

15/92

SUPREME COURT OF VICTORIA

BASHAM v DPP (COMTE)

Marks J

20 November 1991

PROCEDURE – COMMENCEMENT OF CRIMINAL PROCEEDINGS – CHARGE TO BE FILED WITHIN TIME LIMITED – CHARGE NOT FILED WITHIN LIMITATION PERIOD – WHETHER COURT HAS JURISDICTION TO HEAR CHARGE: MAGISTRATES' COURT ACT 1989, S26.

1. A summary proceeding which must be commenced within 12 months of the date of the alleged offence is not commenced in a court until some document is lodged or filed with the appropriate registrar.

2. Where an information laid in May 1990 was not filed in a court until August 1991, and where informations for offences allegedly committed on 5 October 1989 were not filed in a court until 25 October 1990, the prosecutions were out of time and accordingly, a magistrate was in error in ruling that jurisdiction existed to hear and determine the proceedings.

MARKS J: [1] This is an appeal against findings by a magistrate at Moonee Ponds on 19th August 1991 that the appellant was guilty of a number of offences with which he had been charged arising out of events said to have occurred on the 5th October 1989. The question or questions of law arise from the following circumstances.

The appellant had been served only with some five charges filed with the Magistrates' Court on 25th October 1990, notice of which required him to appear at the Moonee Ponds Magistrates' Court at 10 a.m. on 13th December 1990. On the later date, his solicitor told the court that he would plead not guilty and as a result the hearing of the charges was apparently adjourned until some time in March 1991. On the latter date they were again adjourned until 19th August 1991.

The *Magistrates' Court Act* 1989 came into force on 1st September 1990 and it is not suggested otherwise than that the new Act applied to these five charges. When the matter came on for hearing in August 1991 the appellant pleaded not guilty to all the charges and they were then heard.

At the conclusion of the prosecution case no case submissions were made and as a result the first charge was dismissed and either at that time or earlier (it is not clear which) the fifth charge was withdrawn. The solicitor for the appellant also submitted that the magistrate had no jurisdiction to hear any of the [2] charges because they had been commenced, within the meaning of section 26 of the *Magistrates' Court Act* 1989, later than twelve months after the date on which the offences were alleged to have been committed. As the offences were alleged to have been committed on the 5th October 1989 and the charges were neither laid, or if laid not commenced, until 25th October 1990 this submission appears to have been unanswerable. Mr Just of Counsel for the respondent did not contend to the contrary.

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

"A criminal proceeding must be commenced by filing a charge with the appropriate registrar."

Sub-section (4) then provides:

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

The submission should have been upheld. It is not clear whether the magistrate upheld it or not but if he did he did not dismiss or strike out the charges. When the prosecutor was called on to reply to the submission he told the magistrate that there were on the file a number of similarly worded charges which had been laid on 25th May 1990, a date which was within the twelve months.

It was conceded that there had been no service of these charges and that they had not been filed in the court until the morning of 19th August 1991, which was after the twelve months. The magistrate then ruled [3] that having regard to the existence of these informations or charges on the file, that he had jurisdiction to proceed and he did so to make the guilty findings and a Community Based Order.

There were a number of steps which need to be examined. If, as appears to have been the case, the appellant was not told of the charges or his plea taken in respect of the charges laid in May 1990 then a finding of guilty on those charges was impermissible. In any event, the orders must be set aside because, as Mr Just, who appeared here for the respondent conceded, there was a duality in the proceeding before the court by the time the orders were made. It was never made clear to the appellant on which charges he stood in jeopardy of conviction. Indeed, some of the October 25 charges were amended, while the earlier unserved ones were not.

However, there are other problems. Section 34 requires that every summons to answer a charge must be served at least fourteen days before the mention date. The mention date for the May informations was 28th August 1990 and it had long since passed without service. If there was no other problem, it was open to the respondent (informant) to have sought under section 33(2) an extension of the mention date or under section 34(2) applied for substituted service. If it was the case that service could not be promptly effected an order for substituted service was appropriate. Those things were not done.

Then there was the further problem whether [4] section 26 applied to the May informations. If it did they also were out of time. Mr Just conceded that if the *Magistrates' Court Act 1989* applied to the May informations, which were not filed, as I said, until 19th August 1991, then the proceeding in the court was not commenced until 19th August 1991, which was out of time by virtue of sub-section (4).

In an heroic attempt to salvage the situation Mr Just submitted that the *Magistrates' Court Act 1989* did not apply to the May informations because at the time that they were laid the new Act had not come into operation which it did on 1st September 1990. He submitted that its predecessors namely the *Magistrates' Courts Act 1971* and the *Magistrates (Summary Proceedings) Act 1975* did not provide in the same way as the present s26. Schedule 8 to the 1989 Act contained transitional rules. Those rules preserve in specified circumstances the application of previous legislation in respect of offences before 1st September 1990, to certain proceedings in the court after 1st September 1990. Rule 12, however, does not so preserve any proceeding based on informations laid in May 1990 because the proceeding which came before the court, if it ever did, did not come before it until 19th August 1991. The mere laying of a charge before a registrar, or as it once was, a Justice of the Peace, does not in any sense amount to commencement of a proceeding in a court. A proceeding is not commenced in a court until some document is lodged or filed in it. This is made [5] clear in the present case by section 26(1) of the *Magistrates' Court Act 1989*.

Rule 12(1) preserves the application of the old Acts, despite their repeal and despite any rule of law to the contrary, to:

"(a) any action or matter pending in a Magistrates' Court immediately before the commencement of Part 2 unless at that commencement—

- (i) the hearing of that action or matter had not commenced; or
- (ii) no evidence had been given on the hearing of that action or matter; and

(b) any re-hearing or review of, or appeal from, any action or matter—

- (i) that was conducted before the commencement of Part 2; or
- (ii) to which, by virtue of paragraph (a), the *Magistrates' Courts Act 1971* and the *Magistrates (Summary Proceedings) Act 1975* continued to apply (but which is admittedly not applicable); and

(c) the enforcement of any order made in any action or matter referred to in paragraph (b)."

Mr Just of counsel for the respondent was unable to advance any argument which suggested that the proceeding which commenced by virtue of the filing of the charges laid in May 1990 was "an action or matter" pending in any Magistrates' Court immediately before the commencement of any part of the *Magistrates' Court Act 1989*. I emphasise that there is nothing in the transitional rules of Schedule 8 which would preserve the application of the previous *Magistrates' Courts Act 1971* and the *Magistrates (Summary Proceedings) Act 1975* to a proceeding "commenced" after the [6] commencement of the *Magistrates' Court Act 1989* even if it was based on the information or charges having been laid before that commencement.

The magistrate had no jurisdiction to proceed to find the appellant guilty of the charges laid on 25th October 1990 because they were out of time. It is not clear whether he did make the Community Based Order on that finding of guilty or on a finding of guilty of the earlier charges. If he did the latter he was in error in more than one way.

The appellant had not been served with the earlier informations. It is true that it is not necessary on all occasions to serve a defendant with a summons or informations if he is in fact before the court and he has been given proper notice of and opportunity to answer the charges. In this case no such notice or opportunity can be said to have been given because it was never made clear to the appellant which bundle of charges in respect of which he was in jeopardy of being convicted or found guilty.

A further error was the failure or the omission to seek the plea of the appellant to the May 1990 charges if indeed it was on those charges that the magistrate proceeded to make orders. Finally, the magistrate in my opinion was obliged to consider that the proceeding based on the May informations had not within the meaning of section 26 been commenced earlier than twelve months after the date on which the offences to which they related were [7] alleged to have been committed.

For these reasons the appeal is allowed with costs and I order that any charge laid against the appellant by the informant on 23rd, 24th and 25th May 1990, being those in exhibit D to the affidavit of Frank Paul Murone, sworn 18th September 1991, are dismissed. That any charges laid on the informations dated 25th October 1990 by the respondent against the appellant, being those contained and referred to in exhibit A to the said affidavit, are also dismissed with costs.

APPEARANCES: For the appellant Basham: Mr SP Gebhardt, counsel. BTE Flynn Murone & Co, solicitors. For the respondent Comte (DPP): Mr D Just, counsel. JM Buckley, Solicitor for the DPP.