

20/86

SUPREME COURT OF VICTORIA

PEARN v YATES

Gray J

6, 30 May 1986 — [1986] VicRp 68; [1986] VR 690; (1986) 4 MVR 131

PROCEDURE – TRAFFIC OFFENCE – PROCEEDINGS BY WAY OF ALTERNATIVE PROCEDURE – WHETHER ALTERNATIVE TO OTHER PROCEDURES – WHETHER INFORMATION "LAID" – WHETHER ANY TIME LIMIT FOR LAYING OF ALTERNATIVE PROCEDURE – WHEN ALTERNATIVE PROCEDURE INFORMATION "LAID": MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975, SS5, 17, PART VII, 165; MAGISTRATES' COURTS RULES 1980, R26(d).

The alternative procedure provided for in Part VII of the *Magistrates (Summary Proceedings) Act 1975* ('Act') is alternative to the procedure provided for in s17 of the Act. The alternative procedure does not require an informant to lay an information; accordingly, as s165 of the Act is concerned with proceedings which are instituted by the laying of an information, it has no application to the alternative procedure. However, if a wide meaning were to be given to the expression "laid", the point when an alternative procedure information is laid occurs when the document which includes the information is presented to a Justice of the Peace.

GRAY J: [1] On 18th December 1985 Geoffrey Yates ("the defendant") was convicted at the Moonee Ponds Magistrates' Court of driving a motor car at a speed exceeding 80 kilometres per hour contrary to section 22B(2a) of the *Motor Car Act*. The defendant was fined \$200 and his probationary licence was cancelled. On 14th January 1986 an application for an order nisi to review the decision was refused by Master Barker. The defendant appealed against the refusal. On 24th January 1986 Beach J allowed the appeal and made an order nisi to review the decision of the Magistrates' Court upon the following grounds:

1. That the learned Stipendiary Magistrate erred in finding that the information had been laid on the 3rd [2] June 1985 and thereby erred in not dismissing the information.
2. That the learned Magistrate erred in finding that the information had been laid within twelve months of the commission of the offence and thereby erred in not dismissing the information.

The order nisi was made returnable in the Causes List. When it came on for hearing, Mr Tehan of counsel appeared to move for an order absolute. The Solicitor-General appeared with Mr Weinberg of counsel to oppose. The proceedings raise a question concerning the alternative procedure provided for in Part VII of the *Magistrates (Summary Proceedings) Act 1975*. This procedure is available in the case of certain offences specified in Schedule Two of the Act. The offence charged in this case falls within Schedule Two. The informant followed, or purported to follow, the procedure prescribed by Part VII. The part of that procedure which is relevant to this case is to be found in section 84(1) and (2), which reads:

"(1) As an alternative to any other procedure with respect to any offence referred to in Schedule Two the following procedure, hereafter in this Part referred to as the "alternative procedure", may be used whereupon the provisions of this Part shall apply but without prejudice to the application of so much of any other procedure as is not inconsistent therewith.

(2) Where the alternative procedure is to be used an information for any offence referred to in Schedule Two shall be in the form prescribed by the rules for the purpose and may be served in any manner in which a summons may be served under section 10 not less than fourteen days before the date specified in the notice referred to in paragraph (a) or by post not less than 28 days before that date and be accompanied by or have written thereon—

(a) a notice in the prescribed form advising the defendant that he may by election in writing in the prescribed form (copies of which form shall be attached to the notice) delivered by post or [3] otherwise to the informant and also to the clerk of the appropriate Magistrates' Court not later than the date specified in that behalf in the notice elect to appear and that if he does not so elect he will not be entitled to appear on the hearing or to be heard except by leave of the Court; and

(b) a sworn statement of the informant and, where necessary, sworn statements of other witnesses shortly describing the facts of the alleged offence."

In this case, the informant prepared an information in the form prescribed by the rules and a statement shortly describing the facts of an offence alleged to have been committed on 21st June 1984. On 3rd June 1985, the informant presented the information and the statement to Kathleen Heather JP. The informant swore to the truth of the information and the statement before the justice. The information and statement were contained in one document. Also attached were a notice to the defendant and a notice of election to appear, each in the prescribed form. This series of documents was served upon the defendant in accordance with section 84(2). In due course the defendant gave notice of his election to appear.

The clerk of the Magistrates' Court caused to be served upon the defendant a summons to appear before the Magistrates' Court at Moonee Ponds on 28th November 1985. The defendant duly appeared and was represented by his solicitor, Mr Brian Flynn. The Court consisted of Mr William Guy, Stipendiary Magistrate. The informant and the defendant each gave evidence concerning the circumstances relating to the offence. It is sufficient to say that the learned Magistrate was satisfied that the offence had been committed. Mr Flynn then submitted that the information should be dismissed, because it had not been laid within twelve months of the commission of the offence, as required by section 165 of the Act. After hearing argument, the learned Magistrate rejected the submission and convicted the defendant.

[4] Section 165 of the Act reads:

"Where a Magistrates' Court or justices may by law make an order in respect of an offence or where an offence or act is punishable by summary conviction, if no time is specially limited for laying an information in the Act of Parliament relating to that case the information shall be laid within twelve months from the time when the matter of the information arose and not afterwards."

Before me, the same submission was put forward by Mr Tehan. It can be expressed as follows:

(i) The information was not laid on 3rd June 1985. Under the alternative procedure, the information cannot be said to be laid until the defendant comes before the Court.

(ii) Therefore, it can be seen that when the defendant came before the Court in November 1985, and the information was laid, more than twelve months had expired since the commission of the offence on 21st June 1984.

(iii) Support for the proposition that the information was not laid on 3rd June 1985 can be obtained by contrasting the position which prevails when the ordinary procedure is followed. Section 17 requires a justice to issue a summons or warrant when an information is laid before him, whereas section 84 does not allow the justice before whom the statement of facts is sworn to issue either a warrant or summons. The issue of a summons is so much an integral part of the process of bringing a defendant before the Court that it cannot be said that an information is laid at that point.

(iv) Under Section 17 the prescribed form of information and summons recites that the information has been laid. The absence of such a recital in the alternative procedure forms supports the view that in the present case the information was not laid on 3rd June 1985.

[5] (v) To hold that the present information was laid on 3rd June 1985 would involve an inconsistency between section 17 and section 84.

(vi) The only reasonable view open is that the present information was not laid until 28th November 1985.

I have considerable difficulty in accepting the foregoing argument. The argument appears to disregard the undoubted fact that the section 84 procedure is alternative to the section 17 procedure. Thus, it is not surprising to find a lack of consistency between them. Section 84 recognizes this by reciting that where the alternative procedure is used "the provisions of this Part shall apply but without prejudice to the application of so much of any other procedure as is not inconsistent therewith". It appears to me that most of the procedure referred to in Parts II and III of the Act are inconsistent with section 84 and, accordingly, have no application to the

alternative procedure. This is certainly true of section 17. If, however, the Act requires that the present information has to be laid, I perceive no difficulty in treating the events of 3rd June 1985 as including the laying of the information.

In *Mortimore v Stecher* [1971] VicRp 106; [1971] VR 866, the following passage in the Full Court's judgment appears at 874:

"The nature of an information was examined by Winneke CJ, in *Wright v Mooney* [1966] VicRp 30; [1966] VR 225, at p227. It is a statement that an offence has been committed by a specified person at a specified time and place. It is 'laid' when it is laid before or exhibited to or received by a justice of the peace. What is meant is that it is laid before him in the sense of being presented to him: per Sholl J in *Hargreaves v Bourdon* [1963] VicRp 13; [1963] VR 89, at p90. It is a unilateral act. The correlative act in the justice is that of 'receiving it'. Section 34(1) of the Act draws a distinction between laying the information before the justice and his receiving it, just as s32(2) draws a distinction between making a complaint to a justice and his receiving it... The 'receiving' of the complaint appears to involve no more than his accepting it as a communication to him of a statement of the commission of the offence."

[6] However, I am disposed to accept the Solicitor-General's submission that there is nothing in the section 84 procedure which requires that the information be laid. The information, which is nothing more than a written statement that an offence has been committed, must be brought into existence and served upon the defendant. Section 5(1), which does not appear to be inconsistent with section 84, requires that the information be lodged with the clerk of the relevant Magistrates' Court. See also rules 26(d) of the *Magistrates' Courts Rules* 1980. Section 5(2), which deals with the laying of informations, appears to be only referable to the section 17 procedure and is inconsistent with section 84. When one turns to section 165, it is apparent that the section is not concerned with the manner in which proceedings are instituted. Furthermore, it has been held that the section only applies "in proceedings in which an information is laid in relation thereto" per Winneke CJ in *Wright v Mooney* [1966] VicRp 30; [1966] VR at p227.

In my opinion, the alternative procedure under section 84 does not require the informant to lay the information. It follows that section 165 has nothing to say about when these proceedings should have been issued. It may be said that Parliament cannot have intended to impose no time limit upon the commencement of proceedings under the alternative procedure. In this regard, it is noteworthy that section 165 has been in its present form for many years, whereas the section 84 procedure is of recent origin. It is likely that no consideration was given to whether the alternative procedure was affected by section 165.

The language of section 165 makes it clear that it is only concerned with proceedings which are instituted by the laying of an information. The only method by which the section 84 procedure could [7] be brought within the ambit of section 165 is to give a wide meaning to the expression "laid", and then select some point in the section 84 procedure at which the information could be said to be laid.

As I have already said, I can see no basis for selecting the point at which the defendant comes before the Court. This interpretation would produce a capricious result if the defendant's appearance before the Court was delayed for one reason or another. If one was required to select a point in the present proceedings when the information was laid, I would unhesitatingly select the point when the document, which included the information, was presented to the justice on 3rd June 1985. This step represented the point at which the present proceedings were instituted and it is this point with which section 165 is concerned. For the reasons I have endeavoured to express, I consider that the defendant was rightly convicted and that the order nisi should be discharged with costs.

Solicitors for the applicant: BTE Flynn Murone and Co.
Solicitor for the respondent: RJ Lambert, Crown Solicitor.