46/10; [2010] VSC 400

SUPREME COURT OF VICTORIA

DPP v KYPRI

Pagone J

24 August, 7 September 2010 — (2010) 201 A Crim R 424

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT CHARGED WITH REFUSING TO COMPLY WITH A REQUIREMENT UNDER SECTION 55 – SECTION REFERS TO SEVERAL FACT SITUATIONS IN SECTION 55 – NONE SPECIFIED IN THE CHARGE – WHETHER ESSENTIAL ELEMENTS OF CHARGE – WHETHER SECTION 49(1)(e) CREATES SEPARATE OFFENCES – NO CASE SUBMISSION UPHELD BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – AMENDMENT OF CHARGE – WHETHER AMENDMENT OF CHARGE SHOULD BE ALLOWED: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(1).

Section 49(1)(e) of the *Road Safety Act* ('Act') 1986 provides:

"(1) A person is guilty of an offence if he or she—
(e) refuses to comply with a requirement made under section 55(1), (2), (2AA), (2A) or (9A);"

K. was charged under s49(1) of the Act with the offence of having failed to furnish a sample of breath pursuant to section 55 of the Act. The charge did not specify which of the various statutory requirements under s55 K. had failed to comply with. At the hearing of the charge, K. submitted that the charge should be dismissed because the essential ingredients of the offence were missing from the charge. The Magistrate agreed, upheld the submission and dismissed the charge. Upon appeal—

HELD: Appeal dismissed.

1. Section 55 of the Act does not itself create offences. It is s49 of the Act which creates the relevant offence by, in this case, providing that a person is guilty of an offence if he or she "refuses to comply with a requirement made under section 55(1), (2), (2AA), (2A) or (9A)". The charge plainly enough alleged that K. had refused to comply with a requirement made pursuant to s55 but did not specify which of the various statutory requirements under s55 he had failed to comply with. Accordingly, each of the subsections referred to in s49(1)(e) in fact create separate offences.

***Goodey v Clarke* (2002) 37 MVR 121; MC 05/2002, followed.**

2. Section 49(1)(e) refers to separate offences but in the present case a reading of the charge would not identify which of the many potential obligations to accompany a member of the police force which s55 permitted had not been complied with. Accordingly, the magistrate was not in error in concluding that the charge had failed to include essential elements and in dismissing the charge.

3. Whether or not to allow an amendment of a charge which fails to disclose an offence is to be determined as a matter of degree. In undertaking that task it is necessary to ask whether the "amendment" is clarifying something in the nature of a misstatement which is otherwise clearly indicated in the charge. There may, perhaps, be other situations where an amendment may be justified but it must usually be possible for the amendment to be said to clarify a charge otherwise found to have been identified in some meaningful, albeit defective, way. In this case the amendment which was sought could not fairly be described as clarifying something which was otherwise disclosed in the formulation of the charge. An amendment to the charge by referring to subsection 55(1) would, rather, be a selection of one of a number of competing possibilities which the charge in its present form equally permits. Accordingly, the amendment would not be allowed even if it had been properly engaged as a ground of appeal.

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

PAGONE J:

1. The Director of Public Prosecutions ("the DPP") appeals against a decision of Magistrate Cashmore dismissing a charge against Mr Kypri on 17 February 2010. Mr Kypri was charged pursuant to s49(1)(e) of the *Road Safety Act* 1986 (Vic) ("the Act") of having failed to furnish a sample of breath pursuant to s55 of the Act. The learned Magistrate dismissed the charge concluding that the essential elements of the offence were missing from the charge. His Honour appeared also to have accepted the alternative submission that the charge was duplicitous.

2. On 6 February 2007 Mr Kypri was charged under s49 of the Act in the following terms: The defendant at Doncaster on 27 November 2005 having been required to furnish a sample of breath pursuant to section 55 of the Road safety [sic] Act 1986 and for that purpose a requirement was made for him to accompany a member of the police force to a police station did refuse to comply with such requirement to accompany the member of the police force prior to three hours elapsing since the driving of a motor vehicle.

The DPP maintained that the charge in these terms was legally sufficient and ought not to have been dismissed by the Magistrate. Mr Kypri contended that the charge in these terms disclosed no offence known to the law because it did not aver the essential ingredients of an offence under s49(1)(e) of the Act. The DPP contended that the charge averred the essential ingredients of an offence under s49(1)(e) of failing to comply with s55(1) notwithstanding that the particular subsection relied upon was not expressly mentioned in the charge. It was that absence that Mr Kypri relied upon for the contention that the charge did not aver the essential ingredients.

3. Section 55 does not itself create offences. It is s49 of the Act which creates the relevant offence by, in this case, providing that a person is guilty of an offence if he or she "refuses to comply with a requirement made under section 55(1), (2), (2AA), (2A) or (9A)".[1] The charge plainly enough alleged that Mr Kypri had refused to comply with a requirement made pursuant to s55 but did not specify which of the various statutory requirements under s55 he had failed to comply with.

4. It might be thought sufficient for the charge to articulate all of the elements found in s49(1)(e) without having to specify which requirement referred to in that subsection had not been complied with. It is, after all, s49 which creates the offence and not s55. However, in *Goodey v Clarke*[2] Bongiorno J (as his Honour then was) took a different view. In that case his Honour accepted that it was s49(1)(e) which created the relevant offence but that in doing so the section referred to separate offences linked to each of the subsections in s55. His Honour concluded that each of the subsections referred to in s49(1)(e) did in fact create separate offences. In that case his Honour was concerned with ss55(1) and (2A) in relation to which his Honour said:

> Notwithstanding Mr Gyorffy's submission, I have concluded that s55(1) and (2A) do in fact create separate offences: in the first, a failure to provide a breath sample *simpliciter* (emphasis added) and, in the second, a failure to provide further samples in the circumstances provided by s55(2A). Having regard to the preliminary words of s55(2A), it would not be open, in my view, to argue that s49(1)(f) was rendered inoperative where a sample is provided pursuant to s55(2A). Section 55(2A) commences with reference to the person who required a sample of breath under s55(1) or (2) being entitled to require the person who furnished the breath sample to provide further samples. That is sufficient, in my opinion, to interpret s49(1)(f) as applying to a sample of breath and its analysis whether the sample was provided under s55(2A) or (1). That legal analysis does not mean that the two sections create the same offence or that there is only one offence. Section 49(1)(e) makes it clear that there is more than one offence, and when one looks at the elements of those offences which would have to be proved under s55(1) and then under s55(2A) that conclusion is reinforced.[3]

In *DPP v Greelish*[4] the Court of Appeal held that separate offences were created under s55(1) of the Act of refusing to furnish a sample of breath for analysis and of refusing to accompany a police officer to a police station or other place for that purpose. Subsequently in *Clarke v Goodey*[5] the Court of Appeal referred to the decision in *Greelish* and refused leave to appeal from the decision of Bongiorno J concluding that the decision was not attended with sufficient doubt to warrant leave. The Court of Appeal accepted in the leave application in *Clarke v Goodey* (consistently with its decision in *Greelish*) that on the face of s49(1)(e) there appeared to have been created separate offences in respect of each of the subsections of s55 to which it referred.[6]

5. The conclusion that s49(1)(e) refers to separate offences, together with the decisions in *Goodey v Clarke*, *DPP v Greelish* and *Clarke v Goodey*, is sufficient to dispose of the appeal in this case against the DPP. The charge averred a failure to comply with a requirement "to accompany a member" of the police force to a police station but it did not identify which of the possible requirements under s55 had been invoked and not complied with. Each of ss55(1) and (2) expressly contemplates a requirement that a person accompany a member of the police force but do so in different circumstances. Section 55(9A) also permits the imposition of a requirement to accompany a member of the police force but does so as a secondary requirement in the context of an earlier requirement to allow a registered medical practitioner or an approved health professional to take

a sample of blood from a person required to give a sample of breath under subsections (1), (2), (2AA) or (2A) of s55. In these circumstances the learned Magistrate cannot be said to have erred in the conclusion that the charge had failed to include essential elements. It may readily enough be accepted that the charge and summons should be read as a whole and that it is necessary to strive conscientiously to read the information in a sense that gives it the meaning the draftsman intended,[7] but a reading of the charge would not identify which of the many potential obligations to accompany a member of the police force which s55 permitted had not been complied with. It is not a case where the relevant occurrence or foundation of the charge had been averred but that its evidence or proof had been omitted.[8]

6. The DPP maintained that if there was an omission of an essential ingredient "that the charge should have been permitted to be amended". Part of the problem with this submission, however, was that no application to amend appears to have been made to the learned Magistrate at the time. Indeed, no error of a failure to permit an amendment appears in the notice of appeal or in the prayer for relief.

7. In *Broome v Chenoweth*[9] Dixon J said:

> Whether an information disclosing no offence can be amended has been the subject of some difference of judicial opinion. Some Victorian cases will be found discussed by Cussen J in *Knox* v *Bible*, and the matter is very fully examined by Clark J in *Davies v Andrews*, where cases from other jurisdictions are collected. Probably it is necessary to deal with the question as a matter of degree and not by a firmly logical distinction. 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.[10] (footnotes omitted)

Whether or not to allow an amendment of a charge which fails to disclose an offence is not something to be determined by logical distinctions because logical distinctions might dictate that there was no offence capable of amendment. However, as his Honour made clear, whether an amendment to a charge should be allowed is to be determined as a matter of degree. In undertaking that task it is necessary to ask whether the "amendment" is clarifying something in the nature of a misstatement which is otherwise clearly indicated in the charge. There may, perhaps, be other situations where an amendment may be justified but it must usually be possible for the amendment to be said to clarify a charge otherwise found to have been identified in some meaningful, albeit defective, way.[11] In this case I do not think that the amendment which is sought could fairly be described as clarifying something which is otherwise disclosed in the formulation of the charge. An amendment to the charge by referring to subsection 55(1) would, rather, be a selection of one of a number of competing possibilities which the charge in its present form equally permits. Accordingly I would not allow the amendment even if it had been properly engaged as a ground of appeal.

8. It is unnecessary for me to consider the additional basis upon which the respondent sought to defend the decision of the learned Magistrate, namely, that the charge was duplicitous. It may be accepted that a duplicitous or uncertain charge may in certain circumstances be amended[12] but the Magistrate was not in error in failing to allow an amendment if, for no other reason, that no application for amendment was made.

9. I will dismiss the appeal subject to any argument about costs.

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[1] *Road Safety Act* 1986 (Vic) s49(1)(e).
[2] [2002] VSC 246; (2002) 37 MVR 121.
[3] Ibid 122.
[4] [2002] VSCA 49; (2002) 4 VR 220; (2002) 128 A Crim R 144; (2002) 35 MVR 466.
[5] (Unreported, Victorian Supreme Court of Appeal, Batt and Buchanan JJA, 23 August 2002) [12]-[15] (Buchanan JA).
[6] Ibid [11] (Buchanan JA).
[7] *DPP Reference No 2 of 2001*; *Collicoat v DPP* [2001] VSCA 114; (2001) 4 VR 55, 59 [12], 68 (40); (2001) 122 A Crim R 251; (2001) 34 MVR 164; *Smith v Van Maanen* (1991) 14 MVR 365, 369 (Tadgell J).
[8] Compare *Taylor v Environment Protection Authority* [2000] NSWCCA 71; (2000) 50 NSWLR 48; (2000) 113 LGERA 116 (Meagher JA, James and Sperling JJ, 25 August 2000); *Smith v Moody* (1903) 1 KB 56, 63;

[1900-3] All ER Rep Ext 1274 (Channell J); *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 479, 486-7, 489-90; [1938] ALR 104 (Latham CJ and Dixon J).
[9] [1946] HCA 53; (1946) 73 CLR 583; [1947] ALR 27.
[10] Ibid 601; *DPP Reference No 2 of 2001*; *Collicoat v DPP* [2001] VSCA 114; (2001) 4 VR 55, 63 [21]; (2001) 122 A Crim R 251; (2001) 34 MVR 164 (Charles JA).
[11] See also *DPP v Whittleton* (1991) 15 MVR 105, 107 (Smith J).
[12] *Magistrates' Court Act* 1989 (Vic) s50(1); *Rodgers v Richards* [1892] 1 QB 555, 556-7 (Hawkins J and Wills J); *Hedberg v Woodhall* [1913] HCA 2; (1913) 15 CLR 531, 535-6; 19 ALR 95 (Griffith CJ); *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 490; [1938] ALR 104 (Dixon J).

APPEARANCES: For the appellant DPP: Mr A Albert and Mr M Roper, counsel. Office of Public Prosecutions. For the respondent Kypri: Mr P Holdenson QC and Mr W Walsh-Buckley, counsel. Victoria Legal Aid.
