27/74

SUPREME COURT OF VICTORIA

KENNETT v HOLT

Pape J

13, 14 May 1974 — [1974] VicRp 79; [1974] VR 644

MOTOR TRAFFIC – CHARGE THAT DRIVER DROVE THROUGH A RED LIGHT – ADMISSION BY DRIVER THAT HE DROVE THROUGH AN AMBER LIGHT – THAT DUE TO THE WEATHER AND ROAD CONDITIONS HE WAS UNABLE TO STOP – FINDING BY MAGISTRATE THAT HE WAS NOT SATISFIED THAT DEFENDANT DROVE THROUGH A RED LIGHT BUT SATISFIED THAT HE DROVE THROUGH AN AMBER LIGHT – MAGISTRATE AMENDED INFORMATION AND IMPOSED A CONVICTION – WHETHER MAGISTRATE IN ERROR: *JUSTICES ACT* 1958, S200; *ROAD TRAFFIC REGULATIONS* 1962, R401(2).

HELD: Order nisi discharged.
1. In relation to Ground 1 of the Order nisi that the Magistrate amended the information after a final decision had been given on the original information, this ground cannot be supported. Paragraph 10 of the defendant's affidavit does not indicate that the court dismissed the information as originally drawn. The Magistrate had not advanced to that position. It merely shows that the Magistrate stated he had a reasonable doubt as to whether the defendant had driven through a red light, but that he had no doubt he had driven through an amber light.

2. In relation to ground 2 which stated that the Magistrate was wrong in law in amending the information with an entirely different charge, the amendment did not substitute an entirely different charge. The offence charged by the amendment was a cognate offence to that originally charged in that it was akin in origin and quality and allied in nature to the offence originally charged.
Thomson v Lee **[1935] VicLawRp 65; [1935] VLR 360; [1935] ALR 458, followed.**

3. In relation to Ground 3 it was stated that the Magistrate was wrong in law in amending the original information and pronouncing a conviction on the substituted charge without affording counsel for the defendant an opportunity to be heard thereon. As a general rule it is preferable for a court proposing to make such an amendment to invite the prosecution to apply for it so that the defendant can be heard on such an application.

4. The court has power to make the amendment of its own motion "upon or without application". Further, s200 of the *Justices Act* confers a discretion on the court to order an amendment and does not say that such an amendment can only be made upon application by one of the parties. This ground really means that the Magistrate was wrong in pronouncing a conviction on the amended charge without affording counsel for the defendant an opportunity to be heard. But counsel did not apply to be heard, and a conviction was thereupon recorded. Accordingly, Ground 3 was not made out.

PAPE J: This is the return of an order nisi to review the decision of the Magistrates' Court at St Kilda constituted by Mr RW Smith SM, and one honorary justice whereby the defendant was convicted on a charge which was, as will subsequently appear, amended to read:

> "Being a driver of a vehicle on a carriageway to wit Dandenong Road he failed to observe and comply with the instructions of a traffic control signal displaying an amber circle alone erected at or near the intersection of Williams Road and applicable to him."

The defendant appeared, and although the affidavit does not so state, presumably pleaded not guilty, and he was represented by Mr Maguire of counsel. Originally the defendant had been charged with a breach of reg 401(2)(c) of the *Road Traffic Regulations* 1962 in that he failed to comply with a traffic-control signal displaying a red circle alone.

In the affidavit in support of the order nisi no account of the evidence was given, but the answering affidavit does set out the evidence that was tendered before the magistrates, and par. 7 of this affidavit shows that the evidence of the informant was as follows:—

> "On Wednesday 30 May 1973, at about 8.40 p.m. I saw the defendant drive a motor car registered number KHT-496 east in Dandenong Road, Prahran. As he approached the intersection of Williams Road the lights changed to red for east-west traffic. The defendant was approximately 30 feet west of the lights when they changed and he went through the red light. I intercepted the defendant and detailed my observations to him. I said, 'What is your reason for failing to comply with the traffic control signal at Williams Road?' He replied, 'I know from past experience that if I had have tried to stop I would have finished halfway across the intersection.' I said, 'Produce your licence to drive a motor car.' The defendant produced Probationary Licence Number 2328766 which expires on 27 April 1975. The weather was fine, the road was dry, there was no interference with traffic. Under cross-examination by Mr Maguire I gave evidence that I was in the front line of the south bound traffic in Williams Road. I saw the reflection of the red light but couldn't see the red light itself. I believed the light was red prior to the defendant entering the intersection. The defendant told me that the light was amber but I told him that I didn't agree with him and explained to him that it made no difference because it was an offence to drive through an amber light. It was not raining and the road was not greasy. The defendant accelerated through the intersection.' There was other evidence given during cross-examination but I am not able to remember either the questions asked or the answers given."

There was a submission made by counsel for the defendant that there was no case to answer as there was no evidence that the defendant had driven through a red light, but this submission was rejected by the court. The defendant then gave evidence, the effect of which, according to par. 8 of his affidavit in support of the order nisi to review, was stated to be:

> "That I then gave evidence denying that I had proceeded through a red light, but admitted proceeding through an amber light. I gave evidence that I was unable to avoid doing so due to the speed I was travelling, the distance from the lights when I first noticed the amber light and greasiness of the road."

This evidence was supplemented in par. 10 of the informant's affidavit, in which he says: "After the defendant had concluded his evidence-in-chief he was cross-examined. Under cross-examination he stated

> "that he looked at his speedometer after leaving Chapel Street and his speed was 30 to 35 m.p.h., that he looked at his speedometer prior to going through the intersection and his speed was 30 to 35 m.p.h. that he was not able to stop in time because the greasy roads prevented him from doing so. He gave an indication of the distance he was from the intersection when he checked his speedometer on the second occasion but I am unable to remember the distance."

After the case for the defendant had been closed the stipendiary magistrate then said that he had a reasonable doubt as to whether the defendant had proceeded through a red light but that he was satisfied that he had proceeded through an amber light and that the amber light had been showing for some time and that the defendant was not keeping a proper look-out. He then said that he would amend the information by deleting the words "red circle" and inserting the words "amber circle", and he thereupon convicted the defendant on the charge as so amended, fined him $30, cancelled his probationary licence, and disqualified him from obtaining a further licence for three months.

An order nisi to review this decision was obtained on 6 September 1973 on three grounds, which are:—

> "(1) That the Magistrates' Court amended the information after a final decision had been given on the original information.
>
> (2) That the Magistrates' Court was wrong in law in amending the information and substituting therefor an entirely different charge.
>
> (3) That the Magistrates' Court was wrong in law in amending the original information and pronouncing a conviction on the substituted charge without affording counsel for the defendant an opportunity to be heard thereon."

The power of a magistrates' court to amend an information is contained in s200 of the *Justices Act* 1958, which would appear to be confined to criminal proceedings as these were: see *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VicRp 81; [1970] VR 625, per McInerney J at p627. Section 200 reads:—

> "On the hearing of any information or other proceedings before justices or any Magistrates' Court no objection shall be taken or allowed to any information warrant or summons for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justices or court taking the examinations of the witnesses in that behalf as in this Act mentioned; but if any such defect or variance appears to such justices or court to be such that the person charged has been thereby deceived or misled, such justices or court may amend such information warrant or summons and at the request of the person so charged may adjourn the hearing of the case to some future day, and in the meantime may remand the person so charged or may admit him to bail with or without sureties conditioned for his appearance at the time and place to which such hearing is so adjourned."

The first ground of the order nisi is that the magistrates' court amended the information after a final decision had been given on the original information. This ground, in my view, cannot be supported. Paragraph 10 of the defendant's affidavit does not indicate that the court dismissed the information as originally drawn. The stipendiary magistrate had not advanced to that position. It merely shows that the stipendiary magistrate stated he had a reasonable doubt as to whether the defendant had driven through a red light, but that he had no doubt he had driven through an amber light.

A somewhat similar contention to that which is raised by this ground was raised in the West Australian case of *Mitchell v Myers* (1955) 57 WALR 49. In that case a defendant was charged, amongst other charges, with dangerous driving and the magistrate indicated, just as this magistrate indicated, that he was not prepared to convict on that charge, but that if the prosecution applied for an amendment to charge him with negligent driving he would allow the amendment and convict the defendant. Dwyer CJ took the same view of this situation as I have indicated that I take. At p51 of the report he said this:

> "As a preliminary, I have come to the conclusion that when the Magistrate made the remark he did about his unwillingness to record, or come to a conclusion of guilt on the charge of dangerous driving, he had not advanced so far as to find the appellant not guilty and dismiss the charge against him; and so I think that argument on behalf of the appellant fails. I do not agree that on the facts as they are presented to me here there had been any decision given, and it is, of course, highly unlikely that a decision had been given in view of the remarks of the Magistrate himself with regard to the evidence in the case."

That represents in a very similar case entirely my own view. The learned Chief Justice also held that any such amendment may be made at any time before a final decision on the original complaint is made, and he dealt with this question at p53 of the report. It is unnecessary to refer to what he said. I am, therefore, of opinion that ground 1 has not been sustained.

Ground 2 is that the Magistrates' Court was wrong in law in amending the information and substituting therefor an entirely different charge. In my view the amendment did not substitute an entirely different charge. The offence charged by the amendment was a cognate offence to that originally charged in that it was akin in origin and quality and allied in nature to the offence originally charged. In *Thomson v Lee* [1935] VicLawRp 65; [1935] VLR 360; [1935] ALR 458, first par. of the VLR headnote reads:

> "On the hearing of an information, if the facts proved do not establish the charge as laid, but do establish a cognate offence under the same section, the justices should amend the information so as to accord with the facts proved."

That was a case in which the defendant was charged with being in a certain street, to wit a thoroughfare between Saxon Street and Sydney Road for the purposes of betting. The justices found that the place where the defendant was was not a thoroughfare and dismissed the charge. Mann CJ, held they were entitled so to find, but that as the evidence showed that the defendant was on enclosed premises or in enclosed ground, and enclosed ground was included in the definition of "street", the justices should upon or without application have amended the information accordingly. And he, therefore, set the order aside and remitted the matter to the justices for re-hearing. At p364 his Honour said this:

> "But I think, considering the form of the section and of the information, and that in the definition of 'street' there are other words which would have covered the place where the man was standing, the

> proper course for the magistrates to have taken was to amend the variance between the information and the facts found by them, by striking out of the information the references to a thoroughfare, and adding, if they thought it necessary, 'in enclosed land' in the city or town of Brunswick, as the case may be. The magistrates sitting in Brunswick would be entitled to take judicial notice of the city or town. I quite appreciate what Mr Gorman has said as to its being fair to allow only one 'run', but it is not part of the duty of the Bench to regard the matter as a sporting contest; it must use its powers in a proper way to uphold the law; and as the magistrates have full power to amend, upon or without application, and ought, as I think, to have made the amendment, the order of the Court below will be set aside, and the case will be remitted for re-hearing."

That case in my view governs this case. The offence charged by the amendment was one which was provided for by the same regulation as provided for the offence originally charged, namely reg 401 of the *Road Traffic Regulations* 1962.

A similar conclusion to this was come to by Dwyer CJ in the case of *Mitchell v Myers* to which I have already referred, without having the benefit of the citation of Mann CJ's decision. At p52 of the report he said (referring to a section giving power to amend which was *in pari materia* with s200 of the *Justices Act*):

> "It does not mean that some new offence unrelated to that charged in the complaint can be assumed, can be laid, or can be the subject of amendment; it would be something more than a variance if an offence of a different nature and character could be substituted for that which is set out in the complaint or is the subject of the charge before the Justices; but it does extend to alleging what I might call a cognate offence which is established by the evidence, that is one similar in some way to that charged, or one which would be a constituent of the actual complaint which has been laid; and by a constituent I mean what the Code calls an element or something of the sort, an ingredient involved in the complaint laid, and in that respect almost necessarily a complaint of a lesser gravity than that charged."

On this particular point the Chief Justice's decision was followed by the Full Court of Western Australia in the case of *Higgon v O'Dea* [1962] WAR 140, where Hale J at pp143-4 said this:

> "Section 46 of the *Justices Act* 1902 provides that 'no objection shall be taken or allowed to any complaint...for any variance between it and the evidence in support thereof, and any such variance shall be amended by order of the justices at the hearing'. Section 47 provides for an adjournment in order to prevent prejudice to a defendant by such an amendment; and s48 directs that any such amendment shall be entered on the proceedings of the justices. These sections were considered by Dwyer CJ, in *Mitchell v Myers* (1957) 57 WALR 49, and it appears to me that the conclusion there reached is correct, namely, that s46 does not permit an amendment which would result in a charge of some new offence of a different nature but that it does relate to a cognate offence or an offence constituted by facts which would themselves be part and parcel of the offence originally charged; and it appears to me that it must equally permit an amendment where the two charges could in the first place have been stated in the alternative under the combined operation of s44 of the *Justices Act* and s582 of the *Criminal Code*. There could here be no possible prejudice to the appellant and no necessity for offering him an adjournment. In the same case Dwyer CJ, expressed the opinion that an amendment could be made at any time up to the giving of a final decision, i.e. until there is an acquittal or conviction on the original charge, and this I think is correct: the hearing does not end when the last witness leaves the box or when the last address has been made nor even when the reasons for judgment have been given but it extends up to the time when judgment is pronounced."

In this case the primary obligation which is imposed by reg 401 is that contained in sub-reg(1) which provides that every person shall at all times observe and comply with the instructions of any traffic-control signal applicable to him. Sub-reg(2)(c) refers to what is required to ensure compliance with a traffic-control signal displaying a red circle alone. Sub-reg(2)(b) refers to what is required to ensure compliance with a signal displaying an amber circle alone. It therefore seems to me that these two different provisions regarding different traffic-control signals do provide for what might in any sense of the word be regarded as cognate offences, and, in my opinion, ground 2 is not sustained.

Ground 3 was that the magistrates' court was wrong in law in amending the original information and pronouncing a conviction on the substituted charge without affording counsel for the defendant an opportunity to be heard thereon. This ground has given me some concern. It appears from par. 12 of the informant's affidavit that no objection was made by counsel for the

defendant to the course that the magistrates took, and I have no doubt that had he desired to be heard on the matter the court would have allowed him to make such submissions as he thought fit. I have already held that the court was not wrong in law in amending the original information, but I think as a general rule it is preferable for a court proposing to make such an amendment to invite the prosecution to apply for it so that the defendant can be heard on such an application.

Nevertheless, the court has power to make the amendment of its own motion, for as was said by Mann CJ, in the passage from *Thomson v Lee* which I have already cited, the court has full power to amend "upon or without application". Further, s200 of the *Justices Act* confers a discretion on the court to order an amendment and does not say that such an amendment can only be made upon application by one of the parties.

This ground really means that the magistrates were wrong in pronouncing a conviction on the amended charge without affording counsel for the defendant an opportunity to be heard. But as I have said, counsel did not apply to be heard, and a conviction was thereupon recorded. The situation was brought about entirely by the defendant, for in his evidence, instead of confining himself to the original charge and saying that he did not drive through the red light, he went on to admit that he did drive through an amber light, and it was because of that admission that the court ordered the amendment to be made. The court was obviously aware that reg 401(2)(b)(i)(I) provided an escape route for the defendant if it were shown that the vehicle he was driving was so close to the stop line or the intersection when the amber circle first appeared that he could not safely stop his vehicle before passing the stop line, and I think it is plain that the defendant was also well aware of the existence of this escape route for he proceeded to give evidence which was designed to bring him within the provisions of the regulation.

Nevertheless, the court obviously did not accept his evidence, for the stipendiary magistrate held that the amber light had been showing for some time and that the defendant was not keeping a proper look-out. This latter finding is plainly related to the defendant's evidence that he was unable to avoid driving through the amber light due, *inter alia*, to the distance he was from the lights when he first noticed the amber light, and the stipendiary magistrate's finding shows that he was well aware that the test was not how far from the lights the defendant was when he first noticed the amber light, but how far from the lights he was when the amber circle first appeared.

I have given consideration in this case as to whether I should not remit this case for rehearing, but having regard to the plain admission by the defendant and to the findings of the court, to the opportunities which counsel plainly enough could have had had he decided to invoke those rights, it seems to me that to refer this matter back for rehearing would achieve no practical result in view of the defendant's sworn statement that he drove through the amber light, and his explanation of why he did it, which was rejected by the court. In these circumstances, I think the court was entitled to convict him on the charge as amended: see *O'Donnell v Chambers* [1905] VicLawRp 9; [1905] VLR 43; 10 ALR 224. I therefore think ground 3 is not made out, and since they are the only three grounds in the order nisi it follows that none of the grounds has been made out.

It appeared that on the hearing of the informations the regulations were not tendered in evidence and Mr Archibald applied to me for leave to tender them now, and I am disposed, pursuant to s160 of the *Justices Act*, to allow those regulations now to be tendered. I do this because no objection was taken at the hearing to their absence. They were well known to all the parties and I think that the failure to tender them was due to oversight. In addition to that, no ground was taken in the order nisi that there was no evidence on which the conviction could be based. Menhennitt J, appears to have taken a similar view in the unreported case of *Booker v McGuinness*, judgment in which was delivered on 13 March 1969, and the learned Chief Justice seems to have taken the view that it would be proper to allow the tendering of the regulations at this stage in *Schuett v McKenzie* [1968] VicRp 24; [1968] VR 225 at pp228-9. For these reasons, I am of opinion that none of the grounds has been made out and that the order nisi should be discharged. I will order that the informant have leave to tender in evidence the *Road Traffic Regulations* 1962. I will further order that the order nisi be discharged and that the defendant pay the informant's costs fixed at $100. Order nisi discharged.

Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the defendant: Loel J. Caldwell and Associates.