16/01; [2001] VSC 507

SUPREME COURT OF VICTORIA

FLANAGAN v REMICK

Eames J

7, 20 December 2001 — (2001) 35 MVR 289; (2001) 127 A Crim R 534

MOTOR TRAFFIC – PROCEDURE – CHARGE AND SUMMONS ISSUED ALLEGING TWO OFFENCES AGAINST REPEALED SUBORDINATE LEGISLATION – NEW OFFENCES IN TERMS ALMOST IDENTICAL TO REPEALED OFFENCES – AMENDMENT TO CHARGES MADE BY MAGISTRATE – DEFENDANT CONVICTED – WHETHER MAGISTRATE IN ERROR IN MAKING AMENDMENT: *ROAD SAFETY (TRAFFIC) REGULATIONS* 1988, R1001(1)(a); *ROAD SAFETY (PROCEDURES) REGULATIONS* 1988, R225(1); *ROAD RULES VICTORIA*, R20; *ROAD SAFETY (DRIVERS) REGULATIONS* 1999, R217.

F. was charged with exceeding the speed limit and failing to display "P" plates. The charge and summons alleged breaches of Regulations which had been repealed — in relation to the speeding charge, repealed four days before interception by police and in relation to the "P" plate charge, seven months before the incident. The new Regulations which were in force at the time of the incident were in terms almost identical to those which previously pertained. At the hearing of the charges, the magistrate acceded to an application by the prosecutor to amend each information whereby the reference to the repealed Regulations was substituted by a reference to the new Regulations. F. was convicted. Upon appeal—

HELD: Appeal allowed. Convictions set aside.

1. Neither the Act nor the sections which created the offences on which F. was prosecuted had been identified in the charge. The amendments made by the magistrate were not for the purpose of more accurately identifying the statutory bases for the charges but were intended to allege what amounted to entirely new offences even though the elements of the new offences bore similarity to those previously identified in the charges. Whilst it is true that the new offences were in terms almost identical to those which previously pertained, it cannot be said that the offences remained the same before and after the amendment of the charges.

2. The case could not be regarded as an instance of cognate offences being substituted for the original offences but rather an instance of entirely distinct offences being substituted for different (and non-existent) offences under repealed legislation. Therefore, F. was prosecuted and convicted of different offences established on the evidence to that on which he had been charged. The magistrate was in error in allowing the amendment of the charges.

EAMES J:

1. I have before me two appeals on questions of law brought pursuant to s92 of the *Magistrates' Court Act* 1989. The two appeals relate to two charges heard and determined in the same hearing by a magistrate, and raise essentially the same issue.

2. On Sunday 5 December 1999 the appellant, Jason Paul Flanagan, was intercepted by the respondent, a police officer, in Malvern Road, Prahran and was charged on a number of traffic offences. Of those offences two are now relevant to this appeal, the proceedings with respect to those offences having been commenced by the filing of a charge and summons on 9 February 2000. On the first count the appellant was charged with exceeding the speed limit, the charge alleging that the offence was contrary to Regulation 1001(1)(a) of Statutory Regulation Number 30 of 1988 (the *Road Safety (Traffic) Regulations* 1988). The second count alleged a breach of Regulation 225(1) of Statutory Regulation Number 28 of 1988 (the *Road Safety (Procedures) Regulations* 1988). The first count was an offence of exceeding the speed limit, the second count an offence of failing to display "P" plates.

3. The matter came on for hearing in the Magistrates' Court at Melbourne on 13 March 2001 and counsel for the appellant took a preliminary point that the appellant had been charged with breaches of regulations which had been repealed prior to the date of the alleged offences. He submitted that the appellant had, therefore, been charged with offences which were not known to the law. He submitted that the charges were nullities, and should be dismissed.

4. The *Road Safety (Traffic) Regulations* 1988 had in fact been repealed on 1 December 1999, four days before the driving incident, and the *Road Safety (Procedures) Regulations* 1988 were repealed on 1 May 1999, seven months before the incident. The former regulations were repealed by Regulation 104 and by Schedule 1 of the *Road Safety (Road Rules) Regulations* 1999. The latter regulations were repealed by Regulation 104 and Schedule 1 of the *Road Safety (General) Regulations* 1999.

5. The prosecutor in the Magistrates' Court agreed with counsel for the appellant that those regulations had been repealed but submitted that the charges were capable of amendment pursuant to s50(1) of the *Magistrates' Court Act* 1989.

6. Section 50 reads as follows:

> "50(1) On the hearing of a proceeding the Court must not allow an objection to a charge, summons or warrant on account of any defect or error in it in substance or in form or for any variance between it and the evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error. (2) An order must not be set aside or quashed only because of a defect or error in form but the Court may amend the order to correct the defect or error."

7. The prosecutor submitted to the magistrate that such an amendment could be permitted notwithstanding that the amendment would be made outside the 12 months limitation period for the laying of charges imposed by s26(4) of the *Magistrates' Court Act* 1989.

8. Section 26 of the *Magistrates Court Act* 1989 reads as follows:

> "26(1) A criminal proceeding must be commenced by filing a charge—
> (a) with a registrar; or
> (b) if the defendant is arrested without a warrant and is released on bail, with a bail justice.
>
> (1A) If a proceeding is commenced under sub-section (1) (a) by filing a charge with a registrar other than the appropriate registrar, the informant must file a copy of the charge with the appropriate registrar within 7 days after the commencement of the proceeding.
>
> (2) A charge must be on a charge-sheet signed by the informant.
>
> (3) A charge need not be on oath, except where otherwise provided by this or any other Act.
>
> (4) A proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence is alleged to have been committed, except where otherwise provided by or under any other Act."

9. The prosecutor sought to amend the charge and summons with respect to both offences which were contained within it. For the speeding charge he proposed to replace words which appeared within the box titled "Under what law?", and under a sub-heading titled "Act or Regulation No." and under another sub-heading, "Section or Clause (Full ref)". Instead of the reference to "30/1988" and to "1001(1)(a)" there was to appear "Road Rules Victoria", "Rule 20". For the count relating to the "P" plate offence he proposed to replace the reference to Regulation 225.1 of "No. 20/1988" (being the *Road Safety (Procedures) Regulations* 1988) with a reference to Regulation 217 of the *Road Safety (Drivers) Regulations* 1999.

10. No amendment was sought or made to the box for either offence given over to the particulars under the heading "Details of the Charge". The speeding offence, therefore, continued to allege that the appellant had exceeded 60 kph in a "built up area", which was an element of the offence under the repealed legislation. The new offence under Rule 20 prohibited driving "at a speed over the speed-limit applying to the driver for the length of road where the driver is driving". Rule 21 provided that the speed limit was that applying to the length of road by a "speed limit sign" and in default of such a sign Rule 25 provided that in a built up area the speed limit was 60 kph. I presume, but was not told expressly, that the evidence disclosed that a 60 kph speed sign applied to this road.

11. The "P" plate offence set out in the charge also continued to employ the words of the previous legislation, in asserting that the appellant had failed to have a P plate conspicuously

displayed "on the front and rear" of his vehicle. The new offence, under Regulation 217(1), was in almost identical terms to that, but specified that the P plates must be "facing out from the front and rear of the motor vehicle", and words to that effect did not appear in the charge.

12. There is no dispute that the amended provisions which were identified were those which appropriately applied to the conduct which had previously been proscribed by the earlier legislation.

13. The learned magistrate, over the objection of counsel for the appellant, allowed the charges to be amended and convicted the appellant. Although maintaining his pleas of not guilty the appellant did not deny that he had been driving at a speed of 130 kph, without P plates, nor was it disputed that the speed limit was 60 kph over that length of road.

14. The following question of law has been identified for the purpose of this appeal, with respect to the speeding offence:

> "The Appellant having been charged with an offence which allegedly occurred at Prahran on 5 December 1999 pursuant to regulation 225.1 of the *Road Safety (Procedures) Regulations* 1988 (the said Regulations having been revoked on 1 May 1999), did the Magistrate err in law:
>
> (i) in allowing or permitting an amendment to the charge to make it an offence pursuant to regulation 217 of the *Road Safety (Drivers) Regulations* 1999 more than 12 months after the date on which the offence was alleged to have been committed; and/or
>
> (ii) in ruling that the effect of the amendment did not amount to the laying of a fresh charge; and/or
>
> (iii) in ruling or finding that the amendment was not in breach of Section 26 (4) of the *Magistrates' Court Act* 1989?"

15. A similar question of law has been referred to the court with respect to the P plate offence, and it is unnecessary to set out that question in detail.

16. Mr Billings, counsel for the appellant, submitted that the charge which had originally been laid against the appellant alleged offences which were not known to the law. The appellant, he submitted, could not have been charged with offences under the new legislation because the limitation period had expired. The charge, as originally laid, he submitted, breached s27(1) and (2) of the *Magistrates' Court Act* 1989 and both by reference to that section and to common law, constituted a fundamental defect which was incapable of being cured by amendment. The purpose of the purported amendments was merely to circumvent the limitation period, he submitted.

17. Section 27 reads as follows:

> "27(1) A charge must describe the offence which the defendant is alleged to have committed and a description of an offence in the words of the Act or subordinate instrument creating it, or in similar words, is sufficient.
>
> (2) A charge must identify the provision of the Act or subordinate instrument (if any) that creates the offence which the defendant is alleged to have committed.
>
> (3) The description of property in a charge must be in ordinary language and such as to indicate with reasonable clarity the property referred to.
>
> (4) If property is described as specified in sub-section (3), it is not necessary (except where required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property.
>
> (5) If property is vested in more than one person and the owners of the property are referred to in a charge, it is sufficient to describe the property as owned by one of those persons by name with others and if the persons owning the property are a body of persons with a collective name without naming any individual.
>
> (6) The description or designation in a charge of—
> (a) the defendant; or
> (b) any other person to whom reference is made in the charge—
> must be reasonably sufficient to identify the person.

> (7) If the name of the person is not known or for any other reason it is impracticable to comply with sub-section (6), a description or designation must be given that is reasonably practicable in the circumstances or the person may be described as 'a person unknown'.
>
> (8) If it is necessary to refer to any document in a charge, it is sufficient to describe that document by any means by which it may be reasonably identified."

18. Mr Trapnell, counsel for the respondent, submitted that the learned magistrate was correct to allow the charge to be amended, and in so doing was giving s50(1) of the *Magistrates' Court Act* the scope which the legislature intended it to have.

19. In ruling that he would allow the amendments the learned magistrate relied upon a decision of the Court of Appeal in *McMahon v DPP*[1], a decision on which Mr Trapnell, for the respondent on the appeal, also placed reliance. In that case the expression "R.S.A" was inserted in the box provided for identification of the Act under which the offence was brought. The Court of Appeal held that the requirement of s27(2) had not been breached. Mr Trapnell sought support from the observation of Brooking JA that the defendant could not have been in the slightest doubt "about what criminal conduct was alleged against him". Likewise, so Mr Trapnell submitted, the appellant in the present case must have been aware that he was charged with exceeding the 60kph speed limit and with not displaying P plates.

20. In my view, that decision is not to point in the present appeal. Brooking JA was not suggesting that the mere fact that the defendant knew what conduct of his was regarded as being criminal in character would be sufficient to convert a charge which was a nullity into one which was not. The question in *McMahon* was whether the statutory provision which created the offence with which the driver had been charged had been sufficiently identified, not whether a new offence had been substituted for that which had originally been charged. Brooking JA held that the relevant Act had been sufficiently identified in the charge, as had been the provisions of the Act which had been breached. In the present case neither the Act nor the sections which created the offences on which the appellant was prosecuted and convicted had been identified in the charge. The purported amendments were not for the purpose of more accurately identifying the statutory basis for the charges which had been laid against him by the informant, but were intended to allege what amounted to entirely new offences against him, even though the elements of the new offences bore similarity to those previously identified in the charge.

21. Mr Billings submitted that it was not permissible to use s50(1) to amend a charge, outside the limitation period, when the charge was a nullity. The distinction he drew was that discussed by Dixon J in *Broome v Chenoweth*[2]. In that case the information failed to make express allegation of two essential ingredients for an offence under the relevant section. Dixon J drew a distinction between, on the one hand, an instance where an information disclosed no offence simply because it omitted some essential element (which defect could be cured by amendment), and, on the other hand, an instance where the charge failed, more fundamentally, to disclose an offence. His Honour, when discussing whether an information which disclosed no offence could be cured by amendment, held that:

> "Whether an information disclosing no offence can be amended has been the subject of some difference of judicial opinion. Some Victorian cases will be found discussed by Cussen J in *Knox v Bible*[3], and the matter is very fully examined by Clarke J in *Davies v Andrews*[4] where cases from other jurisdictions are collected. Probably it is necessary to deal with the question as a matter of degree and not by a firmly logical distinction. An offence may be clearly indicated in an information, but, in its statement, there may be some slip or clumsiness, which, upon a strict analysis results in an ingredient in the offence being the subject of no proper averment. Logically it may be said in such a case that no offence is disclosed and yet it would seem to be a fit case for amendment, if justice is not to be defeated. By contrast, at the other extreme, an information may contain nothing which can identify the charge with any offence known to the law. Such a case may not be covered by the power of amendment."[5] (My emphasis).

22. Mr Trapnell, for the respondent, placed reliance on the statements of the Court of Appeal in *DPP Reference No. 2 of 2001*[6], but in that case the Court of Appeal recognised the distinction discussed by Dixon J in *Broome v Chenoweth*. That appeal before the Court of Appeal concerned three cases in which counsel had successfully submitted to the magistrates that the charges were defective in that certain words were omitted from the charge although they appeared in the

provisions of the *Road Safety Act* under which the charges were laid. In the course of dealing with the arguments on appeal Charles JA, whose reasons were adopted by Winneke P and Chernov JA, held that weight should be given to the effect of s50(1). His Honour held[7]:

> "The power to amend given by s50(1) is wide ranging, covering any defect in a charge whether in substance or in form, as well as answering any objection to a variance between the charge and the evidence presented in the proceeding. In *McMahon v DPP*[8] the court was concerned with the question whether the *Road Safety Act* had been sufficiently identified in a charge by a reference under the abbreviation 'RSA'. Brooking JA with whom Callaway JA and I agreed, said that: 'I have no doubt that these charges were capable of amendment. Defects or errors both in substance and in form are comprehended by s50(1). There has never been any doubt about the criminal conduct with which the appellant was charged. The offence would remain the same notwithstanding the amendment and the magistrate's reliance on the running of time under s26(4) was erroneous. The only right exercise of discretion was to amend these charges, assuming them to be defective in the respect suggested. The magistrate erred in law in concluding that the date of the offences meant that the amendment could not be made'." (My emphasis).

23. I have highlighted the words in the passage cited above from the judgment of Brooking JA in *McMahon v DPP* in order, once again, to contrast the present case with that case. Here, it can not be said that the offences remained the same before and after the amendment of the charge. The same point of contrast may be made with respect to the decision of the Court of Appeal in *DPP Reference No 2 of 2001*. Thus, the strong statement of Charles JA as to the need to give full effect to s50(1) does not have application to a case where the charge was a nullity from the outset. In the same judgment Charles JA made it clear that he was not deciding otherwise. His Honour held[9]:

> "A question remains whether this power of amendment can be exercised in circumstances where an essential ingredient of an offence has been omitted from the charge, and no offence was, accordingly, disclosed in the summons where, as here, more than 12 months has elapsed since the date of the offence. It is, for reasons which will appear later, not, I think necessary to decide this question in the present cases, but one would commence any examination of this issue by reference to what was said by Dixon J in *Broome v Chenoweth* ..."

24. His Honour then quoted the passage cited earlier in my reasons[10].

25. Charles JA was concerned with charges where it was contended that an essential ingredient of an offence under s49(1)(e) of the *Road Traffic Act* had been omitted. In dealing with the case of Collicoat (being one of the three matters dealt with in the same appeal) Charles JA agreed that it would have been preferable that the charge had included words such as "being the driver of the motor vehicle", but held that whilst that was a fact which the prosecution would have to prove it was not an essential ingredient for the purpose of identifying the offence in the charge. His Honour held that the charge, therefore, was neither defective nor a nullity because of the absence of those words. That being so Charles JA agreed with the statement of the Trial Judge, O'Bryan J, who said in his reasons:

> "The present case was a fit case for amendment, if justice is not to be defeated, and the magistrate had power to amend the charge and summons. His refusal to do so was an error of law. All that was required was to add after s53 the subsection number and subclause; (1)(a) or (b) or (c) as the circumstances required. Alternatively the words `being the driver of a motor vehicle' would have sufficed."

26. In dealing with the case of Bell, being one of the three matters considered in the appeal, Charles JA addressed arguments that the charge against Bell was defective, and a nullity on three grounds. Two of those grounds were quickly dismissed by his Honour, but the third ground was that the charge alleged a failure to accompany the police officer for the purpose of a breath test but did not allege the making of any requirement that he do so and, therefore, had failed to describe any offence, and failed to allege any offence known to the law, so it was contended. It was alleged that the charge should have specified that the requirement had been made under s55(1) of the *Road Safety Act*, and that the accused had failed to comply with that requirement. The magistrate had concluded that the omission was not an essential element of the charge and that the omission could be dealt with by amendment or by particulars. The appellant in *Bell's case* had argued that the magistrate was wrong to have concluded that the matter could be cured in that way.

27. Charles JA added that: "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", and his Honour held that had the appellant, Bell, read the charge as a reasonable defendant then he would be perfectly capable of reaching a correct conclusion "as to the nature of the subject matter of the charge and its essential ingredients". His Honour held that the offence was sufficiently identified so as to comply with s27 of the *Magistrates' Court Act*.

28. Charles JA approved a statement of Mann CJ in *Thompson v Lee*[11] as to the application of the power of amendment, that: "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". Counsel for the respondent placed emphasis on that proposition, and submitted that the ends of justice would have been defeated had the amendments not been permitted, because the appellant knew what conduct was alleged against him and had no answer to the allegations.

29. It is true that the new offences were in terms almost identical to those that previously pertained (more so with respect to the P plate offence than for the speeding offence). It is also true that the conduct of the appellant deserved punishment, but that is also invariably the case where an offender takes advantage of delay in the laying of charges against him or her and relies on the statutory limitation period set down by s26(4)[12]. The statement of Mann CJ in *Thomson v Lee* which was cited by Charles JA does not, however, mean that s50(1) may be given an effect which permits the initiation of a new offence outside the limitation period. That limitation was recognised in *Broome v Chenoweth* and by the Court of Appeal, and has long been accepted.

30. In *Kerr v Hannon*, Nathan J held[13]:

> "Where an information must be laid within a specified time from the date upon which it is alleged the offence was committed, it must contain that date or other particulars which would enable the defendant to ascertain the date. In the event of an information failing to do so, an amendment to insert the missing particulars made after the expiration of the time limit cannot be permitted. It would amount to the laying of a fresh information outside the time limit and thus be invalid."

31. As Gobbo J observed in *Clarke v La Franchi and Ors*[14]:

> "'The clear principle' which was recognised in *Chaudhary v Ducret*[15] and *Kerr v Hannon*[16] was that 'amendment will not be permitted outside the limitation period where the effect of the amendment is to substitute a wholly new charge, or where the effect is to bring forward a charge where the original charge alleged an offence unknown to the law'. This statement of principle is not exhaustive but, in my view it, is sufficient for the purpose of this case. But a defect of substance is not the same as a fundamental defect such as charging an offence unknown to the law."

32. In my view, the distinction drawn by Gobbo J is precisely that which is applicable to the present case. The general proposition is that, as stated in *Garman v Plaice*[17] by the court (Lord Parker CJ, Ashworth and Willis JJ) that an amendment provision (which was in very similar terms to s50(1)) could not be used to save an information which was void *ab initio* by virtue of it disclosing no offence.

33. It is not always easy, however, to appreciate why amendments have been permitted in some circumstances but not in others. In *Schultz v Pettitt*[18] Cox J held that an amendment provision which was similar to s50(1) could not be applied so as "to convert a bad complaint into a good one, or to charge the defendant with a different offence", and held that where a distinct and different offence is created by the amendment that would clearly be a case where the amendment should be refused. Cox J held that a different offence would be one where the essential elements of the charge were different, or where there was a change in the quality or effect, or in the pith and substance, of the charge. His Honour held that it would be inappropriate to allow an amendment where to do so would overcome a limitation period.

34. The requirement that proper notice of the charge be given necessitates that the legislation be identified. Even so, a mere slip or error in specifying the Act or regulation might well be curable by amendment, but in the present case there was not a slip in description of the offence; the informant intended to charge the appellant with offences which he correctly identified as to the legislation and the relevant provision, but in so doing identified offences which no longer existed.

35. In *Woolworths (Vic) Ltd v Marsh*[19] Ormiston J held[20]:

> "... the informant cannot rely on a defective information which is so uncertain that the defendant cannot identify the charge brought against him. As Salter J said in *Pointon v Cox*[21]: 'In my opinion, an accused person is entitled to information in two respects: he is entitled first of all to be told what law, statutory or other, he is alleged to have broken: and in addition he is entitled to be told with reasonable particularity how he is alleged to have broken that law.'"

36. Thus, one basis on which the requirement of precision in a charge is rooted relates to the potential for the defendant being misled as to the case he has to meet. However, it is first necessary to consider whether the words which are in error or which are omitted from the charge are, in any event, necessary to appear in the charge if the charge is to be validly laid. Such a case was *Smith v Van Maanen*[22], where Tadgell J was concerned with an information which alleged an offence against s49(1)(f) of the *Road Safety Act*, but in the description of the charge it was alleged that the driver had first been required to provide a sample of his breath pursuant to a request made under s51(1), instead of s55(1). The reference to s51(1) was a slip. It was submitted that error made the charge defective and that no amendment would have been possible outside the 12 months limitation period. Tadgell J held that this was an instance where no amendment had been necessary, because it was not an essential element of an offence under s49(1)(f) to allege a request for a sample under s55(1).

37. Where a misdescription or deficient description of the offence amounted to nothing more than a slip of the pen, and could not have misled the defendant by its description of the offence and its statutory basis, the courts have shown a willingness to allow an amendment to be made. Thus, in *McMahon v DPP*, as earlier discussed, the Court was satisfied that the charge was not deficient, in any event, because the description of the Act by use of its statutory number was held to be adequate, and to be incapable of misleading the defendant.

38. In *Gigante v Hickson*[23] the Court of Appeal was concerned with a summary offence in which the charge misstated the place at which the offence of failing a breath test had occurred. An amendment had been allowed outside the 12 month limitation period. In that appeal Batt J disapproved observations of Nathan J in *Kerr v Hannon* but only insofar as Nathan J had held that the failure to identify the place at which the offence occurred was a fundamental defect in the charge. Batt JA held that the place of offending was not an essential element of an offence under s49(1)(b) and (f) of the *Road Safety Act*. Batt JA observed, however, that the appeal before him was not an instance of a case where the original charge was defective in that it failed to allege an offence known to the law. The only error in the case on appeal was that a suburb was nominated which was not the correct place of the offence. His Honour held that the offence remained the same but that a particular in the charge had been altered by amendment. The offence, therefore, was not changed by virtue of an amendment to its terms made outside the 12 month limitation period.

39. As Batt JA noted[24], s50(1) deals with two distinct situations where amendment may be permitted: first, where there is a defect in substance or form in the words used in, or omitted from, the charge, and, secondly, where the evidence which is led differs in some detail from that specified in the charge, the latter being described as an instance of variance between the charge, as framed, and the evidence given. Those situations are to be distinguished from the situation where the charge alleges the commission of a different offence to that which is established on the evidence. In my opinion, the situation in that event is akin to that which would apply where the charge disclosed no offence known to the law. These distinctions were made clear in the following passage of the judgment of Batt JA[25]:

> "That the place of offending was not essential or material in the instant case does not mean that it was not an important particular to which the appellant was entitled as a matter of procedural fairness. But he did not need to ask for it as it was supplied in the amendment. If he had been misled by the original charge or if the amendment had caught him by surprise, he would, other things being equal, have been entitled to an adjournment, but no such prejudice or embarrassment was suggested. This is not a case where the original charge was defective in that it failed to allege an offence known to the law or was incomplete, or where it contained a latent ambiguity or duplicity. It merely named a suburb which the evidence to be led would show to be erroneous. Since the suburb was not essential to the offence, the substitution of a different suburb did not amount to charging a different offence. The offence remained the same, though a particular (included in the charge) was altered. Since the

> offence alleged in the amended charge was accordingly that alleged in the original charge (whose filing commenced the proceeding) and since the latter had been filed no later than 12 months after the date on which "the offence" was alleged to have been committed (31 May 1996), there could be no infraction of s26(4) of the *Magistrates' Court Act*[26]. Nor, contrary to the outline of argument for the appellant, had the power of amendment been used to overcome a time limit."

40. Batt JA held that the case on appeal was merely an instance of a variance between the evidence led before the magistrate and the charge, thus distinguishing it from *Felix v Smerdon*[27] where Latham CJ held that if the evidence which was led related to "really a difference offence" than that which had been charged then it was not an instance of a mere variance, which was curable by amendment. Batt JA further adopted the statement of the Full Court in *Hackwill v Kay*[28] in which the Full Court, speaking of the concept of variance, in a section which was the forerunner of s50(1), held:

> "Variance in this section, therefore, does not cover every divergence between the evidence and the information. The principle appears to be that if the offence proved is essentially different from the offence charged, the latter part of (the section) has no operation. The learned author of *Paul's Justices of the Peace* says that variances in this section are limited to variances in non-essential particulars."

41. Counsel for the respondent submitted that the appellant should be regarded as having been charged with offences which were cognates of the offences originally specified, and that the words in which the offences continued to be described were "similar words" to the words appropriate to particularise the offences under the new legislation, and, thus, by reference to s27(1), there was sufficient identification of the offences so as to validate the charge. Mr Trapnell submitted that I should adopt the approach of Balmford J in *Cooper Baker v Judge Ross*[29] where her Honour, applying the *Oxford English Dictionary* definition, held that the word "similar" should be read as meaning "having a marked resemblance or likeness; of a like nature or kind". He submitted that the similarity of the words used in the charge (to describe the offences) to the words used in the regulations which created the new offences, meant that the appellant knew the charges which he was facing. However, as Humphreys J observed in *Atterton v Browne*[30] – whilst accepting that the equivalent amendment section had to be otherwise given full force and effect – a prosecution can not be saved where the error in the charge is fundamental, and, thus, amendment will be refused "where one offence is charged in the information and a different offence is found in the conviction … even though the two matters may seem to be very much the same thing".

42. What then might constitute a different offence, so as to deny efficacy to a purported amendment of the charge? One situation where a new offence would not be regarded as having been created by an amendment would be where one sub-category of an offence under the same section of an Act was substituted for another sub-category under that section which had been identified in the charge. In *R v Newcastle; Ex parte John Bryce Ltd*[31] the court held that a section dealing with overloaded vehicles actually created three distinct offences within the same paragraph, being offences of "causing", "permitting" or "using" an overloaded vehicle which had been driven on a highway. The charge alleged that the appellant had "permitted" the vehicle to be used when overloaded, whereas the evidence disclosed that he had been "using" the vehicle, himself, at the time. The lower court had permitted an amendment outside the limitation period. It was held on appeal that although it could be said that the amendment created a different offence "the facts of the two competing offences are really identical". The decision in that case was similar to the situation which was addressed by Pape J in *Kennett v Holt*[32], but in that case Pape J did not consider that he was dealing with what could be described as being different offences.

43. In *Kennett v Holt* the defendant had been charged with failure to comply with a red traffic control signal, contrary to Reg 401(2)(c) of the *Road Traffic Regulations* 1962, but after evidence had been completed the magistrate allowed an amendment so that the charge alleged non compliance with an amber light, contrary to regulation 401(2)(b). The amendment provision in the then *Justices Act* was in much the same terms as s50(1). Pape J held that Regulation 401 imposed a primary obligation of compliance with traffic signals and that sub-regulations (b) and (c) provided for "cognate offences". His Honour rejected a contention that a totally different offence had been charged as a result of the amendment. He held[33] that:

> "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*[34] the first par of the 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'".

44. Pape J was applying principles relating to situations of variance between the evidence presented in the case and the words of the offence in the charge, that being the second category of occasions for amendment provided for in s50(1). His Honour was not concerned with a situation such as the present (where the offence which was sought to be "amended" had been laid under repealed legislation), and thus, was not determining that such an instance as is now before me might be an instance of a cognate offence being substituted for the original offence by virtue of there being a mere variance between the evidence and the charge. Indeed, Pape J cited *Mitchell v Myers*[35] in which it was held that a new offence unrelated to that charged in the information could not be the subject of amendment, as that would be more than a mere variance. In *Mitchell v Myers* Dwyer CJ defined a "cognate offence" as being one similar to the offence charged or one which would be a constituent of the actual complaint which had been charged, being an element or ingredient of the offence originally charged. A similar approach was taken by the Full Court in Queensland in *Hayes v Wilson; Ex parte Hayes*[36], where the court upheld an amendment outside the limitation period whereby an offence of drunk in charge of a vehicle, under one section of an Act, was substituted for an offence of driving under the influence, under another section, the former being held to be a cognate offence. None of these situations are similar to that before me.

45. In my view, the case before me could not be regarded as an instance of a cognate offence being substituted for the original offence, but, rather, was an instance of an entirely distinct offence being substituted for a different (and non-existent) offence under repealed legislation. Therefore, the present case is an instance, as in *Felix v Smerdon*, where the appellant was prosecuted and convicted of different offences established on the evidence to that on which he had been charged. Furthermore, the present case was not a mere instance of a misdescription of the appropriate section of the legislation under which the charges were brought. The position here may be contrasted with the situation discussed by Beach J in *DPP v Ross*.

46. In *DPP v Ross*[37] Beach J was concerned with a charge which identified the offence by reference to s14 of Act No. 7405 (which was, in fact, the *Summary Offences Act* 1966). The correct section should have been s13 and the reference to s14 was a typographical error. A second charge referred to "s71.1.c" of Act No. 7405, which was again a typographical error, and it should have been s17(1)(c). A third charge mentioned the Act by number 7405, but did not mention any section. It was submitted to Beach J that the charges offended s27(2) of the *Magistrates' Court Act*. Beach J held that s27(2) imposed a mandatory requirement that the charge identify the provision of the Act creating the offence. His Honour held that the mandatory requirement had not been breached in the present case. His Honour held:

> "These were not cases in which the defence was in any doubt as to the nature of the charges brought against the respondent; nor were they cases in which the charges did not disclose an offence; nor were the applications made on behalf of the informant seeking to amend the charges attempts to commence new proceedings outside the 12 months limitation period provided by s26(4) of the *Magistrates' Court Act*. Any consequential errors in the wording or description of a charge and inconsequential omissions from a charge are not, of themselves, sufficient justification for dismissing a charge. The correct numeration of a section in a charge is not an essential element of the offence in question; nor is the numeration of the section in relation to the charge an essential element of the offence. Where such defects or errors occur, the charge is to be amended in accordance with the provisions of s50(1)." (My emphases).

47. The situation before me is not one where the appellant contended that he was misled by any omission of material words or misdescription of the offences with which he was charged. There is no doubt that he was well aware that the allegations against him were that he had driven at 130 kph on a road which was subject to a 60 kph speed limit, and that he was not displaying P plates at all. He was, however, required to be charged with offences which were known to the law. The offences, here, were brought by the laying of a charge and summons (which identified them) before the Registrar of the Magistrates' Court on 9 February 2000. In commencing the proceedings by that process the informant was following the requirements of s26(1) of the *Magistrates' Court Act*. Had the errors in the identification of the offences (by virtue of their reference to repealed legislation) been noticed by the Registrar he would have been entitled to refuse to accept filing of the charge,

on the ground that it was a nullity. A proceeding can only be commenced by a valid charge[38]. The defect in the charge in this case was not a merely technical one, but was fundamental, in a way no less significant than would be the case where the charge omitted an allegation of an essential factual ingredient of the offence[39].

48. In *R v Wakeley*[40] the Earl of Reading CJ (with whom Sankey and Salter JJ agreed) addressed a case where the date of an alleged sexual offence was originally stated as occurring between dates which were outside the statutory time limit, but the charge was amended so that the starting date for the period was before the time limit date, although the last date was outside the time limit. The Chief Justice held that the amendment did not mean that a different offence was now being charged. His Lordship held that the date of the amendment should not be regarded as being the moment when the proceedings were to be regarded as having been first initiated, but as merely being a time when one step in the proceedings occurred, after they had earlier been initiated. In the present case, however, it seems to me that the proceedings under the new legislation must be regarded as having been initiated only after the limitation period had expired, because no valid proceedings had been commenced by the charge, which alleged breaches of repealed legislation.

49. In my view, counsel for the appellant is correct in submitting that the process which was adopted in this case, by purported amendment of the charges so that entirely new charges were substituted (notwithstanding their similarity to the repealed offences), sought, in an impermissible way, to avoid the limitation period which applied in both instances.

50. In my opinion, the learned magistrate should have refused to allow the amendment of the charges and they should have been dismissed. The appeals must be allowed, and the convictions be set aside. I will hear counsel as to costs.

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[1] Unreported, Court of Appeal, 20 June 1995, Brooking, Charles, Callaway JJA
[2] [1946] HCA 53; (1946) 73 CLR 583, at 601; [1947] ALR 27.
[3] [1907] VicLawRp 87; [1907] VLR 485 at 498-500; 13 ALR 352; 29 ALT 23.
[4] (1930) 25 Tas LR 84 at 91-110.
[5] *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, at 601; 13 ALR 352; 29 ALT 23.
[6] DPP Reference No 2 of 2001 [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[7] DPP Reference No.2 of 2001, at par [20]
[8] Unreported, Court of Appeal, 20 June 1995, at [5].
[9] *DPP Reference No 2 of 2001*, at [21]
[10] See par [21] of these Reasons.
[11] [1935] VicLawRp 65; [1935] VLR 360 at 364; [1935] ALR 458.
[12] It may be noted that although the appellant sought and obtained a stay with respect to the fines imposed on him, he did not seek a stay as to the 12 months driving disqualification imposed on the speeding charge or the 3 months licence suspension for the P plate offence.
[13] [1992] VicRp 3; (1992) 1 VR 43 at 45.
[14] Unreported, 26 April 1993, at p22.
[15] (1985) 11 FCR 163.
[16] [1992] VicRp 3; (1992) 1 VR 43.
[17] *Garman v Plaice* (1969) 1 All ER 62; [1969] 1 WLR 19.
[18] *Schultz v Pettitt* [1980] 25 SASR 427, at 433-434.
[19] Unreported, Ormiston J, 12 June 1986.
[20] At p6.
[21] (1926) 136 LT 506 at 509-510.
[22] (1991) 14 MVR 365.
[23] [2001] VSCA 4; (2001) 3 VR 296; (2001) 120 A Crim R 483; (2001) 33 MVR 51.
[24] [2001] VSCA 4; (2001) 3 VR 296; (2001) 120 A Crim R 483; (2001) 33 MVR 51, at 55.
[25] [2001] VSCA 4; (2001) 3 VR 296; (2001) 120 A Crim R 483; (2001) 33 MVR 51, at 54-55 (pars [15-16]).
[26] In a footnote (at 33 MVR 51 at 55, n13) Batt JA observed that *McMahon v DPP* exemplified the proposition that a charge may be amended outside the 12 months limitation period where the offence remains the same.
[27] (1944) 18 ALJ 30 at 30.
[28] [1960] VicRp 98; [1960] VR 632 at 636, 637.
[29] [2000] VSC 221; (2000) 114 A Crim R 40, at 47; (2000) 31 MVR 235.
[30] *Atterton v Browne* [1945] 1 KB 122, at 127 (per Viscount Caldecott CJ, Humphreys and Birkett JJ)
[31] [1976] 2 All ER 611; [1976] 1 WLR 517, at 521 per Lord Widgery CJ, and at 520 per May J (Park J agreeing).
[32] [1974] VicRp 79; [1974] VR 644.
[33] Ibid, at 647.

[34] *Thomson v Lee* [1935] VicLawRp 65; [1935] VLR 360; [1935] ALR 458.
[35] (1955) 57 WALR 49, at 52 per Dwyer CJ; followed in *Higgin v O'Dea* [1962] WAR 140, Full Court.
[36] *Hayes v Wilson; Ex parte Hayes* (1984) 2 Qd R 114; (1984) 10 A Crim R 409; (1984) 1 MVR 198.
[37] Unreported, 7 January 1993.
[38] *John L. Pty Ltd v Attorney-General* (NSW) [1987] HCA 42; (1987) 163 CLR 508, at 520; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.
[39] As was the case in *John L. Pty Ltd v Attorney General* (NSW), *supra*, at 520.
[40] *R v Wakeley* [1920] 1 KB 688, at 691,

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