20/95

SUPREME COURT OF VICTORIA

BRADY v COLLEY

Harper J

30 June 1995

PROCEDURE – CHARGE AND SUMMONS – INFORMANT'S ADDRESS OMITTED – WHETHER DOCUMENT VITIATED – APPLICATION FOR ADJOURNMENT TO SERVE NOTICE ON INFORMANT – APPLICATION REFUSED – WHETHER IMPROPER EXERCISE OF DISCRETION – BIAS – MAGISTRATE INFORMED OF PRIORS BEFORE DEFENCE CASE – NO EVIDENCE CALLED – WHETHER MAGISTRATE IN ERROR IN PROCEEDING TO FINALISE CASE: *ROAD SAFETY ACT* 1986, SS49(1)(b), 58(2).

1. Where a police informant's address was omitted from the charge and summons, this defect did not vitiate the document.

2. Where an accused had 3-4 months in which to serve a notice pursuant to s58(2) of the *Road Safety Act* 1986, there was sufficient time for the notice to be sent to the informant care of the Chief Commissioner of Police. Accordingly, the Magistrate was not in error in refusing an application for an adjournment in order to serve the notice on the informant.

3. Where, before the defence case was opened the Magistrate was informed that the accused had prior convictions and the accused then called no evidence, the Magistrate was not in error in proceeding with the hearing of the charge.

HARPER J: [1] The appellant was on 13 January 1995 convicted in the Magistrates' Court at Wangaratta of an offence under s49(1)(b) of the *Road Safety Act* 1986. That section makes it an offence to drive a motor vehicle while more than the prescribed concentration of alcohol is present in the blood.

The appeal raises the following questions of law, as stated in the orders made by Master Wheeler on 9 February 1995:

> "(i) The address of the Informant not being included in the Information should the Magistrate-
> (a) Have dismissed or struck out same?
> (b) Granted the Appellant an adjournment to enable him to have served a notice pursuant to Section 58(2) of the *Road Safety Act* 1986?
>
> (ii) Having been informed that the Appellant had prior convictions prior to the Appellant's case being opened should the Magistrate have disqualified himself from the further hearing of the case?"

The information, or, more strictly described, the charge and summons, does not contain any information at all in the box opposite the words "Agency and Address". Nevertheless, the informant is clearly identified as "Constable Ross Colley, 29785. Moreover, the document includes a description of the offence, which description has not been challenged as being insufficient. Indeed, such a challenge would not be reasonably open. The document also includes all relevant information about the place, date and time when the defendant must attend court to answer the charge. It is not suggested that the charge and summons is defective in any respect, save **[2]** the absence of an address for the informant.

This defect does not, in my opinion, vitiate the document. It contains all the information which the appellant needs in order to meet the charge. At worst, the absence of the informant's address may cause difficulty in serving documents on the informant. If so, the consequences would be visited upon the informant and not upon the Appellant. In fact, however, any notices required to be served on the informant could be so served by addressing the notice to him care of the Chief Commissioner of Police; the address of the Chief Commissioner is readily available. This, I think, is the answer to the question posed under part (i)(b) of the matters put forward by the Master for decision.

The Appellant complains that the Magistrate's discretion miscarried when His Worship refused the Appellant's application for adjournment. That application was based upon the assertion that an adjournment was necessary to enable the Appellant to serve upon the informant a notice pursuant to s58(2) of the *Road Safety Act* 1986. But the charge and summons were served on the Appellant in August 1994; the information was not heard until 13 January 1995. A notice under s58(2) must be served on the informant not less than 28 days before the hearing or within any shorter period ordered by the court. The notice in this case could therefore have been served upon the informant at any time between August 1994 and 14 December 1994. There could be no suggestion that that time was insufficient. All the Appellant needed to do was forward the notice to the informant care of the Chief Commissioner at the **[3]** Chief Commissioner's address. There is no suggestion that such service would have been insufficient. In any event, I hold that it would have been sufficient, at least in the absence of any other address shown on the charge and summons.

It is then submitted on behalf of the Appellant that there was put to His Worship before his decision to convict or acquit information that the Appellant had prior convictions. The nature of these convictions was not, however, made known to the Magistrate. Having this information put to him at that time, the Magistrate, it was submitted, ought to have disqualified himself. There was before me a dispute about whether the fact that "something was known" about the Appellant was revealed to His Worship before or after the close of the case for the Appellant in the hearing at Wangaratta or indeed before the Appellant's case was opened to His Worship. I am prepared to proceed on the basis that the Magistrate received this information before that opening. As it happened, however, the Appellant called no evidence. The only defence taken was a technical defence to the informant's case. His Worship had decided that point against the Appellant before the question of prior convictions arose.

It was submitted on behalf of the Appellant that the decision to call no evidence may have been taken as a result of the Appellant's legal adviser's apprehension of the Magistrate's bias, bias induced by his receipt of the information that the Appellant had prior convictions. But if so, that apprehension was misplaced. In any event, if an accused has a case to put, that case must **[4]** be put, to the extent that the rulings of the court allow, at the hearing or trial. Should a conviction follow, any appeal against a ruling of the court can then be taken. Here, no ruling of the Magistrate prevented the Appellant calling whatever evidence he wished in his defence.

Accordingly, it is in my opinion not open to attack the result on the basis that had the information about prior convictions not affected or been thought to affect the Magistrate's mind, a different approach to the presentation of the Appellant's case might have been made. For these reasons, it seems to me that the decision of His Worship to proceed with the hearing, despite the application for an adjournment and despite the information about the Appellant's antecedents, was not a decision which can be attacked at law. For these reasons, the appeal must fail.

APPEARANCES: For the Appellant: Mr JA Gibson, counsel. Solicitors for the Appellant: Byrne & Clark. For the Respondent: Mr SL Dewberry, counsel. Solicitors for the Respondent: Mr P Wood, Office of Public Prosecutions Victoria.
