1987) 163 CLR 508 at 520; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.
[38] At 528-529.
[39] [1976] VicRp 73; [1976] VR 680 at 682.
[40] (1978) 20 ACTR 3 at 9; 33 FLR 208.
[41] (1982) 63 FLR 93 at 97; 1 ACLC 484; 7 ACLR 89; cf. on appeal [1982] FCA 279; 45 ALR 543; (1983) 71 FLR 135; 1 ACLC 637at 639, 641 and 642; 7 ACLR 471;.
[42] At 50.
[43] The order made by the County Court judge under s446(1) of the *Crimes Act* on 30 June 2000 postponing execution of his orders, being in the nature of a stay, can no doubt be lifted by him (or, if need be, another County Court judge). I am grateful to Callaway JA for drawing this matter to my attention.

APPEARANCES: For the Appellant Gigante: Mr S Gillespie-Jones, counsel. John A Clements, solicitors. For the Respondent Hickson: Mr CJ Ryan, counsel. Solicitor for Public Prosecutions.
