15/03; [2003] VSC 236

SUPREME COURT OF VICTORIA

SMITH v CHALMERS

Ashley J

25 June, 1 July 2003

PRACTICE AND PROCEDURE – SUMMARY OFFENCE – SERVICE OF SUMMONS BY POST – DETERMINATION OF CHARGE IN ABSENCE OF DEFENDANT – AFFIDAVIT OF SERVICE DEFECTIVE – NAMES OF INFORMANT AND DEFENDANT OMITTED FROM AFFIDAVIT – REFERENCE BY DEPONENT TO "THIS CHARGE AND SUMMONS" – CHARGE AND SUMMONS NOT EXHIBITED TO AFFIDAVIT – REQUIREMENT THAT AFFIDAVIT IDENTIFY THE SUMMONS SERVED – AS AFFIDAVIT DID NOT IDENTIFY THE DEFENDANT WHETHER CHARGE AND SUMMONS IDENTIFIED – WHETHER MAGISTRATE IN ERROR IN PROCEEDING TO HEAR CHARGE – DEFENDANT'S LAST KNOWN PLACE OF RESIDENCE ASCERTAINED BY DEPONENT FROM INFORMANT - WHETHER SUFFICIENT: *MAGISTRATES' COURT ACT* 1989, SS35, 36(3).

Section 35(2) of the *Magistrates' Court Act* 1989 (Act) provides:

> "Evidence of service must identify the summons served and state the time and manner in which service was effected."

A deponent in an affidavit of service of a charge and summons averred that "this charge and summons" was posted to the defendant at an address ascertained "from informant". The names of the informant and defendant were omitted from the affidavit. When the charge and summons came on for hearing, the defendant did not appear, the matter proceeded in the defendant's absence and he was convicted. Upon appeal—

HELD: Appeal allowed. Conviction set aside. Remitted for further determination.
1. In a criminal proceeding there must be strict compliance with the requirements of the legislation governing the laying of charges and the service of summons. In the absence of such compliance, the Magistrates' Court is precluded from proceeding to hear and determine the charge.
***Nitz v Evans* (1993) 19 MVR 55; and**
***Sinclair v Magistrates' Court at Ringwood and Anor* [1998] VSC 170, applied.**

2. In any criminal proceeding it is of the first importance that proof of service of process on the defendant be clearly established. Particularly it will be of importance where the defendant does not appear. The need for proof of service is accentuated where service by post is permitted.

3. In the present case the magistrate could not have proceeded to hear the subject matter of the charge without being first satisfied that the summons had been served on the defendant. Since the affidavit did not identify the defendant and in the absence of a copy of the charge and summons being exhibited to the affidavit, it was impossible to identify "this charge and summons" as required by s35(2) of the Act. Accordingly, as service in accordance with the Act was not established, the magistrate had no power to consider the charge.

4. *Obiter*. It was necessary for the deponent to identify the manner of the ascertainment of the defendant's address by stating, for example, that the address to which the summons was posted was the address on the driver's licence produced by the defendant. The averment that the address was ascertained from the informant might leave unanswered the question whether the address was ascertained in accordance with the Regulations and whether there was service on the defendant at all.

ASHLEY J:
The Circumstances of the Appeal
1. This is an appeal under s92 of the *Magistrates' Court Act* 1989 ("the Act") from a final order of the Magistrates' Court at Heidelberg made 20 January 2003 by which the appellant was convicted of an offence against s49(1)(f) of the *Road Safety Act* 1986. Penalties were imposed including licence cancellation.

2. The offending conduct was alleged to have occurred on 16 February 2002. A charge was filed at the Magistrates' Court at Ringwood on 11 November 2002. That was the commencement of a criminal proceeding against the appellant. See 26(1) of the Act. The charge, as is commonly the case, alleged two offences; one against s49(1)(f) of the *Road Safety Act*; the other against s49(1)(b) of that Act.

3. Also on 11 November 2002 the Magistrates' Court issued a summons. See 28(1)(4) of the Act. The charge and summons were in fact the one document. Nothing was said to turn on that.

4. The summons directed the appellant to attend at the Magistrates' Court at Heidelberg on 20 January 2003. For the purposes of the Act that was the mention date referred to in s33(2). See the definition of the "mention date" in s3(1).

5. By s34(1)(a)(ii) every summons to answer a charge, except where otherwise expressly enacted, must be served, in a case such as the present, at least 14 days before the mention date.

6. Section 36 authorises the service of summonses for certain offences by post. Sub-section (1) provides that in such a case service may be made

> "by posting, at least 14 days before the mention date, a true copy of the summons, addressed to the defendant at the last known place of residence or business of the defendant."

7. Regulation 601 of the *Magistrates' Court General Regulations* 2000 ("the Regulations") prescribes offences for the purposes of s36(1). They include summary offences against the *Road Safety Act* 1986. It follows that the summons issued against the appellant was susceptible of service by post.

8. By s36(3)

> "If a summons is served by post in accordance with this section, evidence of service must state the manner of ascertainment of the address to which the summons was posted and the time and place of posting."

9. Section 36(2) provides that regulations may prescribe how the last known place of residence or business of a defendant is to be ascertained in specified circumstances. Regulation 602 of the Regulations takes up the opportunity given by the sub-section to prescribe how such matters are to be ascertained. The Regulation 602 relevantly says this:

> "For the purposes of section 36(2) of the Act, the last known place of residence or business of a defendant is to be ascertained as follows—
>
> (a) if the alleged offence arises out of the driving or use of a motor vehicle, the address of the defendant appearing on—
> (i) the driver licence produced by the defendant at the time of or during the investigation of the offence; or
> (ii) the certificate of registration of the motor vehicle issued under the *Road Safety Act* 1986 or under any corresponding Act or law of any State or territory of the Commonwealth;
> (b) ...
>
> (c) in any case— ...
> (ii) the address given by the defendant during the investigation of the offence."

10. Section 35 provides that service of a summons may be proved, *inter alia*, by evidence on oath or affidavit. Sub-section (2) says this:

> "Evidence of service must identify the summons served and state the time and manner in which service was effected."

11. Section 35(3) deals with the admissibility of, *inter alia*, an affidavit under sub-s.(1)(b). This is what it says:

> "A document purporting to be an affidavit or declaration under sub-section (1)(b) or (1)(c) is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements in it."

12. The respondent filed an affidavit of service in the Magistrates' Court in this case. The deponent, Sue Pask, swore that she had effected service of certain documents by post on 12 November 2002. The detail of the affidavit must later be considered. It is enough to say for the moment that the affidavit, headed "Affidavit/Declaration of Service of Charge and Summons" was an evident attempt to prove service by post by way of the affidavit contemplated by s35(1)(b) of the Act.

13. If a defendant does not appear in answer to a summons to answer a charge for a summary offence – and this was an offence of that type – by s41(2) the Magistrates' Court may, *inter alia*,

> "(b) Proceed to hear and determine the charge in accordance with Schedule 2."

14. Clause 5(1) of Schedule 2 provides that if the court proceeds in such a way and

> "(b) The informant has served a brief of evidence on the defendant in accordance with s37—

the following are, subject to sub-clause (2) admissible as if their contents were a record of evidence given orally;

> (c) any statement a copy of which has been served in the brief of evidence;
>
> (d) any exhibit or document referred to in a statement which is admissible."

15. That takes the reader to s37. It authorises an informant to serve on the defendant in the case of a charge for a summary offence a brief of evidence which must contain

> "(a) a notice in the prescribed form explaining this section and clause 5 of Schedule 2; and
>
> (b) a list of the persons who have made statements which the informant intends to tender at the hearing of the charge if the defendant does not appear; and
>
> (c) copies of the statements referred to in paragraph (b); and
>
> (d) a copy of the charge-sheet relating to the offence; and
>
> (e) a copy of any document which the informant intends to produce as evidence; and
>
> (f) a list of any things proposed to be tendered as exhibits; and
> (g) a photograph of any proposed exhibit that cannot be described in detail in the list."

16. By s37(7)

> "Service of a brief of evidence may be proved in any manner in which service of a summons to answer a charge may be proved under s35."

Service by post is permissible in the case of an offence prescribed for the purposes of s36(1).

17. In the present case a brief of evidence was shown to be filed at the Magistrates' Court at Heidelberg. Also filed was an affidavit of service thereof. The deponent was again Ms Pask. She deposed to service of documents by post on 12 November 2002.

18. It may safely be inferred that the brief of evidence was on the court file as at 20 January 2003. It is not in debate that the appellant did not attend the Magistrates' Court that day, and that the magistrate intendedly proceeded under s41(2)(b). A transcript of the hearing, reproduced in paragraph 9 of the appellant's affidavit sworn 16 June 2003, shows that his Worship was referred to the brief of evidence.

19. The appellant deposed by an earlier affidavit, sworn 5 February 2003, that "I have not been served with a charge and summons as nothing has been served on me personally nor left for me at 1 Downham Way, Werribee"; and "I was not present at court ... because I was not served with a charge and summons. Had the police served me I would have defended the charge."[1]

20. Against the statutory and factual background thus far established I go to questions of law

which a Master discerned on 6 February 2003 to have arisen in the proceeding which culminated in the final orders made by the Magistrates' Court on 20 January 2003. Thus:

> "A. Was the address to which the charge and summons was posted the last known address of the appellant?
>
> B. Does the affidavit of service sufficiently state the manner in which the deponent ascertained the address to which the summons was posted?
>
> C. If 'no' to either A or B, did the learned magistrate have jurisdiction to determine the proceedings?"

An impermissible aspect of the Appeal

21. As happens too often, the matters agitated on the appeal were not identical with the matters formulated by the questions. Partly that was because, in connection with question A, the appellant sought to rely upon evidence which was not before the magistrate to prove that the summons was not posted to his last known address; and because the respondent in reply sought to rely upon evidence which was not before the magistrate to prove the converse. Neither of counsel for the appellant or respondent was able to point to any authority which would permit this Court to consider and adjudicate upon new factual material in an appeal under s92 of the Act. I know of no such authority. Receipt of such evidence would be contrary, in my opinion, to the concept of appeal on a question of law which derives from the language of the section and which appears from the many authorities that dwell upon what is meant by a question of law both generally and in the particular context. I took the view that such evidence could not be received. That left stillborn the appellant's attempt to establish that the Werribee address was his last known place of residence at the pertinent time, and the respondent's attempt to show that 10 Von Nida Crescent, Rosanna was the relevant address.

Was service of the Summons established?

22. In the event, argument centred upon whether service of the summons was established on the material before the learned magistrate; and, in the event that service was not proved, what the consequence should be. Upon the first of those matters counsel for the appellant submitted that the only relevant material was the affidavit of service sworn by Ms Pask on 12 November 2002 and filed in the Magistrates' Court; whereas counsel for the respondent submitted that the relevant material was both the affidavit and material contained in the brief of evidence which was on the Magistrates' Court file. Upon the second of those matters counsel for the appellant argued that the appeal should be allowed and that the charge and summons should be dismissed. Counsel for the respondent submitted, to the contrary, that the appeal should be allowed and that the matter should be remitted for re-hearing, the respondent being at liberty to adduce evidence to show that service had been effected.

23. In my opinion, in the defendant's absence[2] the learned magistrate should not have proceeded to hear the subject matter of the charge without being satisfied that service of the summons had been effected upon him. The issue is not the same as that which arose in *Nitz v Evans*,[3] for there the question was not whether service had been effected, but whether what had been served was a summons conforming with the requirement of s34(1) that there be service of a true copy of the summons. Neither is the issue in this case analogous with the issue which arose in *Sinclair v Magistrates' Court of Victoria at Ringwood and Anor*.[4] There the question was whether the mention date on the summons which was served on the defendant had been validly extended. See s33(2). What comes out of those decisions, however, is the insistence that, in a criminal proceeding, there be strict compliance with "the requirements of the legislation governing the laying of charges and the service of summons.[5] What further comes out of those decisions is the principle that, in the absence of such compliance, the Magistrates' Court is precluded from proceeding to hear and determine the charge.[6]

24. In *Nitz*, Hayne J addressed an argument that s41(2) permitted the Magistrates' Court to hear and determine a charge in the absence of a defendant despite non-compliance with the requirement in s34(2) that a true copy of the summons be served on the defendant. He said –

> "It would be unthinkable that parliament should intend that there should be power to hear and determine a criminal charge in a case where a summons has been regularly issued but never served and never brought to the attention of the defendant. Thus the bare facts that a summons has been

> regularly issued and that a defendant does not appear cannot, without more, ground the exercise of the powers conferred by s41(2). In my view it is implicit in the expression 'if a defendant does not appear to answer to a summons' that the defendant has been afforded the opportunity to appear. Clearly the defendant has been afforded that opportunity if the summons has been served in accordance with the Act. Moreover I do not consider that it can be said 'that a defendant does not appear in answer to a summons' if there has been no service in accordance with the Act but the defendant is, by some means or other, aware of the fact that a summons has been, or may have been, issued ."[7]

25. To his Honour's observations, and the principles which otherwise emerge from *Nitz* and *Sinclair* I would add this: in any criminal proceeding it is of the first importance that proof of service of process on the defendant be clearly established. Particularly it will be of importance where the defendant does not appear. The need for proof of service is accentuated where service by post is permitted. For there the relative safeguards which result from the service methods permitted by s34(1)(b) are not present. It is thus understandable, for example, that evidence of service by post must advert to the manner of ascertainment of the particular service address. Note also the protection given a defendant by s36(4).

26. It might be contended that *Nitz* and *Sinclair* have nothing to say about the situation where the only question is one of proof of service of a summons; and that the resolution of that question should be as described by O'Bryan J in *Sammassimo v Franich and Anor*.[8]

27. The import of *Sammassimo* – I note in passing that neither that case nor *Gahan*[9] were cited or relied upon by the respondent – is that the requirements of s34 are procedural, and that non-compliance does not deprive the Magistrates' Court of jurisdiction. In that case, I note, there was no doubt that service had been effected. The defendant appeared before the Magistrates' Court. His point, relevantly, was that there had been short service. The circumstances were quite unlike this case, where the question is whether there was proof of service upon the appellant at all. In my opinion *Nitz* and *Sinclair*, despite their differences, supply the proper analogy.

28. I have said that in the defendant's absence the magistrate could not have proceeded to hear the subject matter of the charge without first being satisfied that the summons had been served upon the appellant. It necessarily follows that the magistrate was obliged to consider whether service had been so effected by considering only Ms Pask's affidavit of service of charge and summons sworn 12 November 2002. I reject the submission that the magistrate was entitled to have recourse to the brief of evidence to fill in any gaps in the affidavit of service. The brief of evidence becomes admissible if, relevantly, the Magistrates' Court proceeds to hear and determine the charge in the defendant's absence under s41(2). The Magistrates' Court never gets to that point unless it is satisfied that service has been effected.

29. Addressing the affidavit of service, counsel for the appellant submitted that it failed to

- Identify the summons served;
- State the manner of ascertainment of the address to which the summons was posted;
- Sufficiently state the time and manner in which service was effected.

30. In my opinion, the affidavit:

- Was plainly deficient in respect of the first of those matters;
- Was arguably deficient with respect to the second of them, although I do not finally decide that point; and
- Was not deficient in the case of the third of them.

31. I go to the first matter. The affidavit was a proforma – VP form 402. The form makes provision for insertion of the names of the defendant and informant. Here no names were inserted. The deponent averred that she served a true copy of "this charge and summons" and "true copies of one pages (sic) of continuation of charges" and "brief of evidence" by posting the same to a particular address "in an envelope addressed to the defendant at the defendant's last known place of residence, which I ascertained from informant." The words "one", "brief of evidence", "informant," and the address were handwritten. Since the affidavit did not identify the defendant, it was impossible to identify "this charge and summons," or upon whom it had been served. The same observation may be made with respect to the "brief of evidence" there mentioned.

32. Even with the affidavit in this form, the charge and summons and its recipient might have been sufficiently identified if, as should ordinarily be expected, there had been exhibited to it the charge and summons to which it referred. But no such documents were exhibited.

33. What I have thus far said sufficiently discloses a decisive flaw in the affidavit of service. I should add that counsel for the respondent, conceding that the affidavit was slapdash, in substance accepted that there was a gap in proof of identification of the summons which had been served, and upon whom it had been served, unless the magistrate could have had recourse to other documents in the court file. I have said why his Worship could not have had such recourse.

34. I would not want it thought that what I have so far said involves acceptance of the proposition that, if the names of the appellant and respondent had been endorsed on the affidavit, it would necessarily have been adequate. Then it could have been concluded that what had been served was a charge and summons as between appellant and respondent. But in the absence of a copy of the charge and summons being exhibited to the affidavit, reference in the affidavit to "this charge and summons" would presumably invite a magistrate to accept that a charge and summons which had arrived at the Magistrates' Court in the same envelope, or which found its way onto the same court file, was the charge and summons adverted to in the affidavit. That such an exercise was required would at least be undesirable. I need not decide in this appeal whether it would be impermissible. I should add that in my view there is a very strong case for re-casting the language of the proforma affidavit so that it provides for exhibiting a copy of the charge and summons which is served.

35. Whilst it is strictly unnecessary to say anything about the second and third matters raised by appellant's counsel, I will say something shortly about each of them. As to the second, it will be remembered that Ms Pask deposed that she served the documents "in an envelope addressed to the defendant's last known place of residence, which I ascertained from ... informant", the last word being handwritten.

36. I have already mentioned s36(1). It permits service of a summons by posting a true copy of the same "addressed to the defendant at the last known place of residence ... of the defendant." The language of the affidavit relevantly replicated s36(1).

37. I go again to sub-s(3). If a summons is served by post, evidence of service must state the "manner of ascertainment of the address to which the summons was posted." Here Ms Pask deposed that she ascertained the address from the informant. In one sense that could be said to show the manner of ascertainment. One may infer that the informant provided her with the address. But I am somewhat doubtful that the affidavit in substance conformed with the requirement of s36(3), at least in the case of an offence the subject of regulation made under s36(2). The latter provides that regulations may prescribe how the last known place of residence or business of the defendant is to be ascertained. In the present case I have already noted that Regulation 602 was pertinent.

38. In that connection sub-regulation (a) is specifically in point; and sub-regulation (c) might come into play. It might be the case that the address disclosed by a defendant in the investigation of an alleged offence arising out of the driving or use of a motor vehicle would not be the address on the driver's licence. It might not be the defendant's motor vehicle. There might have been delay in advising change of address. The purpose of the Act and the Regulations being, no doubt, to ensure that service by post is in fact effected upon a defendant at his or her last known place of residence or business, an address provided in the course of investigation of an alleged offence, if it was other than the address ascertained in the manner provided by sub-regulation (a), would seem to be relevant.

39. Be that as may, regulation 602 specifies the manner in which a defendant's last known place of residence or business is to be ascertained in particular cases. It is, I think, arguable that in order to comply with s36(3) it is necessary for the deponent, at least where regulation 602 applies, to identify the manner of ascertainment of the relevant address by reference to the subject matter of the regulation – that is, for example, by stating that the address to which the summons was posted was the address on the driver's licence produced by the defendant. Reference in an affidavit to ascertainment of the address simply from the informant might be said to leave

unanswered the question whether the address for posting was ascertained in accordance with regulations made pursuant to the Act; and the further question whether there was service upon the defendant at all.

40. I mention, very briefly, the third matter of criticism. Ms Pask deposed that she posted documents to a specified address by posting them "by prepaid ordinary post at … Knox City." The words "Knox City" were in handwriting. Knox City is, notoriously, a shopping complex. Counsel for the appellant submitted that it was necessary for the deponent to identify whether the documents were posted at some and what post box or post office. I do not agree. The specification of the "place of posting" was in my view sufficient for the purposes of s36(3).

Dismissal or Remitter?

41. Counsel for the appellant submitted that if the appeal was allowed the orders below should be set aside and the charge should be dismissed. He referred to *Nitz* and *Sinclair*. He submitted also that it was now too late to file any further affidavit of service[10] for which reason it would be futile to do otherwise than dismiss the charge. Counsel for the respondent submitted, to the contrary, that if the appeal was allowed and the orders below were set aside, the matter should be remitted. He sought to distinguish the orders made by this Court in *Nitz* and *Sinclair*. He argued that remitter would not be futile. In response to my question, he submitted that no question of the appellant being thereby exposed to double jeopardy would thereby arise.

42. In my opinion, the submissions of counsel for the respondent should be accepted. First, *Nitz* and *Sinclair* were cases in which the process served was itself defective. It was too late to serve proper process. That is not this case, for here there was no argument about the regularity of the charge and summons, a true copy of which, as the respondent would have it, was served on the defendant. Rather, the defect was in the affidavit of service. If service in accordance with the Act had been established, no reason was advanced why the Magistrates' Court should not have considered the charge.[11]

43. Second, it appears to me that if the matter was remitted to the Magistrates' Court it would be open to the respondent to adduce oral evidence of service. Such a course is available under s35(1)(a). Sub-section (4) would not preclude it.

44. Third, no question of double jeopardy would arise on a remitter. The effect of allowing the appeal would be, in substance, that there had never been a conviction; but not that the appellant had been finally acquitted. It should be open on the remitter for the respondent to adduce evidence of service in accordance with s35(1)(a); and for the appellant to adduce evidence to show that service had not been effected upon him at his last known place of residence. The appellant's attendance at court – probably it should be under protest – to argue that matter should not be taken to be a waiver of the alleged defect in service.[12] In the event that the magistrate found that proper service had been established, the magistrate should proceed to hear the substance of the charge upon the evidence foreshadowed in the brief of evidence.

Other Matters

45. In the course of argument there was debate whether an absent defendant against whom a sentencing order was made could make an application for re-hearing under s93 of the Act in a case such as this; that is, a case in which proof of service was lacking. It was submitted for the appellant that this would not be possible because the reference to a sentencing order in s93 must refer only to a sentencing order made by a court properly seised of a matter. I doubt that s93 should be so understood. It may be contrasted with s41(2), concerning which Hayne J made pertinent observations in *Nitz*. But even if I was wrong it would not affect the outcome of this appeal. The availability of an alternative remedy would not deny entitlement to an order on a successful appeal under s92.

46. There was also debate in argument whether in some way it would be open to an appellant in a case such as the present to get before this Court the evidence which he wished to adduce as to his last known place of residence. A question was raised whether it might be adduced in a proceeding under Order 56 of Chapter 1 of the Rules seeking to have the conviction quashed on grounds of want of jurisdiction. I express no opinion in that connection; although it might be the case that if any such proceeding was brought a question would arise, all other things apart,

whether relief should be granted having regard to the (possible) availability of a remedy under s93 of the Act.

Orders

47. Subject to anything that counsel may wish to say as to form I shall make orders in accordance with the following minutes -

1. Appeal from the final orders of the Magistrates' Court at Heidelberg made 20 January 2003 allowed.

2. Orders referred to in paragraph 1 hereof set aside.

3. Remit the charge filed and summons issued 11 November 2002 for re-hearing and determination by the Magistrates' Court as follows:

(a) for hearing and determination whether the summons was served upon the appellant in accordance with statute;
(b) in the event that the summons was so served, for hearing and determination of the charge brought against the appellant upon the evidence foreshadowed by the brief of evidence filed in the Magistrates' Court at Heidelberg.

(4) Respondent pay appellant's costs.

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[1] I am not concerned with the accuracy of the last sentence, which might be thought to be inconsistent with the way in which the appellant completed a notice of objection to the infringement notice which he was given. The notice is exhibit WS 1 to his affidavit sworn 5 February 2003.
[2] It is unnecessary to go any further in resolving this appeal.
[3] (1993) 19 MVR 55.
[4] [1998] VSC 170.
[5] *Sinclair* at [12].
[6] See *Nitz* at 58; 60; *Sinclair* at [15].
[7] *Nitz* at 59
[8] Unreported, Judgment 11 March 1994; see generally to the same effect, *Gahan v Frahm* [1999] VSC 410.
[9] See footnote 8.
[10] See s35(4).
[11] As a peripheral matter, counsel for the respondent observed that by the orders which the appellant sought to set aside he had suffered a period of licence cancellation which was apparently in breach of statute by being too short.
[12] See *Nitz* at 59.

APPEARANCES: For the appellant Smith: Mr S Hardy, counsel. The Law Offices of Barry Fried, solicitors. For the respondent Chalmers: Mr T Gyorffy, counsel. Solicitor for Public Prosecutions.
