37/88

SUPREME COURT OF VICTORIA

IMPEY v TED ENGINEERING AUSTRALIA Pty Ltd

Murphy J

9 June 1988

PROCEDURE – DEFECT IN INFORMATION – VARIANCE OF ONE WEEK IN DATE OF OFFENCE – PROSECUTION CASE CLOSED – REQUEST FOR AMENDMENT REFUSED – WHETHER PROPER EXERCISE OF DISCRETION: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S157.

1. Section 157 of the *Magistrates (Summary Proceedings) Act* 1975 relates to all defects in an information in substance or in form.

2. Where an information specified 20 September 1985 as the date of offence instead of 27 September 1985, this was a defect and the Magistrate was in error in refusing (after closure of the case for the prosecution) a request for an amendment.

***Stait v Colenso* [1903] VicLawRp 43; (1903) 28 VLR 286;**
***Thomson v Lee* [1935] VicLawRp 65; (1935) VLR 360; [1935] ALR 458; and**
***Lloyd v Biggin* [1962] VicRp 80; (1962) VR 593, applied.**

MURPHY J: [1] Return of an order nisi to review a decision of a Stipendiary Magistrate sitting as the Metropolitan Industrial Court dismissing an information of the applicant that the respondent on the 20th day of September 1985, being the occupier of a workplace in which machinery was used, to wit a Heine power press, did fail to keep the guards required to be provided constantly maintained in an efficient state and properly adjusted and constantly kept in position when the machinery was in use. The informant in the Court below was represented by a solicitor employed by the Department of Labour.

He led evidence of the offence alleged in the information from a worker who stated that he was injured whilst operating the machine on 20th September 1985, when **[2]** the press operated whilst his left hand was removing a piece of material after it had been manufactured. The formal exhibits were filed, and the informant gave evidence that on examination of the Press after the accident, the machine was still operating unsatisfactorily but was subsequently rectified. He also gave evidence of an interview with a director of the respondent claiming to have power to speak on behalf of the respondent. He admitted that the accident happened on 20th September 1985 when the worker's left hand was crushed between the upper and lower dies of the Heine Press, and that the guard wasn't operating 100 per cent.

The respondent was represented by counsel who called evidence from the General Manager of the respondent to the effect that the accident happened on 27th September. Documents relating to Workcare and medical certificates which supported this date as the date of the happening of the accident with the press were tendered, and objected to by the solicitor appearing for the applicant, on the ground that the matters in them had not been put to any of the informant's witnesses. The Magistrate allowed the tender of these documents after counsel for the defendant informed her that he had shown the documents to the informant's solicitor before the commencement of the case, and the informant's solicitor admitted seeing four of the five documents – but not one stating that the injured worker had been treated for shoulder injury on 23rd September and declared on account of it to be unfit for work on 24th and 25th September 1985.

[3] After a short adjournment, during which the applicant's solicitor consulted with the informant and his witnesses, the solicitor for the informant applied to amend the information altering the alleged date of the offence from 20th to 27th September 1985. Objection to the amendment being taken, the amendment was not allowed, and the information was dismissed. The Magistrate refused the amendment saying, "I consider it is not proper to allow this amendment after the case is closed" (referring to the case for the informant).

Before me, the applicant's case was supported by affidavits sworn by Sam Parrino, the solicitor who appeared for the informant in the Magistrates' Court. A document purporting to be an affidavit sworn by Reuben Charles Benkel, barrister was tendered, Mr Benkel being the barrister who appeared for the respondent in the Magistrates' Court. The attestation clause in this purported affidavit reads:-

> "Sworn by the said Reuben Charles Benkel at Melbourne in the State of Victoria this 21st day of May 1987. Before me."

Then appears the deponent's signature to the right of this attestation clause, and a signature which although illegible appears to be "B. Aron" or "B. Avon" or "B. Aroni" beneath the words "Before me". There is no identification of this signatory nor evidence, nor assertion of his or her authority or qualification to take an affidavit. Rule 43(10)(3); ss115, 117(2), 123C *Evidence Act* 1958. **[4]** The purported affidavit is defective at least in form. It is also in many respects defective in substance. It contains repeatedly statements commenced by the words "I believe" or "I admit" (see clauses 6, 7, 9, 10, 11, 12, 13, 14, 15, 17, 18, 20, 22 and 24). The deponent's retainer being at an end on the dismissal of the information, he is not in any position, so far as appears, to make admissions. There are several inconsistencies and also as Mr Spicer for the applicant has submitted, inferential contradictions contained in the document.

For example, in paragraphs 13 and 17 of Mr Parrino's affidavit it is deposed (1) that a director of the respondent agreed that the accident happened on 20th September 1985; and (2) that Mr Parrino objected to the tender of documents by the defence, when the contents had not been put to the informant's witnesses suggesting that the accident was in fact on 27th September 1985. These matters are said to be agreed to, or admitted, in the purported affidavit of Mr Benkel (see paragraphs 16 and 18) yet at the same time Mr Benkel states that the prosecution witnesses were "cross-examined as to the date of the incident".

The answering affidavit is altogether unsatisfactory and the rule, that this Court will normally act upon that version of events which is more favourable to **[5]** the upholding of the decision in the Court below does not, I think, carry much if any weight here.

In any event, it appears to me that the real issues arising on either version of the facts is whether or not the Magistrate ought to have refused to convict the respondent because of the disparity in the date of the offence alleged in the information and the date of the offence assumedly proven by the defence evidence, and alternatively, whether the Magistrate had power to give leave to amend the date in the information after the prosecution case had closed.

The two dates in question were 20th September 1985 and 27th September 1985, both dates being less than 12 months before the information was laid on 2nd September 1986. Thus the time limited for the laying of informations as stipulated in s165 of the *Magistrates (Summary Proceedings) Act* 1975, namely "within twelve months from the time when the matter of the information arose" did not bar the information, whichever of the two dates was the correct one. Next, the date of the alleged offence as set out in the information assumed no importance other than possibly to provide a technical defence. It did not mislead the respondent, nor hamper it in any way in its preparation of its defence.

Nor was the difference between the two dates great – a week only separating the two. There was no suggestion that confusion between two separate incidents might have arisen or did arise. The incident, "the matter of the information" was clearly identified to all parties, **[6]** and to the Court. However, the consideration of the matter must proceed on the hypothesis that the defendant's evidence established that the date alleged in the information namely 20th September 1985 should have read 27th September 1985, precisely a week later.

There is, I think, no doubt but that an informant is not shut out from amending a date in an information simply because the application to amend is made after the informant has closed his case. It is a matter, no doubt, requiring the exercise of a judicial discretion but in the circumstances of the present case, I can see nothing which would suggest that, if there was power to do so, it should not have been exercised in the informant's favour: *Warner v Sunnybrook Icecream Pty Ltd* [1968] VicRp 11; [1968] VR 102, 106; (1967) 15 LGRA 135.

It follows in my opinion, that the refusal of the application to amend (assuming it was required) on the ground that the informant had closed his case was in the circumstances of the present case, wrong. However, Mr Dixon of counsel who appeared for the respondent to show cause, sought to uphold the Magistrate's decision on an altogether different ground, as he is entitled to do on the return of an order nisi.

He submitted that the Magistrates' Court is a court set up by statute, and that as such its powers were circumscribed by the words of the statute empowering it. He submitted that only two sections of the *Magistrates (Summary Proceedings) Act* 1975 were relevant to the Magistrate's power of amendment upon a hearing. Section 94 which related only to complaints in civil matters of which **[7]** this was not one, and s157 which related to the hearing of an information such as the present. His argument then proceeded that an amendment as to time may be made on the hearing of an information only if there is seen to be variance as to time "between an information and the evidence adduced in support thereof", for these words qualify the whole of s157(3). If the variance appears only from the evidence led by the defendant, there is no power to amend.

I must say that I was surprised to hear that this might be so, for I could not see why the Legislature would wish to enact such a distinction, unless it might be, as Mr Dixon contended, that amendments of this sort should not be allowed if the need for them only appeared after the evidence for the defendant was led. I should set out s157 of the *Magistrates (Summary Proceedings) Act* 1975 in its entirety, for it is the construction of this section which determines this order to review. It reads:-

> "157.(1) On the hearing of an information or other proceeding before justices or a Magistrates' Court no objection shall be taken or allowed to an information warrant 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 justices or the Court.
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> (2) If any such variance or defect appears to the justices or Court to be such that the person charged has been deceived or misled thereby the justices or Court may amend the information warrant or summons and at the request of the person charged may adjourn the hearing of the case to some future day, and in the meantime may remand the person charged or may admit him to bail with or without sureties conditioned **[8]** for his appearance at the time and place to which the hearing is so adjourned.
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> (3) No variance between an information and the evidence adduced in support thereof as to the time at which the offence or act mentioned in the information is alleged to have been committed shall be deemed material if it is proved that the information was in fact laid within the time limited by law in that case and no variance between the information and the evidence adduced in support thereof as to the place in which the offence or act is alleged to have been committed shall be deemed material if it is proved that the offence or act was in fact committed within the jurisdiction of the Court by which the information is heard and determined.
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> (4) If any variance referred to in sub-section (3) or any variance in any other respect between the information and the evidence adduced in support thereof appears to the Magistrates' Court or justices to be such that the party charged by the information has been thereby deceived or misled, the Court or justices may amend the information and adjourn the hearing or further hearing of the case to some future day upon such terms as it thinks fit."

The section would appear to be an amalgamation of s88(3)(4) and s200 of the *Justices Act* 1958, No. 6282. It is clear that s157(1) and (2) do not relate only to variances between the information and the evidence adduced on the part of the prosecution. They relate to all defects in the information "in substance or in form". In my opinion, the fact that the information specified 20th September 1985 as the date of the offence whereas it should have specified 27th September 1985 is merely a "defect", which should have been amended on request – even after close of the case for the prosecution: see *Stait v Colenso* [1903] VicLawRp 43; (1903) 28 VLR 286, 288; *Thomson v Lee* [1935] VicLawRp 35; (1935) VLR 360,364; [1935] ALR 458; *Lloyd v Biggin* [1962] VicRp 80; (1962) VR 593.

[9] It may be a moot point whether the variance in the date mentioned in the information from the date in fact when *ex hypothesi* the offence was, committed was a variance requiring amendment at all. There was only one occasion in the month of September 1985 when Son Ha Nguyen was injured through the malfunction of the guard on the Heine power press in question

at the premises occupied by the defendant at 292-298 Bay Road, Cheltenham. The defendant was never in any doubt as to the precise occasion to which the information related. No defences which might have been open to the defendant if the correct date (*ex hypothesi*) of 27th September 1985 had been used in the information, were not open to the defendant apropos the 20th of September 1985. No prejudice to the defendant has been suggested to flow from the insertion of a mistaken date, demonstrating a difference of a week precisely.

It is not a case in which the defendant is put in a position where it is unaware what case it has to meet, or how properly to prepare its defence. Such an objection as has been taken is, in my view, the very sort of objection to which s157(1) applies and the subsection states shall not "be taken or allowed". However, even if I am wrong in this conclusion, and if it could have appeared to the Magistrate that the defendant had been deceived or misled the variance was one which in my opinion the Magistrate should have amended under **[10]** s157(2), and had the defendant requested, adjourned the information until some future day. In either event, it is my view that the Magistrate was wrong to have refused the amendment sought to cure the variance on the ground that the prosecution case had been closed. This was an error in the exercise of her discretion. Her order dismissing the information should be set aside and the matter remitted to her for determination according to law. Order that respondent pay applicant's costs of the order nisi.
