

17/10; [2010] VSC 145

## SUPREME COURT OF VICTORIA

**DPP v TWIGG**

Bell J

16 April 2010

**PROCEDURE – SUMMONS FOR DRIVING OFFENCES SERVED ON DEFENDANT WITHOUT OFFICER DESIGNATION BOX TICKED – WHETHER SUMMONS VALIDLY ISSUED – WHETHER ‘TRUE COPY’ OF SUMMONS SERVED – SUMMONS STRUCK OUT BY MAGISTRATE – WHETHER ERROR ON THE FACE OF THE RECORD – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES’ COURT ACT 1989*, SS1(c), 30, 34(1)(b)(1); *MAGISTRATES’ COURT GENERAL REGULATIONS 2000*, RR302, 1303; *MAGISTRATES’ COURT (CRIMINAL PROCEDURE) RULES 2006*, R2.02(a).**

T. was charged on summons with driving offences. In accordance with standard practice, the informant filled out three copies of the summons, partly in typed and partly in handwritten form. The typed parts were identical. The handwritten parts were relevantly different only in the respect that the copy signed summons served on T. did not have the box ticked. At the hearing before the magistrate, T. argued the summons served was not ‘a true copy’ of the summons issued as required by s34(1)(b)(i) of the *Magistrates’ Court Act 1989*. The magistrate did not decide the case on that basis, but on the basis that the summons had not been validly issued and accordingly, struck the summons out. Upon application for orders for *certiorari*, a declaration that the Magistrate erred in law and mandamus directing the Magistrate to hear and determine the charges according to law—

**HELD: Applications granted. Remitted to the Magistrate for hearing and determination according to law.**

**This was a case where, as required by s34(1)(b)(i) of the *Magistrates’ Court Act*, the summons served on T. was a signed copy. The signed copy of the summons served on T. was, as required, a ‘true copy’ of the summons which was issued and was a ‘true copy’ of the summons even though that signed copy did not have the officer designation box ticked. To serve a copy summons (otherwise in proper form) without the officer designation box ticked did not mean that the summons was invalid. Accordingly, the Magistrate was in error in striking out the summons issued against T.**

*DPP v Diamond*, MC14/2004; [2004] VSC 35; (2004) 142 A Crim R 116, followed.

**BELL J:****INTRODUCTION**

1. Maxwell Twigg was charged on summons with driving offences which were struck out by the Magistrates’ Court of Victoria. The magistrate decided the summons was invalid because the officer designation box was not ticked on the signed copy served on Mr Twigg.

2. In accordance with standard practice, the informant filled out three copies of the summons, partly in typed and partly in handwritten form. The typed parts are identical. The handwritten parts are relevantly different only in the respect that the copy signed summons served on Mr Twigg did not have the box ticked.

3. At the hearing before the magistrate, Mr Twigg argued the summons served was not ‘a true copy’ of the summons issued as required by s34(1)(b)(i) of the *Magistrates’ Court Act 1989*. The magistrate did not decide the case on that basis, but on the basis that the summons had not been validly issued.

4. In this application for judicial review of the magistrate’s decision, there are two issues. The first is whether the magistrate erred in law in deciding the summons had not been validly issued. Being on the face of the record, any such error would allow the court to set aside the magistrate’s decision. The second is whether judicial review should be declined in the exercise of the court’s discretion. If a ‘true copy’ summons was not served on Mr Twigg, the prosecution would be bad anyway.

**WHETHER THE SUMMONS WAS VALIDLY ISSUED**

5. Mr Twigg submitted the magistrate decided the case in the exercise of the discretion in

reg 1303 of the *Magistrates' Court General Regulations* 2000 in relation to dealing with defective documents. I reject that submission. The magistrate determined the summons had not been validly issued and therefore did not validly commence a proceeding in the court. The reference to 'balancing' considerations and the requirements of 'Form 7' (the summons) were part of that reasoning process.

6. This Court has stressed the importance of procedural requirements.<sup>[1]</sup> Also, the purposes of the Magistrates' Court include 'fair and efficient operation'.<sup>[2]</sup> However, in the present case all that happened was that the officer designation box was not ticked in the copy summons served on Mr Twigg. There is no suggestion this was deliberate. The summons was signed by the informant. It particularised the charge and specified where it had been issued and where and when it would be heard. It was obvious from the signature that the summons had been issued by the informant, for that signature appears besides the 'informant signature' box in the summons.

7. In *Director of Public Prosecutions v Diamond*,<sup>[3]</sup> Kaye J decided that, under reg 302 of the *Magistrates' Court General Regulations* 2000, as long as the summons had been signed, failing to tick the officer designation box did not mean the summons was invalid.<sup>[4]</sup>

8. I would follow this decision unless it was clearly wrong.<sup>[5]</sup> Far from that, I respectfully agree with Kaye J. The present case is covered by r2.02(a) of the *Magistrates' Court (Criminal Procedure) Rules* 2006. That is not a distinguishing feature. The rule is in the same terms as the regulation considered by his Honour.

9. Under r2.02(a), a summons signed by an authorised officer, and otherwise in proper form, is validly issued even if the officer designation box is not ticked. The process for commencing a prosecution is not invalid because a summons in such a form is served on the defendant. The summons served on Mr Twigg in the present case falls into this category. It, and the process of commencing the prosecution, was valid.

10. As I have said, the officer designation box was ticked on the other two copies of the summons. These were the filed copy and the copy used to prove service. With respect, as these court copies were unquestionably in proper form, it was a mistake for the magistrate to focus on whether the proceeding had been validly commenced because the box was not ticked on the served copy. The only issue in the case was whether a 'true copy' of the summons had been served as required by s34(1)(b)(i) of the *Magistrates' Court Act*. That was the issue raised by Mr Twigg's submissions at the hearing before the magistrate. To that issue I now turn.

#### **WHETHER A 'TRUE COPY' OF THE SUMMONS HAD BEEN SERVED**

11. I will determine this issue because, if the summons has not been properly served, I would exercise my discretion to decline to grant judicial review. The prosecution would be bad, but not for the reason determined by the magistrate.

12. Mr Twigg submitted that a defendant needed to know the designation of the issuing officer for a number of important procedural reasons. Accepting that principle, I think Mr Twigg had three straightforward ways of obtaining this information.

13. First, the box next to 'S 30' was ticked. This referred to the procedure in s30 of the *Magistrates' Court Act*. A simple inquiry of the court, or of a source of legal advice, would have revealed that this procedure is used by members of the police force, such as the informant in the present case, to issue a summons.<sup>[6]</sup> Secondly, as I have said, the signatures on the served summons reveal it was signed and issued by the informant. Thirdly, if Mr Twigg was in any doubt, he could simply have contacted the court or searched the file. As the officer designation box had been ticked on the court copies, this would have confirmed the informant had issued the summons.

14. In any event, I do not accept that to serve a copy summons (otherwise in proper form) without the officer designation box ticked is not to serve a 'true copy' of the issued summons. This is not a case like *Nitz v Evans*<sup>[7]</sup> where, contrary to r2.02 of the *Magistrates' Court Civil Procedure Rules*, the served summons had not been signed. This is a case where, as required by s34(1)(b)(i) of the *Magistrates' Court Act*, the summons served on Mr Twigg was a signed copy. As Hayne J held

in *Nitz v Evans*,<sup>[8]</sup> the requirement is for service 'of a copy which will show to the defendant [the] fact of issue.'<sup>[9]</sup> That was what the summons served here did. For these reasons, I conclude the signed copy of the summons served on Mr Twigg was, as required, a 'true copy' of the summons which was issued.

### CONCLUSION

15. The magistrate made an error of law on the face of the record by striking out the summons issued against Mr Twigg. The summons was not invalidly issued because, being otherwise in proper form, the signed copy which was served did not have the officer designation box ticked. Further, a 'true copy' of the summons was served on Mr Twigg even though that signed copy did not have that box ticked.

16. There will be orders for *certiorari* quashing the order of the magistrate striking out the summons; for a declaration that the magistrate erred in law in deciding that the summons was not validly issued and served; for mandamus directed to the magistrate to hear and determine the charges in the summons according to law; and for costs against Mr Twigg.

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[1] See, for example, my judgment in *DPP v Fodero* [2008] VSC 46; (2008) 18 VR 606, [12]; (2008) 181 A Crim R 228.

[2] Section 1(c) of the *Magistrates' Court Act*.

[3] [2004] VSC 35; (2004) 142 A Crim R 116.

[4] *Ibid* [19].

[5] See *Shaw v Yarranova Pty Ltd* [2006] VSC 45, [68]; *Engbretson v Bartlett* [2007] VSC 163; (2007) 16 VR 417, [63]; (2007) 172 A Crim R 304.

[6] See s30(1)(a).

[7] (1993) 19 MVR 55, 58.

[8] (1993) 19 MVR 55.

[9] *Ibid* 58.

**APPEARANCES:** For the DPP: Mr CJ Ryan SC, counsel. Office of Public Prosecutions. For the first defendant Twigg: Mr WJ Walsh-Buckley, counsel. JN Martin and Partners, solicitors.

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