42/86

SUPREME COURT OF VICTORIA

MOORE v LORAINE

Marks J

30 October 1986

PROCEDURE – INFORMATION AND SUMMONS – DUPLICATED – BOTH SERVED ON DEFENDANT – FIRST SUMMONS WITHDRAWN ON RETURN DATE – WHETHER SECOND SUMMONS NULL AND VOID – WHETHER COURT HAD JURISDICTION TO CONVICT ON SECOND SUMMONS: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S5(2).

M. was served with a summons to appear before a Magistrates' Court on a certain date. Some ten days after service, M. was again summonsed to appear on the same date in respect of the same charge but at another Court namely a Mention Court. When the first summons was called on, M.'s legal practitioner apprised the Court of the duplication and accordingly, the first summons was withdrawn. As M. did not appear that day at the Mention Court, the matter was adjourned to the first Court for hearing on a later date, on which date, M. was convicted in his absence.

M. obtained an order nisi to review on the grounds that the second summons was null and void, and the court had no jurisdiction to convict.

HELD: Order nisi discharged.
Notwithstanding the similarity in form and language between the two summonses, there was nothing to show that:
(1) the actual information and summons on which the conviction was registered was null and void; or

(2) the court lacked jurisdiction in registering the conviction, in view of the fact that the first summons had been withdrawn.

MARKS J: [1] This is the return of an order nisi made by Master Barker, 14 August 1985, calling on the respondent to show cause why a decision of the Magistrates' Court at Moonee Ponds, 16 July 1985, whereby the applicant was convicted of an offence, commonly referred to as .05, should not be reviewed. There are three grounds :

> (a) the information for an offence punishable summarily and summons thereon dated the 12th day of April 1985 (being Exhibit 'R.J.M.B' herein) was null and void;
>
> (b) that there being no appearance for the defendant and the information and summons therein being null and void, the said Magistrates' Court had no jurisdiction to **[2]** make such orders as it did;
>
> (c) that the Stipendiary Magistrate erred in law in making any order against the defendant.

It would seem that ground (c) is merely repetitive of what was relied on by the applicant under grounds (a) and (b). Further, the one point only in support of (a) and (b) was argued, namely, that the summons and information on which the conviction was founded were null and void.

The background may be shortly stated. The applicant was originally served with an information and summons in respect of his driving with more than .05 per cent alcohol in his blood on 20 September 1984, which summons was dated 31 March 1985. He was thereby called upon to appear at Moonee Ponds Magistrates' Court on 30 May 1985. Some ten days later, he was served with a second information and summons, dated 12 April 1985, calling on him to attend in respect of the same alleged offence on the same date at the Broadmeadows Court.

The issue of two summonses is explained by a recently introduced administrative system, whereby cases are called only for mention to determine which are opposed and which are not. The unopposed are speedily dealt with and dates and appropriate courts allocated for the opposed. The scheme is designed to reduce delays and any unnecessary appearance of witnesses. Apparently it has its problems, as demonstrated by the present case.

[3] It is convenient to refer to the March summons as the first summons and the other one as the second. Eventually, the applicant was convicted on the second summons. It is submitted on behalf of the applicant that that summons was null and void and therefore the conviction falls to the ground.

It goes without saying that the point is highly technical and no suggestion whatever is made that the applicant ever wanted to defend the information or to appear for the purposes of a plea. Indeed, the applicant was legally represented at Moonee Ponds, when the first summons was called on. The applicant's legal representative achieved the withdrawal of that information when he informed the presiding Magistrate that the second summons was before the Court on the same day at Broadmeadows. Having got rid of the first summons, it was then hoped by the present arguments to get rid of the second.

The second summons was referred under the procedure, which I have mentioned, back to the Moonee Ponds court there having been no appearance by or on behalf of the applicant when it was called on at Broadmeadows on 30 May. The second summons eventually came on for hearing at Moonee Ponds, when a member of the same firm of solicitors, which appeared for the applicant in respect of the first summons, was present in court. He did not announce his appearance and is silent as to whether he was in court on behalf of the applicant or was there merely on other business and merely paid attention to the evidence given in the subject case.

[4] The result, however, is that he has deposed as to the evidence given in support of the conviction eventually registered. All that is by way of background and demonstrates merely that no question of injustice is involved. The applicant, if he had wished to defend the matter, had every opportunity to do so and, in any event, may, if he had a good reason to be absent, have applied under s152 of the *Magistrates (Summary Proceedings) Act* for a re-hearing. That course has not been followed. As to the submission, my own view of the law is that the summons here under attack has not been shown to be other than authorised by the relevant provisions of the *Magistrates (Summary Proceedings) Act*.

Mr Downing, who appeared as Counsel on behalf of the applicant, referred me to s5(2) of the *Magistrates (Summary Proceedings) Act* but presented no argument that its provisions did not authorise the summons that was issued. The concession made was merely as to the form of the information and summons. He submitted, however, that it was nevertheless null and void because it was a second summons in identical form and language to the first summons, the only differences being as to the date on which the applicant was called upon to appear at court and the place where he was to go.

In my view, the matter is to be determined by regard being had to the actual information and summons on which the conviction was registered. There is nothing, as was conceded by Mr Downing, in the legislation or at common law to support the argument that the second information and summons was null and void.

The question of nullity is to be distinguished from that of jurisdiction. It is clear that two convictions could not have been registered for the same offence and, indeed, had there been adjudication on one of the informations and summons, there could not thereafter have been any jurisdiction to hear the same matter again, notwithstanding that another information and summons may have been in existence. Of course, that was not the situation here. At the time the conviction was registered, as I understand it, the first summons had already been withdrawn and was no longer in existence. My analysis of the situation here is supported, in my view, by the decision in analogous circumstances of *Poole v R* (1961) AC 223 and the New Zealand Court of Appeal decision which followed it, *R v Lewis and Anor* (1975) 2 NZLR 490 at p493.

For these reasons, the order nisi is discharged with costs.
