46/94

SUPREME COURT OF VICTORIA

SAMMASSIMO v FRANICH and ANOR

O'Bryan J

4, 7, 11 March 1994

PROCEDURE – JURISDICTION – SUMMONS SHORT-SERVED – WHETHER PROVISION AS TO SERVICE DEPRIVES COURT OF JURISDICTION – HEARING NOT COMPLETED DUE TO RESIGNATION OF MAGISTRATE – WHETHER ANOTHER MAGISTRATE MAY REHEAR THE CASE *DE NOVO* – SUMMONS STRUCK OUT – WHETHER MAY BE REINSTATED: *MAGISTRATES' COURT ACT* 1989, S34(1)(a).

A summons containing three charges was short served. A second summons was issued and served within the correct time limit. When both summonses came on for hearing, the Magistrate struck out the second summons and proceeded to hear and determine the first. The Magistrate adjourned the hearing part-heard but resigned before completing the hearing. When the proceeding came before another Magistrate, it was submitted by defence counsel that the matter could not be recommenced and that the Magistrate had no jurisdiction to hear the matter *de novo*. This submission was rejected. Upon appeal—

HELD: Appeal dismissed. Referred for hearing and determination.
1. Where a Magistrate is unable to complete a hearing whether by reasons of death, illness or resignation, another Magistrate is competent to hear and determine the matter *de novo*.

2. S34 of the *Magistrates' Court Act* 1989 which prescribes a time and method of service of a charge is a procedural provision and is not concerned with the question of the Court's jurisdiction.
***Nitz v Evans* (1993) 19 MVR 55; MC19/93, distinguished.**

3. *Obiter*. An order striking out an information is not a determination of the merits and does not put an end to the proceeding. Accordingly, in the present case, the Magistrate had power to set aside the order striking out the second summons and to order that the information be reinstated.
***R v McGowan* [1984] VicRp 78; [1984] VR 1000, followed.**

O'BRYAN J: [1] On 29 September 1991 the applicant allegedly committed offences under s49(1)(f) and 49(1)(b) of the *Road Safety Act* 1986 and under Regulation 1505(1)(a) of the *Road Safety (Traffic) Regulations* 1988. A summons was issued at Preston Magistrates' Court on 10 April 1992, for mention on 4 June. The summons required the applicant to answer the three charges above mentioned. Service of the charge and summons was not effected on the applicant until 26 May, less than 14 days before the mention date in the summons. Section 34 of the *Magistrates' Court Act* requires that every summons to answer to a charge must be served at least 14 days before the mention date.

Possibly anticipating a problem with service the informant caused another summons to be issued on 15 June 1992 in which a mention date 15 October was specified. The second summons required the applicant to answer a charge under s49(1)(f) of the *Road Safety Act* in identical terms to the first charge in the earlier summons. No other charge was included in the second summons. Service of the second summons was effected on the applicant on 7 July. The first summons was adjourned at the request of the applicant for hearing in the Magistrates' Court at Preston on 15 October. Prior to 15 October the applicant consented to a further adjournment to 25 February 1993. On 25 February 1993 the first and second summons came on for hearing before Mr AJ Johnson, Magistrate. There is a dispute as to the events which occurred in Court before the hearing of the charges began. The applicant asserts that the Magistrate was asked to strike out the first **[2]** summons because the summons was short served. The informant (the second named respondent) says that he only wanted the first charge in the first summons namely, the s49(1)(f) charge struck out and wished to proceed with the identical charge specified in the second summons because the second summons had been served within the time limited by s34.

The Court computer records are difficult to interpret and I am unclear whether the records show that the second summons was struck out by the magistrate. I am inclined to the view that

the Magistrate probably struck out the second summons. The informant then asked the Magistrate for leave to withdraw the second charge in the first summons. The hearing commenced on 25 February 1993 and the proceeding was then adjourned to a date to be fixed. Later, 26 April was appointed for resumption of the hearing. But before this date arrived, the Magistrate, Johnson, resigned from office and ceased to be a Magistrate. The summons was then adjourned to Preston Court on 12 July. The Court was now constituted by Mr Franich, Magistrate who indicated that the court would hear the first summons *de novo*. Counsel for the applicant objected to the proceeding being recommenced before another Magistrate and submitted that the Court had no jurisdiction to hear the matter *de novo*. When the learned Magistrate rejected this submission, the applicant applied in this Court for Judicial Review of the decision. By an order of Hampel J on 19 July 1993 the Magistrate and the informant are restrained from proceeding to further hear the charges at the Magistrates' Court at Preston.

[3] Mr Billings submitted that the *Magistrates' Court Act* makes no provision to cover what should occur in circumstances of death, illness or resignation of a Magistrate in the course of an incompleted proceeding. These circumstances are covered by s87(2) of the *Constitution Act* 1975 in the case of the Supreme Court and by s15 of the *County Court Act* 1958 in the case of the County Court, Mr Billings submitted. The threshold point of the argument is whether the learned Magistrate had jurisdiction to order that the first summons be heard *de novo* following the resignation of Mr Johnson. Mr Billings argued that, in the absence of an express provision in the *Magistrates' Court Act* empowering another Magistrate to act in place of Mr Johnson, the partly heard proceeding came to an end with the resignation of Mr Johnson and the proceeding cannot be recommenced before another Magistrate. This is a startling proposition and, not surprisingly, is unsupported by authority.

In my opinion, the argument is flawed, essentially for two reasons. Firstly, it depends upon a misconception as to the purpose of s87(2) and s15. These sections in the superior courts are not necessary to confer jurisdiction upon a Judge to re-hear a proceeding unable to be completed by another Judge in consequence of illness, death or resignation. The purpose of these sections is to empower one Judge to perform the powers and duties of another Judge in the event that the other Judge is unavailable to perform those powers and duties. For example, where a convicted person enters into a bond for good behaviour and to come up for sentence if and when called upon, and commits a breach of **[4]** the bond, and members of the Court who made the original order are no longer members of the Court, a Court differently constituted may issue a bench warrant for the arrest of the convicted person. *R v Nicholson* [1951] VicLawRp 36; [1951] VLR 273; [1951] ALR 574. Another example, in the County Court, of the operation of s15 is seen in *The Bank of Australia v Keirce* [1882] VicLawRp 81; 8 VLR (L) 147. A County Court Judge tried an action to verdict in one district and was removed to another district. The appeal case was settled by another Judge from the notes of the trial Judge and signed by him. Objection having been taken by the respondent, the Court held that s14 of the *County Court Act* 1869 (now s15) allowed the successor to settle the case.

In *Marsland v Taggart* (1928) 2 KB 447 the *Summary Jurisdiction Act* s2, required the justices who had heard an information or complaint to sign a case setting forth all the facts and the grounds of such determination for the opinion of the superior courts of law. A complaint was heard by three justices who agreed to state a case for the opinion of the High Court. One of the justices died before the case could be stated. A Court of Appeal held that the Court had jurisdiction to proceed with the matter despite an objection to its jurisdiction to do so. There was no provision made in the legislation for such an event. The words of Shearman J are appropriate to the present objection.

> "Justices come and go, but justice itself should endure ... This sort of objection ought to be as extinct as the thumbscrew."

The provisions to which Mr Billings referred simply empower a Judge of the Court to perform the powers **[5]** which might have been performed by another Judge no longer able to do so. Secondly, the act of hearing a proceeding *de novo* by one Magistrate because another is unable to complete a hearing of the same matter is within the jurisdiction of the substitute Magistrate under the terms of their appointment as a Magistrate. A Court known as the Magistrates' Court of Victoria is constituted by a Magistrate duly appointed by the Governor in Council. (See ss4 and

7). The Court has jurisdiction in criminal proceedings to hear and determine all summary offences (See s25). In my view, there is no rule of common law which requires that if the presiding judicial officer dealing with a summary offence dies, resigns or, for any other reason, is unable to complete the proceeding, the proceeding cannot be completed by another judicial officer re-hearing the matter *de novo*. Should Mr Billings' argument be upheld the main purposes of the *Magistrates' Court Act* would be frustrated and the administration of justice in the Magistrates' Court brought into disrepute. (See s1). Serious injustice would follow if a partly-completed proceeding could not be restated and heard afresh. No final order of conviction or dismissal or as to costs could be made by the Court.

I am of the opinion that in the unusual event of a Magistrate being unable to complete a hearing, whether by reason of death, illness or resignation, another Magistrate is competent to direct a re-hearing before another Magistrate. Such action will not involve another Magistrate performing the powers of the Magistrate who is no longer able to exercise the powers of a Magistrate. The act of directing **[6]** a re-hearing before another Magistrate is a procedural step in the proceeding. It follows that I reject Mr Billings' argument. It is without merit. No injustice will be caused to the applicant because the proceeding will be heard *de novo* in a Magistrates' Court.

The second argument of Mr Billings concerns service of the first summons. Mr Billings argued that because service of the first summons did not comply with s34(1)(a) of the *Magistrates' Court Act* the Court had no power to proceed to hear the charges the subject matter of the first summons. Section 34 requires that every summons to answer a charge must be served at least 14 days before the mention date. The "mention date" in relation to a criminal proceeding means the first date on which the proceeding is listed before the Court. There is no question but that s34(1)(a) means that service of a summons must be at least 14 days before the mention date. The question raised by Mr Billings' argument is whether the requirement is mandatory so that disobedience will render void what has been done, or should be treated as an irregularity that does not affect the validity of what has been done.

It was argued by Mr Billings that non-compliance with s34 is fatal to the prosecution of the charges specified in the first summons as such non-compliance operates to deny the Court jurisdiction. Mr Boaden, for the informant, argued that as a matter of statutory construction the prescription of the time limit in question must be interpreted as directory only. If this is so, non-compliance **[7]** is no more than an irregularity and cannot serve to deprive the Court of jurisdiction. I am of the opinion that s34 in division 4 is a procedural provision which prescribes a time and method of service and is not concerned with jurisdiction. Part 4, Division 2 of the *Magistrates' Court Act* provides a scheme for the commencement of a criminal proceeding and for compelling the attendance of a defendant in Court.

A summons to answer a charge is a document by which a defendant is directed to attend a Court on a certain date and at a certain time to answer the charge. An irregularity in the summons of the kind that occurred in *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VicRp 81; (1970) VR 625 does not deprive a Court of jurisdiction to hear and determine a proceeding. The question raised by Mr Billings' argument is answered by determining the whole scope and purpose of the enactment. It is "the importance of the provision that has been disregarded, and the relation of that provision to the general object to be secured by the Act" that must be assessed: *Howard v Bodington* (1877) 2 PD 203 at 211. Cf. *Accident Compensation Commission v Murphy* ([1988] VicRp 52; [1988] VR 444, judgment of Full Court, 7/9/87) at pp8-11; *R v Urbanowski* (1976) 1 WLR 455; *Hatton v Beaumont* 52 ALJR 589 at 591.

The *Magistrates' Court Act* does not expressly nullify a summons served otherwise than in accordance with s34. Compliance with the requirements of s34 is not stated to be a pre-condition to the authority of the Court to exercise jurisdiction to hear the charges. **[8]** A compelling consideration in favour of Mr Boaden's argument is that the summons does not specify a day upon which a hearing will take place. A mention date, not a hearing date, is specified in the summons. A defect in service could be met either by adjourning the summons to a later mention date, not less than the time prescribed by ss(1)(a) or by extending the mention date and directing further service of the summons. No real hardship would be caused to a defendant should such a course be taken. It would work serious inconvenience and injustice were the requirements of s34 to be held imperative.

Mr Billings relied upon a recent unreported decision of Hayne J In *Nitz v Evans* (1993) 19 MVR 55 the Court had to consider the validity of service of a document which purported to be a true copy of a summons issued regularly by the Registrar of the Magistrates' Court. The document which was served was irregular in that it 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. The question at issue was whether the service of the copy document which was irregular precluded the Court from proceeding to hear and determine the charge. Hayne J found it unnecessary "to decide whether the difficulties about service go to the jurisdiction of the Court or go only to the question of whether a hearing in the nature of a trial could take place". *Nitz* was decided upon a different point to the point raised in the present proceeding. The copy document served upon the defendant was defective and the defect could not be cured by the Court.

[9] The summons served in the present case was regular and the only question is whether non-compliance with s34 deprived the Court of jurisdiction. I consider that the Court was not deprived of jurisdiction. As earlier mentioned, by consent of the parties the mention date was extended to 15 October 1992 and the Court did not commence to hear the proceeding until 25 February 1993. No hardship or prejudice was caused to the defendant in the result.

A third argument raised by Mr Billings is rendered irrelevant in view of my decision as to the validity of the first summons. In case this matter is taken further I should deal briefly with Mr Billings' third argument. Mr Billings argued that, if the second summons cannot be heard because of non-compliance with s34, it is not open to the informant to have the second summons restored to the register for hearing. In substance the argument is that the order for "striking out" the second summons cannot be reversed by another Magistrate setting aside the order of Mr Johnson.

In my opinion, the decision of Kaye J in *R v McGowan* [1984] VicRp 78; [1984] VR 1000 is directly in point. *McGowan's* case decided that an order striking out an information is not a curial determination of the merits of the charge alleged and does not put an end to the proceedings. A Magistrate is empowered to set aside an order striking out an information and to order that the information be reinstated. The unreported decision of Hedigan J in *Douglas v Langton* ((1992) 16 MVR 21, 1/10/1992) does not cast doubt upon the correctness of the decision in *McGowan*. Were it necessary, I consider the second summons could be reinstated and tried in the Magistrates' Court. **[10]** Accordingly, the application by way of Judicial Review is dismissed with costs. The restraining order of Hampel J made on 19 July 1993 is dissolved. This proceeding is otherwise referred to the Magistrates' Court at Preston for hearing and determination.

APPEARANCES: For the plaintiff Sammassino: Mr P Billings, counsel. MK Steele & Giammario, solicitors. For the second defendant Comley: Mr R Boaden. counsel. Victorian Government Solicitor.
