

3/99; [1998] VSC 170

SUPREME COURT OF VICTORIA

SINCLAIR v MAGISTRATES' COURT of VICTORIA and BRERETON

Warren J

12 November, 9 December 1998

PRACTICE AND PROCEDURE – SUMMONS NOT VALIDLY EXTENDED – PROCEDURAL REQUIREMENTS OF LEGISLATION – WHETHER MANDATORY AND MUST BE COMPLIED WITH – IN VIEW OF LAPSE OF TIME WHETHER HEARING CAN TAKE PLACE: *MAGISTRATES' COURT ACT 1989*, S33(2).

1. The procedural requirements of the *Magistrates' Court Act 1989* ('Act') governing the laying of charges and the service of summonses and mandatory and must be strictly complied with. *Nitz v Evans* (1993) 19 MVR 55, applied.

2. Where there was no satisfactory evidence that a summons was extended within the time provided by the Act, the charge and summons were out of time, the summons lapsed and accordingly, a hearing of the charge could not take place. In those circumstances the magistrate was in error in being satisfied beyond reasonable doubt or at the very least on the basis of the standard stipulated in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; (1938) 12 ALJR 100 that the summons had been extended within time.

WARREN J:

1. The plaintiff in this proceeding is charged with assault alleged to have occurred on 12 December 1996. A summons was issued by the Registrar at the Ringwood Magistrates' Court on 10 December 1997. The summons specified that the matter would be heard at the Magistrates' Court of Victoria at Ringwood at 10:00am on 5 February 1998.

2. Division 2 of the *Magistrates' Court Act 1989* sets out the procedure to be followed in relation to charges and summons concerning criminal matters. Section 26(1) of the Act provides that a criminal proceeding must be commenced by filing a charge in one of two ways, including with a Registrar. Section 28 of the Act provides that upon the filing of a charge under s26 an application may be made for the issue of a summons to answer to the charge in order to compel the attendance of the defendant. Section 33 of the *Magistrates' Court Act* provides:

"33. Summons to answer to a charge

(1) A summons to answer to a charge must direct the defendant to attend at the proper venue on a certain date and at a certain time to answer the charge.

(2) On the application of the informant at any time before the service of a summons to answer to a charge, the mention date specified in the summons may be extended without cause—

(a) before the mention date; or

(b) within one month after the mention date—

by the appropriate registrar on one occasion and thereafter may be extended—

(c) before the current mention date; or

(d) within one month after the current mention date—

by the appropriate registrar if he or she is satisfied by evidence on oath or by affidavit that reasonable efforts have been made to serve the summons."

3. Section 34(1) of the Act provides:

"34. Service of summons to answer to a charge

(1) Every summons to answer to a charge, except where otherwise expressly enacted—

(a) must be served at least 14 days before the mention date; and

(b) must be served on the defendant by—

(i) delivering a true copy of the summons to the defendant personally; or

(ii) leaving a true copy of the summons for the defendant at the defendant's last or most usual

place of residence or of business with a person who apparently resides or works there and who apparently is not less than 16 years of age."

4. Subsequent to issuing the summons on 10 December 1997 nominating a return date of 5 February 1998, the informant on a date that is uncertain went to the Ringwood Magistrates' Court and extended the mention date to 23 April 1998. The charge and summons as originally issued on 10 December 1997 disclosed the identity and address of the defendant to the charge as "Stuart Sinclair 21 Lloyd Street Knoxfield". These matters were set out in typeface as were all other matters on the charge and summons save for the time and date of the original mention date which was written in hand. It appears that at some date after the issue of the charge and summons the informant encountered difficulties in locating the address of the defendant to the charge and ascertained that he had moved to a different address. As a result the informant altered the address of the defendant on the charge by hand to another address, "12 View Street Avonsleigh Emerald". The charge and summons on the file at the Ringwood Magistrates' Court disclosed a date stamp of the court bearing the date 7 April 1998. On the reverse side of the charge and summons was an affidavit of service completed by the informant wherein he deposed that he served a true copy of the relevant charge and summons on the defendant to the summons on 3 April 1998 by posting the same from the Brandon Park Post Office addressed to the defendant at 12 View Street Avonsleigh Emerald. The affidavit of service was sworn on 3 April 1998. The plaintiff in this proceeding, Stuart Sinclair received the charge and summons via post on 8 April 1998. The matter eventually came on at a mention hearing on 20 May 1998 at which the plaintiff submitted that the charge and summons were invalid and the charge ought therefore be dismissed.

5. Counsel for the plaintiff argued, before the learned magistrate that the Summons had not been validly extended pursuant to s33(2) of the *Magistrates' Court Act* 1989. Section 33(2) states that a summons must be extended either before or within one month of the mention date. The summons on the Court file was stamped 7 April 1998, which, it was submitted, was outside the time allowed by the Act. The copy received by the plaintiff had no date at all.

6. There was evidence before the learned magistrate that the relevant summons was the second summons to be issued. The first summons was issued around May of 1997 but was not served. The Informant gave evidence that he issued the second summons as the first one had exceeded the original mention date. During cross-examination the Informant stated that he had delayed in issuing and serving both summonses. He waited until the second last day before issuing the second summons, and then delayed serving it until 3 April 1998.

7. After argument and inquiries conducted over a number of intermittent hearing dates the learned magistrate ruled on 1 June 1998 that the charge and summons complied with the provisions of the Magistrates' Court Act. The matter was adjourned without further determination or adjudication to allow the plaintiff in this proceeding to pursue the matter in this court. By originating motion and pursuant to 0.56 of the Rules of the Supreme Court the plaintiff seeks relief in the nature of *certiorari* and prohibition on the principal ground that the summons was either not extended in accordance with the Act or the purported extension was invalid. It is alleged, further, that the learned magistrate improperly accepted evidence from the informant as to the facts surrounding the extension of time of the summons.

8. In an affidavit sworn by the plaintiff he has deposed that he was present throughout the various hearings that occurred before the learned magistrate sitting at the Ringwood Magistrates' Court with respect to this matter. The affidavit was not challenged or rebutted. The informant deposed that at the behest of the magistrate the informant was required to give evidence of the circumstances surrounding the issue and purported extension of time of the summons. On 27 May 1998 the informant appeared and gave evidence that he attended the Registry counter at the Ringwood Magistrates' Court and arranged the extension of the summons but that he was unable to recall the date this occurred and did not have a note of the same. The informant gave evidence, further, that he believed the period of time when the extension was made was within one month of the original mention date. He said that he was aware of the statutory requirements in relation to the extension of time of a summons. However, the evidence of the informant was generally vague and uncertain as to the circumstances and the date of the extension. The informant's recollection of events was exacerbated by the fact that he had taken leave prior to the extension of the summons, was transferred to a police station at Moe and was on night duty during the

relevant period. When questioned as to how he travelled to the Ringwood Magistrates' Court for the purposes of arranging the extension of the summons again the evidence of the informant was vague save that he travelled the journey in a police car alone. There was no police record produced of the attendance at the court or of the use of the police car. It transpired, also, that an earlier summons in relation to the same matter had been issued by the informant against the defendant in about May 1997 but was never served because the informant allowed the proceeding to go past the original mention date nominated in that summons. The Informant gave evidence that there was no written record made of the date on which he extended the summons. He stated that he would have extended it within time because he knew the rules, and would not have breached them.

The informant further relied upon the fact that the Registrar had not alerted him to the fact that it was being extended out of time, and would have done so if the time limit had expired. Under cross-examination, the informant acknowledged that he had delayed issuing and serving both the original summons and the summons the subject of the hearing before this court. When pressed under cross-examination the informant gave evidence that he did not know the month in which he extended the relevant summons. He agreed that it could have been any of the first or last weeks of February 1998 or the first two weeks or the second two weeks of March 1998. He agreed, further, under cross-examination that if he in fact did extend the summons during the second two weeks of March 1998 it would have been outside the time limit provided under s33 of the *Magistrates' Court Act*. In addition, the informant gave evidence that he ascertained the change of address of the defendant after he had extended the summons but prior to effecting service by post on the defendant. Again the informant was uncertain as to the precise length of time after the extension of the summons and the date of posting the same save that it was possibly a week. In addition to the informant's evidence the learned magistrate indicated to the parties that inquiries of the Registrar of the Ringwood Magistrates' Court were unable to cast any light upon the matter.

9. Clearly, upon challenge by the defendant the informant was unable to precisely state when the extension occurred. Nevertheless, the learned magistrate was prepared to make a finding and proceeded to do so to the effect that the informant had made the extension within time and accordingly made the orders that he did.

10. Section 33(1) of the *Magistrates' Court Act* is mandatory in its requirement that a summons must direct the defendant to attend on a certain date to answer the particular charge. Under sub-s(2) of s33 an informant may at any time before the service of a summons extend the mention date specified in the summons either before the mention date or within one month after the mention date. In this matter there is no satisfactory evidence that the informant extended the summons prior to 5 February 1998 or within one month of 5 February 1998. Indeed, in evidence the informant conceded that the summons may have been extended in the latter part of the month of March 1998. In such a case the extension would have been out of time and the summons would lapse accordingly.

In *Nitz v Evans* (1993) 19 MVR 55 Hayne J considered a challenge to the effectiveness of service of a summons upon a defendant in summary proceedings in the Magistrates' Court. It transpired in that matter that the summons served on the defendant was not a true copy of the summons that was issued. Hayne J defined the question before him as whether given that the document that was served on the defendant was not a true copy of the summons that had been issued the learned magistrate in that matter was entitled to proceed to hear and determine the charge. The issue revolved around compliance with s34 of the *Magistrates' Court Act* in relation to service. The learned judge observed that s34 is cast in mandatory terms. He observed that as the matter was a criminal charge, compliance with the mandatory provisions of the legislation was essential. The learned judge determined that as the summons in the proceeding was not served in accordance with the requirements of the *Magistrates' Court Act* the magistrate should not have proceeded to hear and determine the charge until the defendant had been properly served as the Act required.

11. In *Kerr v Hannon* [1992] VicRp 3; (1992) 1 VR 43 an information was the subject of a challenge on the ground that it did not specify the date on which the alleged events occurred. Nathan J held that as an information must be laid within a specified time, in that instance 12

months from the date of the offence, the information must contain the date or other particulars that would enable the defendant to ascertain the date. As the information did not contain any dates at all the learned judge held that the information was defective. The learned judge was concerned with the application of the provisions of the legislative predecessor of the current Act, the *Magistrates (Summary Proceedings) Act* 1975, and observed (at 45):

"The Act sets out a comprehensive Code governing all aspects of the laying of informations and the procedures a Magistrates' Court must pursue in dealing with them. There is no room for manoeuvre or quibble: see *Galaxy International Pty Ltd v Bates* ([1988] VicRp 85; [1988] VR 948, Nathan J, 12 February 1988): s165 must be strictly complied with".

12. The principle to be extracted from each of these cases is that the procedural requirements of the legislation governing the laying of charges and the service of summons must be strictly complied with, indeed, such provisions are mandatory. Sections 33 and 34 of the *Magistrates' Court Act* are interrelated in that s34 provides that every summons to answer a charge must be served at least 14 days before the mention date and must be served on the defendant by defined means. It is this provision that Hayne J in *Nitz* considered to be mandatory and must be strictly complied with. Section 26 of the Act sets out the way in which a criminal proceeding is commenced and provides in sub-s(4) that a proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence is alleged to have been committed except where otherwise provided by or under any other Act. The latter is the equivalent provision of s165 of the previous *Magistrates (Summary Proceedings) Act* considered by Nathan J in *Kerr*. Similarly, the learned judge held that the provision must be strictly complied with.

The authorities and the circumstances of this matter lead me to conclude that there can be no certainty that the requirements of s33 were strictly complied with by the informant in the course of attempting to extend the time of the summons. The requirements of s33 are couched in mandatory terms. The whole procedural scheme enshrined in Division 2 of Part 4 of the Act is to ensure that proceedings are commenced in a precise and formal way and that the defendant to a summons has reasonable notice of the return date of the mention hearing specified in the summons. Furthermore, s3 of the Act is couched in terms so that the life of a summons can be extended within certain time constraints. It can be reasonably assumed that the legislature intended that the provisions place a burden upon an informant to ensure that a charge and summons proceeds to hearing before the Magistrates' Court expeditiously. The entire circumstances surrounding the issue and extension of time of this summons and the previous summons are far from satisfactory.

13. Having formed this view the issue arises as to the appropriate course. These proceedings are issued by the plaintiff seeking judicial review in the nature of prohibition and certiorari and an order that the learned magistrate be restrained from proceeding to determine the matter and that the charge be dismissed. The originating motion sets out matters under a heading "Grounds of Appeal". I am satisfied that the matters set out in the "Grounds of Appeal" of the originating motion satisfy the requirements of Order 56.01(4) of the Rules. I am further satisfied on the basis of the description of proceedings in the court below in the affidavit sworn by the plaintiff that the requirements of Order 56.01(5) have been satisfied.

14. Mr Dennis who appeared for the defendant submits that the magistrate was entitled to determine the jurisdictional fact in order to determine whether he had jurisdiction. It was submitted that the learned magistrate made determinations of fact which were open to him on the evidence. Mr Dennis relied upon a number of authorities: *Hardy v Gillette* [1976] VicRp 36; (1976) VR 392, 395; and *R v Blakeley; ex parte Association of Architects* [1950] HCA 40; (1950) 82 CLR 54; [1950] ALR 827. This submission is of limited assistance. I respectfully adopt the observations of Hayne J in *Nitz* (at p58)

"Much of the argument on the appeal was couched in terms of whether in the events that had happened the court below had jurisdiction. In the end I doubt that it is useful to speak in terms of presence or absence of jurisdiction in the court below at least without going on to identify the sense in which the expression is used: see *Parisiennne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; (1938) 59 CLR 369; [1938] ALR 119. As I have said, there is no doubt that a criminal proceeding had been validly commenced and a summons had been regularly issued. It may be, then, that analogies can be drawn between the charge and summons on the one hand and the information and process spoken of in *R v Hughes* (1879) 4 QBD 614 on the other. In that case Hawkins J said at 625:

'The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid, that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place, unless under special statutory enactment.'

The question at issue in the present matter is whether the defects in service were such as to preclude the court from proceeding to hear and determine the charge. In my view it is not necessary 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' (to adopt the words of Hawkins J)."

15. On the basis of the views expressed in *Nitz* the question for me to determine ultimately is whether a hearing can take place. In my view it cannot because the informant failed to comply with the mandatory procedural provisions of the *Magistrates' Court Act* in relation to the extension, the mention date specified in the summons and the summons has since lapsed.

16. The issue arose in argument before me as to whether in any event it was open to the learned magistrate to decide as a matter of fact as he did that he was satisfied that the summons had been extended within time. Insofar as it is necessary for me to do so I make the observation that the learned magistrate appears to have satisfied himself only on the basis of the balance of probabilities. The nature of the charge that was the subject of the summons in this matter was a criminal matter. That fact combined with the uncertainty surrounding the issue of compliance with the procedural requirements of the Act lead me to conclude that the learned magistrate ought to have been satisfied beyond reasonable doubt or at the very least on the basis of the higher standard stipulated in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; (1938) 12 ALJR 100. On the evidence, the learned magistrate was not and could not have been so satisfied.

17. It follows that I consider that the learned magistrate was in error in adjourning the matter for further mention to another date when it was contemplated that the matter would proceed to hearing. I will declare that the charge and summons has lapsed and order that the learned magistrate should be prohibited from further hearing the matter. In view of the nature of the objection taken below I consider that each party should bear its own cost of the proceeding below but subject to anything that counsel may say, I consider that the plaintiff should have his costs of this proceeding.

APPEARANCES: For the Plaintiff: Mr AG Cooper, counsel. Fernandez Canda & Co, solicitors. For the Defendant: Mr B Dennis, counsel. Victorian Government Solicitor's Office.