26/86

SUPREME COURT OF VICTORIA

DRAKE v MOUNSEY

Tadgell J

18 September 1985

PROCEDURE – INFORMATION AND SUMMONS – RETURN DATE ALTERED AND INITIALLED – SUMMONS NOT EXTENDED BY ISSUING JUSTICE – WHETHER INFORMATION PROPERLY BEFORE THE COURT – NO APPEARANCE OF DEFENDANT – APPEARANCE BY DEFENDANT'S LEGAL PRACTITIONER 'UNDER PROTEST' – WHETHER SUCH APPEARANCE BRINGS INFORMATION PROPERLY BEFORE COURT – PRESUMPTION OF REGULARITY: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S8.

On 24 August 1984, M. laid an information against D. for unlawful assault. The return date in the summons was shown as 17 October 1984; however, this date had been crossed through and another date – 30 January 1985 – inserted underneath. This alteration was initialled – apparently by M. – and there was no notation in the margin to indicate that the return date had been extended by a justice or clerk. When the matter came on for hearing on 30 January 1985, D. did not appear in person. However, D's legal practitioner appeared 'under protest' and submitted that as the summons was not properly extended, D. did not submit to the Court's jurisdiction and accordingly, the information should be struck out. The Magistrate held that the process was irregular but valid and that the legal practitioner's appearance was sufficient to cure all assumed defects thereby giving the Court jurisdiction to hear and determine the matter. On order nisi to review—

HELD: Order discharged.
(1) Notwithstanding that the return date in the summons was altered and the circumstances of the alteration unexplained, it was open to the Court to apply the presumption of regularity.

(2) As there was no evidence to find that '30 January 1985' was not the due return date for the summons, it was open to the Magistrate to decline to accede to the submission put on behalf of D.

(3) *Obiter*: (a) If a matter is properly before a Court, process by way of summons or otherwise is not a necessary pre-requisite to the exercise of jurisdiction to hear and determine. Accordingly, where a defendant appears in person or by his representative, it is not open to submit that there has been an irregularity in process.

(b) If a matter is not properly before a Court, the appearance of the defendant in person or his legal practitioner 'under protest' will not bring the matter properly before the Court and will not involve the defendant's submission to a jurisdiction which the Court did not have.
***Mortimore v Stecher* [1971] VicRp 106; (1971) VR 866, applied.**

TADGELL J: [1] By this order to review, the applicant, who is defendant to an information, seeks to call in question a decision of a Stipendiary Magistrate constituting the Magistrates' Court at Ferntree Gully on 20 January this year. There is no extract from the Court register in evidence expressing the exact terms of the order complained of, as usually there is upon order to review. The order nisi, however, calls on the respondent, who was the informant below, to show cause why what is referred to as an "order" of the Magistrates' Court whereby the Stipendiary Magistrate "ordered *inter alia* that a summons wrongly extended was not a nullity but an irregularity and that the irregularity in the summons was cured by Counsel appearing under protest" should not be reviewed on five specified grounds.

[2] As will become evident, that formulation expressed not so much the order that was made as the line of reasoning, or part of it, that led to the order. The evidence in this Court rather suggests that the order in question was really no more than one adjourning the hearing of the information until 19 July this year. I have been told, from the Bar table, that on that date the matter was further adjourned to a date to be fixed, presumably pending the outcome of proceedings in this Court. I have had some doubts whether an order simply adjourning the hearing of the information is, in the circumstances, properly reviewable but since no point about that has been taken on behalf of the respondent, I think it is unnecessary to investigate the question.

The relevant circumstances are these. It appears that, on 24 August last year, the respondent, who is a Senior Constable of Police, laid an information against the applicant on oath before a Justice of the Peace, alleging that the applicant "at Clematis on the 21st day of October 1983 did unlawfully assault one Colin Philip Benson". The information was in common form and there is appended on the same sheet a summons, also in common form which is printed and typewritten except for the signature of the Justice of the Peace and, save to the extent that I shall mention, the dates it contains. The return date of the summons initially inserted was "the 17th day of October 1984", of which "17th October" was handwritten, the rest being printed or typed. The expression "17th October" and "84" have been crossed through, although still remaining quite legible, and underneath them are respectively handwritten **[3]** the expressions "30th January" and "85". In a place alongside the alterations are what could be some initials. The other date the summons contains, which is at the foot immediately preceding the Justice's signature, is "the 24th day of August 1984" of which "24th" and "August" are handwritten and the rest is printed and typed. There was no evidence either here or below as to how, when, where, why or by whom the alterations to the return date in the summons were made.

The only evidence of the course of the proceedings before the Magistrates' Court was that contained in the affidavit of the applicant's solicitor, Mr John Xavier Smith, whose account is in effect as follows. He swore that the matter came on for hearing before the Magistrate on 30 January 1985. The applicant did not appear but he, Mr Smith announced that he appeared on his behalf under protest and requested the Magistrate to note the Court register accordingly. A Police Sergeant prosecuted on behalf of the informant. The matter in which the present application was concerned was heard together with another information and summons against one Millane, who did not appear in person but was represented by his solicitor, Mr Window. Mr Window also announced to the Court that his appearance was made under protest. The information and summons against Millane were in identical from (except presumably for the name of the defendant) to those served on the applicant. Mr Window submitted, on behalf of Millane, that the Court should not proceed to hear and determine the information **[4]** because the summons, which purported to bring the defendant before the Court, was defective in that the return date had been amended as I have described. It was submitted by Mr Window that, in amending or extending the date for appearance, the issuing Justice had failed to comply with the provisions of sub-sections (7) and (8) of s8 of the *Magistrates (Summary Proceedings) Act* 1975. Sub-section (7) provides that "Any justice or clerk may, whether before or at or within one month after the time appointed in a summons for attendance, extend the time for attendance but the time for attendance appointed in a summons shall not be so extended more than once". Sub-section (8) provides that "Where the time for attendance appointed in a summons is so extended the justice or clerk extending the time shall alter the date appointed in the summons for attendance and in the margin of the summons opposite, or as nearly opposite as is reasonably practicable, the alteration shall indorse and sign a memorandum stating that the time for attendance appointed in the summons has been extended and the date to which the time has been so extended".

Mr Window submitted that the date for appearance had obviously been amended after the date of issue of the summons and that, since the defendant had not submitted to the jurisdiction of the Court, the information should be struck out. According to Mr Smith's affidavit, the Magistrate, at this point, said, "The summons is, indeed, irregular. The date has been amended and the Act has not been complied with". One may infer, although it is not by any means clear, that **[5]** the Magistrate was referring to the fact that there was no memorandum in terms of that required by sub-section (8) of s8 of the *Magistrates (Summary Proceedings) Act*. That there was none such is clear and counsel for the respondent did not seek to say that sub-section (8) had been complied with. The Magistrate proceeded to say, "However, the defendant has appeared and I therefore propose dealing with the matter. If the defendant had not appeared, the summons would have been struck out but the defendant is here and that is the end of the matter". Mr Window is reported in Mr Smith's affidavit to have responded by saying, "But the defendant has not appeared and I have only appeared on his behalf under protest to argue this point". The Magistrate is said to have replied, Your appearance is sufficient to give me jurisdiction".

Mr Smith then made submissions on behalf of his client, the present applicant, to the effect that the argument which had been advanced and apparently rejected on behalf of the defendant Millane had been right and that the Court was not entitled to proceed to hear either of the matters since neither defendant had submitted to the jurisdiction, both defendants having appeared by

their solicitors under protest to submit that the Court had no jurisdiction. Mr Smith referred to some authorities, namely, *Dixon v Wells* (1890) 25 QBD 249; *Mortimore v Stecher* [1971] VicRp 106; (1971) VR, 866; *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VicRp 81; (1970) VR 625 and *Parisienne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; (1938) 59 CLR 369; [1938] ALR 119. Mr Smith's submission was that any defect in the summons **[6]** was not cured by the appearance of the defendant in this case, since his only appearance was under protest.

The prosecuting Sergeant, according to Mr Smith's affidavit, did not answer Mr Smith's submissions or Mr Window's but conceded that the summons was "irregular" and that the initial in the margin thereof was that of the informant and not that of the issuing Justice of the Peace. The Magistrate, having retired to consider Mr Smith's submissions, returned and delivered reasons for the course he proposed to follow. He said he regarded *Dixon v Wells* as distinguishable because, in that case, the Court proceeded upon the basis that there was no summons at all, whereas in the present case, the summons was good but irregular and not a nullity. In referring to *Mortimore v Stecher*, His Worship said he regarded it as deciding that the summons here was validly issued and that the Court therefore had jurisdiction, the defendants, by his conduct, having submitted to the jurisdiction. His Worship said, according to Mr Smith's affidavit, "In the present case, the return date of the summons was altered. There was no extension or proper extension of the return date. The initials of the Justice did not appear and the Act has not been complied with". Evidently, His Worship again was there referring to s8 of the *Magistrates (Summary Proceedings) Act*. He continued, "The Court's view is that the summons is valid but irregular. If the defendants had not appeared by their Counsel, that would have been the end of this matter. The summons would have been struck out but the irregularity in the summons has been cured by the appearance of Counsel in each case, albeit **[7]** under protest. In my view, the irregularity has been cured and the Court has jurisdiction. I propose to deal with the matter".

There was then some discussion which resulted in the adjournment of the further hearings. In the course of the discussion Mr Smith and Mr Window advised the Court that, notwithstanding the ruling, evidence would be adduced on the adjourned hearing to establish that the summonses had been irregularly extended. Although Mr Smith does not expressly state it, I take the tenor of his affidavit to indicate that he was submitting to the Stipendiary Magistrate, as Mr Window had in the case of Millane, that the information against the applicant should have been struck out. The real complaint made in this Court seems to be that the Stipendiary Magistrate did not accede to that submission although, perhaps, there was some uncertainty in the argument before me as to whether what should have been struck out was the information or the summons or both.

Ultimately, however, counsel for the applicant did not urge me to strike out anything. Rather, his submission was that I should remit the matter to the Stipendiary Magistrate for investigation of the question whether the summons had been properly extended. The investigation contemplated seems to have been one calculated to include, or allow for the inclusion of, evidence called on behalf of the defendant.

The grounds of the order nisi, as to the first four of them, express in slightly different terms a single concept, in substance, that the Magistrate was wrong to **[8]** have determined that Mr Smith's appearance for the applicant was sufficient to cure all defects and that the appearance involved a submission to the jurisdiction. Ground five was not pressed and I need not mention it. I was accordingly invited to rule that the Magistrate's expression of opinion was wrong, inasmuch as he held in substance that the purported appearance on behalf of the applicant under protest was sufficient to cure the assumed defects in the summons.

Before dealing with any of these grounds of the order to review or the submissions which were advanced in support of them, it is pertinent to observe that the whole of the argument for the applicant below and here depended upon the proposition that the summons in question was irregular. The Stipendiary Magistrate, of course, concluded that it was but was of opinion that, in the circumstances, the irregularity was cured and ruled that the hearing of the information should proceed.

The ultimate result, as I have said, was that the only order that the Magistrate made was to adjourn the hearing of the information. But the conclusion that the summons was irregular depended on a matter of fact, namely, that the return date of 30th January 1985 had been

irregularly inserted in the summons. This matter of fact was one which, judging from Mr Smith's affidavit, received little or no attention before the Magistrate but it was one that counsel for the respondent took up before me. The respondent was, of course, entitled to rely, in defending the Stipendiary Magistrate's order adjourning the hearing, on any basis on which the Magistrate could **[9]** properly have made the order.

In my opinion, there was no evidence upon which it was reasonably open to the Magistrate to find that 30th January 1985 was not the due return date for the summons. In particular there is, so far as appears, no proper basis for concluding that the alteration of the date was made in reliance on s8 of the *Magistrates (Summary Proceedings) Act*. One might equally validly conclude that the amendment of the date was made before the summons was issued. It is true that the prosecuting Sergeant appears, from Mr Smith's affidavit, to have conceded that the summons was irregular and that the initials in the margin were those of the informant. No doubt the Sergeant should be taken to have had authority to make, on behalf of the informant, any concession the informant could have made for himself; cf. *Jennings v Newlan* [1982] VicRp 49; (1982) VR 489 at p491. So far as Mr Smith's affidavit discloses, however, the concession of irregularity was quite unspecific. It did not concede in terms that s8 had not been complied with. Indeed, any assumption from what was said to have been conceded that s8 had even been resorted to would appear to involve pure speculation as much as legitimate inference. In a sense, of course, the summons was irregular inasmuch as it had been altered as to its return date and the circumstances of the alteration were unexplained. Moreover, the alteration did not appear to have been initialled by the issuing Justice of the Peace and the informant's initials are said to have been placed next to the alteration.

[10] There was, however, in my opinion no presumption of irregularity. Insofar as there was any room for the application of a presumption, it should have been the other way. At all events, any concession made on behalf of the informant did not, in my view, carry the matter of the alleged non-compliance with s8 far enough to sustain the Stipendiary Magistrate's conclusion. Since it was, in my opinion, not open to the Magistrate, so far as the evidence before me discloses, to conclude that the summons was not properly returnable on 30th January 1985, I think it cannot have been wrong of him to have declined to accede to Mr Smith's submission that the summons or the information or both should be struck out. Nor, I think, can it have been wrong to have adjourned the hearing, or the further hearing, of the information, for the Stipendiary Magistrate had ample power to do that. On this simple and straightforward basis, I conclude that the order made by the Stipendiary Magistrate has not been shown to have been wrong. Strictly, therefore, it is unnecessary to consider whether the basis actually assigned by the Stipendiary Magistrate for refusing to strike out the summons or the information, namely, that any irregularity was cured by the applicant's appearance by his solicitor, was correct.

Since the matter will, however, be returning to the Magistrates' Court (as I assume) and since the question was well argued before me, it might be useful if I state with a little more elaboration my appreciation of the way in **[11]** which Mr Smith's appearance on 30th January should be viewed. What I shall say, however, I do not say as a basis for my present decision, but rather by way of *obiter dicta*.

The Stipendiary Magistrate's reasons for his ruling, as they have been put in evidence before me, suggest that, had Mr Smith not appeared, the summons and probably the whole matter would have been struck out. Mr Smith's appearance on that basis not only had precisely the opposite effect to that which it was intended to have but it seems it actually prevented the occurrence of what, according to the Magistrate, would have occurred in any event. If this is a correct statement of the law, it reveals that the law is very capricious indeed. As I see it, however, the law is not so capricious as that. The submissions for the applicant before the Magistrate really failed, as I think, because an attempt was made to elevate what was essentially a point of fact into a point of principle; and there was no evidence to prove the point of fact.

Now, it has been laid down time and time again that process, by way of summons or otherwise, is not a necessary prerequisite to jurisdiction to hear and determine an information, if the matter is properly before the Court. The Full Court in *Mortimore v Stecher* noticed a number of the authorities for that conclusion and I need not refer to them again. If an information has been properly laid and the defendant appears, in person or by his representative, it will accordingly be

idle to argue that there has been an irregularity in process. If, however, it can be demonstrated by or on behalf of a defendant that the matter is not properly **[12]** before the Court, the appearance of the defendant will not bring it properly before the Court. What Mr Smith sought to show was that the matter was not properly before the Court. He was there himself, it might be said, to make sure that the Magistrate did not overlook what was said to be obvious, namely, that, on the face of the information and summons, the matter was not properly before the Court. The Magistrate said, in effect, that he would have reached that conclusion anyway but that Mr Smith's appearance albeit under protest, prevented his giving effect to it. If the point Mr Smith sought to make had been a good one, it occurs to me that it could presumably have been drawn to the Court's attention by letter addressed to the Court, and the letter placed on the appropriate file so that, when the case came on for hearing on 30th January, the irregularity, which was said to be evident, would make it quite plain that the case was not properly before the Court. If a letter had been used, it could scarcely be said, I should think, that it would have amounted to an appearance on behalf of the defendant which would have had the same effect as the Stipendiary Magistrate attributed to Mr Smith's appearance. If that is right, Mr Smith's appearance could not logically have made all the difference that the Stipendiary Magistrate attributed to it.

But, when properly analysed, the point sought to be made could not properly have been made by letter any more than it was properly made orally by Mr Smith on 30 January in the way in which he sought to do it. It was, as I say, a point of fact that required evidence to prove it. **[13]** Whether one appropriately describes Mr Smith's appearance as under protest or not, what he sought to do, or what he needed in my opinion to seek to do, in order to achieve his object, was to sustain a finding of fact based on evidence or permissible inference. In that he failed, in the way I have analysed the case. His submission properly failed, in my opinion, not primarily for the reason assigned by the Stipendiary Magistrate, which was that his appearance cured the assumed defect in the summons. He failed because he could not properly satisfy the Magistrate that the matter was not properly before him. Had he been able to satisfy the Magistrate of that, his appearance for the purpose of doing so would not, in my opinion, have involved the defendant's submission to a jurisdiction that the Court did not have. In the result, the Stipendiary Magistrate did not find that the matter was not properly before him and he adjourned the further hearing of it. That he did so for reasons which are, in my opinion, not sustainable is not to the point.

Upon the resumed hearing, the matter will remain properly before the Court, having been duly adjourned, there having obviously been, as I would suppose, due service on the defendant. It is evident from what I have said that it would be wrong to remit the case to the Magistrate with a direction for an investigation of the kind contended for on behalf of the applicant. It is not part of the Magistrate's task to conduct any investigation whether the summons was properly extended. What the Magistrate had **[14]** to do was to rule upon Mr Smith's submissions and he ruled upon them adversely to Mr Smith, making an order which, in my opinion, has not been shown to be wrong.

In conclusion, I want to advert briefly to the proposal stated in Mr Smith's affidavit that, upon the adjourned or resumed hearing, evidence would be adduced to establish that the summons had been irregularly extended. All I would say about that – and I say again that my remarks are *obiter* – is that, if the only evidence sought to be led is designed to prove that the process was irregular, as opposed to showing that the proceedings were not properly before the Court, that, I would expect, would not get the applicant very far. I think I ought not to say any more about what further evidence might be capable of proving. I have no knowledge, of course, of what evidence is available or what might be led and I should not speculate upon it, as to whether it might or might not show validity of the information.

I suspect that these reasons are not entirely satisfactory to either side, having regard to the way in which I have seen fit to dispose of the case. That, I think, is again to a great extent brought about by what seems to me to be an illegitimate attempt to elevate a point of fact into a point of principle. It seems to me, gentlemen, that the appropriate order is that the order nisi be discharged.

APPEARANCES: Mr L Lasry of counsel, instructed by Mr JX Smith, Solicitor appeared for the Appellant Drake. Mr DJ Habersberger of counsel, instructed by the Crown Solicitor appeared for the Respondent.
