46/93

SUPREME COURT OF VICTORIA

DPP v CARMODY; DPP v McMAHON

Tadgell J

17 November 1993

PROCEDURE – DESCRIPTION OF CHARGE – MUST IDENTIFY PROVISION OF ACT – RELEVANT ACT STATED WITH INITIALS – OFFENCE FULLY DESCRIBED – WHETHER PROVISION OF ACT IDENTIFIED: *MAGISTRATES' COURT ACT* 1989, S27(2).

Section 27(2) of the *Magistrates' Court Act* 1989 ('Act') provides:

"A charge must identify the provision of the Act or subordinate instrument (if any) that creates the offence which the defendant is alleged to have committed."

Where a charge sheet set out a description of the offence (including particulars of the date place and essential elements of the alleged offence) together with the initials of the Act creating the offence, the charge identified the Act in question and accordingly, a Magistrate was in error in dismissing the charge upon the ground that it did not comply with s27(2) of the Act.

TADGELL J: [1] I have here six appeals by the Director of Public Prosecutions against orders of the Magistrates' Court dismissing six charges, three against the respondent Carmody and three against the respondent McMahon. By consent, the six appeals are being heard together for each raises the same point. Put shortly, the point is whether the magistrate (who was the same in each case) was correct to dismiss each charge on the footing that it did not, in accordance with sub-section 2 of section 27 of the *Magistrates' Court Act* 1989, "identify the provision of the Act or subordinate instrument (if any) that creates the offence which the defendant is alleged to have committed". A subsidiary question in each case is whether, if there was non-compliance with the sub-section, the magistrate should have granted leave to amend under section 50 of the Act, which leave was sought and refused.

It is desirable that I refer in sufficient detail to the charge sheets, as they are now called, which related to the six alleged offences. Carmody, as I say, was charged with three offences, the informant in each case being Constable Trevor Bergman. The first charge was stated in the charge sheet against Carmody as follows:

> "The Defendant at Mount Waverley on Sunday, the 19th of May 1991, did drive a motor vehicle while more than the prescribed concentration of alcohol was present in your blood, being .05 grams per 100 millilitres of blood (.190%)."

That statement was contained in a space in the charge sheet opposite the printed question, "What is the charge?", and then beneath it in a series of boxes and opposite the question, "Under what law?", there is an X in a box opposite the word "State", there is another X in a box opposite the word "Act" and then, in a somewhat larger **[2]** box, under a printed inscription "Act or Regulation No.", there appear the letters "R.S.A." and then, opposite that, in another box beneath the inscription "Section or Clause (Full Ref)", there appear the figures and letter "49.1.b".

The second charge against Carmody was described in these terms:

> "The Defendant on Monday, the 20th of May 1991 at Oakleigh in the State of Victoria did within 3 hours after driving a motor vehicle furnish a sample of breath for analysis by a breath analysing instrument under s55(1), and
>
> (i) the result of the analysis recorded or shown by the breath analysing instrument indicated that more than the prescribed concentration of alcohol was present in his or her blood, and

(ii) the concentration of alcohol indicated by the analysis to be present in his blood was not due solely to the consumption of alcohol after driving the motor vehicle."

Then beneath that, the boxes "State" and "Act" contain an X. Under the words "Act or Regulation No." again appear the initials "R.S.A." and under the words "Section or Clause (Full Ref)", there appears "49.1.f". The third charge against Carmody was described as follows:

"The Defendant at Mount Waverley on Sunday, the 19th of May 1991 being the driver of a vehicle on a highway to wit the South Eastern Arterial did exceed 100 kilometres per hour (Highest speed 138 kph)".

Beneath that, the box opposite "State" contains an X, and there is an X in another box opposite the expression "Reg.". Under "Act or Regulation No.", there appear the letters "R.S.T.R.", and under the expression "Section or Clause (Full Ref)", there appears "1001.1.b".

The three charges against McMahon followed such the same pattern as for Carmody but the informant was Ralph Walker. The first charge, which was alleged to have **[3]** occurred on 29 September 1991, was described in much the same terms *mutatis mutandis* as the second charge, as I have set it out, against Carmody, and the boxes beneath the description were completed in much the same way. The second offence against McMahon was in these terms:

"Furthermore, at Cranbourne on 29.09.91 you did drive a motor vehicle while more than the prescribed concentration of alcohol was present in your blood being 0.120 grams per 100 millilitres of blood".

The boxes beneath were marked in the way I have described in relation to the first charge against Carmody. The third offence alleged against McMahon was in these terms:

"The defendant at Pearcedale on the 29th day of September, 1991, did drive a motor vehicle on a highway to wit Smiths Lane in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature, condition & use of the highway & the amount of traffic which might actually is at the time or which might reasonably be expected to be on the highway".

Beneath that the box opposite "State" is marked. The box opposite "Act" is marked. In an adjacent box under "Act or Regulation No." appear the letters 'R.S.A.", and under "Section or Clause (Full Ref)", there are the figures "64(1)".The magistrate held in each case that the initials "R.S.A." and "R.S.T.R.", as the case may be, were not sufficient to identify the provision of the Act or subordinate instrument that the defendant was alleged to have infringed. He held, in effect, that it was necessary that the name of the Act or the regulations, as the case may be, or an identifying number of the Act or regulations, appear in the charge.

[4] It is to be noted that sub-section 2 of section 27 of the *Magistrates' Court Act* does not in terms require identification of the Act or subordinate instrument in question. What is in terms required to be identified is the provision of the Act or subordinate instrument in question that creates the alleged offence. No doubt, however, it may be said that a provision of an Act or subordinate instrument cannot be identified without an identification of the Act or subordinate instrument itself. It may be difficult, although perhaps not impossible, to identify a provision of an Act or of a statutory instrument without reference to a section number or regulation number or the like. The reason, fairly obviously, is that a provision cannot be easily designated except by reference to its designating number. It is not, however, necessarily difficult, I think, let alone impossible, to convey the identity of an Act or subordinate instrument without using its full name or citing its number, as is permitted by section 9 of the *Interpretation of Legislation Act* or section 7 of the *Subordinate Legislation Act*.

It is further to be noted that the requirement of section 27(2) is not that the provision of the Act or subordinate instrument in question be specified but that it be identified. It is perhaps not adding much to what I have already said to observe that, while it may be difficult to identify a provision in an Act or instrument without specifying the provision, the same is not necessarily true of identifying the Act or instrument itself. A little reflection will reveal that it is perfectly possible to identify a published work or a work **[5]** of art or a piece of music or a building, or many another thing, by giving a description of it which determines its individuality and thus identifies it.

If I were to tell you that I have just spent an hour in the Louvre studying Leonardo Da Vinci's celebrated portrait of a serene young Renaissance woman with beautifully folded hands and an enigmatic smile, could you be in doubt that I had identified the portrait? If I told you that I had lately read a novel by Dickens described the life and times of a young lad in Victorian London who had fallen in with pick-pockets after being cruelly treated by charity when he asked for more food, would I not have identified both the novel and its eponym? The identification in each of the two examples was (I trust) achieved because of the information which the descriptive words inevitably conveyed to the person to whom I addressed them. Now, I do not suggest that my descriptions would necessarily identify the Mona Lisa and Oliver Twist to anyone and everyone to whom I recited them. I should have to choose my audience and my words if I were to expect what I said to provide an identification of the subject matter. Moreover, the question whether an identification of the subject matter had been achieved would be one of fact to be determined by reference to what I had said and the circumstances in which I had said it. Taking into account those matters it would, I think, be possible for an objective decider of fact to reach a reasoned conclusion whether or not an identification of subject matter had been conveyed.

Turning to the six cases in hand, it is plain enough that in each charge a provision of some State Act **[6]** or regulation was not only identified, but positively specified, by reference to its identifying number. What is said on behalf of the respondents not to have been identified was the Act or the regulation of which the provision is part. What was given as an identification by way of description of the Act or regulation included the initials "R.S.A." or "R.S.T.R.". Had that been all that the descriptive indication included, one could not rationally conclude, as an objective decider of fact, that the Act or the regulation in question had been identified in the charge. There was in addition, however, a description of the offence charged in each case, including particulars of the date, the place and essential elements of the alleged offence. These were quite evidently intended to be read, not independently of, but together with the other information (such as it was) of the Act or regulation and the specified provision thereof. In my opinion this information, taken all together, did enable the objective decider of fact to conclude that the charge identified the Act or regulation in question.

Now, it is quite true that a reader of the charge sheet would not necessarily know, merely by reading it, the name of the Act or the regulations which created the offence charged. Section 27(2), however, cannot be construed as requiring that the reader should be capable of deriving the name of the Act or regulations merely from a reading of the charge sheet. Section 9 of the *Interpretation of Legislation Act* would have rendered the statement of an identifying number of the Act or regulations sufficient. In each of the six cases with which I have to **[7]** deal there were initials which, in my opinion, were sufficient as identifying initials when taken in conjunction with the other information which the charge sheet set out. That is to say, a person not knowing what the initials stood for unless he were told could readily discover what they stood for by making a reasonable inquiry in the same way as could have been done if, instead of, for example, saying "R.S.A.", the charge sheet had said "127 of 1986", which is the identifying number of the *Road Safety Act* of that year. It was objected for the respondents that the initials "R.S.A." are equivocal and that they might stand for, say, *Rural Sewerage Act* as well as anything else. No doubt they are equivocal without a context. But, in the context which they have been given, they are no more equivocal than, for example, the word "State" which was designated by the marking of one of the boxes. The word "State" in that context could have no other meaning than "State of Victoria". Having regard to the other information contained in the charge sheets, the initials "R.S.A." and 'R.S.T.R." can in my opinion convey no other identifying information than that the charges were laid under the *Road Safety Act* 1986 of the State of Victoria, and the *Road Safety (Traffic) Regulations* made thereunder (as the case may be).

The objection was also raised on behalf of the respondents that the reader of the charge sheet who did not know and wanted to know what the initials signified would need to inquire, and should not have to inquire, when to do so might involve him in the incurrence of legal expense or contacting a police station in circumstances in **[8]** which he might not desire to do so. To this I would merely say that I am far from satisfied that inquiries would be necessary from any such sources in order to produce a useful answer to the query.

It follows that in my opinion the magistrate was in error in finding, as he did, that sub-section 2 of section 27 had not been complied with in relation to each of these six charges. I do not

mean by this decision to encourage the practice which was followed in these six cases of stating by way of shorthand the Act or the regulation under which the charge is laid. Whether the use of shorthand was a result of pressure of work or laziness or something else, one can but speculate. I need hardly say that it would have been much better from everybody's point of view, and would have saved a lot of trouble, time and expense, if the compilers of the charge sheets had followed what I assume are supposed to be fairly simple directions in their compilation. It ought not to be supposed that in every case the use of abbreviations or hieroglyphics, or anything less than the use of the name or a permitted identifying number of an Act or regulation, will necessarily produce compliance with section 27(2). Each case must be decided upon its own facts and all I have done here is to decide that, upon the facts of these cases, there has been compliance.

There is one other matter to which I should refer. It concerns the form of the order which was made in each case by the Master under Part 3 of Order 58 of the Rules. The order is in the following form: "The Court orders that:- **[9]** 1. The following questions of law are to be decided ..."

Then two questions are set out. I think that is not a proper practice. It is true enough that, under section 92 of the *Magistrates' Court Act* 1989, these appeals come to this court on questions of law from final orders of the Magistrates' Court. It is necessary that a question of law be identified, but it is in my opinion incorrect to present questions of law in appeals such as this to be answered by this court as though upon a case stated or an originating summons. What the court is to do is to deal with the appeal by reference to the questions of law and, by way of reasoned opinion, answer them. It has not to deal with them, however, as though answering a series of interrogatories. I think it appropriate that an order be made in each case in accordance with the following minutes:

1. Appeal allowed.

2. Order that the order of the Magistrates' Court made on 24 May 1993 or 7 June 1993 (whichever is appropriate) be set aside.

3. Further order that the charge the subject of the said appeal be remitted for hearing and determination according to law.

TADGELL J: Is there anything further, gentlemen?

Mr GEBHARDT: I seek an order for costs, Your Honour.

TADGELL J: What do you say about that, Mr Billings?

Mr BILLINGS: In view of Your Honour's *dicta* as regards this matter coming to this court, and in view of the fact that it may be conceded that there was some laziness perhaps on **(10)** behalf of the informant in this matter, it would be my submission that the costs should not flow on to the plaintiff in this case. If Your Honour is against me on that point, I would be asking for an indemnity certificate under section 13(1) of the *Appeal Costs Fund Act*.

TADGELL J: Yes. What I did say was that whether the shorthand was as a result of laziness or something else, I could not say.

Mr BILLINGS: Yes.

TADGELL J: I would not be prepared to make an order for costs against the Director of Public Prosecutions.

Mr BILLINGS: I am not asking Your Honour to do that.

TADGELL J: No. I think the point below as in my view not properly taken, or, if properly taken, was not properly acceded to below, and it was appropriate that the Director have the matter tested by coming here, so that minute number 1 will be, appeal allowed with costs. The next question is whether you should be entitled to an indemnity certificate. I noted that Mr Justice Beach in a case to which I was referred of *Ross*, animadverted upon the taking of a point of this kind and, in order to show his dissatisfaction, denied a certificate.

Mr BILLINGS: The case is not directly on point, as Your Honour so rightly pointed out.

TADGELL J: But that is not to say it is not relevant to this matter of a certificate. I am inclined to take a similar view to that taken by Mr Justice Beach. These are points which are without merit and I think I should do what I can to discourage people taking them below. The system of boxes on these charge forms have been devised to assist the public as much as the police, I think, and I think it is **[11]** up to the legal profession to co-operate.

Mr BILLINGS: That may be so, Your Honour, but - - -

TADGELL J: To take these points is not very co-operative. It is a waste of everybody's time - of magistrates and the clients and the Director of Public prosecutions, and the Supreme Court's time.

Mr BILLINGS: As Your Honour said, it was conceded that if the box contained nothing, then the issue would have been a non-event, and should have been found in favour the appellant. What you have in this case is Your Honour has found an objective test it indicated the words "Road Safety Act".

TADGELL J: All I said is that they are sufficient to someone who wants to know to identify, taken in all the circumstances, what was intended. It seems to me to be a very plain case. I will not allow an indemnity certificate.

Mr BILLINGS: If it please Your Honour.

APPEARANCES: For the appellant DPP: Mr SP Gebhardt, counsel. Solicitor to the DPP. For the respondents Carmody and McMahon: Mr PJ Billings, counsel. Moores, solicitors.
