

04/05; [2005] VSC 80

SUPREME COURT OF VICTORIA

**ROCK POSTERS v BUGEJA**

Balmford J

16, 23 March 2005

**SUMMARY CHARGE – AUTHORISING THE POSTING OF BILLS ON PROPERTY – CHARGE LAID – OFFENCE ALLEGED TO HAVE BEEN COMMITTED BETWEEN CERTAIN DATES – EVIDENCE DISCLOSED THAT OFFENCE COULD HAVE OCCURRED PRIOR TO FIRST DATE SPECIFIED IN CHARGE – WHETHER TIME OF THE ESSENCE – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: SUMMARY OFFENCES ACT 1966, S10(1).**

1. Section 26(4) of the *Magistrates' Court Act 1989* provides that a proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence is alleged to have been committed. The date of the alleged offence is therefore a material matter and is part of the essence of the offence.

*Hackwill v Kay* [1960] VicRp 98; [1960] VR 632, applied.

2. Where a charge alleged that a summary offence was alleged to have been committed between certain dates and the evidence disclosed the possibility that the offence could have occurred some time prior to the first date specified in the charge, the dates were part of the essence of the offence and accordingly, a magistrate was in error in finding the charge proved.

**BALMFORD J:**

**Introduction**

1. This proceeding is an appeal pursuant to section 92 of the *Magistrates' Court Act 1989* ("the Magistrates' Court Act"), which provides that a party to a criminal proceeding in the Magistrates' Court (other than a committal proceeding) may appeal to this Court, on a question of law, from a final order of the Magistrates' Court in that proceeding.

2. The final order under appeal was made on 7 June 2004 by the Magistrates' Court at Melbourne which found the appellant ("Rock Posters") guilty of a charge under section 10(1) of the *Summary Offences Act 1966* ("the Act") and ordered that Rock Posters without conviction be fined \$750.00 and pay the respondent's costs in the sum of \$1,250.00.

3. By Order made on 4 August 2004 Master Kings found that the questions of law raised by the appeal were:

(a) whether a finding of guilt in respect of a charge brought under section 10(1) of the Act can be sustained where there is no evidence or no finding that the posting of a bill by the appellant occurred during the period charged.

(b) whether a finding of guilt in respect of a charge brought under section 10(1) of the Act can be sustained where there is no evidence or no satisfactory evidence that any authority for publication of the bill was given by the appellant during the period charged.

(c) whether the learned Magistrate erred in law in determining that a finding of guilt on a charge brought under section 10(1) of the Act can be founded on a finding that authority for publication of the bill is a continuing authority.

(d) whether the finding of guilt on the part of the appellant in respect of the charge brought under section 10(1) of the Act was against the weight of the evidence.

4. No submissions were made for the appellant in respect of question (d) and accordingly I regard that question as having been abandoned.

5. Section 10 of the Act reads as set out below, so far as relevant. Paragraph 10(1)(b) has

been set out in such a way as to assist in comprehension.

Posting bills etc. and defacing property

(1) Any person who posts any . . . bill . . . on . . . or otherwise defaces any . . . building . . . or other structure whatsoever without the consent of the occupier or owner of the premises concerned or of any person or body having authority to give such consent shall be guilty of an offence.

Penalty: 15 penalty units or imprisonment for three months.

(2) Upon any proceedings for an offence against sub-section (1)—

(a) the burden of proving any consent aforesaid shall be upon the defendant; and

(b) in the case of any . . . bill . . . containing an advertisement of a commercial nature any person who appears to the satisfaction of the court to have authorized the publication thereof or to be in any manner concerned in the promotion or management of any business or entertainment . . . referred to therein shall, unless he satisfies the court that he did not post such . . . bill . . . or authorize the posting thereof and that otherwise he had no knowledge of such posting, be deemed to have posted such . . . bill.

(3) Nothing in sub-section (2) shall affect the liability under sub-section (1) of the person who actually posts any such . . . bill . . .

6. The charge of which Rock Posters was found guilty was charge 11 of twelve charges brought on that day, some of which were withdrawn and others dismissed. Charge 11 read as follows:

Between 27 March 2003 and 9 April 2003 the defendant posted a document being an advertisement for “Steve Bedwell” at 290 La Trobe Street, Melbourne without the consent of the owner [or] occupier of the premises or of any other person or body having authority to give such consent.

*Summary Offences Act 1966 section 10(1)*

7. Charge 5 arose out of the same facts, but was brought under section 450 of the *Environment Protection Act 1970* (“the EPA”).

8. The evidence of the respondent, who was the informant in the matter, was that on 9 April 2003 she observed posters on the building at 290 Latrobe Street. She was unable to say when the posters were placed on the wall. She identified photographs of the posters which she saw. The transcript does not at that point identify the content of the posters. However, it becomes apparent later that one at least of them was an advertisement for “Steve Bedwell”, and nothing turns on this.

9. The other witness was Mr McNeany, marketing manager of the Mercury Lounge where the Steve Bedwell concert the subject of the posters was held. He gave evidence that the art work for the posters was sent to Rock Posters, who have for many years printed and organised the distribution of posters for events at the Mercury Lounge. He said that the performance by Steve Bedwell was from 28<sup>th</sup> March to 9<sup>th</sup> April and they would expect the posters to be distributed anything from one to two weeks before the show began.

10. The appellant called no evidence.

11. The transcript of the Magistrate’s reasons relevantly reads:

Charge 5 is a charge under section 450 in the [EPA] and that section requires evidence of a date of affixing, in my view. Mr McNeany gave evidence that it was possible that this was affixed prior to the 27<sup>th</sup> of March and therefore clearly not within the between dates specified in the charge that is the 27<sup>th</sup> of March and the 9<sup>th</sup> of April, 2003 and Miss Bugeja observed the poster on the building, that being so it is possible on his evidence that could have been up to two weeks before and no later than a day before in the usual course of the matter. I’m therefore not satisfied in relation to the date of the charge being correctly specified beyond reasonable doubt and that charge will be dismissed.  
...

Charge 11. The submission of [counsel for Rock Posters] was in relation to charge 11 that there was no evidence of the affixing of the bill. My view is that the deeming provisions of section 10(2) apply on the evidence of Mr McNeany and supports to my satisfaction the requirements of section 10(2), that the inference that the defendant was in anyway concerned in the promotion, management or management of any business and so on as set out in the section. If I am so satisfied the onus is then on the defendant to prove to the contrary. The defendant has called no evidence in relation to that matter and therefore has not satisfied the evidentiary onus that’s placed on it.

12. Counsel subsequently drew attention to the different treatment of the date issue between charges 5 and 11 and the Magistrate's reply relevantly reads:

. . . in relation to that matter the view I take is this, that the authority is a continuing authority in relation to the matter. And whilst that criticism is warranted in relation to the other charges, I don't think it is in relation to this. I think the evidence that Mr McNeany showed, that they were still authorised and I think that in those circumstances the charge is still proven.

13. It would seem that the Magistrate can be taken as having found:

(i) that it was possible that the poster had been affixed up to two weeks before the commencement of the period set out in the charge and accordingly that he could not find beyond reasonable doubt that the posting of the bill occurred within that period;

(ii) that the provision of the EPA under which charge 5 was brought required such a finding;

(iii) accordingly that charge 5 must fail;

(iv) that Rock Posters was, on the evidence of Mr McNeany authorised to distribute posters for it, i.e. to publish them, and that that authorisation was a continuing authorisation;

(v) that Rock Posters was concerned in the promotion of the entertainment referred to in the poster by virtue of being authorised to distribute the posters as part of that promotion;

(v) that Rock Posters had called no evidence to satisfy the court that it did not post or authorise the posting of the poster;

(vi) accordingly that the deeming provision in paragraph 10(2)(b) operated, so that Rock Posters was deemed to have posted the bill and there was no implication that the posting occurred on any particular date;

(vii) accordingly that (i) above did not operate to cause charge 11 to fail.

#### Question (a)

14. Mr Nicholson, for Rock Posters, submitted that the offence created by section 10 was complete on the posting of the bill on the building. If the actual date of posting could not be proved, or was found to precede the date charged, the offence could not be made out. The deeming provision in section 10(2)(b) did not affect that position.

15. Section 27 of the *Magistrates' Court Act* deals with descriptions in a charge, but makes no reference to the inclusion or description of a date or time period. Given the jurisdiction of the Magistrates' Court in criminal proceedings, appearing in section 25 of that Act, section 27 must be taken to deal with summary offences and indictable offences triable summarily.

16. As to indictable offences, section 375 of the *Crimes Act* 1958 provides:

#### Omission of certain details not fatal to presentment etc.

No indictment or presentment shall be held insufficient for omitting to state the time at which an offence was committed in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or presentment or on an impossible day or on a day that never happened.

17. Neither of these provisions is of assistance.

18. Ms Porritt, for the respondent, relied on the Victorian case of *R v Tieman*,<sup>[1]</sup> in which the Full Court (Madden CJ, a'Beckett and Cussen JJ) found the case before them not to be an exception to "the general rule which makes the assignment of a wrong date for an offence an immaterial circumstance" and on the decision of the English Court of Criminal Appeal in *R v Dossi*<sup>[2]</sup> in which Atkin J said:

From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. . . . Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there

was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment.

19. The question thus is whether time is of the essence of an offence under sub-section 10(1). In my view the effect of the deeming provision in paragraph 10(2)(b) must be that a person may be found guilty of the offence on the basis of findings of fact which are not directly related to the time at which the bill was posted. That being so, it may be said that *prima facie* time is not of the essence of an offence under that section.

20. However, section 26(4) of the *Magistrates' Court Act* provides:

(4) a proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence is alleged to have been committed, except where otherwise provided by or under any other Act.

21. In *Hackwill v Kay*<sup>[3]</sup> the Full Court (O'Bryan, Dean and Monahan JJ) held that where there is a time limit within which an information for an offence must be laid, the date of the alleged offence is an essential part of the information. The Court said, after referring to *Dossi* and *Tieman*:

The question, however, remains whether in this case the date was an essential part of the offence. Here the statute provides that an information for this offence "shall be laid within 12 months from the time when the matter of such information arose *and not afterwards*". [Emphasis in the original.] The date of the alleged offence is therefore a most material matter and is, in our opinion, part of the essence of the offence. This is supported by note (q) to paragraph 702 of Halsbury, 3<sup>rd</sup> ed., vol. 10 pp. 387-8, where the learned authors of the article on "Criminal Law and Procedure" state four cases in which they say time is of the essence of the offence and therefore must be inserted and truly stated in the indictment. The fourth case is "when the prosecution for a particular crime must be commenced within a certain time of the commission of the alleged criminal act". The list of contributors to that article contains names very distinguished in the criminal law. In our opinion, that passage is in accordance with principle and with common sense and we accept it as a correct statement of the law.

22. Ms Porritt sought to distinguish *Hackwill v Kay* on the facts, but the broad statement of principle enunciated by the Full Court is clear and inescapable. The decision was followed by Nathan J in *Kerr v Hannon*.<sup>[4]</sup>

23. The answer to question (a) is accordingly No. That finding is sufficient to dispose of this matter, and it is accordingly not necessary to consider questions (b) and (c).

### Conclusion

24. The appeal will be allowed. Counsel may wish to make submissions as to the form of the orders and as to costs.

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<sup>[1]</sup> [1908] VicLawRp 2; [1908] VLR 4 at 8; 13 ALR 681; 29 ALT 136.

<sup>[2]</sup> (1918) 13 Cr App R 158 at 159-60; (1918) 87 LJKB 1024.

<sup>[3]</sup> [1960] VicRp 98; [1960] VR 632 at 634.

<sup>[4]</sup> [1992] VicRp 3; [1992] 1 VR 43.

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**APPEARANCES:** For the Appellant Rock Posters Pty Ltd: Mr A Nicholson, counsel. Nicholsons Lawyers & Consultants, solicitors. For the Respondent Bugeja: Ms S Porritt, counsel. Legal & Governance Services, Melbourne City Council.

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