07/12; [2012] VSC 78

SUPREME COURT OF VICTORIA

DPP v KIRTLEY

J Forrest J — 1, 9 March 2012

MOTOR TRAFFIC – SPEEDING – MAGISTRATE CONCLUDED A CHARGE IDENTIFYING AN OFFENCE UNDER RULE 20(1) OF THE *ROAD RULES - VICTORIA* 1999 WAS DEFECTIVE – WHETHER THE MAGISTRATE ERRED IN DETERMINING THAT THE CHARGE WAS DEFECTIVE – ESSENTIAL REQUIREMENTS OF A CHARGE – WHETHER CHARGE SATISFIED REQUIREMENTS OF SECTION 27(1) OF THE *MAGISTRATES' COURT ACT* 1989 – WHETHER THE MAGISTRATE ERRED IN DISALLOWING AMENDMENTS TO THE CHARGE: *ROAD RULES - VICTORIA*, R20(1).

K. was charged with exceeding the speed limit by driving at a speed of 156km/h in a 100km/h zone. At the hearing before the Magistrates' Court, K. submitted that the charge did not disclose an offence in that it did not stipulate the speed limit applicable to the driver in regard to that length of the road. The Magistrate accepted the submission and dismissed the charge. The Magistrate said that the charge stated that K. drove at a speed over the speed limit applying to the length of road but there was no mention of the speed limit applicable to K. Upon appeal—

HELD: Appeal allowed. Dismissal quashed. Remitted for hearing and determination according to law.
1. The common law requirement of a charge is that it should identify sufficiently the essential ingredients. Notwithstanding the rule of strictness required of prosecutors in drafting criminal charges, a charge should be interpreted in the manner a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context.
***DPP Reference No 2 of 2001* [2001] VSCA 114; (2001) 4 VR 55, applied.**

2. In relation to a charge under r20 of the *Road Rules – Victoria*, the two essential ingredients of a charge are (a) the driving of a motor vehicle and (b) in excess of the speed limit.
***Ciorra v Cole* (2004) 150 A Crim R 189; MC31/04; applied;**
***Alwer v McLean* [2000] VSC 396; (2000) 116 A Crim R 364; MC17/02; distinguished.**

3. It is clear from the charge in the present case that K. would have known that the offence involved:
(a) his driving of a motor vehicle;
(b) on 15 June 2009, on the Wimmera Highway, between Marnoo and Rupanyup, his vehicle was driven at a speed over the speed limit, which was alleged to be 100km/h;
(c) an allegation by the informant that he drove at 156km/h on that occasion; and
(d) an alleged breach of r20 of the *Road Rules*.

4. It is patent that the essential ingredients of his driving of a vehicle over the prescribed speed limit were contained in the charge and the other details set out in the charge informed K. satisfactorily of the circumstances of the offence.

5. Accordingly, the charge was good in law and the essential ingredients and the relevant facts and circumstances adequately set out. Whilst the reference in the charge to 100km/h being applicable to the road rather than the driver was unfortunate, it could not be doubted that K. was aware that he was being charged in relation to his driving of the motor vehicle, it being alleged that he exceeded the relevant speed limit of 100km/h by driving at 56km/h in excess of the prescribed speed.

Obiter:
(a) Whilst the charge was not in the words of the *Road Rules*, it was described in similar words so as to be sufficient for the purpose of s27)1) of the *Magistrates' Court Act*.

(b) A charge which lacks an essential element of the alleged offence is defective and, at common law, may be described as a nullity. If, however, the true nature of the offence is apparent from the face of the charge, and the defendant has not been misled or otherwise prejudiced by the omission, the charge may be amended under s50 of the *Magistrates' Court Act* (even out of time) to include the missing element on the basis that such an amendment does no more than clarify what is already apparent from the face of the charge.
***DPP v Kypri* (2011) 207 A Crim R 566; MC27/11, applied.**
The nature of the offence was, or should have been, apparent to K.; he was not misled or prejudiced by the notion of the speed limit being applicable to the roadway. The essential elements of the offence were contained in the charge – accordingly it was capable of amendment.

J FORREST J:

Introduction

1. Mr Christopher Kirtley, the respondent, was charged with travelling at an excessive speed on the Wimmera Highway in June 2009. The charge came on for hearing before a magistrate at Horsham on 26 May 2011. As a result of a submission made by Mr Kirtley's counsel that the charge, as laid, was defective, his Honour dismissed the summons.

2. I respectfully disagree with the Magistrate's conclusion. In my opinion the charge, although clumsily drafted, disclosed an offence under the *Road Rules – Victoria* 1999[1] and his Honour should have proceeded to determine it. I will now set out my reasons for reaching this conclusion and the orders that I think ought to be made.

Factual background

3. The police case was simple. Early on Monday 15 June 2009, Senior Constable Mellington detected a vehicle being driven by Mr Kirtley travelling at a speed of 158kph on the Wimmera Highway between Marnoo and Rupanyup – said to be a 100kph zone. The speed was alleged to have been monitored by the Senior Constable utilising a "moving mode radar speed measuring device".

The charge

4. The charge and summons was in the form prescribed by the *Magistrates' Court (Criminal Procedure) Rules* 2006, Schedule 3 Form 7. It set out Mr Kirtley's address, date of birth, the registration number of the vehicle and his licence number. Under the heading "Details of the charge against you", the description in relation to "what is the charge" read as follows:

> The defendant at Rupanyup on 15/06/09 being the driver of vehicle on the length named Wimmera Highway did drive at speed over the speed limit applying for the length of road to which a speed limit sign of 100km/h applied between Marnoo and Rupanyup. Detected speed 158km/h. Alleged speed 156km/h kph.

In the section of the charge entitled "Details of the charge against you", the answer to the question "under what law?" was "State Regulation P2(28/10/99) Road Rules – Victoria", and then r20 was identified as the relevant "section/clause".

The relevant provisions of the *Road Rules*

5. Located under Part 3 of the *Road Rules*, r20, at the relevant time, read as follows:

> A driver must not drive at a speed over the speed limit applying to the driver for the length of road where the driver is driving.
>
> Penalty: in the case of drivers of large vehicles 20 penalty units; in the case of drivers of vehicles other than large vehicles 10 penalty units...

6. Rules 21, 22, 24 and 25[2] then specify the relevant speed limits applicable to particular locations. For instance, by r21(1) the relevant speed limit was imposed by the number on the speed limit sign; r25(3) sets out 100 km/h as the default speed limit applicable to a driver on any other length of road.[3] It is important to note that rr21 and 25 did not create a penalty, but rather facilitated the identification of the relevant speed limit for the purposes of r20, which in turn created the offence.

The hearing

7. The hearing of the charge did not come on for nearly 20 months after the original return date, during which time there were several contest mentions.

8. Mr Billings of counsel appeared for Mr Kirtley and Senior Constable Taggart, of the Horsham Prosecutor's Office, appeared on behalf of the informant, Senior Constable Mellington. At the commencement of the hearing, counsel made a submission to the Magistrate that the charge did not disclose an offence of law. In a nutshell, his point was:

> As specified, that charge does not disclose the offence under the law. It doesn't stipulate the speed limit applicable to the driver in regard to that length of road.[4]

He elaborated, marginally, by asserting that the charge does not specify the essential element said to be that of the speed limit applying to the driver as opposed to the speed limit applying to the roadway – the wording employed on the charge.[5]

9. This point had not been raised at any of the contest mentions and the Magistrate stood the matter down to permit the prosecutor to make submissions in reply.

10. At the resumption of the hearing, the prosecutor submitted that the charge disclosed an offence and relied upon s27 of the *Magistrates' Court Act* 1989, which read, at that time, as follows:

> (1) The charge must describe the offence which the defendant is alleged to have committed and a description of the offence in the words of the Act or subordinate instrument creating it, or in similar words, is sufficient.

Subsequently there was discussion between the Magistrate and the prosecutor as to the power to amend, however no application was made to amend the charge.

11. The Magistrate accepted the argument of Mr Billings stating:

> It is my view that the governing provision, for want of a better expression, is that of road rule 20 and that it refers, quite specifically, to speed limit applying to the driving in the area which he drives. Now, the... charge states that he did drive at speed over the speed limit applying to the length of road. There is no mention of the speed limit applicable to him.[6]

Then, after referring to *Alwer v McLean*[7], his Honour held that he was bound by that decision and concluded that the wording of the charge and the summons was deficient and the charge should be dismissed.

12. Notwithstanding that no formal application had been made to amend the charge, his Honour also concluded that it was not open to the prosecutor to amend the charge as it was, in effect, a nullity.

This appeal

13. The notice of appeal filed 22 June 2011, pursuant to s272(1) of the *Criminal Procedure Act* 2009, set out the following questions of law and grounds of appeal:

Questions of Law

1. Did the charge as drafted disclose an offence known to the law?
2. Did the charge as drafted sufficiently identify the offence charged and its essential elements?

Did the charge as drafted satisfy the requirements of Section 27(1) *Magistrates Court Act* 1989 as applicable at that time?

Did the Magistrate err when he ruled that it was not open to the prosecutor to make an application pursuant to Section 50 *Magistrates Court Act* 1989 as applicable at that time to modify or amend the charge had such an application been made?

Grounds of Appeal

1. The Magistrate failed to properly consider whether the charge as drafted disclosed an offence known to the law?
2. The Magistrate erred in finding that the charge as drafted did not sufficiently identify the offence charged and its essential elements.

The Magistrate erred in finding that the charge as drafted did not satisfy the requirements of Section 27(1) *Magistrates Court Act* 1989 as applicable at that time?

The Magistrate erred when he ruled that it was not open to the prosecutor to make an applicant pursuant to Section 50 *Magistrates Court Act* 1989 as applicable at that time to modify or amend the charge had such an application been made?

The adequacy of the charge (grounds 1 and 2)

14. It was not in issue that the appropriate test for determining the validity of the charge is that laid down by the common law; it was not argued by the Director that s27 of the *Magistrates' Court Act* 1989 removed or affected the prosecutor's common law obligations in relation to the essential ingredients of a charge.

15. In *Kirk v Industrial Relations Commission of New South Wales*,[8] French CJ, Gummow,

Hayne, Crennan Kiefel and Bell JJ said as follows in relation to the common law requirements of a charge:

> The common law requires that a defendant is entitled to be told not only of the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge. In *John L Pty Ltd v A-G (NSW)*, it was explained that the older cases established that an information could be quashed as insufficient in law if it failed to inform the justices of both the nature of the offence and the manner in which it had been committed. In more recent times the rationale of that requirement has been seen as lying in the necessity of informing the court of the identity of the offence with which it is required to deal and in providing the accused with the substance of the charge which he or she is called upon to meet. The common law requirement is that an information, or an application containing a statement of offences, "must at the least condescend to identifying the essential factual ingredients of the actual offence". These facts need not be as extensive as those which a defendant might obtain on an application for particulars. In *Johnson v Miller*, Dixon J considered that an information must specify "the time, place and manner of the defendant's acts or omissions". McTiernan J referred to the requirements of "fair information and reasonable particularity as to the nature of the offence charged".[9]

16. This statement of principle has its genesis in what was said by Dixon J in *Johnson v Miller*,[10] which was extracted by Charles JA (with whom Winneke P and Chernov JA agreed) in *Director of Public Prosecutions Reference No 2 of 2001*:[11]]

> The necessity for a charge to identify sufficiently the essential ingredients of an alleged offence has been stated on many occasions and in various ways. For example in *Johnson v Miller* Dixon J said that the prosecutor:
>
> > ...clearly should be required to identify the transaction on which he relies and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. *For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge*. The court hearing a complaint or information for an offence must have before it a means of identifying with the matter or transaction alleged in the document the matter or transaction appearing in evidence.[12]

Charles JA went on to say:

> It is, however, necessary to distinguish between what have been called the "essential ingredients of the alleged offence" (*John L Pty Ltd v Attorney-General (NSW)*) which must be sufficiently identified, and other facts which the prosecution is obliged to establish but which are not so described. In *De Romanis v Sibraa* Mahoney JA said:
>
> > In *Johnson v Miller* Dixon J saw the decision in *Smith v Moody* as requiring the information to specify "the time, place and manner of the defendant's acts or omissions": McTiernan J referred to "fair information and reasonable particularity as to the nature of the offence charged". The rule does not require that the information contain all such material as a defendant may require, upon an application for particulars, for the preparation of his defence ...
> >
> > These cases establish that it may not be sufficient for an information to state the offence charged: it may be required to condescend to particulars. But ... they do not indicate that the information must go beyond a statement of the offence and proper particularisation of it.[13]

Subsequently, his Honour said:

> In *Smith v Van Maanen*, Tadgell J said that "it is necessary to strive conscientiously to read any information in a sense that gives it the meaning that the draughtsman intended". Notwithstanding the rule of strictness required of prosecutors in drafting criminal charges, a charge should be interpreted in the manner a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context.[14]

It follows that in determining whether the charge contained the essential ingredients of the offence, it is necessary to look at its contents from the perspective of a reasonable defendant in the position of Mr Kirtley.

17. Reduced to its basics, the debate between the Director and the Respondent turned upon what were the essential elements of an offence under r20 and whether that information was conveyed to Mr Kirtley so that he understood the charge he had to meet.

18. Senior Counsel for the Director contended that there were two essential ingredients of a charge laid under r20: namely the driving of a car and exceeding the speed limit. He argued that as long as these two matters were identified in the charge then that, with the details of the alleged offending, provided sufficient information to identify the substance of the charge. He said that charge as laid did all these things and the reference to the speed limit being applicable to the reading did not obscure the fundamental elements of the charge. Accordingly, so the argument concluded, the charge, although not identifying in terms that the speed limit was applicable to the driver, was nevertheless good in law.

19. Counsel for the Respondent repeated the submissions made before the Magistrate. He contended that the three essential elements constituting the offence were:

> (a) the driving of the vehicle;
> (b) in excess of the speed limit; and
> (c) that the speed limit was applicable to the driver.

The final element was missing and therefore the charge was a nullity.

20. In my opinion, the submission made on behalf of the Director – that the two essential ingredients to a charge under r20 are (a) the driving of a motor vehicle (b) in excess of the speed limit – should be accepted.

21. Senior Counsel for the Director, although referring to a number of the decisions to which I have already mentioned, relied primarily on the decision of Redlich J in *Ciorra v Cole*.[15] In that case, Mr Ciorra was charged with exceeding the speed limit in breach of r20 of the Road Rules. The charge was worded as follows:

> The charge detailed the offence alleged against the appellant in these terms:
>
> The defendant at McCrae on 6/4/2003 being the driver of a vehicle on a highway namely the Mornington Peninsula Freeway did exceed 100 kilometres per hour. Alleged speed was 145 km/h.

22. On the appeal to this Court, it was argued that the charge failed to describe an offence under r20 because an essential ingredient of the offence was missing, namely, an allegation that the appellant drove over any identified speed limit. Nor did the charge state what speed limit was applicable and how it was to be determined.[16]

23. His Honour, in a thorough analysis of the line of authorities on this point, said as follows:

> Though the words "the speed limit of" did not precede the words "100 kilometres per hour" that is the only reasonable meaning that could be given to the words used. The respondent further relies on the fact that the charge then specifies the speed at which the appellant is alleged to have travelled, namely 145 km/h. There is considerable force in the submission of the respondent that an allegation that an offence has been committed by driving in excess of a particular nominated speed implies that the nominated speed is the speed limit applicable. Interpreting the charge in the manner in which "a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context" leaves no doubt as to what the draftsman intended.[17]

Then, after distinguishing the decision of Smith J in *Alwer* (to which I shall return briefly), his Honour concluded in relation to r20:

> In my opinion, unlike reg 1001(1) which by its sub-parts created a series of mutually exclusive offences, r20 creates the relevant offence. It is sufficient that a charge alleging a breach of r20 employ the words, or words similar to, the words used in r20.
>
> ***The essence of an offence under r20 is that a driver has driven at a speed over the speed limit***. An essential factual ingredient of the offence is the speed limit which the driver is said to have exceeded. The speed limit which applies to the driver will depend upon which of rr 21-25 apply. As the evidence disclosed that it was speed limit signs which determined the speed limit referrable to the appellant's driving, it would have been preferable that the charge specified that 100 km/h speed limit signs applied. The defence would be entitled to particulars of such a matter if it was not referred to in the charge.
> ...

> There is a distinction between legal elements of the offence, essential factual ingredients and particulars required by the defendant to prepare his or her defence which bear upon the validity of the charge as expressed. I do not accept the contention of the appellant that it was necessary that the charge specify that 100 km/h speed limit signs applied. The basis upon which the speed limit is to be determined need not be set out in the charge. Though it be a fact necessary to be proved by the prosecution, it is not an essential ingredient for the purpose of identifying the offence. The submission that the charge was a nullity because of the absence of these words cannot be sustained. [18] (Emphasis added).

24. His Honour's reasoning (which I readily accept) has direct application here. In determining the essential ingredients of an offence under r20, I need say no more than adopt the emphasised portion of his Honour's reasons.

25. It is clear from the Charge on its face that Mr Kirtley must have known that the offence involved:

> (a) his driving of a motor vehicle;
> (b) on 15 June 2009, on the Wimmera Highway, between Marnoo and Rupanyup, his vehicle was driven at a speed over the speed limit, which was alleged to be 100 km/h;
> (c) an allegation by the informant that he drove at 156 km/h on that occasion; and
> (d) an alleged breach of r20 of the *Road Rules*.

26. It is patent that the essential ingredients of his driving of a vehicle over the prescribed speed limit were contained in the charge and the other details set out in the charge informed him satisfactorily of the circumstances of the offence.

27. I should add that even if Mr Kirtley's submission was accepted as to the essential elements of the offence, on any sensible interpretation the charge gave him sufficient information to know that it was his driving in relation to an applicable speed limit which constituted breach of the Rule. The inelegant drafting of the charge did not, in my view, obscure the core elements of the offence.

28. Finally I should mention, with respect to the Magistrate, that his Honour's reliance upon *Alwer* was misplaced for the reasons set out by Redlich J in *Ciorra*.[19] The distinguishing feature is the difference between the terms of the earlier *Road Safety (Traffic) Regulations* 1988, the subject of *Alwer* and the *Road Rules*, applicable in *Ciorra* and in this case. It suffices to note that reg 1001(1), the relevant regulation in Alwer, created by its sub-parts a series of mutually exclusive offences. To the contrary, r20 of the *Road Rules* creates one relevant offence with the relevant speed limit being identified by reference to rr21, 22, 24 and 25.

29. I have read the submissions put to the Magistrate and his decision carefully; it is a pity that his Honour was referred to *Alwer* which was essentially irrelevant to this debate and that *Ciorra*, which had been provided to his Honour and which dealt specifically with r20, was not identified as providing the answer to Mr Kirtley's submissions. Part, if not the whole of this problem, arose as a result of this point being taken at the last moment in a busy traffic court. It should have been identified earlier (at one of the contest mentions) thus allowing the Magistrate and the prosecutor time to research the point, not debate it in an *ad hoc* fashion with all the attendant pressures encountered in a rural magistrates' court dealing with a large case load.

30. In summary, the charge was good in law and the essential ingredients and the relevant facts and circumstances adequately set out. True it is that the reference to 100km/h being applicable to the road rather than the driver was unfortunate, but it cannot be doubted that Mr Kirtley was aware that he was being charged in relation to his driving of the motor vehicle, it being alleged that he exceeded the relevant speed limit of 100 km/h by driving at 56km/h in excess of the prescribed speed.

31. In my opinion, the appeal on grounds 1 and 2 should be allowed.

Did the charge satisfy the requirements of s27(1) of the *Magistrates' Court Act* as applicable at that time? (Ground 3)

32. Given my conclusion as to the validity of the charge, strictly speaking, it is not necessary

to answer this question. The charge was not dismissed on the basis of a failure to comply with s27(1), but rather on the basis that that, at common law, it failed to disclose an offence.

33. In any event, for the reasons I have set out above, I am of the opinion that the charge, whilst not in the words of the Road Rules, was described in similar words so as to be sufficient for the purpose of s27(1).

34. If it was necessary, I would also allow the appeal on this ground.

Should the Magistrate have allowed the charge to be amended? (Ground 4)

35. It is also not strictly necessary to rule on the question of amendment, however, it may be that the informant, prior to the hearing, wishes to amend the charge so that it sits more comfortably with the wording of r20.

36. No application was made by the prosecutor to amend the charge.[20] However, it is clear that the learned Magistrate considered this issue and ultimately, as he was satisfied that the essential ingredients of the offence were not contained in the charge, refused – on his own motion – to permit any amendment to be made

37. In *DPP v Kypri*,[21] Nettle JA (with whom Ashley and Tate JJA agreed) said as follows in the context of an amendment out of time:

> A charge which lacks an essential element of the alleged offence is defective and, at common law, may be described as a nullity. If, however, the true nature of the offence is apparent from the face of the charge, and the defendant has not been misled or otherwise prejudiced by the omission, the charge may be amended under s50 (even out of time) to include the missing element; on the basis that such an amendment does no more than clarify what is already apparent from the face of the charge.[22]

38. In my opinion the nature of the offence was, or should have been, apparent to Mr Kirtley; he was not misled or prejudiced by the notion of the speed limit being applicable to the roadway. The essential elements of the offence were, as I have concluded, contained in the charge – accordingly it was capable of amendment.

39. It is to be noted that the decision in *Kypri* which deals extensively with a number of earlier decisions relating to amendments and crystallises the legal position in respect of out of time amendments was not handed down until August 2011, after the Magistrate's decision.

40. This ground of appeal should also be allowed, although I note that no formal application was made by the prosecutor pursuant to s50.[23]

Orders

Subject to any submissions counsel may wish to make I propose to make the following orders:
(1) The appeal be allowed.
(2) The order made on 26 May 2011 by the Magistrate, in the Horsham Magistrates' Court in Case No. Y02723618 whereby His Honour dismissed a charge of exceeding the speed limit contrary to Rule 20 be quashed.
(3) The Charge in Magistrates' Court Case No. Y02723618 be remitted to the Magistrates' Court at Horsham for hearing and determination according to law.
(4) That the Respondent pay the Appellant's costs of this appeal, including any reserved costs.

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[1] "*Road Rules*". The Road Rules were incorporated into Victorian law by reg 201 of the *Road Safety (Road Rules) Regulations* 1999.
[2] Road Rule 23 was omitted from the Road Rules in 2005.
[3] Road Rule 25 sets out the other areas controlled by speed limits – such as school zones and speed limited areas.
[4] Transcript ("T") of the hearing on 26 May 2011, T 6.
[5] T 7, T 8.
[6] T 24, 25.
[7] [2000] VSC 396; (2000) 116 A Crim R 364 (*'Alwer'*).
[8] (2010) 239 CLR 831
[9] Ibid [26].
[10] (1937) 57 CLR 167

[11] [2001] VSCA 114; (2001) 4 VR 55.
[12] Ibid[18]. See also Latham CJ in *Johnson v Miller* at 479, *Ex Parte Lovell; Re Buckley* [1937] HCA 77; (1937) 59 CLR 467.
[13] Ibid [19]
[14] Ibid [40].
[15] (2004) 150 A Crim RJ 189 ('*Ciorra*').
[16] Ibid [67].
[17] Ibid [71].
[18] Ibid [80].
[19] See [73]-[77].
[20] Section 50 of the *Magistrates' Court Act* permitted the Court to amend the charge to correct a "defect or error". Section 50, by reason of Schedule 5 of the *Criminal Procedure Act* applied to this charge.
[21] (2011) 207 A Crim R 566 ('*Kypri*').
[22] Ibid [24]. See also [34]-[35].
[23] *Kypri* demonstrates that the failure of the prosecutor to seek an amendment does not relieve a magistrate of the obligation of considering the possibility of amendment [42]-[49]. There can be no criticism of the magistrate as prior to *Kypri* there was no guidance on this point. How such an approach will work in practice is another point altogether.

APPEARANCES: For the appellant DPP: Dr J McArdle QC, counsel. Craig Hyland, Solicitor for Public Prosecutions. For the respondent Kirtley: Mr A Marshall, counsel. Power & Bennett, solicitors.
