

13/89

SUPREME COURT OF VICTORIA

DAVIDSON v TYMENSEN

Beach J

6 March 1989

PROCEDURE – INFORMATION ALLEGING COMMISSION OF OFFENCE BETWEEN CERTAIN DATES – SPECIFIC DATE UNKNOWN TO PROSECUTOR – WHETHER INFORMATION BAD FOR DUPLICITY/ UNCERTAINTY.

Where an information alleges that the defendant on one occasion between certain dates committed a certain offence and the prosecutor is unable to supply a further specific date, the information is not bad for duplicity or uncertainty.

BEACH J: *[After setting out briefly the proceedings before the Magistrate and the grounds of the order nisi, His Honour continued]* ... [6] There can be no doubt that the information before the Magistrates' Court was bad for duplicity. Further, it is clear, as a matter of law, that the applicant was entitled to further and better particulars of any charge the prosecution determined to proceed with against her. That that is so is now conceded and, if I may say so, quite properly conceded by counsel for the respondent. He agrees that the information, even when amended, was bad for duplicity and he agrees that the applicant was entitled to certain further and better particulars of any charge brought against her.

Accordingly, in the ordinary course of events, one would have had little hesitation in making the order nisi absolute, certainly on the grounds that the information was bad for duplicity, was bad for uncertainty and that the Magistrate should have ordered the prosecution to supply the further particulars. However, counsel for the respondent has now sought leave to further amend the information in a way which, he contends, will rectify the matter and has also [7] provided the Court with particulars of the amended information, which, he contends, should be adequate enough in the circumstances.

If his application is successful, the information would then read:

"The information of the informant, a member of the Police Force of the State of Victoria, who says that the defendant at Noble Park on a day between the first day of December 1986 and the 25th day of December 1986 did steal various merchandise items being property belonging to SE. Dickins Pty. Ltd. trading as Coles New World, 1 Douglas Street, Noble Park, and being of the value of \$4."

The particulars he would propose to give the applicant in respect of such information read as follows:

- "(a) save that the offence occurred during the hours of operation of the said Coles New World Supermarket between the dates specified, the informant is unable to specify further;
- (b) Coles New World Supermarket, 1 Douglas Street, Noble Park;
- (c) save that the offence occurred during the hours of operation of the said Coles New World Supermarket between the dates specified, the informant is unable to specify further;
- (d) that on one occasion, the defendant presented herself at a check-out with merchandise being the property of the said Coles New World Supermarket and knowingly permitted the cashier to undercharge the defendant in the sum of \$4 or thereabouts;
- (e) save that the merchandise consisted of a small number of [8] items, the property of the said Coles New World Supermarket, the informant is unable to specify further;
- (f), (g), (h) and (i) the informant is unable to say."

Counsel for the applicant opposes the respondent's application to amend the information on the ground that, as amended, the information could still be bad for duplicity and on the ground that the particulars given, or the proposed particulars, are inadequate and do not enable the applicant to know what case she will be called upon to answer. So far as the contention that the

information may still be bad for duplicity is concerned, in my opinion, that contention is without substance. Counsel for the respondent has stated that only one incident will be relied upon in support of the charge, in other words, that the case for the respondent will be that, on one occasion between those dates, the defendant presented herself at a check-out with merchandise being the property of Coles New World Supermarket and on that one occasion knowingly permitted the cashier to undercharge her in the sum of \$4 or thereabouts. In that situation, I do not see how it could be successfully contended that the information, if amended in the way now sought, could be bad for duplicity.

I turn then to consider whether or not the particulars that it is proposed to give to the applicant are adequate. The first complaint made, in relation to the particulars – and I should add, the information itself – is that no precise date is specified upon which the offence is alleged [9] to have occurred. The information merely alleges the commission of the offence on a day between the 1 December 1986 and 25 December 1986.

The respondent has informed the Court and, indeed, as its proposed particulars make clear, she is unable to specify the date further. In my opinion, that is an insufficient basis upon which to attack the particular information. Speaking generally, it is by no means uncommon for the prosecution to be able to do no more in a particular case than allege that an offence was committed between certain dates. One frequently has murder cases in which a body is found and a person charged with the offence, where the prosecution knows no more than that the accused committed the crime. In many such cases, the prosecution does not know the date upon which the murder was committed, the time of day at which it was committed or the place at which it was committed. It has never been suggested, to my knowledge, that the charge brought against the accused in such circumstances should be dismissed because the Crown is unable to give such particulars.

If counsel's submission in this regard is correct, it would mean that, if a person went to a police officer and said, "Last month, when I was in Coles Supermarket, I stole some merchandise", that no charge of theft could be brought against that person because the police officer would not know the precise date on which the offence took place, the time of day at which it occurred or the precise nature of the merchandise that the person stole. I do not think that that is the law in relation to the matter. [10] The respondent has specified the date, or the occasion upon which the alleged offence took place with as much precision as it can. I do not consider it is any ground for dismissing the information that it cannot state the date more precisely. I should add that counsel for the respondent informed me that the evidence that the respondent will be relying on in support of the charge consists of admissions made by the applicant to a police officer and a security officer.

It is next said that the particulars it is now proposed to give the applicant are defective in that they do not set out the manner in which the offence was committed. I disagree with that proposal. I consider it is clear from the information given in particular (d) the manner in which it is said the applicant committed an offence.

It is next said that the particulars are inadequate in that the actual merchandise is not identified in the way sought by paras (e), (f), (g), (h) and (i) of the request for particulars. In the circumstances of this case, it is hardly surprising that the respondent is unable to provide the particulars sought. What the respondent is relying upon, of course, are the admissions the applicant allegedly made in relation to the matter. In that situation one would have thought that the only person who would have knowledge of those details would, in fact, be the applicant herself if – and I stress the word 'if' – she committed the offence as the respondent alleges she did.

In my opinion, the circumstances of this case are such [11] that it cannot be said that, if the applicant is given the particulars the respondent is now willing to supply to her, she will not know the nature of the case being brought against her. In my opinion, the interests of justice in this case will be best met by giving the respondent leave to amend the information in the way proposed and by directing that the respondent forthwith supply the applicant with the particulars of the amended information to which I have referred.

In the circumstances of this case, I consider the appropriate order to make, in relation to

the order nisi, is that it be discharged and that the information in its amended form be remitted to the Magistrates' Court at Oakleigh for further hearing. Although I have ordered that the order nisi be discharged, the fact of the matter is that the applicant has succeeded in achieving what she sought and, in that situation, I consider the appropriate order to make in respect of the costs of the present proceeding is that those costs, including reserved costs, be taxed and, when taxed, paid by the respondent.

APPEARANCES: For the applicant Davidson: Ms A Mendes De Costa, counsel. John P Rhoden, solicitor. For the respondent Tymensen: Mr GJ Maguire, counsel. Victorian Government Solicitor.
