36/91

SUPREME COURT OF VICTORIA

DPP v WHITTLETON

Smith J

14 November 1991

PROCEDURE – INFORMATION LAID – ERRORS IN WORDING – APPLICATION FOR AMENDMENT – WHETHER OFFENCE SUFFICIENTLY DISCLOSED – WHETHER AMENDMENT APPROPRIATE.

Upon an application by a police prosecutor to amend an information, a Magistrate refused to substitute "S.55(1)" for "S.51(1)" in the description of the offence and "S.49(1)(f)" for "S.49(1)(a)" in the summons, and thereupon dismissed the charge. Upon appeal—

HELD : Appeal allowed. Remitted for hearing. The question is whether the information disclosed an offence. Notwithstanding the errors and clumsy wording of the charge, an offence was disclosed in the details stated and the amendments which should have been made would not have altered the substance of the charge.

Broome v Chenoweth **[1946] HCA 53; (1946) 73 CLR 583 at 601; (1947) ALR 27 at 36, referred to.**

SMITH J: [1] On 3 July 1991, an information between Jeffrey Roy Stockdale as Prosecutor, and Glenn Owen Peter Whittleton as defendant, came on for hearing at the Magistrates' Court at Dromana. The summons described the charge in the following ungrammatical terms:

> "The defendant at Mornington on 26 May 1990 did within three hours after driving a motor vehicle and after a requirement to undergo a Preliminary Breath Test you were further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to Section 51(1) of the *Road Safety Act* 1986, the result of which analysis indicated more than the prescribed concentration of alcohol was present in your blood: B.A.C. .190%"

The description of the charge was contained in a box on the form of summons. Immediately below the box with the statement of the charge, it was stated that the law under which the charge was brought was the *Road Safety Act* 1986, s49(1)(a). At the commencement of the hearing, the Prosecutor sought leave to amend the summons by substituting in the statement of the charge the expression "s55(1)" for "s51(1)", and substituting in the box stating the law under which the charge was brought, the expression "s49(1)(f)" instead of "s49(1)(a)". The Prosecutor stated to the learned Magistrate that the errors were typographical and had only been noticed just prior to the commencement of the proceeding.

Counsel for the defendant opposed the amendments on the ground that the alleged errors had the result that the summons did not disclose an offence, and that an attempt to amend it was, in effect, to attempt to commence new proceedings outside the 12 months' limitation period. He relied on several recent unreported decisions. **[2]** The Prosecutor, in response, sought to distinguish the cases cited. I note that those authorities were not, in my view, directly in point. He also argued that the defendant could not have reasonably been under any misapprehension as to the nature of the case he had to answer.

The reference to s51(1), was a clear error, in that it had nothing to do with requiring the taking of breath samples. He also argued that the reference to s49(1)(a) was of no consequence, as it was not a portion of the information that stated the charge. He drew attention to the fact that the application to amend had been brought at the earliest opportunity and before any evidence had been led. The learned Magistrate simply indicated that he upheld the defendant's submission and dismissed the information. There was then an argument about costs, following which, the learned Magistrate awarded costs to the defendant in the sum of $2,000.

The Prosecutor appeals against the dismissal of the summons and the costs order. The

order of the Master referring the appeal to a Judge of this court states the following questions of law for determination.

> "Did the Magistrate err in law in refusing to permit the following amendments to the information-
> (i) to substitute Section 55(1) for Section 51(1) in the description of the charge;
>
> (ii) to substitute Section 49(1)(f) for Section 49(1)(a) in the Box particularizing the Section or clause under which the charge was brought;
>
> (iii) to what criteria should the Magistrate have had regard in determining the quantum of costs?"

For the purposes of my decision, I will proceed **[3]** initially on the basis that if the summons did not disclose an offence, to amend it in the way sought should not be allowed, as it would, in substance, result in the commencement of proceedings outside the limitation period specified in section 26(4) *Magistrates' Court Act* 1989. I also assume that the learned Magistrate concluded that the summons did not disclose an offence, that being the first question raised for the Magistrate to consider. For the appellant to succeed on that issue, it must persuade me that no reasonable Magistrate could have come to that conclusion. The answer to that question is very much a matter of impression.

As I read the summons, it seems quite plain to me that the substance of the charge as set out in the box labelled in the margin, "What is the charge?" was that within three hours of driving the motor vehicle on the day in question, the defendant furnished a sample of breath for analysis by breathanalysing instrument, and the result of analysis indicated that more than the prescribed concentration of alcohol was present in his blood, and that the actual blood alcohol content was .190 per cent.

A person reading the summons would assume that the breath analysis was carried out pursuant to s51(1) of the *Road Safety Act*, but that reference should not, on reading the document, mislead the reader as to the substance of the charge. The reader familiar with the legislation would immediately realise an error had been made. The reader of the summons who was unfamiliar with the *Road Safety Act* would, on reading the Act, realise that s51(1) was plainly recited in error, and that it was s55(1) that was intended to be referred to in the **[4]** statement of charge.

I agree with the view expressed by Tadgell J in *Smith v Van Maanen* (1991) 14 MVR 365, a decision of 5 July 1991, at p14, that: "Strictly, a reference to s55(1), in terms, is not necessary in the information alleging an offence against s49(1)(f)". His Honour was there dealing with a similar charge. A reader of the summons, having read the statement of charge, would then move to the box section of the charge which is entitled "Under what law?" In information contained in that section it is stated that it is brought under a State Act, the *Road Safety Act*, No. 127 of 1986; and the section under which the charge is brought is s49(1)(a).

Again, the reader should not be misled. A reader familiar with the legislation would realise the wrong paragraph had been named. One unfamiliar with the legislation would, on reading the Act, realise that an error had been made in referring to paragraph (a) and the reference should have been to paragraph (f). The detailed statement of the actual charge must, on any fair reading of the summons, be given primacy, and to the extent that it conflicts with other information given, the *prima facie* conclusion should be that the latter is wrong, and that the statement of the charge records the substance of the charge laid.

It seems to me that this is the only reasonable interpretation of the summons in this case, and that, accordingly, it did disclose an offence. In its statement, however, slips and clumsiness occurred which, while requiring amendment, did not detract from the **[5]** proposition that an offence was disclosed in the details stated in the charge. If, strictly speaking, it did not disclose an offence, the summons would, nonetheless, come within the category of case described by Dixon J in *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583 at p601; [1947] ALR 27, for which amendment should be permitted in a proper exercise of the discretion. The amendments would not be substituting a new charge, but clarifying the charge that had been laid. *Broome v Chenoweth* was not cited to the learned Magistrate.

I have considered whether I have fallen for the trap of substituting my view for that of the

learned Magistrate. The danger of that is heightened by the fact that the respondent did not put any submissions to me, he not appearing or being represented for that purpose. Nonetheless, I am satisfied that an offence was disclosed, and that the learned Magistrate erred in law in not so holding, and in then not allowing the amendment sought. Those amendments did not, in any way, alter the substance of the charge which, in my view, is revealed in the summons. The amendments should have been made under s50 of the *Magistrates' Court Act* 1989.

I have considered whether there is any other basis upon which the learned Magistrate's decision not to allow the amendments and to dismiss the summons might be upheld. I am unable to suggest any. The result of the foregoing is that the first two questions asked in the order should be answered in the affirmative, and the third question does not need to be considered.

APPEARANCES: For the appellant DPP: Mr SP Gebhardt, counsel. JM Buckley, Solicitor for the DPP. For the defendant Whittleton: Mr Smith, counsel.
