44/92

SUPREME COURT OF VICTORIA — APPEAL DIVISION

SPRY v CHAMBERLAIN
(sub nom DPP and Anor v His Honour Judge Fricke)

Fullagar, Tadgell and JD Phillips JJ

31 August, 5 October 1992 — [1993] VicRp 27; [1993] 1 VR 369

PROCEDURE – FILING OF PROCESS – MEANING OF "FILING" – WHETHER INFORMANT REQUIRED TO FILE PROCESS PERSONALLY – WHETHER INFORMANT MAY CAUSE PROCESS TO BE FILED – "NULLITY" – WHETHER PROCEEDING A NULLITY IF PROCESS NOT PERSONALLY FILED: *MAGISTRATES' COURT ACT* 1989, S30(2)(a).

Section 30(2)(a) of the *Magistrates' Court Act* 1989 does not require that an informant attend personally at the office of the appropriate registrar in order to file a charge or a summons. It is enough if the informant causes the process to be filed.

***Spry v Chamberlain*, unrep., Vic Sup Ct, 10 July, 1992 affirmed, for different reasons.**

THE COURT: [1] This appeal arises out of a proceeding in the Magistrates' Court at Box Hill on 3rd March 1992 when the defendant, one David Chamberlain, was convicted of having driven a motor vehicle in excess of the speed limit on 6 August 1990. The defendant was fined $250 and ordered to pay $25 costs under s131(3) of the *Magistrates' Court Act* 1989 and his driving licence was suspended for a period of 4 months. By Notice of appeal dated 3rd March 1992 the defendant appealed to the County Court under s83(1) of the *Magistrates' Court Act*. The appeal came on for hearing on 1st July 1992 before Judge Fricke. His Honour held that the charge sheet and summons had not been filed as required by s30(2)(a) of the *Magistrates' Court Act* and he regarded the proceeding as having been thereby rendered a nullity by virtue of s30(3). His Honour ordered that the appeal be allowed, the conviction quashed and that the informant, Christopher Robert Spry, pay the defendant's costs, fixed at $9,411.22.

By originating motion dated 2nd July 1992 the Director of Public Prosecutions and the informant applied to the Supreme Court under Order 56 of Chapter 1 of the Rules for judicial review of the order of the County Court, seeking to have the order quashed and the matter remitted to the County Court to be further dealt with according to law. Judge Fricke and Mr Chamberlain were made respondents to that application. The application was heard on 9th July 1992 and the learned trial judge, after argument, expressed his agreement with the conclusion reached by the County Court judge. The application for judicial review was accordingly dismissed. The Director **[2]** of Public Prosecutions and the informant have now appealed under s10 of the *Supreme Court Act* 1986.

The point on which the appeal succeeded in the County Court, and the application for judicial review foundered, may be briefly explained. Under the *Magistrates' Court Act* a criminal proceeding "must be commenced by filing a charge", either "with the appropriate registrar" or (in a case not presently material) with a bail justice. So much is provided expressly by s26(1). Section 26(2) provides that a charge "must be on a charge-sheet signed by the informant". The expression "appropriate registrar" is defined in s3(1) to mean "the Registrar at the proper venue of the Court" and, in turn "proper venue" is defined to mean, in relation to a criminal proceeding, the court that is nearest to the place where the offence is alleged to have been committed or the place of residence of the defendant.

In order to compel the attendance of the defendant, on the filing of a charge under s26, application may be made under s28(1) to "the appropriate registrar" for the issue of a summons to answer the charge or, in an appropriate case, a warrant to arrest the defendant. Section 28 goes on to regulate the making of such applications. That was not, however, the procedure followed here. Instead, the informant purported to proceed under s30; for in this case the charge was "for

a prescribed summary offence" and the informant was "a prescribed person" within the meaning of that section. Section 30 is as follows —

> "(1) Without limiting the power of a registrar in any way, in the case of a charge for a prescribed summary offence if the informant is a prescribed **[3]** person he or she may, at the time of signing the charge-sheet, issue a summons to answer to the charge.
>
> (2) If a prescribed person issues a summons under sub-section (1)—
> (a) he or she must file the charge and original summons with the appropriate registrar within 7 days after signing the charge-sheet; and
>
> (b) the proceeding for the offence is commenced at the time the charge-sheet is signed, despite anything to the contrary in section 26(1).
>
> (3) If sub-section (2)(a) is not complied with, the proceeding is a nullity but the Court may award costs against the informant."

It was not in contest before us that the charge-sheet and summons had been filed with "the appropriate registrar" (being the registrar of the Magistrates' Court at Ringwood) within the seven days specified in s30(2). It appears, however, that on the hearing of the appeal in the County Court it was conceded on behalf of the informant that he "had not personally filed the charge and original summons". This concession was, it seems, understood on all sides to mean that the informant himself had not attended personally at the registrar's office to file the document in question – for the prescribed form of charge sheet and summons is but the one document – and that was held by the County Court judge not to have been compliance with s30(2)(a). Of course the appellants contend that s30(2)(a), when properly construed, does not require the personal attendance of the informant at the registrar's office to file the charge sheet and summons.

As explained by counsel in the course of the appeal to this Court, the procedure laid down by s30 is new. We were told that many summary offences have been prescribed for **[4]** the purpose of the section and that all police officers of more than two years' experience are prescribed persons. The new procedure empowers those police officers (among others) to perform a function that previously was performed by justices. There is no longer any need for the informant to make application to another person for the issue of a summons. That procedure is perpetuated, although modified, in s28(1) but under s30(1) the informant may himself issue a summons at the time of signing the charge-sheet. Both charge-sheet and summons may then be handed to the defendant at the time of the initial contact – and hence, no doubt, the appellation in the Second Reading Speech of "on the spot" summonses.

Much of the argument put to us concerned the question whether one upon whom a power is conferred or a duty imposed may delegate any part of it. With respect to those who take a different view, that does not seem to us to be at issue. Plainly, s30(1) does confer a power upon an informant who is a prescribed person: at the time of signing the charge-sheet, he or she is empowered to issue a summons to answer to the charge. But s30(2) is quite different. It simply casts an obligation upon a person who issues a summons under s30(1) to file the documents to which it refers. Hence it commences "he or she must file". Now, it is well established that as a general principle any person may act by an agent: we need only cite *Bowstead on Agency* (15th ed.) 36. The general rule is subject to exceptions one of which is where the principal is required by or under any statute to do the act in person.

That is the issue here: does s30(2)(a) require (either expressly or by necessary implication) that **[5]** the informant, who has signed the charge sheet, must himself attend upon the appropriate registrar in order to "file the charge and original summons"? When the question is put in that way, it is difficult to see any reason why it should be answered in the affirmative. What is the act of filing? We refer to what was said by Stout CJ in *Re Commercial Union Assurance Co Pty Ltd* (1899) 18 NZLR 585 at p588 in a passage recently quoted by Rogers AJA in *Beecham (Aust) Pty Ltd v Roque Pty Ltd* 89 FLR 238; (1987) 11 NSWLR 1 at p10 —

> "...What is the meaning of the word 'filed'? Filing, it has been said, is the means adopted of keeping Court documents (see *Tomlin's Law Dictionary* and *Sweet's Dictionary*). The method of filing, or of putting the documents on a file of filing, or of putting the documents on a file of thread, wire, or string, has, in all Courts, it is said, but the English Bankruptcy Court, been discontinued, but the word has

> been kept. In its primitive meaning 'filing' means putting the documents on a file (see *American and English Encyclopedia of Law*: Title 'File'); but now documents are kept together by other methods. 'Filing' now really means depositing in a Court office. It has, in my opinion, acquired this secondary meaning; and in *Wharton's Law Lexicon* it is said that 'to file' means to deposit at an office: see also *Hunter v Caldwell* [1847] EngR 237; (1847) 10 QB 69 at 80; 116 ER 28. 1 am bound, in my opinion, to interpret the word 'filed' in its popular and usual sense. In none of the Supreme Court offices of this colony are any documents filed, using that word in its primitive sense."

If the word "file" be used in its primitive sense, it must be the registrar or his clerks who alone can "file" the document. In its popular and usual sense, "filing" means no more than depositing the document at the relevant court office for the purpose of its use in the court. Obviously, in s30(2)(a), the word has the popular meaning. The question is whether there is anything in the section to indicate that the act of **[6]** depositing the document is one that must be performed only by the informant personally. Reliance was placed for Mr Chamberlain upon the use of the active voice in s30(2)(a) in contrast, it was said, with the passive elsewhere. It was submitted that, had the Parliament intended that the act of filing might be performed by anybody, s30(2)(a) would have commenced "the charge and original summons must be filed"; and reference was made to the different forms of expression found in ss26 and 28. For instance, s28(1) provides that on the filing of a charge under s26 "an application may be made" for the issue of a summons. By s28(2) such an application "may be made by the informant or a person on behalf of the informant". By s28(3) the application "may be made .... by the applicant in person or by post". None of these alternatives, however, seems to cast any light on what is meant in s30(2)(a) nor is the use of the active voice in s30(2) compelling in itself. It may be accepted that s30(2)(a) requires that the informant file the document but the question remains unresolved: must the informant attend at the relevant office in order to deposit the document or is it enough that he or she arranges for that to be done?

In other contexts it is sufficient, where a party is required to file a document, for him to cause it to be filed. Indeed, there is an analogy which is useful. Under s535 of the *Crimes Act* 1958, a law officer may "make presentment at the Supreme Court or County Court" and it has been held that the act of making the presentment involves not only the formulation and authentication of a charge in writing but also **[7]** its filing in the Court itself. In *R v Rushton* [1967] VicRp 108; [1967] VR 842 at p845, the Full Court said that "the filing of a presentment is, in our opinion, an essential condition of putting a person upon his trial, notwithstanding a direction of a justice or justices at a preliminary hearing that he is to be tried". In *R v Parker* [1977] VicRp 3; [1977] VR 22, the Full Court held that the person who signs the presentment must therefore be qualified to do so not only at the date of signing the presentment but also at the date of its filing at the Court. As to the need for filing, Young CJ said, at p29 —

> "Some public act whereby the formal accusation is brought to the attention of the Court is, I think, required. On the other hand, I see no reason why a prosecutor should personally file a presentment or be present in Court when a presentment signed by him is handed to the Associate or otherwise filed in the Court. He may authorise this part of the procedure to be performed on his behalf."

The comparison is readily made. That the making of a presentment involves not only the signing of a presentment but also its filing at the court is consistent with the requirements of s30, that the charge-sheet be not only signed but also filed. That it be filed by the informant is also consistent with the requirements in relation to a presentment. But that the informant should be required to attend personally at the relevant office in order to deposit the document is an unnecessary step which was not taken even in the case of a presentment. We see nothing in s30 which requires us to add such a requirement to the words of the legislation.

It was submitted that s30(2)(a) should be interpreted as requiring the informant himself to attend **[8]** personally at the relevant registry in order that the Court might, at an early stage, exert some control over the process, correcting any defects and amending any irregularities. Attention was drawn to s28(4) which provides that, upon an application under that section for the issue of a summons or a warrant, the registrar is obliged to issue the document only "if satisfied that the charge discloses an offence known to law". The same, it was contended, should be read into s30(2) so that, at the point when the document is offered for filing, any irregularity can be noted and pointless expense saved.

We see no reason to read into s30(2) any such safeguard for the informant. Nor is it apparent

how such a system might work where, in the ordinary case, the defendant will have been served with the document containing the charge-sheet and the summons at the time of first contact with the informant. That, we were told, was the whole point of s30 and it would seem rather late, then, if some supervision were to be exercised by a court official at the point of filing. Moreover, we wonder whether s30(2)(a) allows the receiving officer to do more than accept the document which is proffered; for there is nothing in s30(2) which indicates any discretion or choice in the matter. Section 28(4) stands in marked contrast and is not of assistance in the interpretation of s30(2).

Other arguments were raised to support the conclusion that in this case s30(2)(a) had not been complied with but it is unnecessary, we think, to deal with them specifically. None of them was sufficient to persuade us that s30(2)(a) requires that the informant attend personally **[9]** at the office of the appropriate registrar in order to see to the filing of the charge and summons. It is enough if he or she causes it to be filed, as is the case with many another court documents. It follows that in our view the application made to the Supreme Court should not have been dismissed, as it was, on the ground that the County Court judge correctly construed s30(2)(a). The question then arises whether the plaintiffs were entitled to relief. Plainly a declaration would go but the plaintiffs sought also orders in the nature of *certiorari* and, it seems, mandamus by way of judicial review.

It was common ground before us that if there were to be relief by way of judicial review the appellants must demonstrate jurisdictional error in the County Court. Section 83(1) of the *Magistrates' Court Act*, pursuant to which the appeal to the County Court was taken, provides-

> "(1) A person may appeal to the County Court against any sentencing order made against that person by the [Magistrates') Court in a criminal proceeding conducted in accordance with Schedule 2."

It was also common ground that the magistrate had made a "sentencing order" within the meaning of s83 (subject, of course, to the effect, if any, of s30(3) on the proceeding as a whole). That is because on 3rd March 1992, when the defendant was convicted and lodged his notice of appeal, the expression "sentencing order" was defined in s3 of the *Magistrates' Court Act* to include "an order convicting the defendant". Such an order had been made. (The definition has been altered since the commencement on 22nd April 1992 of the *Sentencing Act* 1991: See s199(7) of that Act; but that **[10]** does not affect the present case.) In passing, we note that under s83(2), if a person appeals under s92 to the Supreme Court on a question of law, the appellant is deemed to have abandoned any right to appeal to the County Court. The appeal to the County Court is thus an alternative to the Appeal on a question of law to the Supreme Court.

By virtue of s85 of the *Magistrates' Court Act*, an appeal under s83(1) to the County Court "must be conducted as a rehearing". The word "rehearing" is here used in the sense of a hearing *de novo*; for the defendant may even replead: see and compare *Builders Licensing Board v Sperway Constructions Pty Ltd* [1976] HCA 62; (1976) 135 CLR 616 at 619-621 per Mason J; 14 ALR 174; (1976) 51 ALJR 260.

Section 86 is important because it sets out the powers of the County Court on appeal. It reads–

> "(1) On the hearing of an appeal under section 83 or 84, the County Court—
> (a) must set aside the order of the Magistrates' Court; and
>
> (b) may make any order which the County Court thinks just and which the Magistrates' Court made or could have made; and
> (c) may exercise any power which the Magistrates' Court exercised or could have exercised.
> (2) An order made under sub-section (1) is for all purposes to be regarded as an order of the County Court, except for the purposes of section 74 of the *County Court Act* 1958.
>
> (3) If an appellant—
> (a) fails to appear at the time listed for the hearing of the appeal; or
>
> (b) abandons the appeal in accordance with clause 6 of Schedule 6—
> the County Court must strike out the appeal. **[11]**

(4) If an appeal is struck out under sub-section (3), the order of the Magistrates' Court may be enforced as if an appeal had not been made but, for the purposes of the enforcement of any penalty, time is deemed not to have run during the period of any stay."

It is to be noted that, on the hearing of an appeal under s83, the County Court is bound by virtue of s86(1)(a) to set aside the order of the Magistrates' Court. The County Court is then empowered to make such order as it thinks fit if it could have been made below. Apparently it is envisaged that on any appeal, at least if the appellant does not fail to appear, the order below will be set aside and replaced by an order of the County Court. According to the notice of its decision recorded under the *County Court Rules*, the County Court ordered upon the appeal: "Appeal allowed. Conviction quashed", and made an order for costs in favour of the appellant against the respondent. That is the only record we have of the decision, although an affidavit sworn on behalf of the plaintiffs in the Supreme Court asserts that "... following argument by both counsel His Honour Judge Fricke held that the failure of the second plaintiff [the informant] to file the charge and original summons with the Registrar of the Magistrates' Court at Ringwood personally rendered the proceeding initiated by that summons a nullity". If the judge did hold that the proceeding was rendered a nullity, that was no more than to notice the consequence, decreed by s30(3), of his finding that s30(2)(a) had not been complied with.

The terms of the order made by the County Court judge appear to have been surrounded by some confusion. The **[12]** order "conviction quashed" seems not to be appropriate in view of the terms of s86 of the *Magistrates' Court Act*. The correct order, on any view, was first to set aside the order of the Magistrates' Court: s86(1)(a) of the Act required that to be done and it should be understood to have been done, whether in express terms or not. The slate would then have been clean. When the judge embarked on his task to hear the appeal he was bound in any event to approach it as though the order of the Magistrates' Court had gone. What was appropriate was that the County Court conduct a re-hearing. Upon such a re-hearing it was open to the judge – indeed he was required – to dismiss the charge or to uphold it, and to make such other order as was appropriate.

On behalf of the appellants two alternative constructions were put upon the order of the County Court and both, it was said, demonstrate that there was jurisdictional error. First, it was submitted that, having reached the conclusion that by virtue of s30(3) the proceeding was a nullity, his Honour must be taken to have concluded that there was no appeal properly on foot; for an appeal under s83 depends upon a valid "sentencing order" and, in view of s30(3), such a basis for an appeal was altogether lacking. Thus, it was argued, any order made on the appeal involved a usurpation of jurisdiction and should be quashed.

In the alternative, it was submitted that his Honour had reached the conclusion that s30(3) rendered the proceeding a nullity only after embarking upon the hearing of the appeal and taking evidence, albeit by way of concession from counsel. In the course of the hearing of the appeal, **[13]** and by virtue of that concession, his Honour came to the conclusion (wrongly) that the proceeding was a nullity by virtue of s30(3) and that on that account Mr Chamberlain could not be convicted. Again, it was contended, this amounted to jurisdictional error in that his Honour declined to perform his proper function, which was to re-hear the charge and to decide, on the merits, whether the offence was or was not proved beyond reasonable doubt.

Clearly *certiorari* lies not only when a body purports to exercise a jurisdiction that it does not have, but also when a body fails or refuses to exercise jurisdiction that it does have: see, for example, the discussion in *Public Service Association (SA) v Federal Clerks Union* (1991) 65 ALJR 610. This is not a case in which there was error on the face of the record, however widely the expression "record" be understood. The appellants' arguments depend upon their demonstrating that there was a usurpation of jurisdiction or a refusal (whether actual or constructive) by the County Court judge to exercise jurisdiction. The mere fact that a tribunal has made a mistake of law, even as to the proper construction of a statute, does not necessarily constitute an error of jurisdiction: *R v Toohey ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170 at p268 per Aickin J; 38 ALR 439; (1981) 56 ALJR 164; *R v Minister of Health* [1939] 1 KB 232 at pp245-6.

It is important to observe that, on the views we have already expressed, there was no want

of jurisdiction in the Magistrates' Court. The magistrate had proceeded to hear and determine the merits of the matter and to record a **[14]** conviction. For the reasons we have given, s30(2)(a) was complied with and accordingly the proceeding before the Magistrates' Court was not a "nullity" by virtue of s30(3). Section 30(3) having not been called into play, there was, as all parties would concede, a valid sentencing order against which an appeal lay to the County Court. An appeal having been duly brought before the County Court judge, the question for us is whether his erroneous decision that s30(2)(a) was not complied with involved an error going to his jurisdiction, and producing the result that his decision was subject to review.

Since an appeal had been duly brought, the argument for the appellants that the orders made by the judge involved a usurpation of jurisdiction falls to the ground. It was not argued before this Court – indeed it was not in our opinion properly arguable – that the County Court judge was required to decide *correctly* that s30(2)(a) had been complied with before he had jurisdiction to engage in the re-hearing. Correspondingly, his decision – albeit erroneous – that s30(2)(a) had not been complied with did not mean that he had no such jurisdiction. His Honour, having had jurisdiction to engage in the re-hearing had, as it has sometimes been starkly put, as much jurisdiction to decide the case wrongly as he had to decide it correctly. To adapt the language of Lord Wilberforce in *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6; [1969] 2 AC 147 at p210; [1969] 1 All ER 208; [1969] 2 WLR 163, his Honour was not making a decision outside his area; he was simply making a wrong decision within his area. There being no appeal from his decision, its correctness or otherwise is **[15]** not to the point in determining whether he is amenable to judicial review.

Insofar as it was contended by the appellants that the County Court judge refused to exercise a jurisdiction to hear and determine the appeal which was before him, we do not think the contention can succeed. We cannot conclude that the judge refused, or should be taken to have declined, to exercise the jurisdiction he had. So far as appears, he purported to exercise and did exercise his jurisdiction to hear and determine the appeal from the order of the Magistrates' Court. He did so by way of deciding that non-compliance with s30(2)(a) of the *Magistrates' Court* Act required the dismissal of the charge. He might theoretically have decided that there was non-compliance with sub-s.(2)(a) because, for example, the summons had not been filed at all or that, if filed, it was filed out of time. If he had so decided, and the evidence had not supported such a finding, it cannot be supposed that his decision, not being appealable, could have been subject to judicial review on the ground that, having made a wrong decision, he had refused to hear and determine the appeal. No more can it be said that the judge refused to exercise jurisdiction because he held on the ground that he did that sub-s.(2)(a) had not been complied with.

It follows that the refusal of an order for judicial review was in our opinion correct, although not for the reasons assigned by the learned trial judge. The Director of Public Prosecutions has conditionally sought the opinion of the Full Court pursuant to **[16]** s450A of s30(2)(a) of under s450A was made "should the Full Court of the Supreme Court determine that the remedy sought [*scil.* judicial review] is not available in relation to the order of a County Court judge made on an appeal from a conviction in a Magistrates' Court ..." Our conclusion is not that judicial review is not available in a case of this description, but simply that it is not available in this case. The limited basis upon which the reference under s450A of the *Crimes Act* is claimed has not, therefore, in strictness been made out. The points of construction of s30(2)(a) of the *Magistrates' Court Act* set out in the reference have, however, been considered in the reasons we have given for refusal of judicial review, which form part of the *ratio decidendi*. In the circumstances it will not be inappropriate, therefore, to say that the Court regards the reference under s450A as not having been pursued.

Our reasoning has not required us in dealing with the appeal to rule upon the meaning and effect of sub-s(3) of s30. We nevertheless think it appropriate to observe that sub-s.(3) is most unfortunately expressed and, as it now stands, has the potential to cause great difficulty in practice. The bald statement in the sub-section that "the proceeding is a nullity" is unusual and startling in its context and it seems legitimate to ask whether the draftsman gave attention to its ramifications. If sub-s.(3) means that a proceeding of the kind referred to in sub-s.(2)(b) is a nullity unless sub-s(2)(a) **[17]** is complied with, the informant would presumably need to prove all the facts necessary to demonstrate compliance in order that the proceeding should not be a nullity.

This would include proof not only of the fact of filing, but of filing at the appropriate place and within the appointed time. (Whether it would also include proof that the informant was a prescribed person, and that the charge was for a prescribed summary offence, and proof also of the informant's signature, is not made clear.) It might be otherwise if sub-s(3) means no more than that the proceeding is a nullity if noncompliance with sub-s.(2)(a) appears or is shown. Whichever of these views be correct, it occurs to us that in certain cases there could be doubt whether an order made by a Magistrates' Court in a proceeding supposedly resting on s30 could be the subject of appeal to the Supreme Court under s92. In this connection there may be a contrast to be drawn between, on the one hand, the kind of order that was reviewable under the former order to review procedure and, on the other, the kind of order from which an appeal may be brought under s92.

Section 30 was evidently intended to lay down in easily comprehensible terms a simple regime for the commencement of proceedings for charges for prescribed summary offences. The ambiguity in sub-s(2)(a) which has precipitated this appeal has now been clarified. It might have been hoped that, after that clarification, s30 could be left to fulfil its intended useful purpose. Unfortunately the section is so drawn that any such hope is unlikely to be realised; and this Court is not in a position on this appeal **[18]** to rule on the other serious questions of interpretation that are exposed. We have taken the unusual course of drawing attention to some of them in the expectation that they will receive the urgent consideration of the legislature rather than being left, as otherwise they would seem destined to be, the subject of a train of litigation in this Court. The appeal will be dismissed with costs and the Court will give no opinion upon the reference under s450A of the *Crimes Act* 1958.

Solicitor for the appellants: JM Buckley, solicitor to the Director of Public Prosecutions.
Solicitors for the first respondent: Victorian Government Solicitor.
Solicitors for the second respondent: Molomby and Molomby.
