46/86

SUPREME COURT OF VICTORIA

McKAY v GILBERT and ANOR (sub nom McKay v Tankard)

Southwell J

9, 10 September 1986 — [1987] VicRp 32; [1987] VR 381

PROCEDURE – INDICTABLE OFFENCE – SUMMARY JURISDICTION IN RESPECT OF – PROCEDURE LAID DOWN BY ACT NOT FOLLOWED – NO FORMAL APPLICATION BY PROSECUTOR FOR SUMMARY HEARING – WHETHER COURT CAN EXERCISE SUMMARY JURISDICTION – "CHARGED": *MAGISTRATES' COURTS ACT* 1971, S70; *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S6.

1. Strict compliance with the procedure laid down in s70 of the *Magistrates' Courts Act* 1971 ('Act') for the summary hearing of indictable offences triable summarily as listed in s69 of the Act is a condition precedent to dealing summarily with the case.

***Dodemaide v Tucker* [1927] VicLawRp 78; (1927) VLR 539; (1927) ALR 385; 49 ALT 48; and *Hacking v Keath* [1966] VicRp 50; (1966) VR 364, followed.**

2. Accordingly, where a prosecutor made no formal or unequivocal application for a summary hearing of an indictable offence triable summarily, the Court had no jurisdiction to hear the charge summarily.

3. In s70 of the Act, the expression "the Court before which a person is charged" means the court before whom a person is formally charged by the reading of the information.

SOUTHWELL J: **[2]** These are the returns of three orders nisi to review orders of the Magistrates' Court at Dandenong whereby the hearing of three informations alleging indecent assault were adjourned for a committal hearing in November this year. In April 1986 the applicant was charged with two counts of indecent assault, alleged to have occurred on or about the 9th and 11th days of August 1984, (*Crimes Act*, s44(1)), two counts of unlawful assault on the same day, (*Summary Offences Act*, s23), one count of photographing an obscene article and one count of publishing an obscene article, (*Police Offences Act*, s168B(b) and (c)). She was bailed to appear on 7 April 1986. **[3]** On that day the applicant appeared and informed the Court that when charged she intended to plead not guilty to all charges. The matters were adjourned to 28 May. On the latter the matters were called on before Mr King SM. Senior Constable Snell appeared to prosecute and Mr Waugh of counsel appeared for the applicant.

According to the affidavit of the applicant "Mr Snell applied to have the indictable offence charges dealt with summarily". It appears that the informations were not read and the applicant was not asked to plead. However, the affidavit of Mr Snell disputes that such an application was made, and if it were necessary to decide that issue I would be bound to follow the usual course of accepting as correct the latter affidavit. In any event, Mr Waugh applied for adjournment on the grounds that a number of witnesses was not available. After a discussion as to the possible length of the hearing the matters were adjourned for hearing on 9 July. On that date, shortly before the matters were called on, the applicant was served, so it appeared, in the foyer of the court, with other information alleging indecent assault. (The alleged victim throughout was the same girl, then aged 13).

As Mr Downing has conceded, or indeed pointed out, that purported service was no service at all, which doubtless will create a problem that the prosecutor must hereafter face. The hearing was to take place in the second division of the Dandenong Magistrates' Court constituted by Mr Duffy SM. The following dialogue, according to the affidavit of the applicant, then took place:

> **[4]** "The Bench clerk said, 'In the matter of Tamar McKay'. I stood up and stepped forward. Mr Waugh stood by my side. His Worship said, 'You are appearing for the defendant, Mr Waugh?' Mr Waugh said, 'Yes.' His Worship, 'Have you explained to your client her rights to have the indictable matters heard before a judge and jury?' Mr Waugh, 'Yes, I have, Your Worship' His Worship, 'You can have these matters heard before a judge and jury, or I can hear them with your consent today. What do

> you want to do?' I said, 'I want them heard here today.' His Worship, "I take it they are pleas of not guilty to all charges?' I nodded in the affirmative and Mr Waugh said, 'Yes.' The prosecutor, Mr Snell, then said, 'I wish to withdraw all the summary charges, because we cannot proceed with them. They were laid outside 12 months. In respect of the indictable matters, I wish to amend the dates. On the first charge on or about the 9th August" I wish to amend to "on or about the 13th August". On the second charge I wish to amend on or about the 11th August" to "on or about the 14th August", and on the third charge "on or about the 14th August" I wish to amend that to "on or about the 17th August 1986." I believe my friend, Mr Waugh, wishes to make an application about the third charge."

Indeed, that belief was well founded, because Mr Waugh was heard to complain, somewhat bitterly, one gathers, at the short service rather than the ineffective service of the later information, but he then indicated that he was prepared to proceed with the others. Considerable discussion then followed as to whether the later charge could or should be heard with the earlier ones. I am informed that the earlier counts to incidents wherein the applicant was alleged to have entered the bedroom of the complainant and have touched her indecently on the vagina, whereas on the third count she is alleged to have by threat enticed the complainant to pose for nude and apparently obscene photographs, that incident being the subject of the prosecutions under the *Police Offences Act*. The discussion indicated that the **[5]** prosecution would seek to tender the photographs in support of not only the third charge of indecent assault, but also in support of the first two charges, it being the submission of the prosecution that they could do so under the similar fact doctrine.

I must confess that that latter submission sounds somewhat surprising, but it is not necessary for me to consider it further. The Stipendiary Magistrate had told the prosecutor and counsel of his view that he could not, in the face of objection, hear all charges together. It may well be that the learned Stipendiary Magistrate was wrong in that view, having regard to the terms of s6 of the *Magistrates (Summary Proceedings) Act* 1975. However, it is unnecessary for me to decide the matter. Upon the intimation from the Stipendiary Magistrate, Mr Snell sought a short adjournment in order to seek further instructions and he then claimed that he had not yet applied for a summary hearing. A short time later the court reconvened. The three informations for the indictable offence of indecent assault were formally read to the applicant. Before she was asked to plead, Mr Snell applied for an adjournment to a committal hearing in the Melbourne Magistrates' Court. Mr Waugh objected to that course and discussion on the law followed, during which it became apparent that there were some differences between the parties as to whether any formal application had previously been made for a summary hearing.

The learned Stipendiary Magistrate said that he had considered commencing a committal hearing forthwith, no doubt influenced by the fact that witnesses were present and able to give evidence, **[5A]** but he did not do so because transcript facilities were not available. He then adjourned the indictable matters to a committal hearing on 10 November 1986; it is those orders which are now under attack. **[6]** The orders nisi were granted on a number of grounds which I need not here set out. The principal point at issue related to the interpretation which should be placed upon s70 of the *Magistrates' Courts Act* 1971. That section provides:

> "Where the Court before which a person is charged as aforesaid proposes, either—
> (a) on the application of the prosecutor before the hearing of any evidence (other than such evidence, if any, of the amount or value of any chattel, money, valuable consideration, valuable security, property, debt, liability, damage or injury involved as the Court thinks fit); or
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> (b) on the application of the prosecutor or the person charged or on the motion of the Court at any time during or immediately after the hearing of the evidence for the prosecution—
> to dispose of the case summarily under the provisions of section 69 one of the justices shall state to such person the substance of the charge against him and shall then say to him these words or words to the like effect—
> 'Do you consent that the charge against you shall be tried by us or do you desire that it shall be sent for trial by a jury'—
> and if the person charged consents to the charge being summarily tried and determined as aforesaid he shall then be asked how he pleads to the charge and the Court shall proceed to deal with the case summarily."

The opposing submissions are, on the part of Mr Waugh for the applicant that the expression "the court before which a person is charged" merely means "the court to which a person

is summoned who has previously been the subject of an information," whereas Mr Downing for the respondent says that the word "charged" is used in the sense of a charge being formally read in court to that person.

Mr Waugh submits that support for his submission is to be found in the fact that the section refers to the requirement that a person, meaning a magistrate or justice **[7]** who has proposed to dispose of the case summarily, shall state to such person "the substance of the charge against him". Mr Waugh submits that it follows that it may well be that the details of the charge have not yet been read out in court. Mr Waugh was bound to concede that that might well mean that a person could be asked to plead to a charge, having consented to it being heard summarily, without that charge ever having been read in full. I cannot accept that so fundamental a departure from proper procedure in the administration of criminal justice could be tolerated. In my view, the expression "the substance of the charge" refers to the occasion when, the charge having been formally read to the defendant, the court, having proposed that it may hear the charge summarily, will, without the necessity of reading the whole of the charge again, say to the defendant words such as" You have been charged with theft" or: "You have been charged with indecent assault", and thereafter the defendant is asked whether he or she consents to the charge being tried summarily. I am of opinion that the expression "the court before which a person is charged" means the court before whom a person is formally charged by the reading of the information.

Mr Downing has conceded that the procedure here adopted was far from satisfactory, a concession which, to my mind, was entirely proper. He submitted that indeed the procedure was a mess. At first sight it might seem that that submission is well founded. However, in fairness to the Magistrate, it should be observed that the Magistrate may well have regarded the summary hearing as not yet having commenced: that he was still dealing with two applications which had first to be disposed of – namely, the applications to **[8]** adjourn, and to hear all charges together. It appears that the first application was never formally granted: and when the Magistrate formed the view that all charges could not be heard together, there followed the application by the prosecutor for a committal hearing. For reasons which do not appear, the Magistrate did not follow strictly – or indeed even roughly – the procedures laid down by s70.

Mr Waugh submitted that the various steps were taken, albeit in a somewhat disordered manner, but he submits that the procedure adopted was, though somewhat rough and ready, not unusual in Magistrates' Courts these days. I find difficulty in accepting the latter submission as accurate, but if it is, it is time that the rough and ready approach ceased.

Mr Waugh then submitted that whilst the steps had not been strictly followed, there had at least been an application on the part of the prosecutor, before the hearing of any evidence, submitting that an application within the meaning of s70(a) could be made by conduct. As I understood Mr Waugh, he conceded that the evidence showed that no formal verbal application was made but that, having regard to statements previously made before another Magistrate and to passages I have quoted, it was clear that the parties understood that there would be a summary hearing.

Perhaps that is correct – in other words, perhaps the parties did apprehend that there would be such a hearing. That does not, however, constitute an application within the meaning of s70(a). That application must be made formally by the prosecutor, not perhaps in any set form of words, but in such terms as can leave no doubt in anybody's mind that formal application is being made for a summary trial.

[9] There is clear authority for the proposition that s70 must be strictly complied with. In *Dodemaide v Tucker* [1927] VicLawRp 78; [1927] VLR 539 at p540; 33 ALR 385; 49 ALT 48, Mann J, dealing with the precursor of s70, said:

> "I can feel no doubt that the course of procedure there laid down is mandatory and is not such that it can be waived in the way suggested. The conviction is for an offence which is *prima facie* an indictable offence, and one which the Justices only had jurisdiction to deal with subject to the conditions laid down, and it cannot be sustained unless these conditions are complied with."

In *Hacking v Keath* [1966] VicRp 50; [1966] VR 364 at p369, Adams J said:

> "Regarded as a matter of substance it might appear that by making application by his counsel for a summary trial, even although such application was made before any evidence was heard, there was a sufficient compliance with the statutory conditions of jurisdiction, particularly as strict compliance with the statutory conditions is presumably required only for the benefit of the person charged, and so far as possible, through his counsel, he waived such strict compliance. But the answer to this approach is, I think, to be found in the decision of this Court in *Dodemaide v Tucker* [1927] VicLawRp 78; [1927] VLR 539; [1927] ALR 385; 49 ALT 48, in which Mann J, as he then was, held that the course of procedure laid down in the section corresponding to s102B was mandatory, and not such as could be waived by the defendant. Despite the changes introduced into the legislation in 1949 to which I have referred, I consider that that decision governs the construction of s102B.
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> No doubt that was a case where the defendant was convicted and challenged the jurisdiction of the court, and this is a case where the defendant having been acquitted is content to let matters rest. But what is sauce for the goose must he sauce for the gander, and if the court had no jurisdiction to have convicted the defendant, on no sound principle could it be held to have jurisdiction to make an order dismissing the charge against him in exercise of its summary jurisdiction."

[10] There is not suggested to be any relevant ground of distinction between the cases I have referred to and the present case. In my view, the jurisdiction of the Magistrates' Court to try a charge summarily depends upon strict compliance with the requirements of s70. In this case the necessary separate steps were not taken in the manner required by s70, and accordingly the Magistrates' Court never reached the stage of having jurisdiction to hear the matter summarily. In those circumstances, the decision to send the matter for a committal proceedings is not one with which this Court should interfere. For those reasons, the orders nisi must be discharged with no order as to costs.

Solicitors for the applicant: Macpherson and Kelley.
Solicitor for the respondent: RJ Lambert, Crown Solicitor.
