16/08; [2008] VSC 46

SUPREME COURT OF VICTORIA

DPP v FODERO

Bell J

14, 26 February 2008 — (2008) 18 VR 606; (2008) 181 A Crim R 228

PRACTICE AND PROCEDURE – SUMMARY OFFENCE – CHARGE-SHEET SIGNED AND SUMMONS ISSUED BY POLICE OFFICER – REQUIREMENT THAT A TRUE COPY OF THE SUMMONS BE SERVED ON DEFENDANT – SUCH COPY SERVED BEFORE COPY OF SUMMONS FILED WITH APPROPRIATE REGISTRAR OF THE COURT – FINDING BY MAGISTRATE THAT OFFICER REQUIRED TO SERVE A TRUE COPY OF THE SUMMONS ISSUED AND FILED – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT*, SS30(1), 30(2)(a), 34(1)(b)(i).

Where a police officer signs a charge-sheet and issues a summons, the officer does not have to serve on the defendant a true copy of the summons that has been filed with the appropriate registrar of the court. There is nothing in ss30-34 of the *Magistrates' Court Act* 1989 ('Act') which specifies that the summons to be served on the defendant has to be a true copy of the one filed with the appropriate registrar. Accordingly, a magistrate was in error in striking out a charge on the basis that a true copy had not been served on the defendant as required by the Act.

BELL J:

1. Paul Fodero was charged with exceeding the speed limit while driving a motor vehicle contrary to rule 20 of the *Road Rules – Victoria*. The charge was heard in the Magistrates' Court of Victoria at Heidelberg. On 13 April 2007 a magistrate struck the charge out on the basis that a true copy of the summons had not been served on Mr Fodero as required by s34(1)(b)(i) of the *Magistrates' Court Act* 1989.

2. The Director of Public Prosecutions, on behalf of the police informant who brought the charge against Mr Fodero, now seeks judicial review of the decision of the magistrate. He contends her Honour erred in law on the face of the record by making the decision that she did.

3. The matter in issue is one aspect of the proper procedure to be followed by police officers when charging people with summary offences. Three things are clear but one thing is disputed. It is clear, one, that the police have the statutory authority to sign a charge-sheet and issue a summons (which are in the one single-page document); two, that the charge and summons must be filed with the appropriate registrar of the court within a specified time; and three, that the informant must serve a true copy of the summons on the person charged with the offence. What is disputed is whether the true copy of the summons to be so served can be a true copy of the summons as issued, or must be a true copy of the summons issued and filed.

4. Although this is purely a question of procedure, it has practical and legal importance. At present, the practice of the police is based on the understanding that the informant may serve the summons issued, but not necessarily the summons issued and filed. This is very convenient, because it means they do not have to wait until they have filed the issued summons before serving it. If that is not correct, the practice of the police will have to change. So much the better, submits Mr Fodero, because the defendant should be served with a properly filed summons. That, in his submission, is what the legislation requires.

5. The legislation is the *Magistrates' Court Act*. The service requirement is stipulated in s34(1)(b)(i). It relevantly provides that every summons to answer a charge "must be served on the defendant by…delivering a true copy of the summons to the defendant personally…" Under s36(1), that can be done by post, as it was in the present case.

6. What the informant served on Mr Fodero by post was a copy of a charge-sheet signed and summons issued that had been properly completed in all respects, except for the filing details.

That was because it was posted before it was filed. So the charge and summons gave proper particulars of the person bringing the charge, his signature, the details of the alleged offence, the legislation under which the charge was brought, the time and date at which the charge would be heard at the specified court, and the details of the issuing of the summons. But as the charge and summons had not yet been filed, the place for writing in the details of the filing was left blank.

7. The *Magistrates' Court Act* does not anywhere state what "a true copy of the summons" is for the purposes of s34(1)(b)(i). Nothing in any of the rules or regulations that have been made under that Act assists in this regard. The question I have to answer, which is a question of law, is what, on their proper interpretation, do those words mean? The answer to that question will determine whether the magistrate was correct in law in deciding that the informant did not follow the proper procedure in the present case.

8. The basis of the magistrate's decision was that, in her Honour's view, the informant was required, by s34(1)(b)(i), to serve on the defendant a true copy of the summons that had been filed with the appropriate registrar of the court. She accepted the submission made by the defence that the question was covered by the decision of this Court in *Nitz v Evans*.[1] The magistrate rejected the submission of the prosecution that the decision did not apply because it dealt with different circumstances.

9. *Nitz v Evans* was a case in which the summons had been purportedly issued by a registrar of the Magistrates' Court of Victoria. The registrar did so according to another procedure that was available for the issuing of summonses in 1993. That procedure was described by Hayne J:

> A criminal proceeding may be commenced in the Magistrates' Court by filing a charge with the appropriate registrar (*Magistrates' Court Act* 1989 (Vic), 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 the charge: s28(1)(a). The registrar is bound to issue a summons to answer the charge if he is satisfied that the charge discloses an offence known to the 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 (Vic) reg 302.[2]

10. The problem in *Nitz v Evans* was that the copy summons served on the defendant "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."[3] That, held Hayne J, was fatal, because s34(1)(b)(i) (the same provision at issue in the present case) required a true copy of the summons to be delivered personally to the defendant. As held by his Honour –

> 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 signed by the issuing authority and what was served in this case did not.[4]

11. When *Nitz v Evans* was decided, a police officer who was a prescribed person could, under s30(1) of the *Magistrates' Court Act*, sign a charge and issue a summons to a person to answer the charge. The same is the case now, although s30(1) has been amended in ways that are presently immaterial. Section 30(2) required at that time, as it does now, the informant to file the charge and summons with the appropriate registrar within seven days after signing the charge-sheet.

12. In the present case, unlike in *Nitz v Evans*, the charge-sheet and summons had been properly signed and issued by the informant, exercising his powers under s30(1)(a) of the *Magistrates' Court Act* to do so as a member of the police force. The summons so issued was served on Mr Fodero, as required by s34(1)(b)(i), and the charge so signed and that summons was filed within seven days, as required by s30(2)(a). So, submits the Director, the present case is to be distinguished from *Nitz v Evans*. I accept that submission, but that is not the end of the matter. *Nitz v Evans* shows how seriously the court takes these statutory procedural requirements. If I was to be satisfied that the requirements were breached by the informant, I think I would uphold the decision of the magistrate to strike out the summons, by analogy with the decision in *Nitz v Evans*.

13. It was submitted by Mr Fodero that, as a copy summons without the proper issuing details

is not a true copy of a summons for the purpose of the service requirement in s34(1)(b)(i), so also a copy summons without the proper filing details is not a true copy of a summons for that purpose. In support of that submission, Mr Fodero contended ss30-34 of the *Magistrates' Court Act* specified four procedural steps that had to be carried out, in this order: (1) signing the charge-sheet under s30(1); (2) issuing the summons under s30(1); (3) filing the charge and summons under s30(2)(a); and (4) serving a true copy of the summons as filed under s34(1)(b)(i) (or alternatively in the way specified in s34(1)(b)(ii), which is not material in the present case).

14. Those submissions have some force. Filing the summons in court is an important procedural step. That it is important is clear from the legislation, both from s30(2)(a), which requires the charge and summons to be filed within seven days after signing the charge-sheet, and from s30(3) which, if the charge and summons are not filed within that specified time, requires the court to strike out the charge and, possibly, to award costs against the informant. The requirement to file being an important procedural step, submits Mr Fodero, the defendant is entitled to know it has been done. Properly interpreted, he submits, s34(1)(b)(i) ensures the defendant gets that knowledge, for it requires service of a true copy of the summons both issued under s30(1) and filed under s30(2)(a). If that means police officers must delay service of a summons until after the charge and summons has been filed with the appropriate registrar of the court, so be it.

15. I reject Mr Fodero's submissions as regards the proper interpretation of s34(1)(b)(i) of the *Magistrates' Court Act*. I think he is trying to read something into that provision which is not there and which is inconsistent with the scheme of ss30-34. Section 34(1)(b)(i) does not say the summons to be served on the defendant has to be a true copy of the one filed with the appropriate registrar. It should not be interpreted to produce that result.

16. The scheme of the provisions is that s30(1) allows the informant to sign a charge-sheet and issue a summons. Section 30(2)(a) gives the informant seven days, and no longer, to file it. Section 34(1)(b)(i) requires a true copy of the summons to be served which, under *Nitz v Evans*, has to be a true copy of the one issued. But it does not have to be a true copy of the one filed. Read as a whole, I think the provisions were intended to allow the police to adopt a four-step procedure, in this order: (1) signing the charge-sheet under s30(1); (2) issuing the summons under s30(1); (3) serving a true copy of the summons as issued under s34(1)(b)(i) (or in the alternative way); and (4) filing the signed charge and issued summons under s30(2)(a). Under the procedure, serving a signed charge and issued summons as filed under s30(2)(a) is fully compliant with s34(1)(b)(i), but it is not necessary to achieve compliance.

17. The scheme does have a safeguard. As we have seen, if the magistrate sees that a charge and summons has not been filed within the seven days specified in s30(2)(a), it must be struck out under s30(3). Williams J examined that safeguard in *Director of Public Prosecutions (Vic) v Magistrates' Court (Vic) and Another*.[5] Her Honour decided the criminal proceeding was commenced in the Magistrates' Court by the informant signing the charge and issuing the summons pursuant to s30(1). Under provisions applicable since 1994, and so applicable at the time of the present case, the proceeding continues to be valid despite the informant's non-compliance with the timely filing requirement in s30(2)(a), but it is liable to be struck out under s30(3).[6] That does not arise in the present case. The charge and summons was filed within time. But, with respect, I agree with Williams J's approach of interpreting the provisions as a scheme that centres on the capacity of police (among others) to commence summary criminal proceedings, subject to the safeguard. Any defendant who is concerned the informant may not have not filed the charge and summons within the seven days stipulated in s30(2)(a), and the legal representative of any such person, is perfectly entitled to inspect the court file to see if it has been done. The legislation strikes a balance between the interests of the police in being able to sign charges and serve summonses "on the spot", which is an efficient use of resources, and the interest of defendants in being able to see that the proper procedures have been followed, which is their right. The safeguard is the way the legislation achieves that balance. That, I believe, is the answer to Mr Fodero's submissions in this regard.

18. In *CIC Insurance Ltd v Bankstown Football Club Ltd*[7], the High Court laid down the approach to be adopted when engaged in the task of statutory interpretation, especially in cases where it is necessary to identify the object and purpose of the legislation. This is the now classic principle that Brennan CJ, Dawson, Toohey and Gummow JJ expounded:

> Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means ..., one may discern the statute was intended to remedy.[8]

19. In the present case, there are parliamentary materials available which show unequivocally what the object and purpose of the procedures introduced by the *Magistrates' Court Act* 1989 were.

20. When the Bill for the *Magistrates' Court Act* 1987 was introduced into the Victorian Parliament in that year, and in the next year when the Bill for the *Magistrates' Court Act* 1988 was introduced, both the second reading speech and the explanatory memorandum said something about how ss30 and 34, as regards the police issuing, serving and filing a charge and summons, were intended to operate. This is what was said in the second reading speech for the 1987 Bill: The new on-the-spot summons permits police to issue a summons in relation to offences at the time of their original contact with the defendant. It is not necessary for the police to go before a justice to have the summons issued, nor to wait until a later date to have it served. This change will lead to considerable economies in the use of police resources.[9] Here are the comments in the explanatory memorandum for the 1988 Bill, which are equally illuminating:

> Clause 30 provides that in relation to prescribed summary offences a prescribed informant may at the time of the signing of the charge sheet issue a summons to answer the charge. The charge and original summons must then be filed with the registrar within 7 days.[10]

21. The 1988 Bill lay in abeyance in that year, but was reintroduced as the Bill for the *Magistrates' Court Act* 1989 after the change of government that occurred at that time. Section 30 as proposed in 1988 Bill was in the same form when the Bill was reintroduced in 1989. The explanatory memorandum for the 1989 Bill, as regards s30, was identical to the explanatory memorandum for the 1988 Bill. In the second reading speech for the 1989 Bill, this was said:

> A number of new provisions affecting criminal proceedings were outlined when the original Bill was introduced. These include procedures for the issue of on-the-spot summonses for certain summary offences.[11]

22. It is clear from these parliamentary materials that the procedures introduced by ss30-34 of the *Magistrates' Court Act* 1989 were intended to allow police to sign a charge-sheet and issue a summons then serve the summons on the defendant "on-the-spot". It would be inconsistent with that intention to interpret s34(1)(b)(i) in the manner for which Mr Fodero contends. The police would have to file the charge and summons and then serve it, which would delay things, for the police would have to attend to the filing and then obtain a copy of the document so filed for service on the defendant. The police could not just sign the charge-sheet and issue the summons, then serve the summons (remember, the charge and summons are in the one document) "on-the-spot," and then file it within the seven day period specified in s30(2)(a). That, in my view, is exactly what the provisions of ss30-34 were intended to allow the police to do. That, in my view, is what the provisions, properly interpreted, actually achieve.

23. The purpose and scheme of these provisions was examined and taken into account by the Appeal Division of this Court in *Director of Public Prosecutions v His Honour Judge Fricke*.[12] In that case Fullagar, Tadgell and JD Phillips JJ dealt with the question whether, under s30(2)(a), the person issuing the summons personally had to file it with the appropriate registrar, in the sense of going physically to the registry. Their Honours rejected that contention. In doing so, they gave this explanation of the procedures introduced in 1989:

> As explained by counsel in the course of the appeal to this court, the procedure laid down by s30 is new. We were told that many summary offences have been prescribed for the purpose of the section and that all police officers of more than two years' experience are prescribed persons. The new procedure empowers those police officers (among others) to perform a function that previously was performed by justices. There is no longer any need for the informant to make application to another person for the issue of a summons. That procedure is perpetuated, although modified, in s28(1) but under s30(1) the informant may himself issue a summons at the time of signing the charge sheet. Both charge sheet and summons may then be handed to the defendant at the time of the initial contact – and hence, no doubt, the appellation in the Second Reading speech of 'on the spot' summonses.[13]

Their Honours went on to reject the submission that s30(2)(a) required physical attendance by the informant who had signed the charge and issued the summons:

> We see no reason to read into s39(2) any such safeguard for the informant. Nor is it apparent how such a system might work where, in the ordinary case, the defendant will have been served with the document containing the charge sheet and the summons at the time of first contact with the informant. That, we were told, was the whole point of s30...[14]

The explanation of these procedures by Fullagar, Tadgell and JD Phillips JJ, for example that the "charge sheet and summons may then be handed to the defendant at the time of the initial contact", both reflects my own view (with respect) of the proper interpretation of s34(1)(b)(i) and, I feel bound to say, presents an insuperable obstacle to acceptance of Mr Fodero's submissions.

24. So it is that the Director's application for judicial review of the decision of the magistrate to strike out the summons must be granted. The order of the magistrate dated 13 April 2007 striking out the summons with costs will be quashed and the summons remitted back to the Magistrates' Court of Victoria, however constituted, to be heard according to law.

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[1] (1993) 19 MVR 55.
[2] Ibid 56.
[3] Ibid.
[4] Ibid 58.
[5] [2006] VSC 257; (2006) 162 A Crim R 564, 572.
[6] Ibid 572-73.
[7] [1997] HCA 2; [1997] HCATrans 242; (1997) 187 CLR 384; (1997) 141 ALR 618.
[8] Ibid 408 (footnotes omitted).
[9] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 October 1987, 1434 (Frank Wilkes, Minister for Housing).
[10] Victoria, explanatory memorandum for the Bill for the *Magistrates' Court Act* 1988, 2.
[11] Victoria, *Parliamentary Debates*, 31 March 1988, 1160 (Andrew McCutcheon, Attorney-General).
[12] [1993] 1 VR 369.
[13] Ibid 371.
[14] Ibid 373.

APPEARANCES: For the plaintiff DPP: Mr C Ryan SC, counsel. Office of Public Prosecutions. For the first defendant Fodero: Dr I Freckleton SC with Mr J Lavery, counsel. Tony Danos solicitors.
