34/87

SUPREME COURT OF VICTORIA

CHUGG v PACIFIC DUNLOP LIMITED

Fullagar J

12-13, 20 August 1987 — [1988] VicRp 49; [1988] VR 411

PROCEDURE – INFORMATION CHARGING TWO OFFENCES – WHETHER BAD FOR DUPLICITY – WHETHER S21(1) and (2) OF *OCCUPATIONAL HEALTH AND SAFETY ACT* 1985 IN COMBINATION WITH S47(1) CREATE ONE CONTINUING OFFENCE OR A LARGE NUMBER OF OFFENCES – ADJOURNMENT FOR TEST CASE – ORDER FOR COSTS – WHETHER APPROPRIATE: *OCCUPATIONAL HEALTH AND SAFETY ACT* 1985, SS4, 21, 22, 23, 47, 49, 53; *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS6, 97, 157.

C., an Inspector appointed pursuant to the *Occupational Health and Safety Act* 1985 ('Act') laid an information against PDLtd in that being an employer, it did fail to provide such information to its employees to enable them to work safely and did fail to provide a safe working environment. When the matter came on for hearing, defendant's counsel submitted that the information was bad for duplicity and that C. should elect which charge should be heard after dismissal of the other, in default, dismissal of the whole information. The Magistrate upheld the submission and called on C. to elect. C. sought an adjournment to test the ruling in the Supreme Court, which was granted, and allowed the defendant the costs of the day. The order for costs included counsel's fee marked on the back sheet, his junior's at two-thirds and the solicitor's costs at $200, totalling $4366. Upon order nisi to review the Magistrate's ruling and his order for costs—

HELD: Order nisi discharged.
(1) Sections 21(1) and (2) in combination with s47(1) of the Act do not create one continuing offence but a large number of offences.
***Byrne v Baker* [1964] VicRp 57; (1964) VR 443, referred to.**

(2) Accordingly, an information which alleged that an employer failed to provide a safe working environment and failed to supply information to enable the employees to work safely was bad for duplicity and the Magistrate was correct in refusing an amendment without first putting the informant to his election.

(3) In respect of the Magistrate's order for costs, no error was shown.

FULLAGAR J: [1] This is the return of an order nisi to review the decision of a Magistrate made on 28th May 1987 during the course of the hearing of an information laid for commission of an offence created by s47 of the *Occupational Health and Safety Act* 1985. The hearing of the information began on 28th May 1987 and at the outset Mr Gillard QC, who appeared below as he does in this Court with Mr T Morris of counsel for the defendant, took the preliminary point that the information was bad for duplicity, and submitted that the informant should be put to his election as to the one charge which was to be heard after dismissal of the others or, in default of election, should face dismissal of the information as a whole.

[2] For the informant it was submitted that there was no duplicity and, alternatively, if there were, the informant should be permitted to plead two offences in compliance with s6 of the *Magistrates (Summary Proceedings) Act* 1975 and should have leave to amend in order so to plead. The Magistrate ruled in favour of Mr Gillard's submission and called upon the informant to elect. Thereupon the solicitor who appeared for the informant sought an adjournment in order to test in the Supreme Court the correctness of his ruling.

The Magistrate accordingly adjourned the case to a date to be fixed to enable his ruling to be tested. Mr Gillard then asked for "costs of the day". The Magistrate then indicated that he proposed "to grant Mr Gillard's fee marked on the back sheet and his junior's at two-thirds and .... to allow the solicitor's costs at $200." Mr Gillard, who on request had handed to the Magistrate his back sheet for inspection, said "Yes, well, Your Worship, the costs add up to $4366", and the Magistrate replied, "Yes, the prosecution to pay the defendant's costs at $4066".

A full transcript was taken by Court Recording Services Pty Ltd and the record shows the word "(sic)" immediately after the expression "$4066". There seems little doubt that the Magistrate intended to say "$4366 and that this was the sum of the actual fees of counsel on the one hand and $200 for solicitors' costs on the other hand.

The order nisi to review was granted by a Master on 26 June 1987 upon the following grounds:

> **[3]** (a) The learned Magistrate erred in deciding that the information set out in Exhibit 'PFL-l' was bad for duplicity. Further, or in the alternative, the Magistrate erred in refusing to hear or determine the information set out in Exhibit 'PFL-1'.
>
> (b) The learned Magistrate erred in deciding that the informant would be required to elect as between the two offences which the Magistrate held to be contained within the information set out in Exhibit 'AFL-1' rather than permitting an amendment to that information which would have cured any duplicity in that information by alleging separate charges within that information as amended. Further, or in the alternative, the Magistrate erred in refusing to hear or determine an information amended in order to cure any duplicity by alleging separate charges.
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> (c) The learned Magistrate erred in deciding that the informant should be ordered to pay the Defendant's costs.
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> (d) The learned Magistrate erred in deciding that the informant should be ordered to pay the Defendant's costs as fixed by the fee marked on the Senior Counsel's brief together with two-thirds of that fee for junior counsel rather than fixing costs on a party/party basis.

It is necessary first to go to the relevant provisions of the *Occupational Health and Safety Act* 1985, which is at times hereinafter referred to as the Act, and I now set out what I consider to be the salient relevant provisions as follows:

> "47. (1) Any person who contravenes or fails to comply with any provision of this Act or the Regulations shall be guilty of an offence against this Act.
>
> (2) Any person who is guilty of an offence against this Act for which no penalty is expressly provided shall be liable to a penalty of not more than—
> (a) where that person is a body corporate, 250 penalty units; or
> (b) in any other case, 50 penalty units.
>
> (3) an offence against this Act (not being a contravention of or a failure to comply with a provision of the Regulations) shall be an indictable offence.
>
> **[4]** "21.(1) An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health.
>
> (2) Without in anyway limiting the generality of sub-section (1), an employer contravenes that sub-section if the employer fails—
> (a) to provide and maintain plant and systems of work that are so far as is practicable safe and without risks to health;
> (b) to make arrangements for ensuring so far as is practicable safety and absence of risks to health in connexion with the use, handling, storage and transport of plant and substances;
> (c) to maintain so far as is practicable any workplace under the control and management of the employer in a condition that is safe and without risks to health;
> (d) to provide adequate facilities for the welfare of employees at any workplace under the control and management of the employer; or
> (e) to provide such information, instruction, training and supervision to employees as are necessary to enable the employees to perform their work in a manner that is safe and without risks to health.
>
> (3) For the purpose of sub-sections (1) and (2)—
> (a) "employee" includes an independent contractor engaged by an employer and any employees of the independent contractor; and
> (b) the duties of an employer under those sub-sections extend to such an independent contractor and the independent contractor's employees, in relation to matters over which the employer—
> (i) has control; or
> (ii) would have had control but for any agreement between the employer and the independent contractor to the contrary.

(4) An employer shall so far as is practicable— (a) monitor the health of the employees of the employer; **[5]** (b) keep the information and records relating to the health and safety of the employees of the employer;
(c) employ or engage persons who being suitably qualified in relation to occupational health and safety are able to provide advice to the employer in relation to the health and safety of the employees of the employer;
(d) monitor conditions at any workplace under the control and management of the employer; and
(e) provide information to the employees of the employer, in such languages as are appropriate, with respect to health and safety at the workplace, including the names of persons to whom an employee may make an inquiry or complaint in relation to health and safety."

Of some relevance also, on matters of construction, are ss22, 23, 49 (1) and 53, but there is no need to set them out.

The information is in the following terms, omitting formal parts: "Nature of Information: Fail to provide and maintain a safe working environment.

The information of Peter Richard Chugg of Melbourne in the State of Victoria, an Inspector appointed pursuant to the *Occupational Health and Safety Act* 1985, who says that the said defendant on the second day of November 1985 at 68 Cross Street, Footscray was pursuant to section 47 of the *Occupational Health and Safety Act* guilty of an offence against that Act in that being an employer it did fail to provide and maintain as far as was practicable for employees a working environment that was safe and without risks to health when it did fail to provide and maintain plant and systems of work that were so far as was practically safe and without risks to health, and when it did fail to provide such information, instruction and supervision to employees as was necessary to enable the employees to perform their work in a manner that was safe and without risks to health, in contravention of the provisions of section 21 of the *Occupational Health and Safety Act* 1985.

Particulars of failure to provide and maintain safe plant and systems of work:-

Robert Mark Everest was able to gain access to the trapping space created by the power driven hopper door and frame of a Banbury mill on which he was carrying out maintenance.
No system of work was in place to ensure that the interaction of the electrical and hydraulic system of activating a Banbury mill did not result in danger to employees.

[6] Particulars of failure to provide information, instruction and supervision:-

Robert Mark Everest was not provided with up-to-date circuit drawings relating to a Banbury mill on which he had been instructed to carry out maintenance.
Robert Mark Everest was not informed of modifications that had been made to a Banbury mill particularly to the closing function of the hopper door in its manual made.
Robert Mark Everest, an apprentice, was allowed to work with inadequate supervision."

Before this Court it was argued by Mr Weinberg QC, who appeared with Mr Dennis of Counsel for the informant, that the information in the present case did not exhibit duplicity but was for a single continuing offence created by statute. Mr Weinberg contended that s21 of the Act, when read with s47, discloses only one criminal offence, namely, that of failing to "provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health". He said the effect of s21(2) is that an employer, who does any of those things – that is to say, commits any of the failures – set out in the five lettered paragraphs, thereby contravenes s21(1) and thereby contravenes no other relevant provision of the Act.

[7] The only criminal offence, therefore, committed by such an employer, is an offence against s21(1), and that is the only offence with which he can be charged. The offence is simply failing to keep an environment in continuing existence.

It is true that such an employer has committed "an offence against this Act" within the meaning of s47(1) of the Act, and not within the meaning of any other provision, but there is no content of such an offence until it is found to consist of a contravention of, or failure to comply with, some provision of the Act other than s47. The only candidate in the present case for qualification, as such a provision of the Act, is s21(1). This is because there can be no relevant contravention of, or failure to comply with, s21(2) of the Act, because that sub-section creates no obligation at all which is independent of s21(1). Sub-section (2) merely tells us some of the things which constitute a contravention, not of itself but of sub-s (1).

I confess that during the argument of the case I was much troubled by the proper construction of the critical sections of this curious new enactment, and I would have been ready, if one of the parties had asked me, to refer the order to review to the Full Court for determination. However, I have in the end reached a clear conclusion that Mr Gillard is correct in both of his principal contentions before this Court, namely, that s21 of the Act does not in any relevant way create any continuing offence, and that the information is bad for duplicity because it contains more than one offence without complying with the statutory requirements relating to the **[8]** inclusion of more than one offence in an information. Mr Gillard was also correct, in my opinion, in his contention that the reasoning of the Full Court in *Byrne v Baker* [1964] VicRp 57; (1964) VR 443 provides very strong support for both of these conclusions. I do not propose to deal in any detail with that case or to set out *in extenso* any substantial part of the reasons of the Full Court. It will suffice if I state my opinion that a substantial portion of the reasoning of that court, upon the proper construction and effect of s107(1) of the *Companies Act* 1958, reads almost directly on to s21 of the *Occupational Health and Safety Act* 1985.

In the present case I consider that the major issue is whether sub-ss(1) and (2) of s21, in combination with s47(1), create on the one hand one continuing offence of allowing to subsist a particular prescribed environment or create on the other hand a large number of offences each consisting of some identifiable act or omission which in all the circumstances constitutes a failure to comply with a general duty of care laid down by s21(1). I have come to the conclusion that the latter alternative is correct, and that the effect of s21(2) is to ensure that, if the acts or omissions charged and proven establish one or more of the several general failures set out in the lettered paragraphs of sub-s(2), then that without more automatically establishes a failure to comply with the general duty laid down by sub-s (1) and thereby operates to constitute the identifiable act or omission as a criminal offence by force of s47. But it is each particular relevant act or omission itself that quantifies and constitutes the **[9]** offence, not the failure to maintain either the continuing state of affairs indicated by a paragraph of sub-s(2).

The language of s21(1) itself, and most especially when considered in conjunction with that of s21(2), is apt to convey the concept of the tort of negligence in the field of employer and employees, as a breach of duty owed by the former to the latter. It may perhaps be arguable that the statute goes slightly further in favour of the employee than did the common law of negligence in formulating the extent of the duty owed, but I do not think that it does. It may not be essential to my reasoning in the present case to decide whether the duty referred to in the statute is any wider than the duty of care owed at common law, but I am of opinion that the statutory duty is a duty to use reasonable care in all the circumstances to provide and maintain the stipulated environment. It is I think, really stating the same thing to say that the duty is an absolute one to take every reasonable step to provide and maintain the stipulated environment (See the definition of "practicable" in s4 of the Act).

However, the things that matter are, first that the legislature has enacted that every employer owes a legal duty to his employees, and has done so for the purpose of making it a crime for the employer not to comply with that duty and, secondly and more importantly, that the duty itself is in both character and scope the same as or substantially the same as the duty of care owed at common law by employee in tort. **[10]** The importance of these matters for the present case can be explained by adapting the words of the Full Court in *Byrne v Baker* [1964] VicRp 57; (1964) VR at p453 -

> "...this concept of negligence has reference to identifiable acts or omissions, not to any general characterization of the conduct of (an employer) over a selected period."

In my opinion the offences created by sub-ss(1) and (2) of s21 in combination with s47 consist of identifiable acts or omissions which constitute in all the circumstances a breach of the duty stated by s21. If in all the circumstances they constitute a failure falling within one or more of the paragraphs of s21(2), one need look no further because *ipso facto* they constitute a breach of the duty owed by s21(1).

The contrary construction of the section contended for on behalf of the informant, is that the offence to be charged is in substance a failure to keep in uninterrupted existence the stipulated environment. This construction suffers from the same defects as did the construction of the *Companies Act* which was rejected in *Byrne v Baker* (*supra*).

To quote again from that case at p453 of the report -

> "It is a construction which involves a departure from the important principle that crimes should be so defined as to enable the accused to know with precision what he is charged with; and a construction producing that result should not be adopted unless the language of the legislature requires it. Here the language, far from requiring it, points away from the construction. It may be added that the view put forward by the prosecution, if adopted, would give rise to grave practical difficulties, which ... became ... apparent during the argument in this Court."

I have not heard any evidence, nor can I take judicial notice of sufficient facts to enable me to form a **[11]** clear view of the precise acts or omissions which constitute the alleged offences sought to be charged by the information in the present case. I am not an expert on Banbury machines. But enough appears to satisfy me that the acts and omissions covered by the first set of "Particulars" are different from the acts and omissions covered by the second set of "Particulars", and I understood from Counsel that it was common ground that this was so. This being so, it is in my opinion clear that at least two offences, and probably more, have been included in the information, and they have not been included in a way which complies with sub-s(3) of s6 of the *Magistrates (Summary Proceedings) Act* 1975.

There were numerous references, in the helpful arguments of Counsel before this Court, to the question of what is the gist of the offence or offences created by those sections of the Act which are here critical, being ss21 and 47. Using the word "gist" in the same sense as I think the Full Court intended in *Byrne v Baker* [1964] VicRp 57; (1964) VR 443 at p452, I am of opinion that the gist does not lie in a failure to have maintained at all times a constant environment or even in a failure to have provided at all times the information required by paragraph (e) of s21(2). Rather, on the true construction of the sections, it is each and every failure by the employer to provide the environment or the information, that is to say, each and every particular act or omission amounting to such a failure, that constitutes an offence under the sections. This position is in no way altered by the circumstances that a failure may sometimes consist of an act of a continuing character, or of an omission persisted in over a period of time.

[12] As at least two offences are included in the information, and included in a way which does not comply with s6 of the *Magistrates (Summary Proceedings) Act* 1975, and as the only offences which are sought to be charged are contained under the heading of two different sets of particulars, the information is bad for duplicity.

In my opinion the Magistrate was not merely correct in holding that the information was bad for duplicity, but he was also correct in refusing an amendment without first putting the informant to his election. In my opinion the defects in the present information are too fundamental to be corrected by amendment before an election is made. And I observe that there is no evidence from which I could safely conclude that the five separate paragraphs of "particulars" set out precisely five discrete offences, although I suspect that they do. Although the power to amend given by s157 of the *Magistrates (Summary Proceedings) Act* 1975 appears in unrestricted terms, the common law principles which required, in circumstances like the present, either an election or a total dismissal are based upon such fundamental liberties of the subject that the relevant common law rights should not be deemed to be taken away by the statute except by some express statutory words. These common law principles are so entrenched in our law that, although s157(1) provides that "no objection shall be taken or allowed to an information ... for any defect therein in substance or in form", the defect of duplicity is so fundamental that the information is virtually a nullity until an election is made. In my opinion the same notion prevents this information from being "amended", pursuant to s157(2), until an election has been made. See *Johnson v Needham* (1909) 1 KB 626; 100 LT 493, and *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467 especially per Dixon J at pp489-490; [1938] ALR 104, and *Byrne v Baker* [1964] VicRp 57; (1964) VR 443 at pp454-458, and especially (at p457) the citations from the judgement of Lord Goddard CJ in **[13]** *Edwards v Jones* (1947) KB 659 at pp661-2; [1947] 1 All ER 830. The fact that in Victoria it is now permissible to have in one information two or more charges if the requirements of s6 of the *Magistrates (Summary Proceedings) Act* 1975 are all met, does not alter the position where those requirements are not met and the information suffers from duplicity. For these reasons I am of opinion that neither grounds (a) and (b) of the order nisi are made out. As to the matters referred to therein, the Magistrate acted correctly in what he did. It was conceded before me that, if grounds (a) and (b) of the order nisi failed, then ground (c) must also fail.

The final ground of the order nisi relates to the quantum of costs awarded to the defendant and/or to the basis upon which the quantum was arrived at. The costs allowed were, it is conceded, the actual amount of the professional costs incurred by the defendant in paying the professional fees of his solicitors and two counsel for the day of the hearing. The power of the Magistrate to award costs stemmed from s97 of the *Magistrates (Summary Proceedings) Act* 1975 which section is hereinafter called "the costs section". The relevant paragraphs of the costs section are paragraphs (h) and (e) and (g). In paragraph (b) the expression "order" includes the grant of an application and also a determination of any kind, and also any refusal to hear or determine any information or to entertain an application – see s3. In the present case the Magistrate unequivocally accepted the submission of Mr Gillard in the following terms – see transcript p34 -

> Now Your Worship has decided to grant an adjournment, so in other words the other side have sought an adjournment to test Your Worship's ruling, and that is the basis for their **[14]** application for an adjournment. We wish to proceed. They have now got an indulgence, they have got to pay for it."

It seems to me that the Magistrate was deciding that "the costs of and occasioned by the adjournment" should be paid by the informant to the defendant. It was not disputed before me that the costs of the day, incurred by the defendant on rightfully insisting that the information be put in order by election and subsequent amendment or else be dismissed were costs of and occasioned by the adjournment. I think this is correct, but I also think that the Magistrate had made an "order" in favour of the defendant in determining that the information was bad for duplicity and would not be entertained or heard in its present form and in determining that the informant must elect or have the information dismissed, and the Magistrate was therefore empowered by paragraph (b) of the costs section to order the informant to pay to the defendant "such costs as the Court thinks just and reasonable".

I was not referred by counsel to any rules or Regulations or scale of costs which might restrict or inhibit the discretion conferred by the statute. The heavy burden therefore rested on Mr Weinberg to satisfy me that the exercise of the Magistrate's wide discretion was not unreasonable in all the circumstances as to be manifestly no real exercise of the discretion at all. It was not established to my satisfaction that the Magistrate in making the costs order took into account matters which the law required him not to take into account, or that he failed to take into account matters which he was required by law to take into account.

I am not satisfied on the facts before me that the exercise of the discretion was so unreasonable as to be manifestly no proper exercise of the discretion at all. Accordingly ground (d) of the order nisi must fail. For these reasons the order nisi must be discharged. Subject to any submissions as to the proper orders to be made, the orders of this Court will be that the order nisi be discharged and that the defendant's costs of this proceeding be paid by the informant.
