21/73

SUPREME COURT OF VICTORIA

ALLCHIN v MURPHY

Nelson J

29 June 1973

PROCEDURE – AMENDMENT OF DATE OF OFFENCE IN AN INFORMATION – DEFENDANT COMMITTED TWO OFFENCES ON THE ONE DAY – ONE INFORMATION REFERRED TO THE CORRECT DATE THE OTHER HAD AN INCORRECT DATE – ERROR NOT NOTICED BY INFORMANT OR COURT – WHETHER APPROPRIATE TO ALLOW AN AMENDMENT OUTSIDE THE TIME LIMIT.

The present case was a classical example of "some slip or clumsiness" on the part of the police informant. It was perfectly obvious to anyone whose attention was directed to the respective dates of the issue of the summons and of the alleged date of the offence that the latter must have been due to some slip or clumsiness, but there could be no doubt of the nature of the offence which was alleged to have occurred. The case was therefore one in which the Magistrates' Court, if an application for amendment had been made, could have amended the information, and on the return of the order nisi the Supreme Court had the like power.

***Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583 at p601; [1947] ALR 27, applied.**

NELSON J: This is the return of an order nisi, to review an order of the Magistrates' Court at Box Hill made on 28 March 1972. The defendant was convicted on an information which alleged that he on the 7 December 1971, at Nunawading did drive a motor car while the percentage of alcohol in his blood expressed in grammes per 100 millilitres of blood was more than .05 per centum. The summons was dated the 19 October 1971, that is, approximately seven weeks before the date when the offence was alleged to have occurred.

On the same date, the 19 October 1971, an information was laid against the defendant that on the 10 September 1971 at Nunawading he did drive a vehicle in a built up area at a speed exceeding 35 miles per hour. Both summonses were served on the defendant on the 16 February 1972, and they were both heard on 28 March 1972. The defendant did not appear. Evidence was given for the informant relating in each case to an offence committed on 10 September 1971. The obvious error in the date alleged in the first information, and the variation between the date as alleged and the date upon which the evidence indicated that the offence occurred was apparently not noticed by either the informant or the court, and no amendment of the information was sought nor made.

The failure to notice these discrepancies was probably contributed to by the fact that the hearing took place some months after both the date alleged in the information and the date given in evidence, and by the fact that the first information was heard at the sane time as the second information, in which the dates were correctly given. The defendant was convicted on each information, and the register of the court records his conviction in the order under review for an offence committed on 7 December 1971.

It is obvious that the conviction so recorded cannot be permitted to stand in its present form. Mr Graham for the informant requested me to amend both the information and the conviction to accord with the evidence as to the correct date of the offence. The defendant has sworn that he was interviewed on 10 September 1971, that a sample of his breath was then analysed, that he received a certificate in the form of Schedule 7 of the *Motor Car Act*, certifying that on such analysis the instrument indicated that the percentage of alcohol present in his blood was .140 per centum, and that since the said date he had not been interviewed by, nor had he furnished a sample of his breath for analysis to, any member of the Police Force or other person.

It is not suggested that the defendant was in any way misled by the obviously incorrect date in the information, and, indeed, the circumstances, including the fact that he was at the same

time served with another summons and information arising out of the same incident, in which the date of the offence is correctly set out, leave no doubt in my mind that he was aware that the information related to an alleged offence which occurred on 10 September. It was, however, in my opinion reasonable for him to assume that a conviction would not be recorded against him in the form in which the information then stood and that he would be given notice of any intention to amend the information. He was not given any such notice and did not attend the hearing, and in those circumstances I indicated to Mr Graham that I would not be prepared to amend the conviction. The order nisi, accordingly, must be made absolute and the conviction set aside.

The question remains, however, as to whether I should make any further order in respect of the amendment of the information and the remitting of the case to the Magistrates' Court for rehearing. It has been laid down by the Full Court that where there is a time limit within which an information for an offence must be laid — as there is in the case of this information, by virtue of s215 of the *Justices Act* — the date of the alleged offence is an essential part of the information. (*Hackwill v Kay* [1960] VicRp 98; [1960] VR 632).

In this case the information as and when laid alleged an impossible date, and therefore in its then form did not disclose an offence. Whether an information which does not disclose an offence can be amended is a question which has been frequently debated in the courts. I do not intend to review the many cases on that subject, because I think that the test which to now generally adopted in Victoria is that which is stated by Dixon J, as he then was, in *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583 at p601; [1947] ALR 27. His Honor there said:

> "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. Logically it may be said in such a case that no offence is disclosed and yet it would seem to be a fit case for amendment, if justice is not to be defeated. By contrast at the other extreme, an information may contain nothing which can identify the charge with any offence known to the law. Such a case may not be covered by the power of amendment."

The present case, in my opinion, is a classical example of the first type of case to which His Honor referred. It was perfectly obvious to anyone whose attention was directed to the respective dates of the issue of the summons and of the alleged date of the offence that the latter must have been due to some slip or clumsiness, but there could be no doubt of the nature of the offence which was alleged to have occurred. The case was therefore one in which, in my opinion, the Magistrates' Court, if an application for amendment had been made, could have amended the information, and on the return of the order nisi I have the like power: *Molyneux v McPherson* (1902) 8 ALR 120; 23 ALT 228.

I did originally have some doubt whether I should exercise such a power in view of the very great lapse of time since the information was originally laid. The greater part of this lapse of time been, however, ensued between the granting of the order nisi to review and the hearing before me, and no explanation for such delay has been given. It may have been due to the absence of diligence on the part of either or both parties, but there is nothing before me to indicate that it has caused any hardship or prejudice to the defendant. There are no other aspects in which he would be improperly prejudiced by the allowance of the amendment.

I will accordingly allow the date of the alleged offence in the information to be amended to 10 September 1971, and the information as amended will be remitted to the Magistrates' Court for rehearing. The defendant is entitled to his costs of this order to review as the alteration has been brought about by the informant's carelessness, and there will be an order that the informant pay the defendant's costs of this order to review, with costs to be taxed within the statutory limit.
