34/83

SUPREME COURT OF VICTORIA

BIDDLESTONE v BOLITHO & DUNN; SMITH v DINAN

Murphy J

12 April 1983

PRACTICE AND PROCEDURE – CRIMINAL LAW – INFORMATIONS ALLEGING OFFENCES – REQUEST FOR FURTHER PARTICULARS OF OFFENCES – WHETHER PARTICULARS MUST BE SUPPLIED – CASE ADJOURNED FOR DELIVERY OF PARTICULARS – APPLICATION FOR COSTS – WHETHER REFUSAL TO ORDER COSTS ERROR IN EXERCISE OF DISCRETION.

B. was charged with a number of offences including being found armed with an offensive weapon, assault/hinder police, and offences under the *Poisons Act* and the *Firearms Act*. S. was charged with being found armed with offensive weapons, and being in possession of shotgun cartridges. Some time prior to the hearing, notices requesting further particulars of the charges were delivered by B. and S. to the informant; these particulars were supplied. Subsequently, B. and S.'s solicitors requested further particulars of specified matters, but these were not supplied. When the matters came on for hearing, counsel for B. and S. requested further particulars of the charges, and the magistrate ordered that further particulars of some items be delivered before 11:00 a.m. on the following day, and he adjourned the further hearing until that time. Further particulars were then supplied, but when the hearing resumed, counsel submitted that those particulars were inadequate. The magistrate ruled that the particulars supplied were sufficient and refused to order that further particulars be delivered. Counsel then applied for costs occasioned by the adjournment of the cases from the previous day; this application was refused. Upon order nisi to review—

HELD: Order absolute as to sufficiency of the particulars.
(1) When considering the sufficiency or necessity for delivery of particulars of a charge, the governing consideration is the necessity for avoiding injustice being done to the defendant.
***Marchesi v Barnes & Anor* [1970] VicRp 56; (1970) VR 434, applied.**

(2) If particulars are sought, sufficient particulars must be supplied as may be necessary for giving reasonable information as to the nature of the charge.

(3) When an offence is charged containing non-specific elements, then on request the informant must provide particulars sufficient to enable the defendant to understand just how the charge is put against him.
***Whitehead v Koulouklidis* (unreported, 19 June 1979; MC 13/74), applied.**

(4) As the particulars supplied contained ambiguities and uncertainties and needed clarification, further particulars must be supplied, otherwise the charges should be dismissed.

(5) Order nisi discharged as to the refusal to order costs. There was nothing to show that the magistrate, in exercising his discretion, made an error justifying the intervention of the court.

MURPHY J: *[After setting out the facts and the grounds of the order nisi, His Honour continued):* ... **[7]** When considering the sufficiency of particulars of a charge or even the necessity for any particulars to be delivered of a charge, the "governing consideration is the necessity for avoiding injustice being done to the defendant". (See Gowans J, *Marchesi v Barnes & Anor* [1970] VicRp 56; (1970) VR p434 at 439.) **[8]** Although it is the law that an information shall not be open to challenge as to form or contents if it charges an offence in the terms of the Act, it is also clear that if particulars are sought, sufficient particulars must be supplied as may be necessary for giving reasonable information as to the nature of the charge. When an offence is charged which contains elements which are what I termed in *Whitehead v Koulouklidis* (unrep, 19th June 1974) non specific, then on request the informant must provide particulars sufficient to enable the defendant to understand just how the charge is put. But particulars identifying the charge are also important to enable questions relating to the relevance of evidence to be decided, and also to determine, or to enable a determination to be made at a later stage whether the defence of *autrefois convict* or *autrefois acquit* would apply if other charges are brought against the defendant.

In the case of *Whitehead v Koulouklidis*, one of the elements of the charge was that the defendants "used premises for the purpose of unlawful gaming". As the user alleged could have been any one or more possibly of a variety of different users, each of which would have been sufficient to establish the alleged offence, it was necessary that the informant specify the particular use complained of in the charge.

Reference was made in that case to many **[9]** Australian decisions which authoritatively state the law as to the need for and sufficiency of particulars in different situations which arose in the cases. (See for example *Johnson v Miller* [1937] HCA 77; (1957) 59 CLR 467 at pp490 and 497-8; [1938] ALR 104; *Byrne v Baker* [1964] VicRp 57; (1964) VR 443 at pp455-6; *Marchesi v Barnes & Anor* [1970] VicRp 56; (1970) VR 434, at 439; *Ex parte Graham, re Dowling* (1968) 88 WN Pt 1 (NSW) 270 at pp280-281; *Ex parte Ryan, re Johnson* (1944) 44 SR (NSW) 12 and p16; 61 WN (NSW) 17; *Barnes v Polito* (1967) QR 155; *Lafette v Samuels* (1972) 3 SASR 1; *Giles v Samuels* (1972) 3 SASR 307; *Dalton v Bartlett* (1972) 3 SASR 549.) To these cases may now be added *R v The Magistrates' Court at Heidelberg ex parte Karasiesicz* [1976] VicRp 73; (1976) VR at p680, a decision of Menhennitt J.

In the present cases, several terms of what I have called non specific import are to be found in the charges laid. Biddlestone for example is charged that he did "have in his possession a firearm", that he did "possess a shotgun cartridge", that he did "have in his possession fully jacketed rifle ammunition", that he did "have in his possession a drug of addiction", that he did "have in his possession restricted substances". He was also charged that he "was found armed with an offensive weapon". The defendant Smith was charged that he "was armed with an offensive weapon" and that expression was used in **[10]** two of the charges against him, and also he was charged that he "did have in his possession four shotgun cartridges". On the "possession" charges as I shall call them particulars were sought by the defendants specifying "(c) the manner of the alleged offence and (d), the acts, facts, matters or circumstances by reason of which it will be alleged that the said firearm (cartridge) (drug) (restricted substance) etc. was in the possession of the defendant". On the charges of being found "armed", particulars were requested specifying "(c) the circumstances in which the defendant was found by reason of which it is alleged the defendant was found armed, (d) the manner of the defendant's act which will be alleged to constitute being found armed with an offensive weapon, (f) the facts by reason of which it will be alleged that the defendant was found with an offensive weapon". Other particulars which I shall not enumerate were also sought.

The particulars delivered by the informants in February 1982 revealed the wisdom of the request for particulars, for in several cases latent ambiguity was shown to exist in the terms "possession", and "possess". Further, on charge 2 against Biddlestone namely that he was "found armed with an offensive weapon to wit a Old Timer pocket knife", the particulars of the **[11]** 12th February 1982 stated "he was found with two shotguns and ammunition within reach and a knife on his person", but this may have been because of the manner of questioning by the defendants, as I shall later mention. It is clear that this reference to "two shotguns and ammunition within reach" is quite irrelevant to charge 2, and if it related to charge 2 it would have to be struck out, and if these particulars are not struck out, and remained as further particulars of the charge, then the charge could be duplex.

As to charge 3 that Biddlestone was "found armed with on offensive weapon to wit a Smith & Wesson single barrel shotgun", the particulars of 12th February say nothing and the particulars of 26th May 1982 say "the defendant Biddlestone was in possession of the Smith and Wesson single barrel shotgun in Holden sedan Reg. No. KFM 013". It is I would think as a matter of grammar, alleged by these particulars that the shotgun in question was positioned somewhere in the car identified and not that the accused, whilst in the car identified, was in some way thereby in possession of the shotgun. However having regard to the ambiguities which are seen throughout the particulars delivered, it in not in my opinion pure pedantry which would lead to a request for clarification in this matter. The charge is that Biddlestone was "found armed with an offensive weapon" and that he was in **[12]** possession of it. The importance of this distinction is brought out by Gavan Duffy J in *Rowe v Conti* [1958] VicRp 87; (1958) VR 547, pp548-549; [1958] ALR 1038 where his Honour said:

> "The word "found" is not to be disregarded and the offence treated as if it were equivalent to having offensive

> weapons in his possession. When Conti was searched by the police he was not 'armed' in any sense. I do not say that a man must necessarily have the weapon in his hand to be armed with it, but he must have it immediately ready for use. The fact that he has in his vehicle a weapon with which he can arm himself in a few minutes is not enough. I should come to this conclusion without the aid of any authority, but there is authority which lends its support though the enactment there in question differed from the section with which I am concerned".

His Honour then went on to refer to the authorities. That decision of His honour has not, so far as I am aware, been questioned, and I would follow it. If possession in the physical sense of carrying the shotgun is to be proven, that is one thing on a charge of being found armed. **[13]** But if possession in the legal sense of having the gun somewhere under one's control, for example in a car which the defendant owned or leased or had recently driven, is meant, then quite different considerations could well apply. Mr Perkins has suggested that because of the circumstances alleged in the particulars, that the charge should be struck out as being bad, but I do not accept this submission.

The evidence may be altogether insufficient when it is completed to sustain the charge made, and that would be an appropriate time to consider whether or not the charge should be struck out. It would, I think, be important to know where the gun was in the motor vehicle and in relation to the defendant. Particulars should be given as sought, clarifying the way in which it is alleged that the defendant was "found armed" as alleged in charge 3. The ambiguities at present evident in the particulars should be clarified.

[His Honour then discussed further charges against B., and the charges against S. and ordered that unless the particulars were delivered within 28 days, the charges should be dismissed. He continued]: ... **[23]** The ground of the order nisi relating to the order as to costs appears to be based upon Mr Perkins' submission that the refusal of the informants to deliver adequate particulars stems from some obstinacy or obduracy that he sees there. I agree with the Magistrate's remark that the defendants could quite easily, it they had so desired, made an appropriate application at a much earlier stage in Chambers to have the orders made that were sought on the 26th day of May 1982 but, for their own reasons, they chose not to take this course. There are always difficulties arising with relation to appeals based upon the exercise by a tribunal of its **[24]** discretion as to costs in a particular case. The Courts of Appeal have steadfastly set their minds against interfering, except in the most blatant cases of mistake, with orders as to costs made by Courts trying a particular case.

Mr Perkins has submitted that the Magistrate's statement that he could well have made the application in Chambers upon affidavit at an earlier stage simply means that the costs, which should be awarded, should be less than those that would otherwise be awarded, if the costs of the day including Counsel's fee were to be included. I do not understand that this follows. I am not by any means convinced that there is shown in the exercise by the Magistrate of his discretion on this occasion such an error as would justify a Court on an order to review in characterising the exercise of the discretion as one that had failed or been misconceived or failed to take into account something that he should have taken into account or put too much emphasis upon matters that he ought not to have, emphasised or failed to emphasise matters that he should have emphasised in such a way as would cause a Court to make an order nisi relating to such an order absolute.

The cases that have been brought before me do, however, demonstrate perhaps some of the real problems which can arise when informants, as it is sometimes said, throw the **[25]** book at a defendant and the overlapping of offences in this case must tend to cause confusion. Furthermore, I would agree that it would seem, from the particulars delivered, that some confusion entered into the thinking of the informant or his advisers and this appears to have been compounded by a degree of obstinacy that has been shown. Nonetheless I do not intend and will not make the order absolute on this ground.

Finally, I say that appeal on orders as to costs should generally, I think, be discountenanced unless some clear and altogether unjustifiable order is made on the subject matter: **[26]** Appeal Courts have always and will, I believe, remain reluctant to interfere with the exercise of discretion by the court below on the question of costs.
