**26/94**

**SUPREME COURT OF VICTORIA**

# *DPP v PITA VELEVSKI*

**Hansen J**

**19 August, 22 September 1994 — (1994) 20 MVR 426**

**MOTOR TRAFFIC – DRINK/DRIVING – DRIVER GAVE HIS BROTHER'S NAME TO POLICE – MISNOMER NOT REALISED UNTIL DATE OF HEARING – APPLICATION BY POLICE PROSECUTOR TO AMEND FIRST NAME – APPLICATION REFUSED – WHETHER ERROR DISCLOSED: *MAGISTRATES' COURT ACT* 1989. S50.**

PV was charged with 2 offences under the *Road Safety Act* 1986, s49(1). When the charges came on for hearing, the informant realised that the actual offender was not PV but his brother MV. The police prosecutor applied to amend the defendant's name by substituting PV with another name. This application was refused, no evidence was led and the charges were dismissed. Upon appeal—

**HELD: Appeal allowed. Dismissal set aside. Remitted to the Magistrates' Court for further hearing and determination.**
**Section 50 of the *Magistrates' Court Act* 1989 confers on the Court an ample power to amend. In this case the amendment should have been made. No injustice would have been suffered by PV as the amendment would have removed his name as a defendant to a legal proceeding to which he should never have been a party. The making of the amendment would have produced a defendant (MV) who to his own knowledge should always have been the defendant and who would have been the defendant if he had not lied to police in the first place.**
***Pearcey v Chianta* (1987) 6 MVR 10; MC 30/87, applied.**

**HANSEN J: [1]** This is an appeal from orders of the Magistrates' Court at Melbourne on 21 April 1994 whereby two charges under the *Road Safety Act* 1986, ss49(1)(b) and (f) respectively, were dismissed with an order for costs against the informant. The defendant named in the charges was Pita Velevski; he had a brother called Michael Velevski. In essence, the charges were that the defendant on 4 December 1992 had driven a motor vehicle while more than the prescribed concentration of alcohol was present in his blood. The order of dismissal was made following the refusal by the magistrate of an application by the prosecutor to amend the name of the defendant from Pita Velevski to Michael Velevski. The application was made because at Court on 21 April 1994, the informant realised, for the first time, that the actual offender was Michael Velevski. It appears that at a late stage of the application, the prosecutor also applied to amend the name of the defendant to read "Pita Velevski also known as Mick Velevski". I think nothing turns on the amendment having been sought in different terms as the plain sense of the application, which would have been understood by the magistrate, was that the appropriate defendant was not Pita Velevski but Michael Velevski and that the charges should be amended accordingly. The sole question raised on the appeal is whether the magistrate erred in law in refusing to allow the name to be amended to Michael Velevski. For it was in consequence of that refusal that the orders of dismissal were made.

The *Magistrates' Court Act* 1989, s50, confers an ample power to amend, indeed a statutory direction not to **[2]** allow objections on account of a defect or error in substance or in form. The section provides -

> "(1) On the hearing of a proceeding the Court must not allow an objection to a charge, summons or warrant on account of any defect or error in it in substance or in form or for any variance between it and the evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error."

This is a simplified form of the former s157 of the *Magistrates (Summary Proceedings) Act* 1975 which was repealed by the *Magistrates' Court Act* 1989. Section 157 was considered by Murphy J in *Pearcey v Chianta* (1987) 6 MVR 10, the facts in which were very similar to this case. Each case involved a defendant charged with a motor car offence, in that case exceeding the speed limit, who was charged under the name of his brother because that was the name the offender

had given the police. In *Pearcey*, the magistrate refused an application to amend the name of the defendant to the defendant's correct name on the ground that the change would result in the substitution of a charge more than 12 months since the alleged offence occurred, and dismissed the information. The effect of the passing of 12 months, which had also occurred in this case by the date when the magistrate made the orders of dismissal, was that no new proceeding could be brought against the offender. In *Pearcey*, Murphy J held that the amendment should have been made. In speaking of s157, Murphy J said, at p14, that -

> "... just as it is clearly intended to avoid a defendant's objections to inconsequential errors (see *Dring v Mann* (1948) 112 JP 309), so I **[3]** would find its purpose is served by applying it to correct a mis-description in name flowing directly from the defendant's own falsity."

The facts in this case may be summarised as follows. Pita Velevski and Michael Velevski are brothers. They live at 8 Chapman Street, Seddon. They are licensed drivers. Michael was born in August 1964, Pita was born in March 1967. On 5 December 1992 the informant saw a person driving a vehicle who he shortly thereafter apprehended sitting alone in the driver's side of the car in the car-park of a hotel. That person told the informant that his name was Pita Velevski of 8 Chapman Street, Seddon with a date of birth of 12 March 1967. He told the informant that he could not produce his licence, saying that he did not have it with him and that he was not driving the car. He told the informant that he was not the driver and that the driver was "some blond chick from the pub" who he had "just met ... at the pub" and who had run off "just then". Subsequently he was breath tested and told that he may receive a summons. The summons was issued in February 1993 returnable on 26 April 1993. It is worth noting the history of the matter. There was an adjournment for mention on 24 May 1993 on which date there was an adjournment to 28 September 1993. On that date there was no appearance by the defendant, and the matter proceeded to conviction with a penalty. On 8 April 1994 an application for a re-hearing was heard, and granted, and the charges were re-listed for contest on 21 April 1994. Of course, by this date more than 12 months had passed since the occurrence of the offence.

On 9 April 1994 the informant was contacted by a **[4]** solicitor who advised that he acted for Pita Velevski who would deny he was the driver of the motor car. On 20 April 1994 the prosecutor was informed by the defendant's solicitor that he had made arrangements for Pita Velevski to attend Court for identification purposes. At Court on 21 April 1994, and prior to the hearing commencing, the solicitor directed the informant's attention to a group of adult males in the courtyard and asked him to identify the offender. The informant identified the offender and, in turn, that person established his identity as Michael Velevski. Another person present established his identity as Pita Velevski. The solicitor, who had obviously arranged for the group of males to be present, had them all produce identification. By this process it was revealed to the informant for the first time that he had been deceived by Michael Velevski on 5 December 1992; and it meant that Pita Velevski was wrongly named as the defendant in the summons.

When the matter came on for hearing the prosecutor informed the magistrate of these matters and made the application to amend the name of the defendant. The defendant's solicitor did not take exception to the history and stated that he acted for the named defendant Pita Velevski, and opposed the application to amend. He submitted that the charges should be dismissed as the informant had proceeded against the wrong person. This was submitted to be an abuse of process and that the charges should be dismissed because the informant's evidence would not support a charge against the named defendant. The solicitor arranged for a solicitor who was present at court to appear for Michael **[5]** Velevski but no contribution to the hearing was made by that solicitor.

As part of the application the prosecutor called the informant who gave evidence as to identifying the offender on 5 December 1992 and that he was now aware that the offender was Michael Velevski. The informant stated how many times Michael Velevski had claimed he was Pita Velevski and that his enquiries had revealed that Pita Velevski held a driver's licence and was the registered owner of the subject motor vehicle. He stated that Michael Velevski had led him to believe that he was in fact Pita Velevski. In cross-examination the informant stated that there was no record of Michael Velevski using an alias of Pita Velevski. No evidence was given by or on behalf of Pita Velevski or Michael Velevski.

The informant referred the magistrate to several cases in support of the application to amend, namely, *Thornley v Clegg* [1982] RTR 405; [1982] Crim LR 523; *Burvett v Moody* [1909] VicLawRp 23; [1909] VLR 126; 15 ALR 91; 30 ALT 160; and *Kennett v Holt* [1974] VicRp 79; [1974] VR 644. He submitted that there was no injustice in making the amendment. In answer the defendant's solicitor submitted that it would be an abuse of process for the charge to proceed if the amendment was allowed. He submitted that the summons had been served on Pita Velevski and that as Michael Velevski was not recorded on police files as using the alias Pita Velevski, an amendment could not be made to describe the defendant as Michael Velevski "also known as" Pita Velevski, which, as noted, was a formulation suggested by the prosecutor. To this the prosecutor replied that the only **[6]** abuse of process was by Michael Velevski who had delayed disclosure of his identity, that the summons had been served on the address where both Pita and Michael Velevski lived and that Michael Velevski was present before the Court. He further submitted that it was irrelevant if Michael Velevski had used the name Pita Velevski before the offence and that it would be proper to describe him as "also known as" by reason of him having used his brother's name at the time of the offence.

The magistrate considered the matter for some time and on returning gave reasons at the end of which she refused the application to amend and dismissed the summons with costs. The magistrate referred to two cases mentioned in *Nash*, *Magistrates' Court Act* 1989, para. 213. She said these cases outlined two different scenarios. The first was where a person gave an alias and then answered the charges; she referred to *R v Carr; Ex parte Ah Ying* [1879] VicLawRp 177; (1879) 5 VLR (L) 391. The second was where an entirely wrong name appeared on a summons and she referred to *Marco (Croydon) Limited v Metropolitan Police* [1983] Crim LR 395. She then refused the application and made the orders mentioned.

The two cases mentioned by the magistrate may be put to one side. In *Carr* the defendant was summoned by a name which was the title of his house and he appeared at the hearing and stated that and that his true name was Ah Ying. That was held to be a proper case for amendment. It is not clear whether the magistrate regarded the case as supportive of the application to amend, although it should be noted that Ah Ying had not used an alias. In *Marco* the defendant was a **[7]** company but the proper defendant was a different company, although one in a group of companies. In holding there should not be an amendment the Court said, at p396, "The situation was more difficult with a limited company than with an individual", and that it was not a case in which a person who was intended to receive the summons had received it and knew it was for him although it contained a misnomer. The case is not authority for a proposition that an amendment will not be permitted where a wrong name appears on a summons. And note the reference to *Marco* in *Pearcey* at p14.

If authority was needed in this case it was to be found in *Pearcey*, but unfortunately the magistrate was not made aware of the decision. *Pearcey* had not been reported in the Victorian Reports or noted in Mr Nash's work. If the magistrate had been aware of *Pearcey* it is hard to see how she could have taken the course which she did. But it is not essential to have been aware of *Pearcey* to conclude that the magistrate was in error in refusing the application to amend. It is self-evident that the power to amend would not ordinarily be used if to do so would cause injustice, and the cases referred to by the prosecutor establish that proposition. On that point, and the point whether an amendment should be allowed if it would raise a new case, it is worth noting that in *Kennett* it was held proper to amend a charge from driving through a "red circle" to "amber circle" after the evidence had been heard and the magistrate had formed a view as to the driving. The reasoning was that the amendment did not substitute a new charge, for the offence charged by the amendment was a cognate offence akin in origin **[8]** and quality and allied in nature to the offence originally charged. It is instructive that at p648, Pape J quoted a passage from the judgment of Mann CJ in *Thomson v Lee* [1935] VicLawRp 65; [1935] VLR 360; [1935] ALR 458 which is worth repeating and should always be kept in mind -

> "... It is not part of the duty of the Bench to regard the matter as a sporting contest; it must use its powers in a proper way to uphold the law; and as the magistrates have full power to amend, upon or without application, and ought, as I think, to have made the amendment ...".

Let the matter be looked at from the point of view of injustice. What injustice could there have been to Pita Velevski in allowing the amendment. None at all. Indeed it would have removed his name as a defendant to a legal proceeding to which he should never have been a party and

would not have been a party if it had not been for his brother's deceit. The informant never intended to charge him, as distinct from the actual offender. Then, where is the injustice from the point of view of Michael Velevski who was the offender and would have been the named defendant if he had not lied to the police. To use the language of Murphy J in *Pearcey*, at p13 -

> "It is, I would think, a defect which cannot be said to have created an injustice to the true offender. He in fact caused it. It is an error which he should have anticipated would be corrected at some stage."

Michael Velevski must always have expected to be charged. It was submitted on behalf of the defendant that *Pearcey* was to be distinguished as in that case there was evidence that when the summons was served upon his brother the offender admitted that he was the driver of the car at **[9]** the time of the offence. That evidence meant that the offender was aware of the information and summons and this fact was referred to by Murphy J in his reasons (see pp11 and 13). It was submitted that in the present case there was no evidence that Michael Velevski had been served or was aware of the charges. It was common ground that the summons had been served on Pita Velevski by mail. In view of the seriousness of the charges, and of the adjournments, and of the conviction of Pita Velevski and his subsequent application to set aside, and that Michael Velevski was brought to the Court for the purpose of establishing identification, it seems likely that Michael Velevski would have been aware, well before 21 April 1994, of the existence of these charges. Of course, for the present time this must be speculation and not relied on although one would have thought it likely that being brothers living at the same address, the summons would have come to the attention of Michael Velevski at a reasonably early stage. In any event, and whether that be so or not, I do not read Murphy J's decision as being dependant upon the information and summons having been served on the offender and in this respect I note that at p14, he said that-

> "If there remained doubt concerning service upon the defendant by his true description or doubt whether he might have presumed that he was not at risk, an adjournment to enable service to be effected after amendment would enable justice to be satisfied in this regard."

So, also, in this case, if an amendment had been granted, could an adjournment have been allowed to "enable justice to be satisfied" to permit service or time for preparation. **[10]** All that was required was to amend the christian name of the defendant (see *Pearcey* at p13). That simple change would have produced a defendant who, to his own knowledge, should always have been the defendant, and removed a person who was never intended to be and should never have been, a defendant. As Murphy J said in *Pearcey*, at p14 -

> "The case is not one in which it is desired to substitute one defendant for another. It is the same person against whom the information is to go, but there has been a misnomer, caused by the defendant himself."

I am firmly of the opinion that the magistrate erred in not allowing the name of the defendant to be amended. Two further submissions were made on behalf of the defendant. First, that this was not an appeal from a "final order" within the meaning of s92 of the *Magistrates' Court Act* 1989. Reliance was placed on the well-known distinction between a final order and an interlocutory order and I was referred to *Southern Cross Exploration NL v Fire and All Risks Insurance Company Limited* (1990) 21 NSWLR 200. The submission was that the order dismissing the summons was a final order consequent upon the prosecutor leading no evidence in support of the charge; that view of what happened was said to be supported by the statement recorded in the register "Dismissed. Merits of the case."

It was submitted that the refusal of the application to amend was an interlocutory order to be regarded as "quite distinct and separate from the final order". In my opinion the submission is untenable. What happened was that the prosecutor informed the magistrate of the situation and it was clear that if the **[11]** amendment was not permitted, the prosecutor could not establish the case. Thus the magistrate pronounced that the summons was dismissed immediately following the statement that the application to amend was refused. The two cannot be separated. In *Transport Accident Commission v Hoffman* [1989] VicRp 18; [1989] VR 197 at p199; (1988) 7 MVR 193, Young CJ and McGarvie J, in speaking of an "appeal to the Supreme Court on a question of law from a decision of the Administrative Appeals Tribunal", said that the provision was to be construed as a right of appeal from any decision of a Tribunal on a question of law which was involved in the Tribunal's decision. The decision to refuse the application to amend was "involved" in the decision

to dismiss the summons; it was the necessary precursor or condition which produced the order of dismissal. Secondly, it was submitted that the magistrate had merely adjudged the merits of the case against Pita Velevski and properly dismissed the charge, there being no evidence in support.

Accordingly, it was submitted that the decision to dismiss was correct as a determination of that proceeding. In my view the point is without merit and need not be discussed further. The orders will be -

1. Appeal allowed.

2. The order of the Magistrates' Court at Melbourne made on 21 April 1994 that the charge and summons under the *Road Safety Act* 1986, s49(1)(f) be dismissed and the order concerning costs be set aside.

3. The matter be remitted to the Magistrates' **[12]** Court to be heard and determined according to law.

4. The appellant's costs including reserved costs be paid by the respondent.

**APPEARANCES:** For the appellant DPP: Mr S Devlin, counsel. Solicitor for the DPP. For the respondent Velevski: Mr ME Dean, counsel. Galbally Fraser & Rolfe, solicitors.

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