30/87

SUPREME COURT OF VICTORIA

PEARCEY v CHIANTA

Murphy J

5 October 1987 — (1987) 6 MVR 10

MOTOR TRAFFIC – SPEEDING – FALSE NAME GIVEN BY OFFENDER – INFORMATION LAID – ACTUAL OFFENDER'S NAME ASCERTAINED BEFORE HEARING – ADMISSION BY OFFENDER OF FALSITY – AWARE OF INFORMATION AND HEARING – NO APPEARANCE AT HEARING – APPLICATION BY PROSECUTOR TO AMEND – WHETHER COURT SHOULD GRANT APPLICATION – "DEFECT IN SUBSTANCE OR IN FORM": *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS11(5), 79(1)(b), 84, 157, 165.

P, a police officer intercepted C. for speeding. When asked to state his name, C. gave his brother's name. Subsequently, P laid an information by way of the alternative procedure in C.'s brother's name. When a notice of election to appear was filed, a summons was issued in C.'s brother's name and served on him. P was informed that the driver's name was in fact C. and subsequently he interviewed both C. and his brother at their home address. During this interview, C. admitted he was the driver, that he had given his brother's name and that he was aware of the information and summons. When the matter came on for hearing, neither C. nor his brother appeared. The prosecutor indicated to the Court that he proposed to call P to give evidence concerning the substitution of the name and would apply to amend the information to C's name. The learned Magistrate refused the application on the ground that it would result in a substitution of the charge. Upon order nisi to review—

HELD: Order absolute. Remitted to the Court to be heard and determined according to law.
(1) S157 of the *Magistrates (Summary Proceedings) Act* 1975 allows a Court to correct a misdescription in name flowing directly from the defendant's own falsity.

(2) In this case, the difference in the names was a misnomer caused by the defendant and was not a defect which created an injustice to the actual offender.

(3) As evidence was available to the effect that the actual offender was aware of the error made, the laying of the information and issue of the summons, the court should have granted the application to amend the defendant's name on the information.

MURPHY J: [1] Return of an order nisi granted by Master Barker 30 January 1986, whereby the applicant Pearcey sought to review a decision of the Magistrate's Court at Moonee Ponds on 19 December 1985 refusing an application by the prosecution to amend the name of the defendant to an information from Alexander Colin Chianta to Danillo Andrew Chianta.

The facts were short. The prosecution alleged by information dated 20 June 1985, issued under the Alternative Procedure that Alexander Colin Chianta of 33 Herlihys Road Lower Templestowe, did on 27 July 1984 at Fairfield drive a motor vehicle in a built up area at a speed exceeding 60 km per hour on a highway to wit Station Street between Christmas Street and McGregor Street. **[2]** The Informant's sworn statement annexed to the Information stated *inter alia* he saw the defendant on 27 July 1984 drive a vehicle IZA 344 along Station Street (specifying where) at a speed of 99 km per hour. On being stopped, the defendant gave his name as Alexander Colin Chianta of 33 Herlihys Road Lower Templestowe.

On the 19th of December 1985 the information came on before the court for hearing, the respondent having elected to have the matter heard in open court. The respondent did not appear. At the outset, the prosecutor applied to amend the name of the defendant on the information and summons from Alexander Colin Chianta to Danillo Andrew Chianta. The prosecutor informed the Magistrate that although the alleged offender had given his name at the time of the alleged offence as Alexander Colin Chianta and the information and summons had been issued naming the defendant accordingly, a person named Alexander Colin Chianta had recently told the informant that he was not the driver but that his brother Danillo Andrew Chianta was. Accordingly the informant on 28 November 1985 interviewed both Alexander and Danillo at their address at 33

Herlihys Road Lower Templestowe and recognized Danillo as the alleged offender. Danillo had admitted that he was the driver whom the informant had apprehended at the time of the alleged offence, and that he had given his brother's name at the time and that his name was Danillo Andrew Chianta born 27 November 1965. No evidence was led in support of these statements, but the police witness was available to give evidence.

[3] The Magistrate refused the application saying that he "believed an amendment of the name would result in a substitution of a charge and as it was more than 12 months since the alleged offence occurred, this could not be done". The prosecutor then suggested that the matter be adjourned *sine die* to allow further consideration of it or that it proceed and if the charge was found proved the conviction could be recorded against Danillo Andrew Chianta alias Alexander Colin Chianta. The Magistrate refused each of these alternatives, and dismissed the information. It is, I think important to remark that notwithstanding the election of the defendant there was no appearance for the defendant before the court. It was the prosecutor's statement to the court and his application to amend which led eventually to the dismissal of the information, and unfortunately no evidence at all was led. The questions which arise are -

1. Whether the amendment sought was wrongly refused;

2. Whether the proposition to proceed and to record any conviction against Danillo Andrew Chianta alias Alexander Colin Chianta was wrongly rejected.

If one proceeds to consider the matter as one in which the offence alleged was alleged to be committed by a male driver, the only question arising on the form of the information is whether he was rightly named. The alleged offender gave his name as Alexander Colin Chianta of a certain address. The name given was also the name of an **[4]** actual person, the alleged offender's brother, but the only relevance of this fact seems to me to be that service of the information and summons presumably went to him and possibly not to the actual alleged offender, although he lived at the same address. The evidence would have disclosed that the actual alleged offender knew of the information and summons and admitted that he had given his brother's name and also that he was the driver of the vehicle allegedly committing the offence.

In substance, there was no question whether or not the actual alleged offender was aware of the information and summons or whether he gave his name as the name appearing on each of them. No question arose such as that considered by McInerney J in *Green v Philippines Consulate General* [1971] VicRp 2; (1971) VR 12 or by Cussen J in *Dangerfield v McDonald & Co* [1914] VicLawRp 47; (1914) VLR 357; 20 ALR 217; 35 ALT 193. The facts are such as not to support a view which relies to any degree upon a supposed injustice to the actual alleged offender Danillo Andrew Chianta. For the situation that has arisen is due to the said Danillo Andrew Chianta's falsity in giving his brother's name.

What then does the Act provide? *The Magistrates (Summary Proceedings) Act* 1975 is the Act pursuant to which the information and summons were issued. It is described as -

> "An Act to re-enact with Amendments the law relating to the Procedure and Practice of Magistrates' Courts with respect to the Summary Determination of Matters, the Practice of Justices with respect to the taking of Informations and Complaints, and **[5]** the Issue of Warrants and Summonses thereon, the Preliminary Examination of Persons charged with Indictable Offences, and for Purposes connected therewith."

In the circumstances which are set out above it would appear extremely unlikely that a rehearing pursuant to s11(5) would be granted, if Danillo Andrew Chianta was in fact to be convicted on this information, and was to assert that the information and summons did not come to his notice. It would appear that he would be unable to satisfy the onus resting on him. The court clearly had the power to adjourn the information and summons, see s79(1)(b). The "Alternative Procedure" which had been adopted here is set out in s84 *et seq.* Section 165 of the Act relates to the time within which an information must be laid and 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."

In *Wright v Mooney* [1966] VicRp 30; (1966) VR 225 Winneke CJ at 227 said of s215 of the Justices Act 1958, which is to all intents and purposes the forerunner to s165 of the *Magistrates (Summary Proceedings) Act* 1975 -

> "In my opinion an information within the meaning of s215 is a document by which proceedings for an offence are initiated, and which takes the form of a statement of the offence as distinct from a direct charge of the offender himself ...It is to the information that s215 refers."

Such an information must be "laid" before or exhibited to or received by a justice. "The basal **[6]** characteristic of the information is that it informs that an offence is alleged to have been committed: see Short and Mellor, *The Practice of the Crown Office*, 2nd ed, p151, and Form 30, p515, and *Shortt on Informations*, pp1-3." (above ref. p227). It is the summons which summonses the person named in it to court to answer the information. The laying of the information need not come to the notice of the defendant to be charged with the offence: see *Hargreaves v Bourdon* [1963] VicRp 13; (1963) VR 89 at 90 per Sholl J. In this latter case, Sholl J (at pp92-3) traced the history of s215 of the *Justices Act* 1958 back to s11 of the English *Summary Jurisdiction Act* 1848, and examined differences which he enumerated between the English Victorian practice and legislation.

In *Mortimore v Stecher* [1971] VicRp 106; (1971) VR 866 at 874 the Full Court (Winneke CJ, Gowans and Menhennitt JJ) when considering the nature of an information said -

> "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."

In the present case, it would seem clear that the information was laid within time, described the offence clearly and the time and place at which it was committed. It was in the form appropriate to the alternative procedure (s84). Following the election of the said Alexander Colin Chianta (s84(3)) a summons directed to **[7]** Alexander Colin Chianta was served on him. It was apparently then that the informant became aware that he had been given by the offender the wrong name and that, accordingly, the information and summons had each named the defendant as a person other than the actual offender. Accordingly, the prosecutor applied to amend the name of the alleged offender. In the peculiar circumstances, there would seem to be no doubt but that the actual offender was aware of the laying of the information, and of the issue of the summons, but of course there would have to be evidence led concerning these matters. The sole defect in the information, and in the summons was that the name of the defendant should have been Danillo Andrew Chianta and not Alexander Colin Chianta.

Section 157 of the Act reads insofar as relevant -

> "157 Technical defects.
> (1) On the hearing of an information ... before ... a Magistrates' Court no objection shall be taken or allowed to an information ... or summons for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the ... Court.
>
> (2) If any such variance or defect appears to the .. Court to be such that the person charged has been deceived or misled thereby the ... Court may amend the information ... or summons and at the request of the person charged may adjourn the hearing of the case to some future day ... .

Is this then a "defect therein in substance or in form"? It is, I would think, a defect which cannot be said to have created an injustice to the true offender. He in fact caused it. It is an error which he should have anticipated would be corrected at some stage. That no doubt **[8]** is why he admitted on the service of the summons upon his brother, that it was he who was the driver of the car at the time and place of the alleged offence. If the evidence had been led at the hearing as it should have been and it had been found that Danillo Andrew Chianta was aware of the information, and the charge, and also of the summons, I am of the opinion that an amendment to the christian names of the defendant as set out on the information would have been appropriate.

Section 157 has received a more restricted interpretation than its literal wording might seem to allow (cf. s123 *Magistrates' Courts Act* 1980 (Eng) and *Marco (Croydon) Ltd v Metropolitan Police*

[1983] Crim LR 395; [1984] RTR 24). However, just as it is clearly intended to avoid a defendant's objections to inconsequential errors (see *Dring v Mann* (1948) 112 JP 270), so I would find its purpose is served by applying it to correct a mis-description in name flowing directly from the defendant's own falsity. If there remained doubt concerning service upon the defendant by his true description or doubt whether he might have presumed that he was not at risk, an adjournment to enable service to be effected after amendment would enable justice to be satisfied in this Regard.

There was no question in this case, if the evidence was as outlined by the prosecutor, to suggest that Danillo Andrew Chianta was misled. Indeed, any misleading emanated from him. The case is not one in which it is desired to substitute one defendant for another. It is the same person against whom the information is to go, but there has been a misnomer, caused by the defendant himself. **[9]** In civil actions, it has been held that if a defendant reading the writ served would say to himself "Of course it must mean me, but they have got my name wrong" – then it is a case of misnomer: *Davies v Elsby Brothers Ltd* 1960] 3 All ER 672; (1961) 1 WLR 170, 176; *Whittam v WJ Daniel & Co Ltd* (1962) 1 QB 271, 277; [1961] 3 All ER 796; *Harstoff v Allen* (1967) Qd R 211; *J Robertson & Co v Ferguson Transformers Pty Ltd* [1971] ALR 377; (1970) 44 ALJR 441, 443 (Walsh J).

In the present case, it is I would think unarguable but that Danillo Andrew Chianta knew at all material times of the error made, knew that this information and summons were intended for him, and knew that it was his ruse which had led to the misnomer. The state of mind of the true party has been held to be material in determining whether or not a mere misnomer is involved: *Beardmore Motors Ltd v Birch Bros (Properties) Ltd* (1959) Ch 298, 304; [1958] 2 All ER 311. He lived at the same address as his brother. He was with his brother when his brother denied to the informant that he was driving the car at the relevant time. He admitted that he was the driver of the car at the time of the alleged offence. In my opinion, the anticipated evidence would have disclosed that Danillo Andrew Chianta was not misled or deceived.

Such evidence should have been led, and if it was as the prosecutor opened, amendment of the defendant's name **[10]** should have followed, and if thought necessary an adjournment for personal service on Danillo Andrew Chianta. The order nisi should be made absolute, the order below set aside, and the matter remitted to the Magistrates' Court at Moonee Ponds to be heard and determined according to law.
