

37A/99; [1999] VSC 410

SUPREME COURT OF VICTORIA

GAHAN v FRAHM

Hedigan J

19, 27 October 1999

PRACTICE AND PROCEDURE – JURISDICTION – PROCEEDING COMMENCED BY FILING CHARGE WITH REGISTRAR – CHARGE TO BE HEARD AT ANOTHER COURT – CHARGE NOT FILED WITHIN SEVEN DAYS WITH REGISTRAR AT OTHER COURT – WHETHER STATUTORY PROVISION PROCEDURAL OR MANDATORY – WHETHER COURT DEPRIVED OF JURISDICTION: *MAGISTRATES' COURT ACT 1989*, S26(1), (1A).

Section 26(1A) of the *Magistrates' Court Act 1989* ("Act") provides:

"If a proceeding is commenced under sub-section (1)(a) by filing a charge with a registrar other than the appropriate registrar, the informant must file a copy of the charge with the appropriate registrar within 7 days after the commencement of the proceeding."

A charge laid by G. was issued and filed with the registrar at Horsham Magistrates' Court. The summons specified that the charge would be heard at Mildura Magistrates' Court. G. failed to file a copy of the charge at Mildura within seven days. When the charge came on for hearing at the Mildura Magistrates' Court, F. submitted that non-compliance with the provisions of s26(1A) of the Act was mandatory and accordingly the court had no jurisdiction to deal with the charge. The magistrate upheld this submission and dismissed the charge. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted for re-hearing.

Section 26(1A) of the Act is concerned with the hearing at a proper venue of a proceeding commenced appropriately so as to confer jurisdiction. The requirement that a copy of a charge be filed with the appropriate registrar within 7 days is procedural and regulatory. Non-compliance with the time limit is not fatal to the assumption of jurisdiction. Accordingly, the magistrate was in error in accepting the submission by F. and dismissing the charge.

HEDIGAN J:

1. This is an appeal pursuant to s92 of the *Magistrates' Court Act* against a decision of the Magistrates' Court at Mildura whereby the magistrate dismissed a number of charges laid by the informant Gahan against the respondent Frahm pursuant to sections in the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992* ("the Act") ordering that the appellant informant Gahan pay costs of \$7,296. It is not necessary for the present purpose to examine the nature of the six charges that were laid.

2. The evidence concerning what transpired in the Magistrates' Court appears in the affidavits of the appellant Christopher Charles Gahan and the solicitor for the respondent, one Lindsay Anderson. Gahan was an officer of the Department of Natural Resources and Environment and authorized under s53 of Act. The offences allegedly occurred at Karadoc, near Mildura and the Magistrates' Court at Mildura was the proper venue for the hearing of these proceedings. For a reason that is not made apparent on any of the material, the charge and summons thereon in respect of each of the alleged offences were filed and issued at Horsham on 1 October 1998. The offences were allegedly committed in October 1996 and the charges were brought just within the period of two years provided for under the Act for the bringing of the charges. With respect to the question contained in the charge and summons (Form 7) "Where will the case be heard", it was stated "The Magistrates' Court at Mildura". After filing of the charge and summons, a mention was heard at the Mildura Court on 26 March attended by representatives of informant and defendant. On that occasion an amendment to the particulars of the first charge was made. The charges were listed for hearing at the court on 28th May 1999 and on that day the proceeding commenced before the magistrate, both parties represented. Two of the charges numbered 5 and 7 were withdrawn and pleas of not guilty were entered for the respondent in respect of the remaining six charges. At the outset counsel for the then defendant made a number of submissions to the magistrate. There was a disagreement between the deponents Gahan and Anderson as to how

the submission was described. Mr Gahan says that counsel for the respondent submitted that the charges were a nullity. The solicitor for the respondent says that the submission was that the Court had no jurisdiction to deal with the charges. For the purposes of my dealing with this case and the question of law committed to me, I propose to deal with the matter on the basis that a submission was made that there was no jurisdiction to deal with the charges. This really arises from the nature of the submissions made which are more appropriate to relate to jurisdiction rather than a nullity.

3. The substance of the submission was based upon an alleged non-compliance with s26(1A) of the *Magistrates' Court Act* 1989 which is the section in Division 2 of Part IV, Division 2 being concerned with procedure. It will be convenient to set out the provisions of ss26 and 30 of the Act.

"26. How criminal proceeding commenced

(1) A criminal proceeding must be commenced by filing a charge—

(a) with a registrar; or

(b) if the defendant is arrested without a warrant and is released on bail, with a bail justice.

(1A) If a proceeding is commenced under sub-section (1)(a) by filing a charge with a registrar other than the appropriate registrar, the informant must file a copy of the charge with the appropriate registrar within 7 days after the commencement of the proceeding.

(2) A charge must be on a charge-sheet signed by the informant.

(3) A charge need not be on oath, except where otherwise provided by this or any other Act.

(4) A proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence is alleged to have been committed, except where otherwise provided by or under any other Act. "

"30. Prescribed persons may issue summons

(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 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) Subject to sub-section (4), if it appears to the Court that sub-section (2)(a) has not been complied with in relation to a proceeding, the Court must strike out the charge and may, in addition, award costs against the informant.

(4) If a prescribed person issues a summons under sub-section (1) and files the charge and original summons with the registrar at a venue of the Court other than the proper venue, sub-clauses (2A) and (2B) of clause 1 of Schedule 2 apply to the hearing and determination of the charge."

4. It was common ground that the informant did not file a copy of the charge with the Registrar at the Magistrates' Court at Mildura (clearly the appropriate Registrar within the meaning of s3(1) of the Act) within seven days. It was also common ground that the proper venue of the Court was the Magistrates' Court at Mildura. The submission made to the Court was, in those circumstances, that there was no jurisdiction because of non-compliance with s26(1A), the filing with the appropriate Registrar being a day late. Counsel for the informant submitted that the requirement of s26(1A) as to the time within which a copy of the charge must be filed with the appropriate Registrar after the commencement of the proceeding was procedural and not mandatory. There were other submissions put but it is not necessary to deal with them on this appeal.

5. The magistrate accepted the defendant's submissions that there was no jurisdiction to hear the matter in those circumstances and ordered that the summonses be dismissed with costs. The informant has appealed that decision. The question of law formulated and appearing in the order of Master Wheeler of 28 June 1999 is in this form:

"Is a charge a nullity or must be dismissed as a result of non-compliance with s26(1A) of the *Magistrates' Court Act* 1989 other than the appropriate registrar and the informant files a copy of the charge with the appropriate registrar after seven days from the commencement of the proceeding."

Notwithstanding that, both parties before me dealt with the matter on the basis that the issue was whether or not the non-compliance with s26(1A) because of the filing with the appropriate

registrar outside the period of seven days meant that the Court had no jurisdiction.

6. The submission of Mr Albert for the appellant was essentially to the following effect. First a criminal proceeding in the Magistrates' Court of Victoria was commenced by filing a charge with any registrar. This, he contended was the act which conferred jurisdiction upon the Magistrates' Court of Victoria. In order for that jurisdiction to be obtained, it was not necessary that the charge be filed with the appropriate registrar, that is the registrar of that Magistrates' Court of Victoria which was going to hear the proceeding. He argued that the phrase "a registrar" was clearly intended to denote a registrar of any Magistrates' Court in Victoria and did not mean and was not confined to "the appropriate registrar". Other language could have easily been used if that was the intention. However, he argued, that was not the intention because of the far-flung jurisdiction of the Magistrates' Court of Victoria. He drew attention to the statements of Nathan J in *Hynes v Bux* (unreported, Supreme Court of Victoria, 13 November 1996) in which his Honour emphasized that the *Magistrates' Court Act* created a single Magistrates' Court of Victoria, not a series of self-contained divisions each with its own exclusive territorial or residential jurisdiction. His Honour there emphasized that it had created a single entity which administratively operated from a number of locations, possibly at different times. Having referred to s1 of the Act which dealt with the purposes of the Act, s4(1) which states: "There shall be a court to be known as the Magistrates' Court of Victoria." and s5(2) which states "The Court may sit and act at any time and place.", His Honour stated:

"Section 26(1)(a) must be interpreted in the light of s1 and s4. Accordingly they are procedural in character, designated to put into effect the jurisdiction of the Magistrates' Court of Victoria."

His Honour went on to add:

"Pursuant to s26(1) all criminal proceedings in the court must be commenced by filing a charge with the registrar. The identity and location of that registrar is then narrowed to the appropriate registrar of the proper venue. That venue is not closely defined, the charging officer is given a choice which subsequently may be challenged by the person charged. Section 3 recites the proper venue as either the location nearest where the offence occurred or the place of residence of the defendant. ... The Act has done nothing more than come to terms with the exigencies of the criminal law which encompasses variable factors, both temporal and geographical. If it did not do so it would be unworkable. ... In order to make the convenience for the parties and the court itself, the (Second) Schedule enables to have both the proceedings transferred; not to another court but as the words say 'to another venue of the court'."

His Honour also expressed the view that s26(1A) was directed towards limiting the vice of "magistrate shopping".

7. I note the provisions of Schedule 2 of the *Magistrates' Court Act* 1989 which makes provision in respect of the venue of a court in a criminal proceeding enabling defendants to object to the venue and the court to transfer the proceeding to another venue of the court. If, however, there is no objection by a defendant to the hearing and determination of the proceeding at a venue other than the proper venue, the court may at its discretion proceed to hear the case. The argument thus was that the Magistrates' Court of Victoria has jurisdiction if a charge is filed at any of its locations and the failure to comply with s26(1A) by not filing a copy of the charge with the appropriate registrar within seven days does not deprive the court of jurisdiction, already established by filing with the other registrar. It is therefore only a breach of the procedural requirement. The basis of this submission involves that the requirements of s26(1A) are really driven by the administrative necessity that the court that is the proper venue will have its appropriate registrar informed of the charge in a reasonable time, nominated by the statute to be seven days after the commencement of the proceeding by filing with the other registrar, so that the court of the proper venue's business can be efficiently managed.

8. Counsel for the appellant relied upon the provisions of s30(3) to support this construction. Essentially, s30 is concerned with the issuing of summonses by prescribed persons, that is other than the registrars of the Magistrates' Court (usually senior police officers) who may, at the time of signing the charge sheet, issue a summons. If this is the event which happens (because, for example, the charge needs to be laid and the summons issued well after ordinary court hours), the prescribed person must file the charge and the summons with the appropriate registrar

within seven days after signing the charge sheet. Section 30(2)(b) establishes that the proceeding is commenced at the time the charge sheet is signed rather than being filed with the registrar. Notably, however, if that procedure is not complied with, the court must strike out the charge and award costs. In other words, in the case of the prescribed person procedure the court is directed to strike out the charge and award costs in the event of non-compliance with the seven day filing requirement, whereas it is not in cases under s26. Thus the submission was made, and in my view it is correct and unanswerable, that the absence of similar language in s26(1A) leads to the conclusion that the requirement is procedural and regulatory. Thus non-compliance with the time is not fatal to the assumption of jurisdiction. Notwithstanding the strictures of the New South Wales Court of Appeal in *Tasker v Fullwood* (1978) 1 NSWLR 20 at 23-24 as to the use of language to contrast mandatory with directory as a means of identifying the nature of the enactment's directions (because those descriptions may have varying signification), it is not inappropriate on an issue of this simplicity to use it. I note that counsel for the appellant did employ that language, submitting that requirements of s26(1A) are directory and not mandatory. See too, the decision of the Federal Court of Australia in *Yapeen Holdings Pty Ltd v Calardu Pty Ltd* [1992] FCA 284; (1992) 36 FCR 478; (1992) 108 ALR 107; (1992) 75 LGRA 430 where the court declined to construe the requirements in relation to the advertising of the purpose clause in relation to the use of land as being mandatory so that the slightest failure would warrant the conclusion that the action in advertising the proposed clause was of no effect. In the course of the court's reasons, it adopted the principles enunciated in *Pearce Statutory Interpretation in Australia* (that author rejecting the mandatory/directory classification as being confusing). That work expresses the view that the guiding principle as to the issue will be found in the statute and that a court will ordinarily regard three possible statutory intentions in regard to the designated procedure:

- (a) strict compliance is necessary;
- (b) substantial compliance is necessary together with the degree of substantiality; or
- (c) that compliance is not a pre-condition of the action taken.

Pearce expresses the view that breach of (a) or (b) would or might involve an invalidity but no adverse consequences would flow if compliance was not a pre-condition: see too *Accident Compensation Commission v Murphy* [1988] VicRp 52; [1988] VR 444 at 449. Thus it would seem that on a proper understanding of the purpose of s26(1A) that the failure, as here, to effect the filing within seven days ought not be viewed as leading to any conclusion that the jurisdiction already gained by filing with a registrar of the Magistrates' Court was lost unless there were particular circumstances prevailing. I daresay one might take the view that if there were a substantial breach of the requirement then that might require the court to reject the charge.

9. In this case, I have formed the view that the legislature did not intend that non-compliance with the time element in the filing with the appropriate registrar would lead to stripping the court of jurisdiction. In support of that view of legislative intention, one might note that it is not mandatory for a charge or a copy of the charge to be filed with the appropriate registrar in every case. In support of this is the matter to which I have already referred, that the time limit is likely to have been formulated to assist registrars in managing the business of their particular location of the Magistrates' Court of Victoria. It would be an unusual case in which late compliance with the seven-day time limit would produce prejudice but if it did, in the judgment of the court, it would have power to act. It was also submitted by Mr Albert that if strict compliance was necessary then no matter what the reason for non-compliance (e.g. illness or accident supervening at the critical stage to the informant) the charge would have to be dismissed or struck out. Thus the view would be taken that the scheme of the Act would not be defeated if s26(1A) required substantial compliance with the time limit rather than strict compliance. This view of the matter would enable the court to either strike out a late transfer charge on the basis of a lack of substantial compliance depending on the circumstances, possibly, even as an abuse of process.

10. It is not necessary in this case to refer to much of the considerable corpus of authority on the legal phenomenon of "must" sometimes meaning "may" and vice-versa. In *Brygel v Stewart-Thornton* [1992] VR 387 JD Phillips J construed the word "must" in s56(2) of the *Magistrates' Court Act 1989* as not imposing a mandatory obligation, deeming that the context (the form of conducting a committal) ran counter to regarding the intention of Parliament to requires a committal be null

and void because some obligation in the Schedule was not performed. For those who might desire to inform themselves further, Tadgell J in *Halwood Corporation Ltd v Roads Corporation* [1998] 2 VR 439 at 445-446, in an entertaining and erudite judgment has examined the use of "must" and "must not" in legislation.

11. I note the views of O'Bryan J in *Sammassimo v Magistrates' Court at Preston* (unreported, Supreme Court of Victoria, 11 March 1994) that s34 (the service section) in Division 4 is a procedural provision which prescribes the time and method of service, and is not concerned with jurisdiction. The same thing, that is unconcerned with jurisdiction, may be said of s26(1A) which is concerned with the hearing at a proper venue of a proceeding already commenced appropriately so as to confer jurisdiction. Similarly irregularities in the specification of dates and times to answer charges does not deprive a court of jurisdiction to hear and determine the proceeding: see *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VicRp 81; [1970] VR 625. If regard is had to the purpose and significance of s26(1A), that is the object sought to be achieved by it, consistent with the scope and purpose of the enactment, one could not support the view espoused by the magistrate that there was no jurisdiction or that the summons was a nullity.

12. Mr Lacava who appeared for the respondent in the appeal, accepted that the weight of authority was to the contrary of the proposition apparently accepted by the magistrate and did not seek to argue any issue other than a particular one which he put in this way: that in a case where the charge is filed with the registrar other than the appropriate registrar and the proper venue is elsewhere, the seven-day requirement of s26(1A) must be absolutely complied with. He did not identify why in such a circumstance the seven-day requirement became mandatory rather than directory, or why there was any changed necessities in those circumstances. In many cases, one assumes, the charge is filed with a registrar other than the appropriate registrar, with an intention to re-file within seven days with the appropriate registrar, because of some convenience or necessity to go to a registry other than the registry of the court at the proper venue. But the answer to the submission is a simple one, namely, that the proceeding is commenced by filing the charge with any registrar, even an "inappropriate" one. Once the proceeding is commenced, as it clearly is under s26(1), the matter is governed by s26(1A). For the reasons to which I have already adverted, no change of circumstances is effected by the pre-existing intention. The reality is, one supposes, that in many cases the decision as to whether or not to file with the appropriate registrar may not be taken or postponed because the accused person may informally indicate that there will not be any objection to having the charge heard by the court at the registry of the original filing.

13. For these reasons the appeal must be allowed. The question of law is answered "No". It appears from the material before me that there were other submissions either made or foreshadowed which were not dealt with by the magistrate, because of his acceptance of the submission advanced. Accordingly, the orders of the Magistrates' Court at Mildura in this proceeding made on 28 May 1999 are set aside and the matter is remitted to the Magistrates' Court at Mildura for re-hearing.

14. I will order that the respondent pay the appellant's costs of this appeal.

APPEARANCES: For the appellant Gahan: Mr A Albert, counsel. Victorian Government Solicitor. For the respondent Frahm: Mr P Lacava, counsel. Ryan Moloney Anderson, solicitors.