

33/03; [2003] VSC 336

SUPREME COURT OF VICTORIA

DAWSON v MAGISTRATES' COURT of VICTORIA & ANOR

Warren J

4, 9 September 2003

PRACTICE AND PROCEDURE – PROCEEDING BY WAY OF SUMMONS – SUMMONS ON COURT FILE LOST – APPLICATION BY DEFENDANT FOR ADJOURNMENT OF SUMMONS TO A DATE TO BE FIXED – WHETHER REQUIREMENTS OF ACT AS TO SERVICE AND FILING WERE MET WITHOUT ORIGINAL DOCUMENT BEING BEFORE THE COURT – INFORMANT'S COPY OF SUMMONS PROVIDED TO COURT – ACCESS BY MAGISTRATE TO COURT COMPUTER CONCERNING DETAILS OF SUMMONS – APPLICATION FOR A STAY DISMISSED – WHETHER MAGISTRATE IN ERROR – WHETHER MAGISTRATE WAS ENTITLED TO BE SATISFIED AS TO STATUTORY COMPLIANCE: MAGISTRATES' COURT ACT 1989, ss30(2)(a), 33.

At the commencement of the hearing of charges, the defendant applied for an adjournment of the proceeding to a date to be fixed on the basis that the Court file was lost and the defendant was deprived of the opportunity of satisfying herself that the statutory requirements as to service and filing were met. The magistrate was shown the informant's copy of the summons and also accessed the Court computer record which set out certain details. In rejecting the application for the adjournment the magistrate relied on "direct and secondary evidence" in order to be satisfied of procedural compliance. Upon an originating motion seeking an order in the nature of *certiorari*—

HELD: Originating motion dismissed.

The fact of service was not truly in issue, although the plaintiff below announced an appearance under protest. The issue was the fact of whether the original summons as filed complied with the requirements of the *Magistrates' Court Act* 1989. It was open to the magistrate to find that there had been compliance on the basis of the information derived from the court computer and the informant's copy of the summons.

Blair v Magistrates' Court of Victoria MC14/02, applied.

WARREN J:

1. The plaintiff was charged by summons and convicted at the Magistrates' Court at Melbourne on 18 December 2002 of furnishing a breath sample for analysis resulting in a reading of more than .05 grams per 100 millilitres of blood within three hours after driving a motor vehicle and after a requirement to undergo a preliminary breath test in breach of s49(1)(f) of the *Road Safety Act* 1986. Another charge of driving a motor vehicle exceeding the blood alcohol limit of .05 was struck out. The actual blood alcohol reading of the plaintiff was 0.105 per cent. The plaintiff was convicted and fined \$500, ordered to pay costs of \$36.50, her driver's licence was cancelled and she was disqualified from obtaining a licence for a period of 20 months from 30 June 2002. The plaintiff lodged an appeal against conviction and sentence which was adjourned pending the outcome of the present proceeding.

2. At the commencement of the hearing below counsel for the plaintiff applied to the presiding magistrate for an adjournment of the hearing of the summons to a date to be fixed. The application was made on the basis that the Magistrates' Court file was lost and the plaintiff was deprived, therefore, of the opportunity of satisfying herself that the requirements of the *Magistrates' Court Act* 1989, and in particular, service and filing, were met. The requirements are those contained in ss33 and 34 of the *Magistrates' Court Act*.

3. There was no issue that the court file was in fact lost. The subject summons was a computer generated document constituting four sets of two pages that were identical save for the copy description at the top front page designating the nature of the copy e.g. "informant's copy". The magistrate was shown the informant's copy of the summons being one of the four computer generated documents. It recited the charge, the details of the informant, showed his signature, recited a hearing date and issuing details, and showed the signature of the Registrar of the court. It was not suggested, here or below, that the informant's copy of the summons revealed any non-

compliance with the statutory requirements. Nonetheless, the plaintiff maintained that the court could not be satisfied as to compliance with the statutory requirements, in particular, service and filing, without the original document being before it. The learned magistrate had available on the bench the court computer system. She utilised that and ascertained from the screen before her during submissions a page setting out charge details and a further page setting out summons details. The charge details set out in a precise form the charge details as recited on the informant's copy of the summons. The summons details as shown on the court screen accorded also with those contained in the informant's copy of the summons save in a reduced form. There was no issue, here or below, as to the accuracy or efficacy of the charge details or the summons details as recorded on the court computer. The magistrate did not provide the plaintiff or her counsel below with the opportunity to view the computer screen on the bench, rather, she informed the parties of that which the screen contained.

4. It was submitted below that the hearing should be adjourned because without the court file the court could not be satisfied as to the matters necessary to found jurisdiction. The learned magistrate held that although the court file was lost the court could nonetheless be satisfied of compliance with s30(2)(a) of the *Magistrates' Court Act*. The preliminary application being unsuccessful the hearing then proceeded.

5. On the hearing evidence was led on the charge from the informant. He was specifically cross-examined by counsel for the plaintiff about the preparation and issuing of the summons. The informant said that he did not specifically recall preparing the relevant charge sheet. He was questioned about his general practice and said that he signed the documents in question and had never missed signing one in his experience. He said he signed the documents concerned with the plaintiff. In cross-examination the informant went so far as to say that he could not be one hundred per cent certain that he had signed the charge and summons relating to the plaintiff. The informant also said in his evidence that he issued the summons at the Magistrates' Court at Melbourne but he could not recall before whom. It was not suggested to the informant that he had failed to issue the summons. The informant did not execute service himself, that was done by another officer. The informant in his evidence acknowledged that he could not prove service of the summons. The second defendant did not call the officer who served the summons. The informant gave evidence that another officer served the summons and subsequently confirmed to the informant in writing that service had been effected. The informant was not asked to produce the written confirmation of service.

6. At the close of the case of the second defendant below the magistrate heard further submission by way of a no case submission on behalf of the plaintiff. The plaintiff's counsel submitted that the learned magistrate should reconsider the challenge to the summons and charge as to compliance with the statutory requirements, namely, filing and service, on the basis of the evidence given by the informant that he could not be certain he had signed the summons.

7. In her reasons the magistrate recited in considerable detail the submissions on both sides. Ultimately, the no case submission was rejected. The magistrate was satisfied that she was entitled to rely on what was described as "direct and secondary evidence" in order to be satisfied of procedural compliance. The evidence relied on consisted of the informant's copy of the summons (provided by the prosecutor), a further informant's copy (provided by the plaintiff's counsel), the matters appearing on the Magistrates' Court computer screen on the bench, the magistrate's own knowledge of court procedure and filing arrangements and the evidence given by the informant. After dismissing the no case submission the magistrate heard the remaining evidence. As already stated, the other charge was struck out and the plaintiff was convicted of the remaining charge.

8. The plaintiff brings this proceeding by originating motion seeking relief in the nature of *certiorari*. In summary, the grounds relied on are that the magistrate refused to adjourn or stay the proceeding below, allowed the informant to give evidence as to the validity of the summons without the document being before the court and, in finding that the court had jurisdiction both on the preliminary application and on the no case submission, that the magistrate erred in finding jurisdiction without the requisite standard of proof. On these bases the plaintiff alleges that she was denied natural justice, procedural fairness and that there was an abuse of process and error on the face of the record.

9. Section 33 of the *Magistrates' Court Act* sets out the requirements in relation to a summons. It must direct the subject person to attend on a certain date and at a certain time (s33(1)); the mention date may be extended by the informant at certain times in specified circumstances (s33(2)). The section is cast in mandatory terms. See *Nitz v Evans*;^[1] *Sinclair v Magistrates' Court of Victoria at Ringwood*;^[2] *Brereton v Sinclair*;^[3] *Platz v Barmby*.^[4]

10. A not dissimilar set of circumstances to the present case arose in *Blair v The Magistrates' Court of Victoria and Anor*.^[5] There the original summons was missing from the court file. The summons was a multi-copy carbonated document such that the requisite statutory details, including the signature of the informant upon being entered on the first page were copied by way of carbon entry through to the last page. The magistrate in *Blair's* case concluded that the statutory requirements had been met on the basis that the missing document was part of a carbonated set and the court had before it the other parts of the carbon copies. The court in *Blair's* case also had before it the court computer record; the magistrate concluded that the information could only have been derived from the missing document. The magistrate in *Blair* inferred statutory compliance on these bases, that is, from secondary evidence available to the court. A review to this court was dismissed. Pagone J held that the magistrate in *Blair* was entitled to act as he did.^[6]

11. In my view, the present case falls within the same parameters as *Blair*. The magistrate below was entitled to be satisfied as to statutory compliance on the basis described in her reasons. Much was made in submissions of the statements by this court that strict compliance with the statutory requirements is mandatory. That is trite law. The real issue is the manner in which strict compliance is proved. In *Sinclair* the difficulty with the summons was that the informant was unable to prove that the return date had been validly extended in accordance with the requirements of s33(2). Further, in *Sinclair* the informant gave evidence that he attended the court Registry to extend the time but could not recall when he did it. As observed in the Court of Appeal, a conclusion was justified that there was no satisfactory evidence that the informant had duly extended the summons.^[7] Here the magistrate had a range of sources available to her upon which to be satisfied as to compliance similar to those available to the magistrate in *Blair*. It was only necessary for the magistrate to be satisfied on the balance of probabilities^[8] and in my view the learned magistrate was entitled to be satisfied, as she was, of statutory compliance. In submissions, reliance was placed by the plaintiff before me on the observations of Hayne J in *Nitz* as to the requirement of strict compliance. In *Nitz* the issue was whether a summons that complied with the requirements of the *Magistrates' Court Act* had been served. The matter of proof of compliance by other, secondary means does not appear to have been an issue in the case.

12. In the present case the fact of service was not truly in issue, although the plaintiff below announced an appearance under protest, rather the fact of whether the original summons as filed complied with the requirements of the Act was the issue. That was a matter about which the magistrate was able in the somewhat unusual circumstances to satisfy herself upon. It was open to the magistrate on the preliminary submissions of the plaintiff to find that there had been compliance; it was open, further, upon the no case submission to find again that there was compliance. In my view, there was no error in the magistrate receiving evidence from the informant as she did. Nevertheless, even without that evidence it was open to her to be satisfied as to compliance on the basis of the information derived from the court computer and the informant's copy of the summons.

13. There are two remaining matters to be addressed. First, the matter of jurisdiction. I adopt respectfully the observations of Hayne J in *Nitz* that in these types of cases it is not really a matter of jurisdiction, rather a matter of compliance with statutory requirements that is the issue to be determined. This leads me to the second matter. The plaintiff proceeded to seek judicial review by originating motion rather than an appeal on an error of law pursuant to s92 of the *Magistrates' Court Act*. I observe that at the time the proceeding was issued the time for an appeal seems to have expired. There was no explanation before me as to why the plaintiff acted as she did. The matter was not raised in argument by the second defendant. On the basis of the position explained in *Kuek v Victoria Legal Aid and Anor*^[9] it may have been arguable that the procedure was misconceived. However, in the circumstances it is unnecessary for me to determine that matter.

14. It follows from these reasons that I am not satisfied that there was any error below as to

jurisdiction or that there was a denial of natural justice, procedural fairness or that there was an abuse of process or an error on the face of the record. I am not satisfied that the discretion should be exercised to grant relief in the nature of *certiorari* as sought by the plaintiff on the originating motion. The proceeding should be dismissed.

[1] (1993) 19 MVR 55, 59.

[2] [1998] VSC 170.

[3] [2000] VSCA 211; (2000) 2 VR 424, 432 [25]; (2000) 118 A Crim R 366.

[4] [2002] VSC 531 [9]; 135 A Crim R 571.

[5] [2002] VSC 242.

[6] Ibid [5] - [6].

[7] *Brereton v Sinclair* [2000] VSCA 211; (2000) 2 VR 424 [26]; (2000) 118 A Crim R 366.

[8] Ibid at [29].

[9] [2001] VSCA 80; (2001) 3 VR 289.

APPEARANCES: For the plaintiff Dawson: Mr P Billings, counsel. Voitin Walker Davis, solicitors. For the second defendant Jarvis: Mr P Southey, counsel. Kay Robertson, Solicitor for Public Prosecutions.
