47/86

SUPREME COURT OF VICTORIA

WOOLWORTHS (VICTORIA) LIMITED v MARSH

Ormiston J

12 June 1986

PROCEDURE – INFORMATION FOR AN OFFENCE – FAILURE OF INFORMATION TO DISCLOSE OFFENCE – AMENDMENT OF INFORMATION – WHETHER DESCRIPTION OF OFFENCE "SUFFICIENT IN LAW" – SUFFICIENCY WHERE AMBULATORY STATUTORY PROVISION – SERIOUS DEFECT IN INFORMATION – TIME EXPIRED FOR LAYING NEW INFORMATION – DISCRETION TO ALLOW OR REFUSE AMENDMENT: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S167; *LABOUR AND INDUSTRY ACT* 1958, S98.

Section 167 of the *Magistrates (Summary Proceedings) Act* 1975 provides:

"The description of an offence in the words of the Act or of the order, by-law, regulation, or other document creating the offence, or in similar words, shall be sufficient in law."

(1) A person charged with an offence, is entitled to be informed with precision what specific contravention is relied upon by the informant.
***Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104, applied.**

(2) Where the information is deficient in some aspect, the defect is capable of being cured by the provision of further and better particulars or by putting the informant to his election as to which of a number of alternative charges he seeks to proceed upon.

(3) However, where:
(a) the information does not identify any offence known to the law (the defect being a serious failure to inform the defendant of the charge rather than a defect in form or lack of particularity); and
(b) the time for laying a new information has expired – it is not appropriate to allow an amendment of the information.

(4) Where the section of the Act is ambulatory in operation in that it refers to contraventions otherwise appearing in the Act or in another Act, the provisions of s167 of the *Magistrates (Summary Proceedings) Act* 1975 cannot be relied upon.

ORMISTON J: *[After setting out the terms of the information alleging a "contravention of the provisions of the* Labour and Industry Act *1958", referring to several provisions of the Act and holding that the information was defective in that it was ambiguous and left the defendant in a state of uncertainty as to the precise nature of the charge, His Honour continued]:* ... **[14]** Dixon J... in *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467 especially at pp489-490; [1938] ALR 104, (said):

> "In my opinion he clearly should be required to identify the transaction on which he relies and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. The court hearing a complaint or information for an offence must have before it a means of identifying with the matter or transaction alleged in the document the matter or transaction appearing in evidence."

In many cases, it has been held that the defect is capable of being cured by the provision of further and better particulars or by putting the informant to his election as to which of a number of alternative charges he seeks to proceed upon. See, for example, *Davies v Ryan* [1933] HCA 64; (1937) 50 CLR 379; [1934] ALR 98; *Day and Riggs v Rugala* (1978) 20 ACTR 3; 33 FLR 208; *Lillyman v Pinkerton* [1982] FCA 279; 45 ALR 543; (1982) 71 FLR 135; 7 ACLR 471; 1 ACLC 637; *R v Magistrates' Court at Heidelberg ex parte Karasiewicz* [1976] VicRp 73; [1976] VR 680; and the cases there cited by Menhennitt, J Cf. *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR

583, especially at pp600-602 per Dixon J; [1947] ALR 27. However, the present case is not one which was capable of correction by either amendment or the provision of particulars. Essentially, the informant did not identify in the information any offence known to the law and his attempt to rely on **[15]** s167 of the *Magistrates (Summary Proceedings) Act* was misconceived.

In the first place, I have already pointed out the way in which the information fails to comply with the requirements of that section in that the language of s98 of the *Labour and Industry Act* 1958 has not been accurately described in either the words of that section or in words sufficiently similar to enable the defendant to identify with precision the charge brought against it.

Furthermore, in my opinion, s167 may not be relied upon where the section creating the offence is ambulatory in operation in that it refers to contraventions otherwise appearing in the Act or in another Act. It may be convenient for the legislature to set up a myriad of offences by sections in these general terms, picking up a series of contraventions identified by prohibitions of conduct set out in other sections or statutes.

Taking sections such as s570 of the *Companies (Victoria) Code* and s205 of the *Labour and Industry Act* itself, there would be thousands of offences in the one case, and dozens of offences in the other, created by those provisions. It cannot have been intended that s167 should be relied upon merely by the recitation of the words of the "offence" section for that would tell the defendant nothing.

The present section is little different, except that it identifies the activity as failing or neglecting to close a shop, but it refers generally to Part VI of the Act and to a variety of different requirements, many of which are difficult to understand or construe. A person charged **[16]** under this Part, as under any legislation, is entitled to be informed with precision what specific contravention is relied upon by the informant.

It is perhaps difficult to find precise analogies in reported case law, for it is not often that persons are charged in such a defective way, and none were cited to me as such; but the decision in *Pointon v Cox* (1927) 136 LT 506, apparently approved by Jordan CJ in *Lovell 's case* (1938) 38 SR (NSW) 153, may serve as an example. In that case the appellant was charged on an information for that he "at the said city on *divers* dates between 26th March 1926 and 17th April 1926 (both dates inclusive), then being the holder of a justices' licence, unlawfully did suffer to be used his premises situate at New Street there and known by the sign of the 'Living Stables' in contravention of the *Betting Act* 1853."

There were in fact only two possible contraventions of the *Betting Act* and in particular of sl of that Act, and neither was identified in the information or conviction thereon. The Court of Quarter Sessions allowed an appeal from conviction subject to a case stated to the Divisional Court. Both courts held that the conviction was bad upon its face. Section 39 of the *Summary Jurisdiction Act* 1879 (the progenitor of s167 of the *Magistrates (Summary Proceedings) Act)* was relied upon, but it was nevertheless held that the conviction was bad "because the alleged contravention of the *Betting Act* was not set out, nor was the section of the Act of Parliament referred to": per Lord Hewart CJ at p509: see also at p510 per Salter and Talbot JJ.

[17] The same defect is evident in the present case in that the nature of the offence and the section or sections defining the contravention have not been set out. I would understand *Pointon v Cox* as holding that a provision such as s167 cannot be relied upon in circumstances where an offence is stated in ambulatory terms by reference to other statutory provisions, whatever be the position where the whole of the substance of an offence is set out within a single section. For that reason also I consider the information and order made upon it bad in the present case.

That would be sufficient to justify making the order nisi absolute in the present case on both the first and second grounds of the order nisi, in that the Magistrate wrongly failed to hold the information to be ambiguous and bad in law, and failing to hold that it disclosed no offence known to the law.

It was, however, argued that the information could be amended either in this court, pursuant to s93 and s98 of the *Magistrates' Courts Act*, or that it should be remitted to the

Magistrates' Court so that it might be there amended and the matter proceed according to law. As the defendant did not lead evidence after relying on the arguments which I have accepted (at least in broad terms), the latter course would be the only real alternative. Nevertheless, the time fixed by statute for the bringing of an information has well and truly expired and the question arises whether the informant should have an opportunity now to mend his hand. The prosecution was itself commenced close to the twelve-month limitation period.

[18] However, assuming, but not deciding, that I have a discretion to allow an amendment in these circumstances or to remit the information to permit amendment after the expiration of the time period (cf. *Warner v Sunnybrook Icecream Pty Ltd* [1968] VicRp 11; [1968] VR 102 at p106; (1967) 15 LGRA 135), this is not a case where it is appropriate to exercise a discretion to permit amendment or to exercise a discretion to remit the matter to enable amendment. The particulars given at the trial in no way identified the nature of the offence as I have analyzed it, and as it was suggested to me in argument, and I do not consider the defect a mere technicality but a serious failure to inform the defendant of the charge brought.

I have read a number of cases cited to me as to this question of amendment and relating to the amendment in circumstances such as these, including *Knox v Bible* [1907] VicLawRp 87; [1907] VLR 485 at pp498-500; 13 ALR 352; 29 ALT 23, per Cussen J; *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583 at pp594 and 600-601; [1947] ALR 27; and *Walpole v Bywool Pty Limited* [1963] VicRp 26; [1963] VR 157; 9 LGRA 44.

As is clear from these cases, where it is unjust to allow an amendment, as when the original charge does not properly describe any offence in contrast to defects in form or lack of particularity, then it is not ordinarily appropriate to allow an amendment, certainly if the time for laying a new information has expired.

[19] I therefore do not propose to allow any amendment or to enable by remittal to the Magistrates' Court an amendment to be effected in the Magistrates' Court. Consequently the order nisi will be made absolute.
