14/04; [2004] VSC 35

SUPREME COURT OF VICTORIA

DPP v DIAMOND

Kaye J

11, 12, 17 February 2004 — (2004) 142 A Crim R 116

PROCEDURE – VALIDITY OF SUMMONS – SUMMONS SIGNED BUT NO DESIGNATION GIVEN OF OFFICER ISSUING SUMMONS – ON HEARING FINDING BY MAGISTRATE THAT SUMMONS NOT VALIDLY ISSUED – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, SS28, 34.

A charge and summons served on the defendant contained a handwritten signature adjacent to the words "Issued by (signature"). However, none of the boxes adjacent to the signature marked "Registrar", "Magistrate" or "Prescribed person" were ticked. At the hearing of the charges, the magistrate found that as a result of the failure to indicate the designation of the issuing officer the summons was not validly issued and dismissed the charges. Upon appeal—

HELD: Appeal allowed. Orders set aside.
There is no requirement either under the *Magistrates' Court Act* 1989 or the regulations that the designation of the issuing officer must be set out in the summons. Accordingly, the magistrate was in error in determining that the summons had not been validly served on the defendant.

KAYE J:

1. This is an appeal, by way of originating motion, against an order of the Magistrates' Court of 20 August 2003. By that order the Court dismissed charges against the respondent under s49(1)(b) and s49(1)(f) of the *Road Safety Act*, and ordered the appellant to pay the respondent $3,000 costs.

2. The issue before the magistrate, and before me, concerned the validity of the charge and summons, copies of which were served on the respondent on 2 June 2002. It was argued on behalf of the respondent, before the magistrate, that the summons was not validly issued. The respondent appeared before his worship "under protest."

3. The documents, which were served on the respondent, included a document in the form of a "Charge and Summons" which purported to follow Form 7 of the *Magistrates' Court General Regulations.* The page contained, *inter alia*, the names and addresses of the informant, Constable Imogen Horlor, and the defendant, the present respondent. It also contained the first charge under s49(1)(b) of the *Road Safety Act.* The document stated that the case was to be heard at Melbourne Court on 18 July 2002. At the foot of the page was the section entitled "Details about this Summons". It stated that the summons was issued at Melbourne on 24 May 2002. Adjacent to the words "Issued by (signature)" was a handwritten signature. Immediately adjacent to that signature were three boxes, beside each of which were, respectively, the words "Registrar", "Magistrate", and "Prescribed person". None of those boxes were ticked. The short point upon which the fate of this appeal rests is whether the failure of the person who signed the document to tick any of those boxes was fatal to the validity of the summons.

4. The charge and summons was served with a document entitled "Continuation of charges" which contained the second charge under s49(1)(f) of the *Road Safety Act.* At the foot of that document, in the space allocated for the "Registrar's signature", is the same signature as appeared at the foot of p1 of the document.

5. It was contended before the magistrate on behalf of the respondent that the summons was not validly issued according to s28 of the *Magistrates' Court Act*, because none of the relevant boxes, to which I have referred, were ticked or crossed (this argument can be found at pp2, 6 and 11 of the transcript of the proceedings which was exhibited before me). In support of that submission counsel for the respondent relied on passages from the judgment of Hayne J who was then a member of this Court, in *Nitz v. Evans*[1], to which I shall refer later in these reasons. The

magistrate, relying on those dicta, held that the summons and charges were not validly served on the respondent under s34 of the *Magistrates' Court Act*.

Submissions on appeal

6. By order of the Honourable Justice Dodds-Streeton made 19 September 2003 it was ordered that the questions of law raised by the appeal are:

> (a) Did the magistrate err in law in holding that the respondent had not been properly served with the charge and summons because the charge and summons did not indicate the designation of the issuing officer who signed the charge and summons?
>
> (b) Did the magistrate err in law in holding that the charges should be dismissed because he found that service was defective notwithstanding that, although the charge and summons did not indicate the designation of the issuing officer who signed the charge and summons, it was not contended that all other requirements for proper issue and service had not been complied with?

7. In support of the decision of the magistrate Mr S Hardy, who appeared for the respondent, submitted that the summons had not been validly issued or served. There were two basic premises to his argument, namely:

> (a) There is a mandatory requirement at law that the summons must indicate the designation of the issuing officer who signed the charge and summons.
>
> (b) Where there has been a failure to comply with a mandatory requirement relating to the issue of a summons, that summons has not been validly issued or served.

8. In response Mr Perry accepted the validity of the second premise in Mr Hardy's submissions. That concession was based on good authority: see for example *Sinclair v Magistrates' Court of Victoria and Brereton*[2]; *Platz v Barmby*[3]; *Kerr v Hannon*[4]. However, Mr Perry took issue with the first premise of Mr Hardy's submission. Mr Perry contended that there is no statutory provision or legal principle requiring the designation, on the summons, of the issuing officer who signed the charge and the summons. The critical point for determination in this appeal is whether the second premise, contended for by Mr Hardy, is correct.

Magistrates' Court Act* and *Regulations

9. Mr Perry is clearly correct in his submission that neither the *Magistrates' Court Act* 1989 nor the relevant *Magistrates' Court General Regulations* 2000, made under that Act, contain any express requirement that the summons and the charges specify the designation of the officer who issued the summons. Section 26(1) of the Act provides that a criminal proceeding must be commenced by filing a charge either with a Registrar or, if the defendant is arrested without a warrant and is released on bail, with a bail justice. Section 27 specifies various matters which must be set out in the charge. There is no suggestion that the charges in the document served on the defendant failed to comply with any of the requirements of s27. Section 28 provides for the issuing of summonses. Section 28(1) provides that on the filing of a charge under s26 an application may be made to the appropriate Registrar for the issue of a summons to answer the charge to compel the attendance of the defendant. Section 28(2) provides that the application must be made by the informant. Section 28(4) provides that on such an application the Registrar must, if satisfied that the charge discloses an offence known to law, issue a summons. There is no suggestion that the charge was not an inappropriate form to justify the issue of a summons. Section 29 provides that a magistrate may exercise any of the powers of a Registrar for the purpose of issuing criminal process. Section 30 provides that a prescribed person may issue a summons. Section 33(1) provides that a summons to answer a charge must direct the defendant to attend at the proper venue on a certain date and at a certain time to answer the charge.

10. Section 34(1) provides for the service of the summons. Section 34(1)(a) provides for the time within which the summons is to be served. That requirement was complied with in this case. Section 34(1)(b) provides that the summons must be served on the defendant either by delivering a true copy of the summons to the defendant personally or by leaving a true copy of the summons for the defendant at the defendant's last or most usual place of residence or of business with a person who apparently resides or works there and who is not less than 16 years of age. There is no suggestion that the document served on the defendant was not a "true copy" of the document apparently issued by the court.

11. Section 140(1)(d) and (j) of the Act provide (*inter alia*) for the making of regulations in respect of the form in which process may be issued out of the court and prescribing the manner of service of any document in a criminal proceeding. The *Magistrates' Court General Regulations* 2000 were made under that provision. Regulation 302 provides as follows:

> "302 Process may be issued or authenticated by— (a) the signature of; or (b) stamping with the facsimile signature stamp by— the person issuing or authenticating the process".

12. Again I note that the regulation does not contain any requirement that a summons issued by the Magistrates' Court must contain the designation of the officer or person responsible for issuing the summons.

13. Mr Perry did draw my attention to Regulation 1301 which states that the forms to be used in criminal proceedings are set out in Schedule 5 to the Regulations. The relevant form is that contained in form 7. At the foot of that form are the words "Registrar, Magistrate, member of the Police Force, prescribed persons". Mr Hardy did not seek to rely on this provision, no doubt because Regulation 1303 provides that non compliance with any form does not render a proceeding void unless the Court so directs.

14. Notwithstanding that neither the legislation nor the regulations contain any express requirement that the summons contain the designation of the issuing officer, nevertheless the respondent submitted that the summons served on him was not validly issued or served unless one of the three boxes on it were ticked, indicating whether the summons had been issued by a Registrar, magistrate or other prescribed person. In support of that submission Mr Hardy relied heavily, if not solely, on passages from the judgment of Hayne J in *Nitz v Evans*[5].

15. In *Nitz's* case, the motorist (the appellant in the Supreme Court) was charged with a driving offence. The Registrar either signed or stamped his signature on the summons. However the copy of the document which was served on the appellant did not contain any indication that it had been signed. The question before Hayne J was whether the document served on the defendant was a true copy of the summons that had been issued in compliance with s34(1)(b) of the *Magistrates' Court Act*. His Honour held that s34(1)(b) had not been complied with because the copy served did not show that it had been signed. Section 34 is cast in mandatory terms. Accordingly valid service had not been effected on the appellant. For that reason his Honour allowed the appellant's appeal, and ordered that the charge against the appellant be dismissed.

16. In support of his proposition that, in order to be valid, the summons must contain the designation of the issuing officer, Mr Hardy relied on two passages from the judgment of Hayne J. In my view neither of those passages bear out the proposition for which he contended, when they are examined in the context of the issues determined in that case. The first passage is as follows:

> "The Registrar signed or stamped a facsimile signature stamp and printed his title on one or more copies of the document against the printed words on the form 'Issued by (signature)'. On 22 April 1992 one copy of the document was served on *Nitz* but the copy served did not indicate that it had been signed by the Registrar and did not indicate that the Registrar's title had been noted on the document." (p56; emphasis added)

17. The above passage was relied on by Mr Hardy as implying that the copy document must note the Registrar's title on the document. In my view, the passage does not carry that implication. Hayne J had noted that the Registrar had not only signed or stamped the original document, but had also printed his title on it. However the copy served did not contain either the signature or stamp of the Registrar, or the Registrar's title. In other words, it was not a true copy of the original document. The reference to the copy not containing the Registrar's title was relevant to show that the document served was not a true copy of the document which had been issued. It was not intended to convey, nor did it convey, that, in order to be valid, the document served must contain a notation of the Registrar's title.

18. The second passage from the judgment in *Nitz v Evans* upon which Mr Hardy relied is as follows:

> "But the summons must be issued, and that step is taken, as I have noted above, by the signing of a summons by the appropriate Registrar. Thus, when s34 requires the service of a true copy of the summons it requires service of a true copy of the summons that has been issued. It follows in my view that s34 requires the service of a copy which will show to the defendant that fact of issue. Thus it requires service of a copy which will show that it has been signed by the issuing authority and what was served in this case did not." (p58).

19. The passage, which I have just referred to, does not articulate any requirement that the copy served must contain the designation of the office of the person signing the summons. The passage does no more than reflect the requirement, contained in the regulations, that the original summons be signed (Regulation 302(a)), and that accordingly the copy of it must also be signed. Again it is necessary to bear in mind the context in which *Nitz v Evans* was decided. The issue in *Nitz v Evans* was not whether the original process contained the designation of the issuing officer. Rather, the issue was whether the copy document served was a true copy of the original process, notwithstanding that the copy document served did not contain the signature of the issuing authority.

20. For the above reasons, I reject the submission by Mr. Hardy that the dicta in *Nitz v Evans*, to which he referred, support his fundamental submission, namely, that in order that valid process be issued and served, the relevant documents must contain the actual designation of the officer responsible for issuing the process.

21. Mr Hardy did not refer me to any other authority to support the first premise of his argument that the designation of the issuing officer must be set out in the summons. I was not able to locate any authority to that effect from my own researches. It seems clear that there is no additional common law requirement to the effect contended for by Mr Hardy. The existence or otherwise of any such requirement must be derived from the terms of the relevant legislation: see *Electronic Rentals Pty Ltd v Anderson*[6] (per Windeyer J with whom Dixon CJ and Owen J agreed). As I have already stated, there is, in my view, no requirement in either the *Magistrates' Court Act* or the regulations made under that legislation to the effect contended for by Mr Hardy. Accordingly I conclude that the magistrate erred in determining that the summons had not been validly served on the respondent. Equally I reject the submission by Mr Hardy that the summons had not been validly issued.

22. For the purposes of completeness I note that Mr Hardy did not contend that this was a case in which the magistrate could not discern whether or not the summons had been validly issued. It is understandable that Mr Hardy did not seek to press any such contention. If in fact the magistrate, on the documents before him, was unable to determine whether valid process had been issued and therefore served, he was entitled to resort to secondary evidence to determine whether the process had been validly issued: see *Blair v The Magistrates' Court of Victoria & Another*[7]; *Dawson v The Magistrates' Court of Victoria & Jarvis*[8]. In the present case, the magistrate need not have left the Bench in order to embark on that process. A mere comparison of the signature on the summons with the signature on the document "Continuation of Charges" in the space allocated for the "Registrar's Signature", would have readily convinced the magistrate that the person signing the summons was the Registrar.

23. For the reasons which I have set out above the appeal should be allowed and the orders below set aside. I shall hear Counsel on any other orders which might be required, and on the issue of costs.

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[1] (1993) 19 MVR 55.
[2] (1998) VSC 170 para 2; (leave to appeal refused sub nom *Brereton v Sinclair* [2000] VSCA 211; (2000) 2 VR 424 especially at paras 25, 26; (2000) 118 A Crim R 366)
[3] (2002) VSC 531 at para 12; 135 A Crim R 571.
[4] [1992] VicRp 3; (1992) 1 VR 43 at 46.
[5] (1993) 19 MVR 55.
[6] [1971] HCA 13; (1971) 124 CLR 27 at 43 to 44; [1971] ALR 513; 45 ALJR 302.
[7] (2002) VSC 242 especially at para 5
[8] (2003) VSC 336 at paras 10 to 11.

APPEARANCES: For the appellant DPP: Mr M Perry, counsel. K Robertson, Solicitor for Public Prosecutions. For the respondent Diamond: Mr S Hardy, counsel. Jack Sher & Associates, solicitors.