14/91

SUPREME COURT OF VICTORIA

KERR v HANNON

Nathan J

13 December 1990; 30 January 1991 — [1992] VicRp 3; [1992] 1 VR 43

PROCEDURE – PARTICULARS IN INFORMATIONS – DATE AND PLACE OF COMMISSION OF ALLEGED OFFENCES NOT INCLUDED IN INFORMATION – 12 MONTHS EXPIRED WHEN INFORMATIONS LISTED FOR HEARING – APPLICATION FOR AMENDMENT BY INSERTING PARTICULARS – WHETHER APPLICATION SHOULD BE GRANTED – WHETHER OMISSION A MERE VARIANCE: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS157, 162.

On 14 November 1989, K., a police officer laid informations against H., alleging a drink/driving offence and a failure to comply with a traffic control signal. No date or place was mentioned in the drink/driving information and no date or time was disclosed in the other information. When the charges came on for hearing on 24 May 1990, the prosecutor applied to amend the information by inserting the date, 21 November 1988 and the place, Hawthorn in the informations. The magistrate refused to grant the application for leave to amend and dismissed the informations. Upon order nisi to review—

HELD: Order nisi discharged.
1. The date and place are essential parts of the commission of the alleged offences and a defendant is entitled to be supplied with these particulars in order to know what case is required to be met.
***Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104, applied.**

2. In the present case, the omission of the particulars was not a mere variance but a fundamental defect. Therefore, an amendment of the informations as sought would have amounted to the invalid laying of fresh informations, given the 12 months' time limit imposed by s165 of the *Magistrates (Summary Proceedings) Act* 1975. Accordingly, the learned magistrate was not in error in refusing the application to amend and dismissing the informations.

NATHAN J: [1] The applicant (Kerr) a policeman, laid an Information on 14th November 1989 charging the respondent (Hannon) with driving a car when more than the prescribed concentration of alcohol was present in his blood. The Information contained a second charge that Hannon supplied a sample of his breath which indicated it contained more than the prescribed concentration of alcohol. Both of these offences were laid pursuant to s49(1) of the *Road Safety Act* 1986 (the Act). Kerr alleged as a third matter, that Hannon, being the driver of a vehicle on Burwood Road, Hawthorn, failed to comply with a road traffic signal. This latter charge was laid under the terms of regulation 30 of the *Motor Car Act* 1958. None of the Informations disclosed a date or time at which the alleged offences occurred. The *Road Safety Act* offences did not contain any reference to a place.

The Informations came on for hearing before a magistrate at Prahran on 24th May 1990. The prosecutor applied to amend the Informations to insert the times and places at which the offences allegedly occurred, that is in Burwood Road, Hawthorn, on 21st November 1988. The magistrate dismissed the application for leave to amend, and also dismissed the Information. He did not state reasons for this decision, but inserted upon the Certificate of Summary Conviction the following:

> "Dismissed - no date or place of offence disclosed in summons. Time limit applicable to a summary offence. Application to amend summons made after expiry of time limit for the offence is refused."

Kerr obtained an order to review the magistrate's decision upon the following grounds (as edited by me):

> **[2]** 1. The magistrate was in error in holding that to amend the Informations to insert the times and places of the alleged offences would amount to the laying of a fresh Information outside the time

limit prescribed by the *Magistrates (Summary Proceedings) Act* 1975 (the Act). Section 165 of that Act requires Information such as these to be laid within twelve months from "the date when the matter of the Information arose and not afterwards."

2. The magistrate was in error in not holding that he had power to amend or vary the Informations to allege the date and places of the offences. The Act, s157 gave the magistrate power to do so.

3. In any event the Information ought to have been amended.

Two issues emerge from these orders. The first is whether the amendments sought more than one year after the alleged offences occurred would amount to a breach of s167 of the Act, and secondly, whether the amendments as sought were of a nature permitted by s157. This section headed "technical defects" when as appropriately edited, reads:

"(1) On the hearing of an information ... no objection shall be taken or allowed to an information ... for any defect ... in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution.

(2) If any such variance or defect appears to the ... Court or ... the person charged (which has) deceived or misled ... the Court may amend the information.

(3) No variance between the information and the evidence adduced in support thereof as to the time at which the offence ... in the information is alleged to have been committed shall be deemed material if it **[3]** is proved that the information was in fact laid within the time limited by law ... .

(4) If any variance referred to in sub-s.(3) ... appears to the Court ... to be such that the party charged ... has been deceived or misled the Court ... may amend the information ... upon such terms as it thinks fit."

In my view both issues are disposed of by High Court and Full Court authority, the former being *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104, and the latter *Hackwill v Kay* [1960] VicRp 98; (1960) VR 632. Both cases are binding authority for the proposition that where an Information must be laid within a specified time from the date upon which it is alleged the offence was committed, it must contain that date or other particulars which would enable the defendant to ascertain the date. In the event of an Information failing to do so, an amendment to insert the missing particulars made after the expiration of the time limit cannot be permitted. It would amount to the laying of a fresh Information outside the time limit and thus be invalid.

Section 165 is explicit. As paraphrased it reads:

"If no time is specifically limited for laying an information ... (it) shall be laid within twelve months from the time when the matter of the information arose and not afterwards."

The Act imposes a condition which must be met if an Information is to be validly laid for an offence when no specific time limit is enacted. The condition to be satisfied is that it must be laid within the twelve months period "and not afterwards". If no date is alleged, a defendant cannot ascertain whether the Information complies with s165. Such a state of affairs cannot be permitted. Not only does justice demand that a defendant be adequately appraised of the date of **[4]** the offence (and also of its place of commission, in my view), but the Act has entrenched the common law position.

In *Hackwill v Kay*, the Full Court per O'Bryan, Dean and Monahan JJ said, after referring to the earlier authority of *R v Dossi* (1918) 13 Cr App R 158; (1918) 87 LJKB 1024 which said:

"From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence"

went on to say:

"The question, however, remains whether in this case the date was an essential part of the offence. Here the statute provides that an information for this offence 'shall be laid within 12 months from the time when the matter of such information arose *and not afterwards*.' The date of the alleged offence is therefore a most material matter and is, in our opinion, part of the essence of the offence."

R v Dossi referred to an indictment, but the section refers to summary offences. The Act sets out a comprehensive Code governing all aspects of the laying of Informations and the procedures a Magistrates' Court must pursue in dealing with them. There is no room for manoeuvre or quibble. (See *Galaxy International Pty Ltd v Bates & Levine,* [1988] VicRp 85; [1988] VR 948, delivered 2nd February 1988): s165 must be strictly complied with. I turn to the second issue. In my view s157 is of no assistance to Kerr. An amendment to insert the critical date, and also a place of the alleged offences, does not amount to varying an Information. It amounts to rectifying a fundamental defect in terms not permitted by s165. In my view the issue is despatched by the authority of *Warner v Sunnybrook Ice Cream Pty Ltd* [1968] VicRp 11; [1968] VR 102; (1967) 15 LGRA 135. The Court **[5]** upheld dismissal of an Information in circumstances where an amendment had been sought which would have had the effect of reciting the offence outside the relevant statutory period.

Similar issues to those before me were disposed of by Ormiston J in *Woolworths (Victoria) Ltd v Marsh* (Unreported, delivered 12th June 1986). That case which concerned an alleged contravention of the *Labour & Industry Act* 1958 brought the judge to a consideration of s167 of the Act. After reference to *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583; [1947] ALR 27 and *Walpole v Bywool Pty Ltd* [1963] VicRp 26; [1963] VR 157; 9 LGRA 44 and upon the authority of *Johnson v Miller* (*ibid*) the judge said:

> "However the present case is not one which was capable of correction by either amendment or the provision of particulars. Essentially the informant did not identify in the information any offence known to the law and his attempt to rely on s167 of the Act was misconceived ... . As is clear from these cases where it is unjust to allow an amendment as when the original charge does not properly describe any offence in contrast to defects in form or lack of particularity then it is not ordinarily appropriate to allow an amendment, certainly if the time for laying a new information has expired."

It was contended that Hannon would have become aware of the date and location of the alleged offence because he had been served with an authorized Certificate of Breath Analysis which recited those details in its text. Accordingly, it was argued, by reference and necessary implication the time and place could been seen to be part of the Information.

These contentions are incorrect. The Certificate is not part of the Information but part of its proof. An Information cannot be extended by reference to another document which the defendant may or may not have, even though it is an obligation to serve **[6]** one upon a person. It has never been a principle of the common law that a defendant should be asked to assume or calculate particulars of an offence. It is the Crown which asserts a breach of an Act, and it must particularize with clarity, albeit briefly, the nature of the offence and the time at which it was committed. In my view it must also provide sufficient particulars to identify the place or location. In my view the above propositions reflect the law as pronounced in *Johnson v Miller* and also *R v Magistrates' Court at Heidelberg; ex parte Karasiewicz* [1976] VicRp 73; (1976) VR 680. The head note of the latter, in my opinion, properly recites the law, viz:

> "A defendant to an information for an offence is entitled to particulars specifying the time, place and manner of his alleged acts and omissions and the case he has to meet."

The issue was conclusively decided in South Australia in respect of its *Justices Act* which contained a section similar to s165. In *R v Jiri Fiala; Ex parte GJ Coles & Co Ltd* (1986) 46 SASR 47, the Full Court of the Supreme Court which on this point was in accord, held that the date of the conduct complained of is an essential allegation, in the absence of which no offence is disclosed. In such a case, amendment to the complaint to allege a date of offence cannot be made after the expiration of the period of limitation. The use of the word "complaint" in this case in respect of Informations alleging offences under the *Packages Act* is to be equated with the word "Information" used in the Victorian Act. The majority held that all the Informations read together did disclose a time and place of the alleged offence, and accordingly, the Orders Nisi seeking prohibition and *certiorari* **[7]** were discharged.

Other than for the point of principle I have already recited, that case turned upon its special facts and I need not deal with it further. It follows from these reasons the appeal will be dismissed. The magistrate at Prahran was correct. He did not have jurisdiction to accept the proposed amendments and was obliged to dismiss the Information.

Solicitor for the applicant: Victorian Government Solicitor. Solicitors for the respondent: Oakleys of South Gippsland.