02/72

SUPREME COURT OF VICTORIA

NEMTAS v CARTER

Pape J

14 February 1972

PROCEDURE – DRINK/DRIVING CHARGE – DEFENDANT ARRESTED ON A WARRANT AND LATER APPEARED AT COURT – SUBMISSION MADE BY DEFENCE COUNSEL THAT INFORMATION SHOULD BE DISMISSED ON THE GROUND THAT THE WARRANT HAD NOT BEEN ISSUED BY THE PERSON WHO ISSUED THE SUMMONS – SUBMISSION UPHELD – CHARGE DISMISSED – WHETHER COURT IN ERROR: *JUSTICES ACT* 1958, SS18(2), (3), 36(2), 215.

HELD: Order nisi absolute. Dismissal set aside. Remitted for hearing in accordance with the law.
1. It would appear that the Justices took the view that since Mr Walsh JP was the justice before whom the original information was laid and sworn, if a warrant was to be issued the section required that it be issued only by Mr Walsh and not by any other justice. If this was what they decided they were clearly wrong.

2. Since the only reason for requiring the same Justice who issued the first information to issue a second summons or warrant was that the second warrant was based upon the original information (which was not the case here) and since the original information ceased to be effective once it was struck out, there was no information in existence thereafter on which a warrant or summons could be based, and it followed that the order nisi was made absolute on both grounds.

PAPE J: This is the return of an Order Nisi to review the decision of the Magistrates' Court at Prahran consisting of Mr Turner JP and Mrs Lattimore JP, given on 29 July 1971 whereby they dismissed an information laid and sworn on 6 February 1971 before Mr Allison JP, charging the defendant with an offence under s81A of the *Motor Car Act* 1958 in that at Prahran on 24 February 1970 he drove a motor car while the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than .05 per centum.

The defendant had been arrested on a warrant issued pursuant to the said information, which warrant in accordance with s18(3) of the *Justices Act* 1958 was comprised in the same document as the information. He appeared on the hearing and was represented by his solicitor Mr Colin Campbell. The affidavit of Sergeant Scott the prosecuting officer sworn on 25 August 1971 shows that the defendant did not plead to the information but that immediately the case was called, Mr Campbell made a submission to the Justices that the information should be dismissed as the provisions of s36(2) of the *Justices Act* 1958 had not been complied with in that the warrant issued by Mr Allison JP on 8 February 1971 pursuant to the sworn information of the informant should have been issued by the Justice (Mr Walsh JP) who on 22 October 1970 had issued a summons directed to the defendant for the same offence based upon a sworn information by the informant laid on the same day. He cited and relied upon the judgment of Sholl J in *Hargreaves v Bourdon* [1963] VicRp 13; [1963] VR 89 particularly on a passage at p92 lines 18 to 58.

The Prosecutor answered this submission by saying that as the first information upon which Mr Walsh JP had issued a summons had been struck out by Mr Proposch SM on 4 February 1971 without any hearing because of a defect which appeared on the face of the summons, it had been finally disposed of and that *Hargreaves v Bourdon* had no application to the present case as 12 months had not elapsed between the date of the offence (24 February 1970) and the issue of the warrant on 8 February 1971 (see *Justices Act* 1958 s215). The Justices then adjourned to consider their decision and on returning to court the Chairman stated that the information would be dismissed, and that in dismissing the information the court relied upon the statements of Sholl J, in *Hargreaves v Bourdon*.

No evidence of any kind was called by the defendant in support of the submission so made. The first information was not before the justices nor was there any evidence that it had been

struck out. The justices did not comprise the Bench which had dealt with the original information. I think this course was irregular, but I am prepared to assume in favour of the justices that after their retirement, they consulted the court records and verified what they had been told, and I am prepared to assume that they were entitled so to do.

This lack of evidence of the matters upon which the justices purported to act was of concern to Master Bergere before whom the application for an order nisi was made, for he required further material to be put before him as to these earlier proceedings. Consequently, a further affidavit was filed by Sergeant Scott, which was sworn on 27 August 1971, and to this affidavit be exhibited a duplicate copy of the original information and summons issued on 22 October 1970 by Mr Walsh JP. I required Mr Winneke, who appeared to move the order absolute to produce to me a certificate as to the disposal of this original information, and such certificate when produced showed that the said information had been struck out by Mr Proposch SM on 4 February 1971, Mr Winneke could not tell me why it had been struck out except that it was struck out for a defect which appeared on the face of the summons.

An examination of the summons disclosed only one matter which could by any stretch of the imagination be said to be a defect appearing on the face thereof. This was that although the defendant was commanded to attend on 4 February 1971 at the hour of 10 o'clock, it was not stated whether this was in the forenoon or the afternoon (the space provided was left blank) and the description of the court at which he was to attend was left blank – he was commanded to attend "at the said Court of Petty Sessions at ____. Since the defendant had appeared to answer the information I should not have regarded this defect as fatal, but the important matter is not whether the stipendiary magistrate was correct in striking out the summons but that he had in fact done so.

It appeared from the duplicate information so exhibited that on 22nd October 1970 the informant had laid before Mr Walsh JP an information in the form of Form 1 to the Second Schedule of the *Justices Act* which was sworn, charging the defendant with the same offence as that which he was charged with in the information with which I am now concerned, and that the Justice issued thereon in the same document a summons in the form and with the defect I have referred to. It also appeared from the affidavits in support of the order nisi and from the certificate I have referred to that on 4 February 1971 this summons was struck out by Mr Proposch SM, and that Mr Campbell appeared for the defendant.

The order nisi was obtained on two grounds, namely –

> (1) that the said Magistrates' Court was wrong in holding (if it so held) that the information should be struck out because the warrant issued thereon on the 8 day of February 1971 had been issued by a justice other than the justice who issued a summons to the defendant on the 22 October 1970 on a similar information of the informant laid and sworn on that day, and
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> (2) that the said Magistrates' Court was wrong in law in refusing to proceed to hear and determine the said information.

It is not easy to ascertain the grounds for the Justices' decision to dismiss the information, for all they said was that they dismissed it in reliance upon the judgment of Sholl J in *Hargreaves v Bourdon* which in my opinion affords no basis for the course that they took.

Since it is to be assumed that the Justices upheld the submission made by the defendant's solicitor which was that s36(2) of the *Justices Act* 1958 had not been complied with and that the judgment of Sholl J in *Hargreaves v Bourdon* supported that submission, it is reasonable to assume that what they decided was that the only person qualified to issue the warrant which brought the defendant to court was Mr Walsh JP before whom the original information was laid and sworn. It is therefore necessary to consider the provisions of s36(2) which provides that:

> "The following rules shall be observed for the purpose of enforcing the appearance of any person against whom any information or complaint has been received by any Justice—
> (2) In all cases where an information is laid for any indictable offence or offence punishable on summary conviction, the justice before whom such information is laid (if the information is on oath) may it he thinks fit instead of issuing such summons as aforesaid issue in the first instance his

> warrant, or may if he thinks fit issue his warrant at any time before or after the time mentioned in such summons for the appearance of such person to apprehend such person and to cause him to be brought before such justice—
> to answer the said information."

It would appear that the justices took the view that since Mr Walsh JP was the justice before whom the original information was laid and sworn, if a warrant was to be issued the section required that it be issued only by Mr Walsh and not by any other justice. If this is what they decided in my view they were clearly wrong. Firstly, it is made plain by the decision of Hudson J in *Hancock v W Angliss & Co (Australia) Pty Ltd* [1961] VicRp 93; [1961] VR 590 at pp592 and 593 (in a passage which was approved by Sholl J in *Hargreaves v Bourdon* (*supra*) at p90,) that since s18(2) and (3) of the *Justices Act* required the summons or the warrant to be comprised in the same document, the only information that can be looked at as leading to the warrant in the present case is the information laid and sworn before Mr Allison JP on 8 February 1971, which appeared in the same document as the warrant, and that it cannot be said that the issue of that warrant was in any way based upon the information laid and sworn before Mr Walsh JP on 22 October 1970.

Secondly, it was impossible even if the informant had desired to do so, for him to rely upon the information of 22 October 1970 laid before Mr Walsh JP, for that information had no separate existence from the summons based on it and comprised in the one document, and its existence was terminated on 4 February 1971 when Mr Proposch SM struck it out. The information clearly did not survive such striking out, and could not on 8 February 1971 have been a valid and existing information which could form the basis for the issue of a warrant on that day.

Thirdly, there is nothing in s38(2) which prevents the laying and swearing of a fresh information and the issue of a warrant thereon even if (contrary to the fact in this case) the original information was then validly in existence, provided that a period of more than 12 months had not elapsed between the date of the offence and the issue of the fresh information. Section 36(2) does not say that the justice before whom the information is laid must issue his warrant at any time before or after the return date, but that he may issue it if he thinks fit. It is permissive, not mandatory.

Fourthly, *Hargreaves v Bourdon* has no application to the facts of this case. It was concerned with an attempt to circumvent the limitation period laid down by s215 of the *Justices Act* (which requires an information to be laid within 12 months from the time when the matter of such information arose) by getting the Justice before whom an information was laid within that period of 12 months but which for some reason had not been served to issue a second summons on the original information after the limitation period had expired. It would have been useless for the informant to lay a fresh information and lead a summons from such information (as but for the limitation period he might have done) because s215 would have provided a complete defence.

This attempt was not successful, for Sholl J held that a second summons could not issue upon an information upon which a summons had been issued but not served and he distinguished the case of *Brooks v Bagshaw* [1904] 2 KB 798. The passage in the judgment at p92 upon which the defendant's solicitor relied was one in which the learned judge was discussing the decision in *Brooks v Bagshaw* (where it was held that a fresh summons might validly be issued on the original information (laid within time) after the time for laying the information had expired.) He was there examining the situation in the light of the English legislation, which did not contain the equivalent of s18(2) and (3) of our *Justices Act*. At p94 he turned to consider the applicability of that decision to our own statutory provisions which did contain s18(2) and (3) and concluded that because of those provisions, *Brooks v Bagshaw* was not applicable in Victoria. He thought that under our own *Justices Act* a Justice cannot issue a series of summonses on the one information and that in consequence, once the 12 months limitation period had elapsed from the laying of the information upon which the Justice had issued the summons in the first instance, no further proceedings on that information or by fresh information and fresh summons can be taken.

It is thus plain that His Honour thought that a fresh information and summons, or a fresh information and warrant could issue within the 12 months period but not thereafter. Indeed, at p95 he said

> "Thus when once a summons has been issued upon an information laid before a Justice, then subject only to the power of extension given by s21(2) which incidentally is not limited to the same justice, once the proper time for service has passed without service having been effected, there must be a new information in order to lead a new summons."

This passage is in my view just as applicable to a case where the original information and summons has been spent because it has been struck out as it is to a case where the original information and summons has been spent because it has not been served.

The case is thus not authority for the course that the Justices took, but rather is it authority which supports the validity of the proceedings which they dismissed. It establishes (at least by implication) that provided it be within the time limit fixed by s215 a fresh information and summons might be issued, and it establishes that once the original information and summons were struck out those proceedings were spent and that (provided that they were within time) fresh proceedings based upon a fresh information might be taken. The striking out without a hearing on the merits cannot be a bar to such fresh proceedings: See *Ward v Hodgkins* [1957] VicRp 103; [1957] VR 715; [1958] ALR 348 and *Barnes v Gougousis* [1969] VicRp 123; [1969] VR 1019. Since the only reason for requiring the same Justice who issued the first information to issue a second summons or warrant was that the second warrant was based upon the original information (which is not the case here) and since the original information ceased to be effective once it was struck out, there was no information in existence thereafter on which a warrant or summons could be based, and it must follow that the order nisi must be made absolute on both grounds.

I must confess to having some sympathy for the Justices for *Hargreaves v Bourdon* is a complex decision and not an easy case to understand, and they were given little or no assistance as to what that case really decided. Before concluding there are two other matters to which I should advert. Firstly, the defendant did not appear on the hearing of this order nisi to support the decision of the Justices. Secondly, during the hearing I was disposed to take the view that the original information laid before Mr Walsh JP had not been sworn, as stated in the summons issued thereon and the order nisi.

What led me to this view was that the information did not state, as was stated in the later information, that such information had been laid by the informant "on his Oath". However, on looking at the forms in the Second Schedule, and comparing Form 1 with Form 2, it became apparent that where it is only intended to issue a summons as distinct from a warrant on such an information, it was possible to swear such information in which case Form 1 was the appropriate form to use. See s5 of the *Justices Act* 1958.

The order nisi will be made absolute with costs to be taxed (including reserved costs) such costs not to exceed $200. The order dismissing the information will be set aside and the information remitted to the Magistrates' Court at Prahran to be dealt with according to law.

APPEARANCES: For the applicant Nemtas: Mr J Winneke, counsel. Crown Solicitor. No appearance by or on behalf of the respondent Carter.
