1/00; [2000] VSC 169

SUPREME COURT OF VICTORIA

BELL v DAWSON

Balmford J

19 April, 9 May 2000 — (2000) 31 MVR 111; (2000) 114 A Crim R 26

MOTOR TRAFFIC – DRINK/DRIVING – OFFENCE AGAINST S49(1)(e) OF *ROAD SAFETY ACT* 1986 – ELEMENTS OF – WHETHER MAKING OF A REQUIREMENT AN ESSENTIAL INGREDIENT OF OFFENCE – FAILURE TO ALLEGE MAKING OF REQUIREMENT IN CHARGE – WHETHER DEFECT IN SUBSTANCE OR FORM – AMENDMENT MADE BY MAGISTRATE – "REFUSE" – MEANING OF – WHETHER MAGISTRATE IN ERROR IN MAKING AMENDMENT: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(1); *MAGISTRATES' COURT ACT* 1989, SS27, 50.

Section 27(1) of the *Magistrates' Court Act* 1989 provides:

> (1) A charge must describe the offence which the defendant is alleged to have committed and a description of an offence in the words of the Act or subordinate instrument creating it, or in similar words, is sufficient.

B. was charged with refusing to accompany a police officer to a police station for the purpose of furnishing a sample of breath for analysis. The charge failed to allege specifically that a requirement to accompany was made. At the hearing of the charge B. submitted that without the allegation of the making of a requirement the charge did not disclose an offence known to law. The prosecutor applied for an amendment of the charge to include the making of the requirement. The magistrate granted the application, made the amendment and subsequently convicted B. of the charge. Upon appeal—

HELD: Appeal dismissed.

1. Given that the making of a requirement is an essential ingredient of the offence with which B. was charged, the question was whether the failure to allege specifically that the requirement was made was such a defect that the charge was bad as not disclosing an offence known to law.
***DPP v Bajram; DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365, applied.**

2. The meaning and effect of any written document must depend on the words appearing in that document. The use of the word "refuse" in the charge implied the previous making of a requirement or request. It is not possible for a person to refuse to do something which that person has not been required or requested to do. When the charge was interpreted according to the ordinary meaning of the words used, the allegation that B. "did refuse to accompany ..." must have necessarily implied an allegation of a requirement or request to accompany. It could not be said that the absence of a specific statement of the making of the requirement would have left B. in any doubt, on reading the charge, as to what was alleged against him both as to the nature of the offence and as to the acts said to constitute that offence.
***Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104; and**
***Pointon v Cox* (1927) 136 LT 506, applied.**

3. In those circumstances, the charge (prior to its amendment by the magistrate) sufficiently described an offence under the *Road Safety Act* 1986.

BALMFORD J:

1. This proceeding is an appeal pursuant to section 92 of the *Magistrates' Court Act* 1989 ("the Magistrates' Court Act"), which provides that a party to a criminal proceeding in the Magistrates' Court (other than a committal proceeding) may appeal to this Court, on a question of law, from a final order of the Magistrates' Court in that proceeding.

2. The final order under appeal was made on 19 October 1999 by the Magistrates' Court at Sunshine constituted by Mr JS Mornane, Magistrate, convicting the appellant of a charge laid under section 49(1)(e) of the *Road Safety Act* 1986 ("the Road Safety Act") and ordering that he pay a fine of $1000 together with $31.50 statutory costs, that his driver's licence be cancelled and

that he be disqualified from driving in the State of Victoria for a period of four years. The relevant facts are set out in the two affidavits of the appellant and the exhibits thereto.

3. By Order made on 18 November 1999 Master Wheeler found that the three questions of law raised by the appeal were:

> (a) Whether the charge, (prior to its amendment) sufficiently described an offence under the *Road Safety Act* 1986?
>
> (b) Whether the amendment of the charge had the effect of the "laying of a fresh information"?
>
> (c) Whether the Learned Magistrate erred in granting leave to the Respondent to amend the charge where more than 12 months had passed since the date of the alleged offence?

It is not in issue that the word "information" in question (b) should read "charge", since the enactment of section 26(1) of the *Magistrates' Court Act*, as to which see paragraph 7 below.

4. The charge pursuant to which the appellant was convicted is in the following terms:

> The defendant at Altona North on 28/08/98 after having been required to have a preliminary breath test in accordance with Section 53 of the Act, and the test in the opinion of the member of the police force, in whose presence it was made indicated that his blood contained alcohol, and he was then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to section 55(1) of the Act did refuse to accompany a member of the police force to a police station where a sample of breath was to be furnished prior to 3 hours elapsing from the driving of a motor vehicle.
> REFUSE/FAIL TO ACCOMPANY

5. The charge was stated to have been brought under section 49(1)(e) of the *Road Safety Act,* which reads:

> **49. Offences involving alcohol or other drugs**
> (1) A person is guilty of an offence if he or she— …
> (e) refuses to comply with a requirement made under section 55(1), (2), (2A) or (9A);

6. It is apparent from the terms of the charge that it relates to a refusal to accompany a member of a police force to a police station. The relevant obligation arises under section 55(1) of the *Road Safety Act*, which reads, so far as relevant:

> **55. Breath analysis**
> (1) If a person undergoes a preliminary breath test when required by a member of the police force … under section 53 to do so and—
> (a) the test in the opinion of the member … in whose presence it is made indicates that the person's blood contains alcohol; or
>
> (b) the person, in the opinion of the member …, refuses or fails to carry out the test in the manner specified in section 53(3)—
> any member of the police force … may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force … for the purposes of section 53 to a police station or other place where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and been given the certificate referred to in sub-section (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

Sub-section 55(4) reads:

> (4) As soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument the person operating the instrument must sign and give to the person whose breath has been analysed a certificate containing the prescribed particulars produced by the breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in his or her blood.

7. The relevant provisions of the *Magistrates' Court Act* are sections 26, 27 and 50, which read, so far as relevant, as follows:

26. How criminal proceeding commenced
(1) A criminal proceeding must be commenced by filing a charge—
(a) with a registrar;...

(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.

27. Descriptions in charge
(1) A charge must describe the offence which the defendant is alleged to have committed and a description of an offence in the words of the Act or subordinate instrument creating it, or in similar words, is sufficient.

(2) A charge must identify the provision of the Act or subordinate instrument (if any) that creates the offence which the defendant is alleged to have committed.

50. Power to amend where there is a defect or error
(1) On the hearing of a proceeding the Court must not allow an objection to a charge, summons or warrant on account of any defect or error in it in substance or in form or for any variance between it and the evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error.

(2) An order must not be set aside or quashed only because of a defect or error in form but the Court may amend the order to correct the defect or error.

8. At the outset of the hearing before the Magistrate, counsel for the defendant submitted that the charge was defective in that it alleged that the defendant had refused to accompany a member of the police force to a police station, but did not allege that he had been required to do so. It was put that the making of a requirement to accompany was an essential element of the offence, the refusal itself being the other element, and without the allegation of the making of a requirement the charge did not disclose an offence known to the law.

9. After argument, the prosecutor applied to amend the charge to include the words "having been required by a member of the police force to accompany a member to the police station" before the words "did refuse to accompany". Counsel for the defendant opposed the amendment, on the ground that there was no offence known to the law alleged in the charge as it stood. Accordingly, he submitted, the making of the amendment would result in a new offence being alleged against the defendant, and as more than 12 months had passed since the date on which the offence was alleged to have been committed, the informant was out of time to lay a fresh charge.

10. The magistrate said that he believed that the making of the requirement could be supplied as further particulars to the charge. In any case, he found that it was proper to amend the charge as requested by the prosecution, and did so. The prosecution witnesses were then called, and were cross-examined by counsel for the defendant. The informant gave evidence, *inter alia*, that after certain events, which he described, he had required the defendant to accompany him to the Altona North Police Station for the purpose of a breath test and the defendant had refused to do so. In the event, the charge was found proved and the defendant sentenced, as set out in paragraph 2 above.

11. It is clear that the making of a requirement is an essential ingredient of the offence with which the appellant was charged. The authorities on the requirement to furnish a sample of breath, also contained in section 55(1), are equally applicable to the requirement to accompany a member of the police force to a police station. See *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579 at 581-2 (Sholl J); *Walker v DPP* (1993) 17 MVR 194 at 195 (Fullagar J, with whom Brooking and McDonald JJ agreed). And the point is made specifically in relation to the offence in issue here in *DPP v Foster* [1999] VSCA 73 at [15]; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365 by Winneke P, with whom Ormiston and Batt JJ A agreed.

12. Given that the making of a requirement is an essential element of the offence charged, the question is, whether the failure to allege specifically that the requirement was made is such a defect that the charge is bad as not disclosing an offence known to the law.

13. Mr Hardy relied on a number of classic authorities as to the need for specificity in a charge. In *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104 Latham CJ said at CLR 479:

> The complaint must show upon its face that what is charged is an offence according to law, and it is sufficient if it sets forth the acts which are relied upon as constituting the offence with such a reference to time and place as identifies those acts.

and at CLR 489-490 Dixon J said:

> ... a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. The court hearing a complaint or information for an offence must have before it a means of identifying with the matter or transaction alleged in the document the matter or transaction appearing in evidence.

That passage is cited by Ormiston J in *Woolworths (Victoria) Limited v Fred Marsh* (unreported; delivered on 12 June 1986) where His Honour said at page 6 of 10 of the copy provided to the Court:

> ... the informant cannot rely on a defective information which is so uncertain that the defendant cannot identify the charge brought against him. As Salter J said in *Pointon v Cox* (1927) 136 LT 506 at p509-510:
>
> > "In my opinion, an accused person is entitled to information in two respects: he is entitled first of all to be told what law, statutory or other, he is alleged to have broken; and in addition he is entitled to be told with reasonable particularity how he is alleged to have broken that law."

After an extensive consideration of the history of informations and the statutory provisions enabling technical defects to be overcome, Jordan CJ of the Supreme Court of New South Wales concluded in *Ex parte Lovell; re Buckley* (1938) 38 SR (NSW) 153 at 173; 55 WN (NSW) 63, in a passage also cited by Ormiston J in *Woolworths*:

> A magistrate has no jurisdiction to convict a person except for a statutory offence; and it is contrary to natural justice to convict a person of a statutory offence with which he has not been charged. Hence, in order to support a conviction for an offence, it is necessary either that the information and summons upon which it is based should accurately state the acts necessary to constitute all the ingredients of that offence, or else, if they do not, that the accused person should have been accurately charged orally before the magistrate and should have raised no objection to the absence of information or summons [there referring to the relevant legislation of New South Wales which is not applicable in Victoria] ... If the magistrate convicts upon an information or charge which discloses no offence, or for an offence with which the accused has not been duly charged, the conviction is bad.

14. In his submissions, Mr Hardy measured the charge to which this appeal relates against the tests set out in those authorities, and found it wanting, in that it did not specify the making of a requirement to accompany a member of the police force to a police station or other place. But the meaning and effect of any written document must depend on the words appearing in that document. In my view, the use of the word "refuse" implies the previous making of a requirement or request. It is not possible for a person to refuse to do something which that person has not been required or requested to do. The relevant meaning of the verb "refuse" in the second edition of the *Oxford English Dictionary* is:

> to decline to accept or submit to (a command, rule, instruction etc) or to undergo (pain or penalty).

The charge is to be interpreted according to the ordinary meaning of the words used. The allegation that the defendant "did refuse to accompany ..." must necessarily imply an allegation of a requirement or request to accompany.

15. I have said that the implication is of a requirement or a request, and thus not necessarily of a formal requirement. An informal request is a sufficient compliance with section 55(1). As Winneke P, with whom Ormiston and Batt JJ A agreed, said in *DPP v Foster* at [25] of an earlier, but similar, passage in section 55(1):

> ... it is not in my view necessary that a "demand" in imperative terms should have been made as a pre-requisite to proof of a "requirement". A request in precatory or polite terms by a person clothed with apparent authority will be sufficient to satisfy the requirement to "furnish a breath test", if indeed such a requirement is an element of the offence under s49(1)(f).

Likewise the English Court of Appeal in *R v Clarke* [1969] 2 All ER 1008 found at 1010 (cited by Brooking J in *Walker* at 198) that the power to require a specimen of breath for a breath test, under similar but not identical English legislation, could be exercised by "a request in words which it is clear to the defendant is being made as of right".

16. Given what I have found to be the effect of the verb "refuse", I find that by the use of that word, as required by section 49(1)(e), the charge "sets forth the acts which are relied upon as constituting the offence" (Latham CJ in *Johnson v Miller*); apprises the defendant of "the particular act, matter or thing alleged as the foundation of the charge" (Dixon J in *Johnson v Miller*); tells the accused "what law, statutory or other, he is alleged to have broken; and … with reasonable particularity how he is alleged to have broken that law" (Salter J in *Pointon v Cox*); and, finally, "describes the offence" as required by section 27 of the *Magistrates' Court Act.*

17. One further issue, not considered by either counsel, arises from the fact that section 55(1) reads: "any member of the police force … may require the person to furnish a sample of breath … and for that purpose may further require the person to accompany a member of the police force …" The requirement to accompany must thus be made specifically by the member of the police force who required the person to furnish a sample of breath. It is not sufficient only that a requirement be made; it must be made, specifically, by that member. The implication of the word "refuse" appearing in the charge is not, of course, that the request was made by any particular person. I note that the amendment made by the magistrate is defective in this regard, in that the words "a member" where first appearing in the amendment should have read "the member". In my view, however, it would be carrying technicality to extremes to find either the charge or the amendment invalid on that ground.

18. It could not be said that the absence of a specific statement of the making of the requirement would have left the defendant in any doubt, on reading the charge, as to what was alleged against him both as to the nature of the offence and as to the acts said to constitute that offence. The charge is by no means clear at first reading; but that lack of clarity derives from the extensive verbiage which it necessarily contains, and the grammatical deficiencies which it is not necessary to specify here. The applicant does not rely on any of those difficulties.

19. I am, of course, here concerned only with the meaning to be attributed to the words of the charge, and not with the evidence required to make out that charge.

20. Mr Silbert submitted that authorities such as *Johnson v Miller*, *Woolworths, Pointon v Cox* and *Ex parte Lovell,* were no longer relevant since the enactment in 1989 of section 27 of the *Magistrates' Court Act*. By that provision the words "A charge must describe the offence which the defendant is alleged to have committed" were added to what had been contained in section 167 of the *Magistrates (Summary Proceedings) Act* 1975, which read:

> **Description of offence**
> 167. The description of an offence in the words of the Act or of the order, by-law, regulation, or other document creating the offence, or in similar words, shall be sufficient in law.

Given the view which I hold as to the effect of the charge with which I am concerned, it is not necessary for me to make any finding as to that submission and I do not do so. I note merely that it may be thought that the expression "should accurately state the acts necessary to constitute all the ingredients of that offence" in the passage cited above from *Lovell* goes a little further than section 27 now requires.

21. Accordingly, I find that the answers to the questions contained in the Order of the Master are
(a) Yes; (b) No. (c) Not necessary to answer.

For the reasons given, the appeal will be dismissed. Counsel may wish to make submissions as to costs.

APPEARANCES: For the appellant Bell: Mr G Hardy with Mr S Hardy, counsel. Einsiedels, solicitors. For the respondent Dawson: Mr GJC Silbert, counsel. Peter Wood, Solicitor for Public Prosecutions.