34/91

SUPREME COURT OF VICTORIA

EVANS v UNITED TRANSPORT SERVICES PTY LTD

Southwell J

19, 28 August 1991

PROCEDURE – INFORMATION ISSUED – STATUTORY DEFENCE – INFORMATION LAID AGAINST THIRD PARTY OUT OF TIME – SUCH INFORMATION DISMISSED – WHETHER DEFENDANT DEPRIVED OF DEFENCE – WHETHER ABUSE OF PROCESS: *DANGEROUS GOODS ACT* 1985, S43; *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S165.

Section 43(4)(b)(ii) of the *Dangerous Goods Act* 1985 ('Act') provides that a defence is made out where a defendant satisfies a court that:

(i) the contravention constituting the offence was due to the act or default of a third party; and

(ii) due diligence was exercised to ensure compliance with the provision of the Act in question.

Section 43 of the Act does not require the third party to be convicted as a condition precedent to the dismissal of an information against a defendant. Accordingly, a magistrate was in error in dismissing informations as an abuse of process where informations against a third party were dismissed on the ground that they were not issued within the 12 months' limitation period.

***R v Bicester Justices: ex parte Unigate Ltd* (1975) 1 WLR 207, applied.**

SOUTHWELL J: [1] This is an appeal pursuant to s92 of the *Magistrates' Court Act* 1989 against an order of the Magistrates' Court at Broadmeadows, made on 12 February 1991, dismissing two informations against United Transport Services Pty Ltd ("the respondent"): the informations were brought by Robert S. Evans ("the applicant"), an officer of the Department of Labour. The informations, laid on 2 April 1990, allege that the respondent was guilty of offences against the *Dangerous Goods Act* 1985 (the Act) and the regulations made thereunder. Briefly stated the offences related to the storage of flammable liquids in excess quantities, and without the necessary licence.

At all material times the respondent carried on business at Altona as a marketer and distributor of various chemicals and their compounds. On 30 March 1989 a container of drums of substances which were said to constitute "dangerous goods" within the meaning of the Act were delivered to the respondent's premises. The respondent claims that many of the drums of chemicals were not labelled in such manner as is necessary for their lawful carriage by road transport.

The information alleged that the offences were committed "on or about 3 April 1989"; the informations were issued on 2 April 1990, that is, one day before the 12 months' limitation period fixed by s165 of the *Magistrates (Summary Proceedings) Act* 1975; the informations were served on 9 April 1990.

As has already been indicated, the respondent's defence was that the supplier to it was to blame, in that the goods were so labelled that they could neither be stored nor carried lawfully. So the respondent decided to avail itself of the protection offered by s43 of the Act. [*His Honour set out the provisions of the Section and continued.*] ... **[3]** On 11 May 1990 the respondent gave notice to the applicant pursuant to s43(2) of the Act, claiming that any contravention was due to the default of three named companies, but no informations against them were then issued. By further notice of 23 January 1991 the respondent named four companies as being guilty of relevant default, and caused informations to issue against them. After a number of adjournments which were sought by the respondent, the matter finally came on for hearing in the Magistrates' Court on 11 February 1991.

[4] Counsel appeared for the applicant, for the respondent, and for Nu-farm Ltd, one of

the four companies referred to above. Counsel for Nu-farm Ltd submitted that the informations against it should be dismissed upon the ground that they were not issued within the 12 months' limitation period. Counsel for the respondent conceded that the point was well taken, and the informations were accordingly dismissed by the Magistrate, who then dismissed the informations against the other companies. Then followed a submission, in the result unsuccessful, by counsel for the respondent that one of the informations should be dismissed for the reason that they related to identical offences. Next there was a submission that the informations were laid out of time, in that, notwithstanding the provisions of s165 already referred to, since the respondent was entitled to rely upon a s43 defence the Court should imply an earlier expiry of the limitation period so that a reasonable time was afforded to the respondent to take proceedings against third parties pursuant to s43 of the Act.

In the course of discussion which followed that submission, the Magistrate stated that:

> "he was not convinced that the circumstances did not give rise to an abuse of process .... and that by issuing the information a day or two before the expiry of the 12 month period, albeit without *mala fides*, this may have constituted an abuse of process."

So far as material before this Court discloses, this was the first mention of a possible abuse of process; in the circumstances it was not surprising that counsel for the respondent stated that he "would adopt that submission or **[5]** construction wholeheartedly". There followed lengthy submissions relating to the proper construction of s43 of the Act. The Magistrate then gave a ruling in which he held that "the procedure adopted in this case foreclosed the possibility of laying a s43 based information". After some further discussion the matter was adjourned until the next day, when at the request of the Magistrate, counsel appeared in the Magistrate's chambers, where the Magistrate informed counsel that he was concerned as to whether there had been an abuse of process. In court further submissions were made on the latter question. In his final ruling the Magistrate stated that:

> "a continued hearing would be an abuse of the process of the Court".

In the course of detailed reasons the Magistrate said:

> "the charges laid pursuant to s43 must necessarily have been dismissed. Consequently the defendant was precluded from invoking a statutory right granted, indeed its only statutory right in terms of a defence."

Later the Magistrate said that he was satisfied:

> "that there was unfairness and potential injustice brought about by the preclusion from bringing a defence which might lead to a statutory dismissal."

In due course after giving some further reasons, which need not now be summarised, the magistrate ordered in respect of each information that there be a permanent stay and that the informant should pay costs in the amount of $20,100. It is conceded by Mr Uren QC, who appeared in this Court with Mr Morris for the respondent, that the Magistrate was in **[6]** error in ordering that amount of costs in respect of each information and that one or other of the orders for costs must be set aside. Mr Berkeley QC, Solicitor-General, who appeared with Mr Maguire for the applicant, submitted that the basic premise upon which the Magistrate reached the conclusion that the issue of the informations constituted an abuse of process was wrong; that is to say, the premise that since the s43 informations against the third parties were necessarily dismissed, it followed that the respondent was precluded from relying upon a s43 defence. It is convenient here to interpolate that Mr Uren readily conceded that if it were held that notwithstanding the necessary dismissal of the third party informations, the respondent could still rely upon a s43 defence, then it would follow that the appeal must be allowed.

I should here state that "a s43 defence" here means a defence pursuant to s43(4)(b)(ii) which requires the Court to "dismiss the information ... if in addition to satisfying the Court that the contravention was due to the act or default of the other person, the original defendant satisfies the Court that the original defendant exercised due diligence to ensure compliance with the provision of this Act in question ..."

Mr Berkeley submitted that s43(2) and (3) prescribe the procedure that a defendant who desires to rely upon s43 must follow. He submitted that it was to be noted that while a defendant was thereby required to serve notice upon the informant and to lay an information against the **[7]** third party, there was no requirement that the information should be served, nor did the Act specifically deal with the situation where a defendant could not procure the attendance at Court of a foreigner who was not amenable to the jurisdiction, and who may well have been the guilty supplier of the relevant dangerous goods.

It was said that upon its proper construction s43(4)(b) did not require that the Court first convict the third party before it could dismiss the information under s43(4)(b)(ii); that for one reason or another the third party might escape conviction, yet if a defendant were to satisfy the Court of the two matters referred to in s43(4)(b) (ii), it was entitled to a dismissal of the information. In other words, a conviction of the third party was not a condition precedent to the dismissal of the information against a defendant.

The principal submission on behalf of the applicant finds considerable support in *R v Bicester Justices: ex parte Unigate Ltd* [1975] 1 WLR 207. In that case an information had been laid against a retailer of rancid butter. The retailer laid an information against the manufacturers pursuant to s113 of the *Food and Drugs Act* 1955, which, for present purposes, may be regarded as similar to s43 of the Act. The latter information was laid more than six months after the date of the sale which constituted the offence, and was accordingly outside the limitation period fixed by s104 of the *Magistrates' Court Act* 1952.

It should be interpolated that s104 provides that the Court "shall not try an information ... unless the information was **[8]** laid ... within six months from the time when the offence was committed ..."; whereas s165 of the *Magistrates (Summary Proceedings) Act* 1975 merely states that "the information shall be laid within 12 months from the time when the matter of the information arose and not afterwards". The relevance of this different terminology is later referred to. In the judgment with which Widgery LCJ and Shaw J agreed, Bridge J (as he then was) said at p210:

> It seems to me clear that there are three possible solutions to this problem, and only three. One possibility is that the six month limitation does not apply to an information against a third party, so that such an information, laid out of time, is effective for all purposes. A second possibility is that it is wholly ineffective, so that unless the defendant lays his information within the six months the special defence provided by section 113 ceases to be available to him. The third possibility, which Mr Wheeler, on behalf of the manufacturers, invites us to adopt as the correct construction of the statute, is that whilst the laying of the third party information after the expiry of six months from the date of the offence does not deprive the original defendant of the protection of section 113, it is nevertheless ineffective to render the third party liable to conviction.
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> For my part I confess at the outset that I do not find any of those three alternatives wholly satisfactory. Objection can be made, both in principle and on the ground of the difficulty of fitting them into the statutory language, to any one of the three, but I have come to the conclusion that it is the third course, the middle course, which provides the right solution. I arrive at that conclusion partly by process of elimination in considering the extremely unsatisfactory aspects of the other two alternatives. It is really unthinkable, and indeed no submission has been made to us in support of the view, that the passage of six months before the original defendant has the opportunity to serve an information on the third party under section 113 should deprive him of the protection of the section. Clearly a situation could arise in which the prosecutor **[9]** only laid his information against the defendant on the last day of the six months period so that the defendant would first hear about the matter at a time when it was too late for him to lay a timely information under section 113 against the third party.
>
> On the other hand, to hold that the third, fourth, fifth or subsequent parties remain liable to conviction under the operation of this provision, no matter how long the delay from the time of the events which constitute the alleged contravention to the time when the intention to prosecute him is brought to the notice of the third or subsequent party, is unsatisfactory for at least two solid reasons. One is that there seems no ground in principle, unless the statute makes it clear by unambiguous language, why a party liable to prosecution should lightly be held to have been deprived of the protection of the six-month limitation period, which section 104 of the *Magistrates' Courts Act* 1952 prescribes.
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> Secondly, it seems to me that one could only adopt this solution of the problem by doing some violence to the language of the two statutes read together. The provisions of section 113 certainly refer to the step which brings the third party before the court as an information, and it is clearly a separate information, a different information from that which instituted the proceedings. It is difficult to see

how the third party can be convicted pursuant to that information without the justices trying that information; but that is precisely what section 104 of the *Magistrates' Courts Act* 1952 says they may not do when the information is laid after the expiry of six months from the date of the offence. What then of the third solution to the problem which presents itself, the conclusion that when the information is laid outside the period of six months from the date of the offence the defendant is entitled to the protection of section 113, albeit that the third party is not at risk of being convicted. I am fortified in the conclusion that that is not an unreasonable solution for the problem by a decision of this court in *Malcolm v Cheek* [1948] 1 KB 400, which at least establishes in principle that a situation may arise in which the defence made available by this section may be effective for a defendant's purpose even though there is no possibility of convicting the third party. It is unnecessary to recite the facts of the case.

It is sufficient to say that an offence under the predecessor to the Act of 1955 had been charged against a publican. Under **[10]** the provision of the earlier Act corresponding to section 113 of the Act of 1955 he laid an information against a barman in his employ, alleging that it was the barman's act or default which had caused the contravention of the statute. But when the matter came before the magistrates' court the barman was not present because it had not proved possible to serve him with the necessary summons. The stipendiary magistrate took the view, although the third party was not before the court, that the defendant was not deprived of the defence under the section, and on appeal by the prosecutor to this court the magistrate's view was confirmed. It is sufficient to read one paragraph from the leading judgment of Lord Goddard CJ, who said, at p407:

> '... it is not the conviction of the other person which is made a condition precedent to the defence being effective to the defendant. The section says: 'that other person may be convicted of the offence.' If the magistrate refuses, under the provisions of the *Probation of Offenders Act*, to proceed to conviction, or anything of that sort, there would be no conviction, but nevertheless, although there was no conviction, it seems to me the defence provided by section 83 would be available to the original defendant.'

He goes on to point out that the original defendant in the case had done everything which it was necessary for him to do, and indeed in the circumstances had done everything which it was possible for him to do to avail himself of the special defence."

Mr Berkeley submitted that the reasoning in that case was correct and ought here to be applied, and that the present case calls more strongly for the application of that reasoning, in that while s104 of the English Act deprives the Court of jurisdiction, s165 of the Victorian Act does not. Authority for the latter proposition is to be found in *Adams v Chas C Watson Pty Ltd* [1938] HCA 37; (1938) 60 CLR 545; [1938] ALR 365; 5 ATD 1; and *Hawkes Bros Motors Pty Ltd v Riddle* [1940] VicLawRp 44; [1940] VLR 272; [1940] ALR 160, where it was held that the predecessor of s165 does not go **[11]** to the jurisdiction of the Court, but merely operates as a statute of limitations.

Mr Berkeley submitted that if the contention which found favour with the Magistrate were to be upheld it would follow that since foreign suppliers in default may not be amenable to the jurisdiction, the importer could not rely upon s43. It was said that this could not have been the intent of the legislature. Mr Uren submitted that the decision of the Magistrate was correct, the abuse of process here relied upon being "the delay in the issue of the proceedings for so long that the respondent was unable to avail itself of the statutory defence by issuing proceedings against third parties which were not defective in the sense that there was no impediment to their being heard on their merits". Here, it was said that there was an impediment to any hearing on the merits, in that any third party appearing and taking the defence of the statutory limitation period must necessarily succeed. Mr Uren said that although the abuse of process was present at the time of the issue of the information, that abuse would cease if a third party appeared without protest and did not take the limitation defence.

It was said that s43, read as a whole, contemplates that there would be a hearing of the informations against both the original defendant and the third parties at the same time; that ss(4)(b) provides alternative courses following a hearing on the merits. It was said that while a conviction of a third party was not a condition precedent to a dismissal of the information **[12]** pursuant to ss(4)(b)(ii), nevertheless it must have been open to the Court to convict before the defendant would become entitled to an order of dismissal. It was said that if the applicant's submission were held to be correct, then a defendant which deliberately or carelessly laid an information against a third party out of time, could still rely upon ss(4)(b)(ii) and demand a dismissal, and in this way the defendant could immunise a guilty third party from proceedings. This, it was said, would be an absurd result, and it followed that the information contemplated

in s43(2)(b) was an information which could be heard on its merits. As to the latter submission Mr Berkeley responded by submitting that the law did not demand an impossible performance by a defendant – if the statute requires a defendant to do something, he only has to do his best. In this regard he referred again to the observations of Bridge J in *Bicester* which are set out at the conclusion of the passage quoted above. Mr Berkeley submitted that if the defendant did not act reasonably to protect himself he could not avail himself of s43.

I cannot accept the latter submission of Mr Uren. It should be remembered that the Court is here dealing with a statute which creates offences which for the most part are offences of strict liability. Section 43 is intended to provide relief from strict liability in certain prescribed circumstances and the section sets out the procedure which must be followed by a defendant wishing to avail itself of that section. It cannot be right that a defendant who carelessly or deliberately fails to act with reasonable **[13]** promptness can at the same time escape liability and immunise the guilty party from the sanction of the law.

Mr Uren went on to submit that *Bicester* was wrongly decided. It was said that faced with three unpalatable alternatives, the Court had chosen one, only because it was the least unpalatable, but the court had not studied the language of the section in an attempt to define the true intention of the legislature. It was said that the Court had apparently not thought of a fourth solution, that is, a dismissal of the information as an abuse of process. Mr Uren went on to submit that there was here inordinate and unexplained delay in bringing the prosecution, although it was not necessary for success upon this appeal to make good that submission. Mr Uren referred to numerous passages in the judgments in *Jago v The District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307. I do not here set out those references for the reason that I am unable to see that they assist in the resolution of the point now before the Court.

Mr Uren was not able to refer to any case where an information issued within a statutory time limit had been held to have constituted an abuse of process in that there had been inordinate delay before the issue of the information. On the question of inordinate delay I accept as correct Mr Berkeley's response that firstly, the material before the Court tends to demonstrate that the question whether the delay in issuing the information was inordinate or inexcusable was never in issue in the Magistrates' Court; **[14]** and secondly, there was no evidence upon which the Magistrate could have held that the delay was inordinate. Upon my reading for the reasons given by the Magistrate, he did not find that there was an abuse of process by reason of inordinate or inexcusable delay; as I understand the reasons as set out in the material before this Court, the Magistrate found abuse to exist in that the information was issued too late to enable the respondent to avail itself of a s43 defence.

I am unable to accept Mr Uren's submission that the divisional Court overlooked the possibility that a fourth solution existed, that is, that the information could be dismissed as an abuse of process. It scarcely needs to be stated that it was a strong court indeed, and although the report does not include summaries of the submissions, it is to be noted that the only authority referred to in argument was that of *Malcolm v Cheek*, which is referred to in the judgment of Bridge J. It seems unlikely that the question whether the information should be dismissed as an abuse of process was debated at all. However, I would infer that this resulted not from any oversight by counsel but rather that no tenable proposition as to that possibility could be formulated.

I respectfully adopt as correct the reasoning in *Bicester* and am of opinion that it should here be applied. Section 43 does not in terms require that the Court must convict the third party as a condition precedent to a dismissal of the information pursuant to ss(4)(b)(ii). It does not in terms require that an information once laid must **[15]** be served upon a person who is or becomes amenable to the jurisdiction. It would of course be unjust to the respondent if it were to be denied the opportunity of establishing a s43 defence. However, there is no injustice in requiring the defendant to meet the charge, so long as a s43 defence is open.

Furthermore, I do not accept the proposition that the application of the reasoning in *Bicester* involves any disregard of the intention of Parliament. Clearly enough, it was intended that if more than one party faced trial, they should be tried together. However, Parliament should not be held to have intended that a person who might have committed an offence of some seriousness

in relation to dangerous goods should escape trial when the information is laid within the time prescribed by statute, merely by reason of the fact that another party escapes trial. If a defendant has a good defence, he will be acquitted; if not, the intention of Parliament, and a purpose of the criminal law, coincide, that is, that he who is guilty should suffer such penalty as the Court regards as appropriate. It should be remembered that it is not suggested that the respondent will suffer any prejudice in the conduct of the trial, so long as a s43 defence remains open.

Accordingly the Magistrate was in error in ordering a permanent stay of the proceedings, and question (B) of the questions of law falling for determination is answered in the affirmative; the orders below are set aside; the matters are referred to the Magistrates' Court at Broadmeadows for **[16]** further hearing according to law. The respondent must pay the costs of the appeal.

APPEARANCES: For the applicant Evans: Mr H Berkeley QC, Solicitor General with Mr GT Maguire, counsel. Solicitors for the Department of Labour. For the respondent United Transport Services: Mr AG Uren QC with Mr T Morris, counsel. Lewis Walker, solicitors.
