4/00; [2000] VSC 268

SUPREME COURT OF VICTORIA

DPP v SHER

Gillard J

21-23 June 2000

PRACTICE AND PROCEDURE – SUMMONS FILED WITH COURT – CARBON COPY OF CHARGE-SHEET – SUMMONS PART FILLED OUT AND SIGNED BY INFORMANT – AFFIDAVIT OF SERVICE COMPLETED – DOCUMENT FILED WITHIN PRESCRIBED PERIOD – WHETHER DOCUMENT FILED WITH COURT AN "ORIGINAL SUMMONS" – FINDING BY MAGISTRATE THAT DOCUMENT NOT AN "ORIGINAL SUMMONS" – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR – NO EVIDENCE THAT INFORMANT A PRESCRIBED PERSON – ISSUE NOT CONTESTED BY DEFENDANT – WHETHER INFERENCE OPEN TO BE DRAWN THAT INFORMANT WAS A PRESCRIBED PERSON – PRESUMPTION OF REGULARITY – WHETHER PRESUMPTION CAPABLE OF BEING APPLIED: *MAGISTRATES' COURT ACT* 1989, S30(2) (3).

Section 30(2) and (3) of the *Magistrates' Court Act* 1989 ('Act') provides:

> (2) "If a prescribed person issues a summons under sub-section (1)—
> (a) he or she must file the charge and original summons with the appropriate Registrar within seven days after signing the charge sheet; and
> (b) the proceeding for the offence is commenced at the time the charge sheet is signed, despite anything to the contrary in s26(1).
>
> (3) Subject to sub-section 4, if it appears to the Court that sub-section (2)(a) has not been complied with in relation to a proceeding, the court must strike out the charge and may, in addition, award costs against the informant."

The informant filed with the Court within the prescribed time a carbon copy of the charge-sheet. The section of the document referred to as the summons was completed and signed by the informant. In the box next to the words "Prescribed Person" was a cross. The only summons which bore the original signature of the informant was the one which was filed with the court. When the charges came on for hearing and the evidence had been given, S. submitted that the prosecution had failed to prove that the original signed charge and summons had been filed as required by s30 of the Act. S. further submitted that the informant had failed to prove he was a prescribed person. The magistrate upheld the first submission, dismissed the proceeding and ordered that the Chief Commissioner of Police pay an amount of costs. Upon appeal—

HELD: Appeal allowed. Orders set aside. Remitted to the Magistrate for further hearing.

1. The word "original" has a number of meanings and the particular meaning must depend upon the context. The summons filed in the present case answered the description of "original summons". It contained the signature of the informant and it was his act in signing that copy of the document which issued the summons to answer the charge. It was the informant's intention to issue the summons by signing that particular copy. The mere fact the actual document itself happened to be the first carbon copy of the original document did not alter the fact that it was issued as the summons and hence was the original summons.

***DPP v Emaden Pty Ltd* [1991] Magistrates Cases 171, distinguished.**

2. In relation to the question whether the informant was a prescribed person, the court was entitled to infer this from the document. If the defendant wished to challenge that assertion, the defendant should have raised the issue during the course of the hearing whilst evidence was being given. The issue did not go to proof of any element in the charge nor to the court's jurisdiction. It was a procedural matter which could have been debated and resolved as a preliminary issue.

3. Further, the presumption of regularity applied in this case. The document filed with the court asserted that the informant was a prescribed person. This established the basic fact that the document was signed by a member of the police force of rank senior constable. It followed that the court was entitled to conclude that the basic fact existed in the absence of evidence to the contrary.

4. The magistrate was wrong in dismissing the charges. Once he came to the view that the "original summons" was not filed as required by s30(2)(a) of the Act he was obliged to strike out the charges, not dismiss them.

GILLARD J:

1. I have before me an appeal pursuant to s92 of the *Magistrates' Court Act* 1989 ("the Act") against two orders made by the Magistrates' Court sitting at Ringwood, dismissing two charges brought by a member of the police force against Mr Jack Sher. In addition I have a summons issued on behalf of Mr Sher seeking orders in respect to the appeal.

Parties

2. The appellant, the Director of Public Prosecutions, brings this appeal on behalf of a member of the police force, Senior Constable Darren van Veen ("informant") who is aggrieved by the orders made by the magistrate. (See s92(2) of the Act.)

3. Mr Jack Sher, the respondent to the appeal, is a solicitor and was charged with a number of road traffic offences.

Proceeding below

4. Senior Constable van Veen filed four charges against Mr Sher on 8 November 1998.

5. The charges were that —

> (i) Mr Sher at Box Hill on 7 November 1998 was found driving a motor vehicle and being required to undergo a preliminary breath test by a prescribed device did refuse to undergo such test;
>
> (ii) Mr Sher at Box Hill on 7 November 1998 did drive a motor vehicle while under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle;
>
> (iii) Mr Sher at Box Hill on 7 November 1998 did leave a vehicle in a "no standing" area on a highway, namely, Station Street;
>
> (iv) Mr Sher at Box Hill on 7 November 1998 did use on a highway, namely, Station Street, a vehicle fitted with a tyre that does not have a tread pattern around the whole circumference of the tyre.

6. The charges and summons were contained in the one document and required Mr Sher to attend at the Ringwood Court on 5 January 1999.

7. On 15 November 1999 the charges came on for hearing before a magistrate at Ringwood.

8. Charges 2 and 3 were withdrawn by the prosecution, and the other two charges proceeded.

9. Mr Sher was represented by counsel and a senior constable prosecuted on behalf of the informant.

10. Mr Sher pleaded not guilty to charges 1 and 4, and the charges were heard on 15, 16 and 17 November when the evidence was concluded. The proceeding was then adjourned until 23 November 1999 for the decision.

11. On the resumption of the hearing the magistrate informed the parties that there were decisions of Smith J in *DPP v Emaden Pty Ltd* and *DPP v Censori*, unreported, delivered 20 November 1991 and stated the decisions were to the effect that it was mandatory to file the original summons with the Registrar as required by s30 of the Act and if not done the proceeding was a nullity (see s30(3) as it then was).

12. After hearing debate the magistrate dismissed the two charges on the ground that the charge-summons document filed with the court was not an "original summons" within the meaning of s30(2)(a).

13. The proceeding was recorded and although the transcript is incomplete in some respects, the magistrate's reasons have been completely recorded and transcribed. His Worship said –

> "Alright. Well, gentlemen, it seems to me that this case of DPP against Emiden (sic) has a vital bearing on this prosecution. This court is bound by the decisions of the Supreme Court and, in my view, the decision in Emiden's case is clearly on point in this case, in relation to the – the – the charges and the summons, which have been filed in this case. And having looked at those - or that document,

> I'm not satisfied that it does comply with Section 30. Section 30 is an alternative procedure which has been provided, and it was commonly called, I think, in the parliamentary debates, 'on the spot summonses.' And it seems to me that the - the decision in Emiden's case is a decision of the Supreme Court, which requires strict compliance with that legislation when that alternative procedure is used. That strict compliance, in my view, hasn't been observed in this particular case. What we have before the court is a document which is, obviously, from a – a reading of the document, not a first strike document and, therefore, the charges will be dismissed."

The magistrate was wrong in dismissing the charges. Once he came to the view that the "original summons" was not filed as required by s30(2)(a) he was obliged to strike out the charges, not dismiss them — see s30(3).

Appeal

14. In accordance with Part 3 of Order 58 of the Rules of Court, application was made *ex parte* to the court for an order of appeal.

15. The application came on for hearing before Beach J in the Practice Court on 27 January 2000 and his Honour granted an order in the usual form.

16. It is noted that the final orders which are the subject of the appeal were the orders made dismissing the charge under s49(1)(c) of the *Road Safety Act* 1986 and the charge under Regulation 809(3)(b) *Road Safety (Vehicles) Regulations* 1988 and the order that the Chief Commissioner of Police pay the defendant's costs in the sum of $7,700.

17. The questions of law raised by the appeal are as follows –

> "1. Was his Worship correct in applying *DPP v Emaden Pty Ltd* and *DPP v Censori* (unreported) Victorian Supreme Court 20 November 1991 to the circumstances of this case?
>
> 2. What are the consequences of a failure to comply with s30 *Magistrates' Court Act* 1989, if such a failure is found to have occurred?"

18. On 7 June 2000 Mr Sher issued a summons seeking orders to the effect that the order made on 27 January 2000 be set aside and alternatively that the exhibits RE4 to RE7 inclusive to the affidavit of Richard Eldridge sworn 20 December 1999 be expunged from the record on the ground that the exhibits were not before the magistrate and hence are not properly before this court.

Respondent's summons

19. When the matter was called on for hearing Mr G Hardy who appeared with Mr P Billings on behalf of the respondent Mr Sher, raised five issues with respect to the proceeding.

20. The issues raised by him were –

> (i) that the order should be set aside because there has been non-compliance with its terms in that the appellant did not serve all the exhibits on Mr Sher by 17 February 2000;
>
> (ii) that it was not permissible to obtain one order in respect to two charges and that there should have been two orders in respect to the appeal;
>
> (iii) that certain material which was not before the magistrate should not be admitted before this court; and
>
> (iv) that the questions of law stated in the order were not questions of law; and
>
> (v) that the appellant has failed to place the full transcript of all the evidence and submissions made in the proceeding in the Magistrates' Court.

21. With respect to service of the exhibits, the failure to comply with the order would not be a basis for setting it aside. The proceeding was recorded in accordance with the practice which has been implemented over the last 12 months. The tape was not served on Mr Sher until 31 May. Mr Hardy was unable to refer to any prejudice caused by the late service. Accordingly there is no basis for setting aside the order or indeed taking any other action. If necessary I could regularise the service by extending the time.

22. I should say that Mr Hardy sought to rely upon an affidavit which was sworn on 21 June being the first day of the hearing and I indicated a provisional view that I would admit the affidavit as it set out in parts a better transcript of the recorded proceeding. Mrs C Quin who appeared on behalf of the Director of Public Prosecutions was given the opportunity overnight to consider the affidavit and she raises no objection to its admission but did submit that most of the affidavit was irrelevant. Accordingly I admitted it subject to relevance.

23. Mr Hardy submitted that since there were two orders which were challenged it was necessary that each order should be the subject of a separate order of appeal.

24. By reason of s92 of the *Magistrates' Court Act* 1989 an appeal must be brought in accordance with the Rules of Court.

25. Part III of Order 58 concerns appeals on a question of law. By reason of Rule 58.07 the appeal is instituted by application to a Master for an order. By reason of Rule 58.09 the appeal is in fact constituted by an order if the Master is satisfied there is an arguable case for appeal on a question of law.

26. There is nothing in the Act or the Rules which provide for a situation where there are appeals in respect to two or more different complaints.

27. However, the whole procedure is based upon an appeal from a particular proceeding.

28. Mr Hardy relied upon the decision of Crockett J in *Riddle v Ingram* [1977] VicRp 2; (1977) VR 20. That case was decided in 1975. His Honour was concerned with the return of an order nisi to review two orders of dismissal pronounced by the Magistrates' Court on 23 September 1974 in a criminal proceeding. That was the procedure under the *Justices Act* of 1958 which was still in operation.

29. In the original proceeding before the magistrate the court was concerned with two informations against a defendant.

30. The informant obtained one order nisi to review both orders of dismissal.

31. His Honour raised the question whether that was the appropriate procedure because the orders were made in different proceedings.

32. His Honour held that for the purpose of reviewing the decision of a magistrate upon each of several informations, a separate order must be obtained in respect of each information notwithstanding that the informations were heard together and notwithstanding that identical grounds for review are relied upon.

33. The rationale for the decision is found in what his Honour said at p21 –

> "The two informations, although heard together by the Magistrate, did of course remain at all times separate and independent legal proceedings." (Emphasis added.)

34. His Honour went on to say this –

> "In doing what has been done, an attempt has been made, in effect, to consolidate before this Court those two criminal proceedings into one proceeding in this Court by way of appeal. Such a course is clearly impermissible."

35. His Honour went on to say however that the *order nisi* could be treated as raising a matter that could not be raised and therefore the *order nisi* could proceed in respect to one information.

36. It can be seen that the basis for the decision is that the appeal procedure relates to a legal proceeding and if in fact an appeal is brought in respect to two separate and independent legal proceedings then it is irregular. The irregularity can be cured by striking out from the appeal the additional legal proceeding.

37. The principle has been applied in a number of other cases. Mr Hardy relied upon them.

38. The principle is good law.

39. In *Birch v Hotham Management Pty Ltd* [1991] VicRp 42; (1991) 2 VR 11 Fullagar J held in relation to a civil proceeding that the principle applied. There were two separate proceedings in the Magistrates' Court. Accordingly it was necessary to apply for separate orders. The principle has been applied in appeals from the Planning Appeals Board. See *The Mayor, Councillors and Citizens of the City of Northcote v One View Street Pty Ltd* (1984) 57 LGRA 253, a decision of Murphy J delivered 28 November 1984 in which he upheld the decision of Master Mahoney.

40. But whether the principle applies to a particular proceeding depends upon whether there is more than one legal proceeding. When Crockett J dealt with the matter in May 1975, it was not possible to issue a criminal proceeding in the Magistrates' Court alleging more than one charge in the proceeding. But subsequently to that decision the Parliament changed the law with respect to the procedure concerning the institution and hearing of criminal proceedings in the Magistrates' Court.

41. The procedure is now found in Part IV of the Act. Division 1 of that Part is concerned with the jurisdiction of the court and Division 2 is concerned with procedure. Section 26 sets out how a criminal proceeding must be commenced and it must be commenced by filing a charge, *inter alia*, with a Registrar. The charge must be on a charge sheet signed by the informant. See s26(2).

42. Section 27 prescribes what has to be included in the charge with respect to the description and necessary details.

43. Section 28 is concerned with compelling attendance by the issue of a summons to answer to the charge or by a warrant to arrest.

44. The important section is s31. It authorises the joinder of offences in the one charge sheet.

45. It relevantly provides –

> "(1) A charge-sheet may contain charges for more than one offence if those offences—
> (a) are founded on the same facts; or
>
> (b) form part of a series of offences of the same or of similar character—
> and those charges must be heard together unless an order is made under sub-s(3)."

46. The court is empowered to hear the charges separately (see sub-s(3)).

47. Section 33 provides that a summons to answer the charge must direct the defendant to attend the proper venue on a certain date and a certain time.

48. It can be seen that the modern procedure is different to the old procedure which only permitted the laying of one charge in an information. It followed each charge was a separate proceeding.

49. The present position is that a charge-sheet may contain any number of charges and the one summons issues in respect to all the charges. The charges must be heard together unless an order is made to the contrary.

50. It follows that under the modern procedure there is one legal proceeding even though it is made up of a number of charges. The court is not dealing with more than one legal proceeding.

51. In the present case a charge-sheet was signed by the informant alleging four charges and there was one summons issued in respect to that charge-sheet.

52. In my opinion the principle stated by Crockett J in *Riddle v Ingram* does not apply. It does not apply because there is only one legal proceeding.

53. In regard to this conclusion I refer to the decision of Tadgell J in *Johnson v Collis and Krisohos* [1981] VicRp 37; (1981) VR 349 where his Honour observed at p359 the following –

> "It is not clear to me why there were four orders to review obtained. Although there were in the aggregate four charges of rape alleged against the respondents between them, there were only two informations, each alleging two charges against one of the respondents. That was permissible pursuant to s6(1) of the *Magistrates (Summary Proceedings) Act* 1975, which abolished the former practice prohibiting the joinder of two charges in the one information. The Stipendiary Magistrate made only two orders, one in respect of both the alleged offences of rape charged in each information. It was, therefore, not necessary, as it was for example in *Riddle v Ingram* [1977] VicRp 2; (1977) VR 20, to obtain a separate order to review in respect of each of the offences charged."

54. Mr Hardy submitted that his Honour's observations were *obiter dicta*. In my view they were not. His Honour's comments were in relation to the question of the costs and he ordered that the successful applicant was entitled to no more than one set of costs. But in any event what his Honour said was in accordance with the Law.

55. A number of judges of this court have accepted that the principle does not apply in relation to criminal cases where the charges are laid in one charge sheet. See *Alexander v Renney*, unreported decision of Batt J delivered 21 August 1995 and *Princeway Investments Pty Ltd v Dynasty Heights Pty Ltd*, an unreported decision of Eames J delivered 4 September 1996. I also refer to the other cases cited in Williams, *Civil Procedure – Victoria*, Volume 1, para 58.06.45.

56. Mr Hardy submitted that the observations of their Honours in the cases referred to were *obiter*. In my view they were not *obiter* in all cases. But in any event I am firmly of the view that as a result of the change in the legislation the principle stated in *Riddle v Ingram* does not apply in the present proceeding.

57. The third matter raised by Mr Hardy concerned some of the exhibits to the affidavit in support of the appeal. He submitted that the exhibits were not evidence before the magistrate. I indicated that I would bear that matter in mind in considering the merits of the appeal and if he was correct and it was inappropriate that the material should be considered then I would ignore it.

58. The fourth matter was that the questions of law stated in the appeal order were not proper questions of law. Again, I indicated to Mr Hardy that I would bear that in mind in considering the merits of the appeal.

59. Finally, he submitted that the appellant had not placed all necessary material before the court. Indeed, the material in the affidavit including the exhibits only refers to the discussion which took place on the last day of the proceeding and none of the evidence and submissions made on the three previous days.

60. Again, I informed Mr Hardy that I would bear that in mind but did point out to him that it was only necessary to place relevant material before the court. I informed him that his complaint could only have substance if in fact there was material before the magistrate which had a bearing upon his decision under appeal and which should have been placed before this court.

Commencement of criminal proceeding and issue of summons

61. The informant alleged that the defendant, Mr Sher, committed the four offences which I have set out above. It is alleged that they occurred at Box Hill on 7 November 1998. The 7th was a Saturday.

62. On the 7th or the following day the informant prepared a charge and summons document which he signed either on 7 or 8 November.

63. The original was headed "CDEB/Police Brief copy".

64. Three carbon copies were made at the same time.

65. I interpolate to note that the charge and summons which was in the police brief was produced to the court when the magistrate raised the issue on the day, when he was to give the decision, after he had indicated that the court copy was in fact a copy. Mr Hardy initially objected to this document being placed in evidence before this court but then withdrew his objection. In my

opinion the document was admissible in this appeal because the issue raised by the magistrate involved reference to the court file and the explanation by the police prosecutor at the time. It would have been unjust to the appellant not to permit reference to the police brief copy but in any event the material was relevant to the magistrate's decision.

66. The file from the Magistrates' Court was also placed before me as a result of an order made by Beach J earlier this month. Again, it was necessary to have the court file because of the issue raised by the magistrate and to understand his decision.

67. The court file revealed the charge and summons document filed at the court, and that a copy of the charge and summons was served by the informant on 8 November 1998 at 6.08pm by personally serving the defendant at Carlton North.

68. The informant completed a declaration of service of the charge and summons and filed the copy with the declaration noted on the back of the first page.

69. What the informant did in this case was to take advantage of the alternative procedure by signing the charge sheet and issuing the summons himself.

70. Part 4 of the Act deals with warrants and criminal proceedings. Division 1 is concerned with jurisdiction and Division 2 is concerned with procedure. Sub-division (1) of Division 2 is headed "General".

71. Section 26(1) deals with how a criminal proceeding is commenced and it is commenced by filing a charge, *inter alia*, with a Registrar. It is expected that the charge will be filed with the appropriate Registrar which means the Registrar at a proper venue of the court but if it is not filed with the appropriate Registrar the informant must file a copy of the charge with the appropriate Registrar within seven days after the commencement of the proceeding. — see s26(1A).

72. The charge sheet must be signed by the informant — see s26(2).

73. Section 27 sets out the description in the charge and s28 is concerned with compelling attendance. This section authorises an application being made to the Registrar to issue, *inter alia*, a summons to answer the charge.

74. Once the application is made, if the Registrar is satisfied that the charge discloses an offence, he must issue a summons.

75. Section 30 is concerned with the alternative procedure.

76. It enables a prescribed person to issue a summons him or herself at the time of the signing of the charge sheet. This procedure is only available in respect to a prescribed summary offence.

77. The definitions are provided by the *Magistrates' Court General Regulations* 1990.

78. Regulation 801 defines a prescribed person as a member of the Police Force who has served for at least two years.

79. Regulation 802 prescribes summary offences and the two charges against Mr Sher are prescribed summary offences.

80. Section 30(1) provides –

> "(1) Without limiting the power of a Registrar in any way, in the case of a charge for a prescribed summary offence if the informant is a prescribed person he or she may, at the time of signing the charge sheet, issue a summons to answer the charge."

81. The main issue in this appeal concerns the interpretation of s30(2) of the Act. It provides –

> "(2) If a prescribed person issues a summons under sub-section (1)—
> (a) he or she must file the charge and original summons with the appropriate Registrar within seven

days after signing the charge sheet; and

(b) the proceeding for the offence is commenced at the time the charge sheet is signed, despite anything to the contrary in s26(1)."

82. Sub-section (3) provides what is to occur if there has been a non-compliance with sub-s(2)(a).

83. It provides –

"(3) Subject to sub-section 4, if it appears to the Court that sub-section (2)(a) has not been complied with in relation to a proceeding, the court must strike out the charge and may, in addition, award costs against the informant."

84. Sub-section (4) is not relevant to the present appeal. It is concerned with a proper venue of the court.

Magistrate's reasons

85. I have set out above the magistrate's reasons but to better understand them it is necessary to take into account the context.

86. The proceeding was heard over three days, concluding on 17 November 1999. During that period all evidence was placed before the court and submissions were made.

87. Mr Hardy appearing on behalf of the defendant made a number of submissions on 17 November and submitted, *inter alia*, that the informant had failed to prove he was a prescribed person and that the prosecution had failed to prove that the original signed charge and summons had been filed as required by s30 of the Act.

88. It is common ground that no evidence was given by the informant that he was a prescribed person. Mr Hardy drew the attention of the magistrate to the Full Court decision of the *DPP v His Honour Judge Fricke* [1993] VicRp 27; (1993) 1 VR 369 and drew attention to what the court said at p377 in relation to the informant needing to prove facts to demonstrate compliance with s30.

89. He also submitted that the regulations had not been tendered and therefore it was not possible to say whether the charges were prescribed offences. However, Mr Hardy conceded before me that if it was necessary I could give leave to permit the tender of the regulations to overcome that over-technical point.

90. The proceeding concluded on 17 November by the magistrate stating that he wished to look at s30 himself.

91. On resuming on 23 November the magistrate referred to the decision of Smith J on 20 November 1991 of *DPP v Emaden Pty Ltd* and *DPP v Elia Censori*. He invited submissions.

92. Discussion took place and during the course of the discussion the police prosecutor explained the procedure followed by the police in relation to that permitted by s30 of the Act.

93. It was conceded that the original being the first strike was kept in the police brief, was signed by the informant as the person laying the charges but the part on the front page dealing with the summons was not signed by the informant.

94. The next copy was in fact signed and dated by the informant in respect to the summons. The next copy was served on the defendant which took place on the following day, 8 November. The first copy, which contained the original signature of the informant with respect to the summons, was endorsed with the declaration as to service and then filed with the court.

95. Counsel for Mr Sher, Mr Billings, emphasised that Smith J had held that it was the first strike document which had to be filed in the court to satisfy s30(2) of the Act.

96. The copy of the charge and summons in the court file is not the original document but the

first copy. The signature of the informant as informant is a carbon copy signature. The details concerning the summons are also carbon copy typing but the informant has signed that part of the document, has put a cross in the box "Prescribed Person", has noted that the charge is filed at "Ringwood" and has dated it 10 November 1998.

97. The magistrate having heard submissions referred to the document filed with the court and having observed the police brief original came to the conclusion that the decision of *DPP v Emaden Pty Ltd* concluded the matter and accordingly dismissed the proceeding.

98. As I have already stated he should not have dismissed the proceeding but should have struck out each charge pursuant to s30(3) of the Act.

99. It is now necessary to consider the decision of Smith J.

DPP v Emaden Pty Ltd

100. When this case was decided sub-ss(1) and (2) of s30 were in exactly the same terms but sub-s(3) provided that if there was a failure to comply with sub-s(2)(a) the proceeding is a nullity.

101. In that case charge sheets were signed by prescribed persons and the summons issued on 7 November 1990. A carbon copy summons headed "Copy for Bench Clerk" was filed on 9 November 1990. It was the first carbon copy. However, the summons bearing the original signature of the informant and from which all carbon copies were made was not filed until 22 November 1990.

102. It is pertinent to note that in the present case the charge and summons filed at the court was filed on 10 November 1998, that is, within the seven day period.

103. In my opinion it was clear that the filing of a carbon copy of the charges and the summons could not possibly have complied with the sub-section which required the original summons to be filed. In that case a copy with the original signature, i.e. the original issue of the summons was not filed within the seven day period.

104. Accordingly, the appellant was forced to argue that the filing of the first document complied with the sub-section. Various submissions were put but his Honour was not prepared to find that the carbon copy was an "original summons".

105. His Honour said at p4 –

> "It seems to me that applying the word 'original' in its ordinary and natural meaning, the expression 'original summons' should be construed as applying to the document that bore the initial imprint of the typewriter, in this case, recording the details and the signature of the prescribed officer issuing it — the 'first strike document'."

106. The respondent relies upon that *dictum* in the present matter.

107. His Honour went on to state that the first strike document was necessary in order to resolve any disputes that may arise thereafter in relation to the documents which are served upon a defendant. In that case there were some issues arising as to how the charges were laid.

108. His Honour at p7 said this –

> "Instead, it seems to me that the inclusion of the adjective 'original' in the phrase the 'charge and original summons' suggests that the draftsman was not troubled about whether an original or duplicate of the charge was filed but was particularly concerned to ensure that the 'first strike' summons and not a duplicate of the summons was filed."

109. The appellant relied upon that observation to satisfy the requirement of sub-s(2)(a) in relation to the charge.

110. In my opinion the decision of *DPP v Emaden* does not answer the question of law raised in the present proceeding. There are *dicta* in the judgment which supports the proposition that 'original summons' means the first strike document and not a copy thereof.

111. When his Honour made those observations it was in relation to a document which was clearly a copy not only of the charge sheet but the summons which did not bear the original signature on the summons.

Original summons

112. The charge and summons form signed by the informant was in accordance with Form 7 of the *Magistrates' Court General Regulations* 1990.

113. The form gives details of the charge against the defendant and after charge 1 is described there is a box for signature by the informant. The document which was filed with the court is a carbon copy of the original charge sheet. The signature on the charge sheet, is a carbon copy.

114. Immediately below the signature of the informant are two parts comprising a number of lines which note where the case is to be heard, when it is to be heard and then details are given about the summons. The details recorded on the document were –

> "Issued at NUNAWADING Date 8/11/98
> Issued by
> Signature (Original Signature of Informant)
> Registrar Prescribed Person
> Magistrate
> Charge filed at RINGWOOD Date 10-11-98"

115. The signature of the informant is an original one.

116. In the box located next to the description Prescribed Person is a cross.

117. The word "Ringwood" is handwritten as is the date "10-11-98".

118. The evidence established, in my opinion, that the charge and summons was filed within the seven day period. This is clear from the document itself.

119. Mr Sher in his affidavit sworn 1 June 2000 produced an extract of the record from the Magistrates' Court and it revealed that the date the document was filed was 8 November 1998. That was clearly an error as 8 November was a Sunday.

120. In my opinion there was ample evidence before the magistrate to conclude that the document was filed within the seven days' period. Further it is clear from the court record that the court officials examine the filed copy to ensure that there has been compliance with s30.

121. The issue comes down to whether the summons was the "original summons" within the meaning of s30(2) of the Act. The evidence also shows that the first strike was never signed by the informant in respect to the summons but he did in fact sign the document as the informant and the person who authorised the prosecution.

122. In fact on the first strike the part concerning the summons has no box on it to enable a signature to be made.

123. The only summons which bears the original signature is the one that was filed with the court.

124. Mrs Quin of counsel on behalf of the DPP submits that that makes the document an original summons within the meaning of s30(2)(a).

125. In construing a statute the court seeks to determine the intention of Parliament. The words to be construed are to be construed in their natural and ordinary meaning, in context and after reading the Act as a whole. The exercise may result in the words being construed in a meaning which is not its primary or popular one.

126. The procedure under s30 is an alternative one to the standard procedure of filing a charge sheet with the Registrar and having the summons issued by the Registrar at the same time. The

criminal proceeding is actually commenced by filing the charge. The alternative procedure under s30 permits the informant to issue a summons after signing the charge sheet. The purpose of requiring filing within seven days is because the signing of the charge sheet commences the proceeding and this involves the court and accordingly it is necessary that the charge and summons be disclosed to the court so that the court can thereafter control the proceeding.

127. The word "original" has a number of meanings and the particular meaning must depend upon the context.

128. Two of the meanings of the word are - "belonging or pertaining to the origin or beginning of something" – and "an original work writing or the like as opposed to any copy or imitation".

129. In my opinion the summons filed in the present case was an original summons. It contained the signature of the informant and it was his act in signing that copy of the document which issued the summons to answer the charge. It was his intention to issue the summons by signing that particular copy. In fact it was the only document signed by him as a summons.

130. In my opinion it does answer the description of "original summons".

131. The mere fact that the actual document itself happened to be the first carbon copy of the original document does not alter the fact that it was issued as the summons and hence was the original summons.

132. In my opinion such a construction gives effect to the purpose of requiring the filing of the original. That is the document which issues as the summons and accordingly any questions concerning its content or validity can be determined by looking at the document which the informant signs to issue the summons.

133. In my opinion the decision in *DPP v Emaden Pty Ltd* is distinguishable because the facts are entirely different. That was a clear case when the attempt to file the actual issued summons was outside the seven days' period.

134. Insofar as Smith J confined the phrase "original summons" to the initial imprint of the typewriter I would respectfully disagree with that proposition applying generally. His Honour's observations must be taken into account in the context of the factual matters with which he was dealing and the submissions which were put to him.

135. Mr Hardy submitted that the *Emaden* decision has stood since 1991 and should be therefore followed because when s30(3) was amended the legislature did not seek to amend 30(2). He referred to the observations made in the High Court case of *Platz v Osborne* [1943] HCA 39; (1943) 68 CLR 133 especially at pp141, 145 and 146.

136. Sub-section (3) was not amended until 1994 and in my opinion was amended because of the decision of *DPP v His Honour Judge Fricke* [1993] VicRp 27; (1993) 1 VR 369. In that case the Full Court observed that sub-s(3) of s30 of the Act was most unfortunately expressed and as it then stood had the potential to cause great difficulty in practice. This was because the sub-section in its original form provided that the proceeding was a nullity if there was non-compliance with s30(2)(a).

137. I am not in any way persuaded that the amendment to the section was in any way influenced by the decision of Smith J. In my view it could not follow that the legislature by not making any other amendments had endorsed all that his Honour had said.

138. In my opinion the fact that Parliament has not in any way amended the section subsequent to the decision of Smith J does not support an argument that what Smith J said about the "first strike" document is correct law.

139. It follows therefore that the answer to the first question of law is "no". With respect to the second question of law, the answer is found in s30(3) of the Act. If there is a failure then the court must strike out the charge.

Alternative contention

140. It is well established that a successful respondent to an appeal from a magistrate is entitled to rely upon any other ground which would have supported the order. In *Preston Ice and Cool Stores Pty Ltd v Hawkins* [1955] VicLawRp 17; [1955] VLR 89; [1955] ALR 371 Smith J at VLR p92 said –

> "The defendant is clearly entitled to support the magistrate's order dismissing the complaint upon any ground which was open to him at the stage when that order was made."

141. It was submitted to the magistrate that there was no proof that the informant was a prescribed person. It was also submitted that there was no proof that the charge had been filed within seven days.

142. As I have already found, in my opinion there was ample evidence before the magistrate to conclude that the document was filed on 10 November 1998. This is apparent from the face of the document itself but also the record of the court which was produced as an exhibit to Mr Sher's affidavit even though the reference is to Sunday 8 November instead of 10 November. This is clearly an error. In my view there was ample evidence to support that fact. The court record demonstrates that the Court officials check to ensure compliance with s30.

143. This brings me to the question of whether the informant was a prescribed person.

144. It is accepted that there was no direct evidence of this fact.

145. Mr Hardy submitted that it was necessary as part of the informant's case to prove that he was a prescribed person.

146. No evidence was given to this effect by the informant. No cross-examination took place raising the issue. Mr Hardy submitted that he was not obliged to raise the issue and was quite entitled at the end of all the evidence to submit that there was no evidence that he was a prescribed person. This is indeed what he did.

147. He referred to a number of decisions. He referred to the case of *Matosic v Hamilton*, an unreported decision of Beach J delivered 8 February 1991. In that case Beach J held that it was for the defence to cross-examine on various points which were relevant to the defence. However, in that case the defendant carried the burden of proof and accordingly could hardly defend the case without raising the issue.

148. The other cases of *Verbaken v Dowie* (19920 16 MVR 461, *Robertson v Smith*, an unreported decision of Nicholson J delivered 27 July 1983 and *Dalzotto v Lowell*, an unreported decision of Ashley J delivered 18 December 1992 were all cases where the particular matter in issue was an element of proof, the burden of which was on the prosecution. All those cases recognised that the defence was not obliged in any way to cross-examine or raise the issues but were quite entitled to test the prosecution case however thought appropriate, and then make a submission that it had not been proven.

149. This is all trite law.

150. Mr Hardy in particular relied upon the observations of Nicholson J in the *Robertson case*, *supra* at p23 where his Honour said –

> "Evidence not having been given by the informant at all concerning whether or not the instrument was a prescribed instrument, in my view, counsel for the defendant was entitled to remain silent, as he did, and to rely upon the informant's failure to prove this matter as a failure to prove an essential element of the charge."

151. The issue here does not concern an essential ingredient of the proof of any charge. Whether or not the informant was a prescribed person went to his authority to issue the summons. The signing of the charge sheet according to s30(2)(b) of the Act commenced the proceeding. Accordingly, the jurisdiction of the court was activated. However, an informant cannot issue the summons to answer the charge unless he or she is a prescribed person. So the issue does not concern an

essential ingredient in the proof of a charge, nor does it go to the question of the commencement of the proceeding and the invoking of the jurisdiction of the court. The question goes to the authority to issue the summons to answer the charge.

152. It was common ground between the parties to the appeal that the defendant had appeared and defended the proceeding under protest and hence was not in any way consenting to jurisdiction or waiving any requirement.

153. But the issue of the summons in my opinion does not go to the question of jurisdiction. It is a procedural matter.

154. If the summons is issued by a person who is not a prescribed person then the summons has been invalidly issued in a proceeding where the court's jurisdiction has been invoked. The effect on the proceeding raises difficult questions.

155. Does it mean that the summons is invalid? What effect if any, does it have upon the jurisdiction of the court? The Act is silent on these questions. The first question is whether the magistrate could infer from the facts and the court documents that the informant was a prescribed person.

156. I repeat that a prescribed person is a member of the police force who has served for at least two years in the force. The informant was a senior constable. One might infer from that fact that being at a rank above a constable that he had been in the force for at least two years.

157. Mr Hardy submitted that that was an illegitimate inference and involved speculation. He submitted that the court could not take judicial notice of any prerequisites for appointment as a senior constable. He informed the court that his junior had perused the *Police Regulation Act* 1958 and the Regulations and there was nothing in either legislation which established that a person could only be appointed a senior constable after a certain period in the force.

158. In my opinion I cannot take judicial notice that a senior constable was in the force for a period in excess of two years, nor could I draw the inference that the fact that he was a senior constable meant that he had to have served for at least a period of two years.

159. The document filed by the informant revealed alongside his original signature on the summons that he was a prescribed person. There was a box to that effect and it is a clear inference from looking at the document that the informant put a cross in the box. That document was filed with the court.

160. In my opinion the court was entitled to infer from that document that the informant was a prescribed person and if the defendant wished to challenge that assertion then the defendant in my opinion should have raised the issue during the course of the hearing whilst evidence was being given. The defendant did not do that and in my opinion failed to contest what was a reasonable inference open to the magistrate to draw from the contents of the document which was filed with the court. This contention falls into the class of those matters raised in a court proceeding which have no merit and if it had any substance then it was incumbent upon the defendant to raise it as an issue. The issue did not go to proof of any element in the charge, it did not go to the question of the jurisdiction of the court which had been properly invoked by the signing of the charge sheet but went to the question as to the procedural regularity of the issue of the summons.

161. In my opinion if a party contests the issue of a summons, it must appear under protest and state the objection at the time so that if it has any substance, it can be debated and resolved as a preliminary issue. If there was any substance in the point, defence counsel should have raised it at the outset. It is not appropriate to appear under protest without stating the basis for the objection.

162. In summary, the inference was open to be drawn, it was not contested by the defendant in the course of the evidence and accordingly the magistrate was entitled to legitimately infer that the summons was validly issued.

163. Further, in my opinion the presumption of regularity applies as expressed in the maxim *omnia praesumuntur rite esse acta* — all acts are presumed to have been done rightly and regularly.

164. This is a rebuttal presumption of law in that once the basic fact is established the conclusion as to the existence of the presumed fact must be drawn in the absence of evidence to the contrary.

165. The basic fact that is established here is that a document is signed by a member of the police force of rank senior constable, who asserts in that document that he is a prescribed person. In my opinion it is legitimate to infer that a senior constable would not issue a summons unless he was a prescribed person.

166. It is well established that there is a presumption that public and official acts and duties have been regularly and properly performed. Further, that persons acting as public officers or in public capacities have been regularly and properly appointed. Indeed, this is the case of all constables. See *Berryman v Wise* [1791] EngR 1392; 4 TR 366; 100 ER 1067.

167. There are many modern examples of the application of the *omnia praesumuntur rite esse acta* maxim.

168. For example, the maxim has been applied to prove the due appointment of an analyst and the validity of her certificate in a prosecution. See *Hardess v Beaumont* [1953] VicLawRp 46; [1953] VLR 315; [1953] ALR 656. Those elements were necessary elements of proof in the charge. In other words there is considerable authority for the proposition that there is a rebuttable presumption of law establishing due appointment and capacity to act.

169. It has been recognised that the maxim should be used with care in criminal cases and I would agree. One would have to be extremely careful in considering its application to the existence of facts which are critical to the offence.

170. In *Harris v Knight* (1890) 15 PD 170 Lindley LJ said at p179 –

> "The maxim *omnia praesumuntur rite esse acta* is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved."

171. In my opinion all the evidence points to the fact that the senior constable was a prescribed person and would not have issued the summons unless he was. He has asserted as much on the face of the document. The inference was not contested during the hearing.

172. The court is not dealing with an essential ingredient in the offence but is dealing with a procedural question concerning the issue of the summons and the right of the person issuing it to do so.

173. Mr Hardy relied upon the Court of Appeal decision of *Scott v Baker* (1969) 1 QB 659; [1968] 2 All ER 993; [1968] 3 WLR 796. In that case the court was concerned with whether the breathalyser device had been approved by the Secretary of State and this was an essential element to proof of the offence. It was said that the principle *omnia praesumuntur* was a rebuttal presumption that having been challenged in a criminal case approval of the device had to be proved by other means other than the presumption.

174. That case is entirely different from the present.

175. The court is dealing with an alleged procedural irregularity and not an essential ingredient to the proof of a charge and accordingly, in my opinion the presumption does apply and has not been contested.

176. Accordingly, in my opinion the alternative basis upon which the respondent seeks to uphold the orders made by the magistrate fails.

Defendant's summons

177. That in respect of the issues raised by the defendant in his summons I am satisifed that certain material to which objection was taken should be admitted in evidence before me and taken into consideration which I have. I do not accept the contention that the questions of law stated in the order were not questions of law, clearly they were. Finally, the contention that the appellant failed to place full transcript of all evidence and submissions made in the proceeding at the Magistrates' Court does not affect the validity of this proceeding as it was unnecessary to do so. I am satisfied that all relevant material which bore on the issues raised in this appeal were before this court.

Conclusion

178. In my opinion the orders made by the magistrate dismissing the two charges should be set aside and the two charges remitted to the Magistrates' Court for further hearing.

179. The court raised with counsel the question of whether the charges should be remitted back to the same magistrate and it was the general consensus that it should be in order to avoid further cost and expense.

180. The only matter of concern is that the proceeding was heard in November 1999 and the magistrate will be required to refresh his memory to enable him to finalise the proceeding. The proceeding was in fact recorded and the audio tapes are still available. These tapes no doubt with the assistance of the magistrate's notes, his memory and submissions of counsel should enable him to finalise the proceeding.

181. Accordingly, I propose to remit the matter back to the Magistrate to complete the proceeding in accordance with these reasons.

Subject to submissions from counsel I propose to make the following orders –

(i) That the appeal against the orders made by Magistrate Mr R Eggleston on 23 November 1999 be allowed.

(ii) That the orders dismissing a charge under section 49(1)(c) of the *Road Safety Act* 1986 and the charge under Regulation 809(3)(b) of the *Road Safety (Vehicles) Regulations* 1988 wherein Darren Norman Vanveen was informant and Jack Sher was defendant and the order that the Chief Commissioner of Police pay costs to the defendant to the sum of $7,700 be set aside.

(iii) That the two charges be remitted back to the Magistrates' Court to be further heard by Mr R Eggleston Magistrate.

(iv) That the respondent pay the appellant's cost of the appeal.

(v) That the respondent be granted a certificate under the *Appeal Costs Act* 1998.

(vi) That the respondent's summons filed the 7th June 2000 is dismissed.

(vii) That the respondent pay the appellant's costs of his summons.

APPEARANCES: For the appellant DPP: Mrs C Quin, counsel. Peter Wood, Solicitor for Public Prosecutions. For the respondent Sher: Mr G Hardy and Mr P Billings, counsel. Agricola Wunderlich & Associates, solicitors.
