**1/95**

## SUPREME COURT OF VICTORIA — COURT OF APPEAL — CIVIL DIVISION

# *McMAHON v DPP*

**Brooking, Charles and Callaway JJA**

**20 June 1995**

**PRACTICE AND PROCEDURE – CHARGE - IDENTIFICATION OF PROVISION OF ACT – DRINK/DRIVING CHARGE – *ROAD SAFETY ACT* REFERRED TO AS 'RSA' – WHETHER CHARGE IDENTIFIED PROVISION OF ACT – WHETHER CHARGE CAPABLE OF AMENDMENT: *MAGISTRATES' COURT ACT* 1989, SS27(2), 50(1).**

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

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

A magistrate held 3 charges laid under the *Road Safety Act* 1986 to be invalid and not capable of amendment on the ground that in the box provided in the printed form of charge for identification of the Act creating the offence the abbreviation "RSA" appeared. Upon appeal from Tadgell J upholding the appeal and finding the magistrate to be in error—

**HELD: Appeal dismissed with costs.**
**1. The charges sufficiently identified the provision of the Act as required. The appellant cannot have been in the slightest doubt about what criminal conduct was alleged against him. The *Road Safety Act* 1986 is the only Victorian Act the short title if abbreviated gives the letters "RSA".**

**2. Even if the identification of the provision was defective, the case was a clear one for amendment under S50(1) of the *Magistrates' Court Act* 1989.**

**BROOKING JA: [1]** On 7 June 1993 the appellant, a motorist, appeared at the Springvale Magistrates' Court charged with nine offences, three only of which are relevant for present purposes. These are driving in a manner dangerous, driving with a blood alcohol level of 0.120, and furnishing a breath sample for analysis within three hours after driving which showed more than the prescribed blood alcohol level. These offences are created by s64(1), s49(1)(b), and s49(1)(f) respectively of the *Road Safety Act* 1986.

The appellant was represented by Mr Billings of counsel, who persuaded the Magistrate to dismiss all three charges on the ground that in the box provided in the printed form of charge for the identification of the Act creating the offence the abbreviation "RSA" appeared. The informant was ordered to pay $2,000 costs.

Each of the three charges alleged the offence in the words of the section creating it and the provision of the *Road Safety Act* was in each case correctly identified in the box provided for that purpose, the section, sub-section, and, where appropriate, paragraph being correctly stated. The appellant cannot have been in the slightest doubt about what criminal conduct was alleged against him. The point taken was entirely devoid of merit so far as considerations of fairness and justice are concerned. But it was the submission on his behalf that the use of the abbreviation "RSA" instead of the short title to the Act or its year and number was fatal to the prosecution having regard to the provisions of s27(2) of the *Magistrates' Court Act* 1989, whereby a charge "must identify the provision of the Act or subordinate instrument (if any) **[2]** that creates the offence which the defendant is alleged to have committed".

It was accepted in the submission to the Magistrate that, if the Act had been identified by the insertion into the box of "127 of 1986", all would have been well in consequence of s9 of the *Interpretation of Legislation Act* 1984. It was accepted that the short title might instead have been referred to: s10. It may be noted that the *Road Safety Act* 1986 is the only Victorian Act the short title of which, omitting the year, comprises words which, if abbreviated, give the letters "RSA".

The Magistrate held the charges to be invalid and ruled that they could not be amended because more than twelve months had passed since the date of the appellant's driving. By s26(4) of the *Magistrates' Court Act* 1989 a time limit of twelve months for proceedings for a summary offence is in general imposed.

The Director of Public Prosecutions launched an appeal in each case under s92 of the *Magistrates' Court Act* against the order of dismissal, the questions of law being said to be in each case whether the Magistrate erred in law in dismissing the charge on the ground that the charge specified "RSA" instead of "*Road Safety Act* 1986" or "Act No.127/1986" as the relevant Act, and whether the Magistrate erred in law in refusing the application to amend the charge on the ground that more than twelve months had passed since the date of commission of the offence.

The three appeals came before Tadgell J on 17 November 1993, who, on that day, allowed each appeal, setting aside the order of the Magistrates' Court and **[3]** remitting the charge for hearing and determination. The present appeals are brought from those orders of Tadgell J. His Honour held that each of the three charges did identify the provision of the Act that created the offence and so did not deal with the question whether the Magistrate had erred in not amending the charges.

For the appellant it has been argued before us that no application for amendment of the charges was made to the Magistrate. In my opinion, however, the affidavit of the senior constable who appeared to prosecute, which is not contradicted by that of the appellant, shows that the position taken up by the informant in the Magistrates' Court was that the charges were good as they stood but that, if they were not, then they could be and ought to be amended. An application for leave to amend is shown to have been made in the sense that the prosecutor made it clear that, if the Magistrate regarded the charges as insufficient to identify the statutory provisions, he asked that the charges be amended.

When regard is had to the affidavit of the appellant, it seems that the Magistrate accepted the submission on his behalf that the requirement of s27(2) of the *Magistrates' Court Act* could be met only by use in the charge either of the short title of the Act or of its year and number. If he took this view, as I think he did, it is clear that he misdirected himself. In addition to this misdirection, the Magistrate erred in law in determining that the requirement of s27(2) had not been met. I agree with Tadgell J's view that these three charges did identify the provision of the Act as required and I consider that the contrary view was not open to the **[4]** Magistrate.

The *Road Safety Act*, which deals with registration of motor vehicles and the licensing of drivers and with road safety, is by no means obscure legislation. No other Victorian Act has the initials "RSA". The specification of the sub-sections and paragraphs and the charging of the offences in the words of those provisions and the reference to the "RSA" make it clear that the provision creating the offence is the particular provision concerned of the *Road Safety Act* 1986. I think His Honour was right. In any event, that is, even if the identification of the provision was defective, the case was a clear one for amendment. By s50(1) of the *Magistrates' Court Act*:

> "On the hearing of a proceeding the Court must not allow an objection to a charge, summons or warrant on account of any defect or error in it in substance or in form or for any variance between it and the evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error."

In view of the imperative terms in which the opening part of the sub-section is couched, it may be doubted whether any application for an amendment was necessary in this case, it being on this view the duty of the Magistrate to amend in an appropriate case whether or not application is made. Be that as it may, an amendment was, as I have said, sought by the prosecutor in this case. The supposed defect or error in these charges plainly falls within s50. Failure to comply with s27(2) is not, contrary to Mr Hardy's submission, an incurable defect. The submission went so far at one stage as to contend that the omission or misstatement of the year of an Act would be fatal, so that the charge would have to be dismissed if **[5]** it referred to the "*Road Safety Act*" simply or to the "*Road Safety Act* 1985", amendment not being open.

I have no doubt that these charges were capable of amendment. Defects or errors both in substance and in form are comprehended by s50(1). There has never been any doubt about

the criminal conduct with which the appellant was charged. The offence would remain the same notwithstanding the amendment and the Magistrate's reliance on the running of time under s26(4) was erroneous. The only right exercise of discretion was to amend these charges, assuming them to be defective in the respect suggested. The Magistrate erred in law in concluding that the date of the offences meant that the amendment could not be made.

The appeals also relate to the refusal of a certificate under s13 of the *Appeal Costs Act* 1964. In this respect they proceed on the mistaken basis that the grant of a certificate under that section to an unsuccessful respondent is a determination that may be called in question by the respondent on an appeal taken by him against the decision allowing the first appeal. The party, the success of whose appeal led to the application for an indemnity certificate, has, however, no standing with regard to the grant or refusal of the certificate. That grant or refusal forms no part of the order determining the appeal, although it is on occasions – not, I might say, in this case – erroneously shown as part of the order. Quite apart from this difficulty, s17(1) of the *Appeal Costs Act* provides that no appeal shall lie against the grant or refusal of an indemnity certificate. In the third place, Tadgell J's refusal to grant a **[6]** certificate and His Honour's view that the taking of points of this kind was regrettable are plainly correct. The Appeal Costs Act is not to be used to encourage the taking of idle points in the hope that a certificate will be given to indemnify the taker against the costs of an appeal when one ensues. I would dismiss each appeal with costs.

**CHARLES JA:** I agree.

**CALLAWAY JA:** I also agree. In doing so I am not intending to encourage the use of abbreviations in charges. Sufficiency of identification is a question of degree. The provisions were sufficiently identified in the present case. Even if that had not been so, s50 was applicable. Failure to comply with s27(2) does not, in my opinion, deprive the Magistrate of jurisdiction to make amendments under s50. I also agree with what the learned presiding Judge has said concerning the refusal of an indemnity certificate.

**BROOKING JA:** The order of the Court is, in each appeal, Appeal dismissed with costs.

**APPEARANCES:** For the appellant/defendant McMahon: Mr GA Hardy and Mr PJ Billings, counsel. EA Einsiedel, solicitor. For the plaintiff/respondent; Mr T Gyorffy, counsel. P Wood. DPP.

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