27/11; [2011] VSCA 257

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v KYPRI

Nettle, Ashley and Tate JJA

7 June, 31 August 2011 — (2011) 207 A Crim R 566

MOTOR TRAFFIC – DRINK/DRIVING – FAILURE TO OBEY A REQUIREMENT TO ACCOMPANY A MEMBER OF THE POLICE FORCE TO A POLICE STATION IN ORDER TO FURNISH A SAMPLE OF BREATH – CHARGE DISMISSED BY THE MAGISTRATE – APPEAL FROM THE MAGISTRATE TO A SINGLE JUDGE DISMISSED – APPEAL TO THE COURT OF APPEAL – WHETHER CHARGE AS FRAMED SUFFICIENTLY SPECIFIED THE OFFENCE – WHETHER CHARGE SHOULD HAVE REFERRED TO THE RELEVANT SUBSECTIONS OF SECTION 55 OF THE *ROAD SAFETY ACT* 1986 – WHETHER MAGISTRATE SHOULD HAVE AMENDED THE CHARGE: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(1), (2), (2AA), (9A).

Section 49(1)(e) of the *Road Safety Act* ('Act') 1986 provides:

"(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), (2AA), (2A) or (9A);"

K. was charged under s49(1) of the Act with the offence of having failed to furnish a sample of breath pursuant to section 55 of the Act. The charge did not specify which of the various statutory requirements under s55 K. had failed to comply with. At the hearing of the charge, K. submitted that the charge should be dismissed because the essential ingredients of the offence were missing from the charge. The Magistrate agreed, upheld the submission and dismissed the charge. Upon appeal to the Supreme Court (Pagone J) the appeal was dismissed. Upon appeal—

HELD: Appeal allowed. Matter remitted to the magistrate for reconsideration of whether the charge might be amended.

1. Section 49(1)(f) of the Act creates but one offence (of having a blood alcohol concentration greater than the prescribed percentage) albeit that the offence may be committed in a number of different circumstances. Contrastingly, s49(1)(e) creates as many different offences (of failing to comply with a requirement under s55) as there are different kinds of requirements under s55.

2. The proper characterisation of an act which comprises an offence under s49(1)(e) is one of failure to comply with a particular kind of requirement under s55. It follows that, in order to identify the act which comprises the offence, it is necessary to identify the particular kind of requirement under s55 with which it is alleged that there was non-compliance. Hence, it was an essential element.

3. Where the charge and summons did not allege sufficient facts to enable a reasonable defendant to determine *ex facie* the sub-section of s55 under which the requirement is alleged to have been uttered, the charge was defective because it failed to convey the nature of the offence alleged.

4. If the police brief in this case were provided to K. before the expiration of the limitation period, and its contents were such as to enable K. to understand that the case alleged against him was one of failing to comply with a requirement to accompany the informant to a place for the purposes of a breath test, which requirement was made because K. had undergone a preliminary breath test and in the opinion of the informant it indicated that K.'s breath contained alcohol, it would be open (and, other things being equal, it would be appropriate) to amend the charge to make clear that the reference to s55 is a reference to sub-section (1) of s55.

5. The magistrate having embarked on a consideration of whether the defect in the charge in this case should have been amended, as he was right to do, the questions which the magistrate needed to decide were as follows:
(a) Whether, before the expiration of the limitation period, the police brief was supplied to the defendant or his representatives and whether it made clear that the case alleged against the defendant was one of failing to comply with a requirement to accompany the informant to a place for the purposes of a breath test, which requirement was made because the respondent had undergone a preliminary breath test and in the opinion of the informant it indicated that the respondent's breath contained alcohol;

(b) If so, whether the defendant was able to point to anything which showed that he could not reasonably have understood that the case alleged against him was one of failing to comply with a requirement to

accompany the informant to a place for the purposes of a breath test, which requirement was made because the respondent had undergone a preliminary breath test and in the opinion of the informant it indicated that the respondent's breath contained alcohol; and

(c) If not, whether there was any reason, in those circumstances, which would render it unjust to allow the charge to be amended so as to make specific reference to s55(1) (and thereby to make the form of the charge accord to the case which the defendant had always understood was alleged against him).

6. Accordingly, the appeal was allowed, the magistrate's order dismissing the charge quashed and the matter remitted to the magistrate for reconsideration of whether the charge should be amended.

NETTLE J:

1. This is an appeal from a judgment given in the Common Law Division rejecting an appeal by the Director of Public Prosecutions against a magistrate's dismissal of a charge under s49(1)(e) of the *Road Safety Act* 1986.

The facts

2. On 22 November 2006, a charge and summons was issued by the Registrar of the Heidelberg Magistrates' Court in Magistrates' Court Case No U03052260 ('the charge'). It alleged that:

> Charge 1 The defendant at Doncaster on 27 November 2005 having been required to furnish a sample of breath for analysis by a breath analysing instrument under s.55 of the *Road Safety Act 1986* and for that purpose a requirement was made for him to accompany a member of the police force to a police station did refuse to comply with such requirement to accompany the member of the police force prior to three hours elapsing since the driving of a motor vehicle.

3. On 17 February 2010, the case was called on for hearing in the Magistrates' Court at Ringwood. A police prosecutor appeared for the informant and counsel for the respondent. Counsel for the respondent submitted by way of preliminary objection that the charge was improperly drawn and duplicitous in that it failed to identify the sub-section of s55 of the *Road Safety Act* under which the requirement was made for the respondent to accompany the informant. He relied on a decision of a County Court judge in *R v Christine Kidd*,[1] that a charge under s49(1)(e) is bad if it fails to allege the sub-section of s55 which is relied upon, and also on the decision of this court in *Director of Public Prosecutions Reference No 2 of 2001*, *Collicoat v Director of Public Prosecutions*, *Bell v Dawson*,[2] as to the essential elements of an offence under s49(1)(f). The prosecutor submitted that identification of the relevant sub-section of s55 was not an essential element of an offence under s49(1)(e) of the *Road Safety Act*, and thus that the charge was not deficient. In effect, he argued that *R v Christine Kidd* was wrongly decided and should not be followed.

4. The magistrate accepted the respondent's counsel's submissions. He held that identification of the relevant sub-section of s55 was an essential ingredient of an offence under s49(1)(e) and, therefore, that the charge was defective (because it failed to identify the sub-section of s55 which was relied upon). He distinguished *Director of Public Prosecutions Reference No 2 of 2001* on the basis that the charges in that case were 'more expansive' than the subject charge. He ordered that the charge be dismissed and that the Chief Commissioner pay the respondent's costs fixed in the sum of $5,500.

5. The Director appealed to the Supreme Court under s272 of the *Criminal Procedure Act* 2009, and the judge below rejected the appeal for reasons which his Honour stated thus:[3]

> In *DPP v Greelish*[4] the Court of Appeal held that separate offences were created under s55(1) of the Act of refusing to furnish a sample of breath for analysis and of refusing to accompany a police officer to a police station or other place for that purpose. Subsequently in *Clarke v Goodey*[5] the Court of Appeal referred to the decision in *Greelish* and refused leave to appeal from the decision of Bongiorno J concluding that the decision was not attended with sufficient doubt to warrant leave. The Court of Appeal accepted in the leave application in *Clarke v Goodey* (consistently with its decision in *Greelish*) that on the face of s49(1)(e) there appeared to have been created separate offences in respect of each of the subsections of s55 to which it referred.[6]
>
> The conclusion that s49(1)(e) refers to separate offences, together with the decisions in *Goodey v Clarke*, *DPP v Greelish* and *Clarke v Goodey*, is sufficient to dispose of the appeal in this case against the DPP. The charge averred a failure to comply with a requirement 'to accompany a member' of the police force to a police station but it did not identify which of the possible requirements under s55 had

> been invoked and not complied with. Each of ss55(1) and (2) expressly contemplates a requirement that a person accompany a member of the police force but do so in different circumstances. Section 55(9A) also permits the imposition of a requirement to accompany a member of the police force but does so as a secondary requirement in the context of an earlier requirement to allow a registered medical practitioner or an approved health professional to take a sample of blood from a person required to give a sample of breath under subsections (1), (2), (2AA) or (2A) of s55. In these circumstances the learned Magistrate cannot be said to have erred in the conclusion that the charge had failed to include essential elements. It may readily enough be accepted that the charge and summons should be read as a whole and that it is necessary to strive conscientiously to read the information in a sense that gives it the meaning the draftsman intended,[7] but a reading of the charge would not identify which of the many potential obligations to accompany a member of the police force which s55 permitted had not been complied with. It is not a case where the relevant occurrence or foundation of the charge had been averred but that its evidence or proof had been omitted.[8]

6. The judge also referred to the question of whether the magistrate erred in failing to amend the charge. He held that it was unnecessary to decide the point but said that, in any event, he did not consider that the magistrate had so erred:

> It is unnecessary for me to consider the additional basis upon which the respondent sought to defend the decision of the learned Magistrate, namely, that the charge was duplicitous. It may be accepted that a duplicitous or uncertain charge may in certain circumstances be amended[9] but the Magistrate was not in error in failing to allow an amendment if, for no other reason, that no application for amendment was made.[10]

Grounds of Appeal

7. The Director contends that the judge erred in holding that the charge lacked an essential element of the offence alleged and so in concluding that the charge was defective. In the alternative, the Director says, if the charge were defective, the judge was wrong to uphold the magistrate's decision not to amend it.

Director's submissions

8. Before this court, counsel for the Director invoked Dixon J's observation in *Johnson v Miller*[11] that the essential elements of a charge are 'the time, place and manner of the defendant's acts or omissions'. He contended that the charge in this case met those requirements. In his submission, the relevant act was properly to be characterised as 'a refusal [to comply with] a requirement to accompany a police member to a police station to furnish a breath sample'. Hence, identification of the relevant sub-section of s55 was inessential. It was, counsel said, no more than an indication of the circumstances in which the requirement came to be made. Thus, to reason as the judge had done was to mistake facts of which particulars may be required for elements of an offence which must be alleged in the charge.

9. Counsel for the Director also sought to draw an analogy with *Director of Public Prosecutions Reference No 2 of 2001*. He submitted that just as in Director of Public Prosecutions Reference No 2 of 2001, proof of a requirement to furnish a blood sample under ss53 and 55 was held not to be an essential element of an offence under s49(1)(f) (of having a blood alcohol concentration of more than the prescribed percentage), so it should be in this case that proof of the basis on which the requirement was made under s55 was not an essential element of an offence under s49(1)(e) the Act (of failing to comply with that requirement).

Requirement an essential element of offence under s49(1)(e)

10. In my view, those arguments should be rejected. In effect, they repeat the contentions which the Director advanced before the judge below and, by and large, I agree with the judge's conclusions.

11. As the decision of *Director of Public Prosecutions Reference No 2 of 2001* makes clear, s49(1)(f) creates but one offence (of having a blood alcohol concentration greater than the prescribed percentage) albeit that the offence may be committed in a number of different circumstances. Contrastingly, as was held by this court in *Director of Public Prosecutions v Greelish*,[12] and reaffirmed in *Clarke v Goodey*,[13] s49(1)(e) creates as many different offences (of failing to comply with a requirement under s55) as there are different kinds of requirements under s55.

12. It being so, the proper characterisation of an act which comprises an offence under s49(1)

(e) is one of failure to comply with a particular kind of requirement under s55. It follows that, in order to identify the act which comprises the offence, it is necessary to identify the particular kind of requirement under s55 with which it is alleged that there was non-compliance. Hence, it is an essential element.

13. Counsel for the Director submitted that *Greelish* and *Clarke v Goodey* were wrongly decided. I reject that submission. As Bray CJ said, in another context, in *Romeyko v Samuels*:[14]

> The true distinction ... is between a statute which penalizes one or more acts, in which case two or more offences are created, and a statute which penalizes one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several such characteristics.

Given the way in which s49(1)(e) is drafted, with specific reference to each of the sub-sections of s55 and so to each kind of requirement for which the section provides, it is apparent that s49(1)(e) is a 'statute which penalises one or more acts, in which case two or more offences are created'. With respect, *Greelish* and *Clarke v Goodey* were on that point rightly decided.

14. Counsel for the Director argued that, if that were so, s27(1) of the *Magistrates' Court Act* 1989 provides that it is sufficient for a charge to describe an offence in the words of the Act or subordinate instrument by which it is created, or in similar words, and that, whatever criticisms may be levelled at the charge, it cannot be gainsaid that it described the offence as one under s49(1)(e) in terms of or similar to the words of s49(1)(e).

15. I do not accept that submission either. To start with, the charge did not describe the offence in the terms of s49(1)(e). Section 49(1)(e) refers to the several sub-sections of s55 individually. The charge did not. It referred collectively or globally to s55 as a whole. Further, because s49(1)(e) operates in an ambulatory fashion, creating offences by reference to contraventions of obligations otherwise appearing in several different sub-sections of the Act, it is semantically inapt to speak of something as framed in terms 'similar' to s49(1)(e) unless it specifically identifies the particular obligation which is alleged to have been breached. Furthermore, and perhaps for that reason, it has been held that a provision like s27 has no application relation to an ambulatory provision like s49(1)(e). In *Woolworths (Victoria) Limited v Marsh*,[15] Ormiston J said:

> It cannot have been intended that [the section] should be relied upon merely by the recitation of the words of the 'offence' section for that would tell the defendant nothing.

16. To say so does not mean that every charge which alleges an offence under s49(1)(e) is fatally flawed unless it refers by name to the sub-section of s55 under which the requirement is alleged to have been made. A charge is to be interpreted in the way in which a reasonable defendant would understand it, giving reasonable consideration to the words of the charge in their context.[16] If, therefore, the contents of the charge and the summons are sufficient when read as a whole to bring home to a reasonable defendant the essential elements of the offence alleged, the charge will not be invalid. Failure to name the sub-section would be a breach of s27 of the *Magistrates' Court Act* 1989.[17] But that would be the sort of breach which could be rectified by amendment. It would not affect the essential validity of the charge or, necessarily, the validity of any conviction obtained on it.[18] Where, however, as here, the charge and summons do not allege sufficient facts to enable a reasonable defendant to determine *ex facie* the sub-section of s55 under which the requirement is alleged to have been uttered, the charge is defective because it fails to convey the nature of the offence alleged.

17. The point is illustrated in the reasoning of Smith J in *Alwer v McLean*.[19] In that case, his Honour allowed an appeal against a conviction of an offence under regulation 1001(1)(1) of the *Road Safety (Traffic) Regulation* 1988 (of exceeding the speed limit) because the charge failed to specify the speed limit applicable to the section of highway referred to in the charge. The matter was complicated by the realisation that on the facts alleged the offence was one under regulation 1001(1)(c) as opposed to regulation 1001(1)(a). That aside, however, Smith J held that the charge was invalid for its failure to include an element of the offence alleged:

> Counsel for the respondent submits that the charge was in words that were similar to the words in the Act and therefore the charge described the offence in the manner that complied with s27 of the Act. He said further that it implies the words of the regulation.

> It was common ground that s27 of the *Magistrates' Court Act*, does not remove the obligation to identify the essential factual ingredients of the offence.[20] In seeking to apply s27, however, the respondent is faced with a situation where the charge and summons did not describe the offence in the words of the regulations; for it omits words of the regulation that spell out an essential element. This was, in effect, recognised by counsel for the respondent who submits that, in any event, the missing ingredient was to be implied. He cites the case of *Bell v Dawson*.[21] It seems to me that more is required here than implication to deal with the omission.[22] *It is true that the description of the offence in referring to it being committed 'on a highway' draws attention to 1001(1)(a) but that is an expression that could be used in respect of other offences under Regulation 1001(1)(a) (see definition of 'highway', Reg. 105). In my view s27 does not assist the respondent.*[23]

18. Parity of reasoning dictates a similar conclusion in this case. The charge draws attention to 'section 55' and that is an expression which can be used in respect of a number of offences created by s49(1)(e).

19. Finally, on the question of validity of the charge, counsel for the Director submitted that the respondent can have been in no doubt as to the facts of the offence alleged because his solicitors were provided with the complete police brief of evidence.[24] So far as the validity of the charge is concerned, that submission is misplaced. The validity of a charge is to be determined according to the contents of the summons and charge[25] and a defendant is entitled to insist upon a valid charge before the matter proceeds to evidence.[26]

Amendment

20. It is different, however, when it comes to the question of amendment. For that purpose, the fact that the respondent was supplied with the complete police brief may be relevant. Section 50 of the *Magistrates' Court Act* 1989 provides that the court may amend a charge, summons or warrant to correct a defect or error. Depending on the circumstances, the fact that a defendant has been fully apprised of the way in which a charge is to be put against him is relevant to, and may be determinative of, whether to allow an invalid charge to be amended under s50 in order to rectify the defect.

21. Counsel for the respondent submitted that the High Court's decision in *John L*,[27] and the decision in *Ex parte Lovell*[28] (on which to some extent the decision in *John L* was based) determined that a charge which omits an essential element is essentially invalid and cannot be amended. That is incorrect. As Redlich J[29] explained in *Ciorra v Cole*,[30] decisions such as *John L* and *Ex parte Lovell* were made under statutory regimes which did not include a statutory power of amendment like s50. Contrary to the respondent's contentions, the power to amend under s50 is available where a charge discloses no offence.[31]

Amendment out of time

22. One difficulty in this case which did not arise in *Ciorra* is that the 12 month limitation period set by s26(4) of the *Magistrates' Court Act* 1989 expired very shortly after the charge was instituted and so well before the charge came on to be heard. That poses a question of when and in what circumstances a charge which fails to allege an essential element of an offence may be amended after expiration of the limitation period.

23. The rule is that an amendment which clarifies a charge is permissible and an amendment which goes further than that is not.[32] So, an amendment may be permitted out of time when, despite the amendment, the offence charged stays the same.[33] But an amendment will not be allowed out of time if it would result in the formulation of a new and different charge. The latter is treated as an impermissible attempt to avoid the limitation period.[34]

24. A charge which lacks an essential element of the alleged offence is defective and, at common law, may be described as a nullity. If, however, the true nature of the offence is apparent from the face of the charge, and the defendant has not been misled or otherwise prejudiced by the omission, the charge may be amended under s50 (even out of time) to include the missing element;[35] on the basis that such an amendment does no more than clarify what is already apparent from the face of the charge.

25. In this case, it is not apparent from the face of the charge and summons what offence was alleged. Contrary to the respondent's submissions, however, the charge is not duplicitous. It

alleges only one offence: an offence under s49(1)(e) of failing to comply with a requirement under s55. Contrary also to the respondent's submissions, although s49(1)(e) creates a multiplicity of offences of failing to comply with a requirement under s55, practically speaking the allegation of 'having been required to provide a sample of breath pursuant to section 55' narrows the field to an offence of failing to comply with a requirement under s55(1) or s55(2). It is not possible to say *ex facie* which of those two it is.[36] If the Director is correct, however, that was made clear by the contents of the police brief.

26. Counsel for the Director was unable to refer us to a case in which it has been held that an amendment out of time may be allowed in those circumstances. In *Director of Public Prosecutions Reference No 2 of 2001*, Charles JA said only that, if it were necessary to decide the point, one would be well advised to commence the task with a consideration of Dixon J's observations in *Broome v Chenoweth*. Somewhat more expansively, in *Woolworths (Victoria) Ltd v Marsh*,[37] Ormiston J implied that one might also take into account any particulars given. His Honour said that:

> This is not a case where it is appropriate to exercise a discretion to permit amendment or to exercise a discretion to remit the matter to enable amendment. *The particulars given at the trial in no way identified the nature of the offence as I have analyzed it*, and as it was suggested to me in argument, and I do not consider the defect a mere technicality but a serious failure to inform the defendant of the charge brought.

27. If one approaches the problem at the level of principle, however, it is difficult to see that there is any impediment to allowing such an amendment before the expiration of the limitation period, the defendant is otherwise put on notice in writing of the true nature of the offence alleged. After all, as Charles JA said in *Director of Public Prosecutions Reference No 2 of 2001*, the power to amend given by s50(1) is wide-ranging, covering any defect in a charge whether in substance or in form, as well as answering any objection to a variance between the charge and the evidence presented in the proceeding.[38] It exists to ensure that justice is not defeated by errors and omissions which are not productive of injustice. So, if the justice of the case is the criterion, why should it not be thought appropriate to allow such an amendment, so long as the true nature of the charge is able to be discerned before expiration of the limitation period – whether that be *ex facie* or from particulars given or by means of some other form of written communication?

28. It is true that the validity of a charge must be judged on the basis only of what appears from the face of the charge and the summons. But that is so because the charge defines the issues and thus the evidence admissible in the litigation. It would make no sense to seek to support the validity of a charge on the basis of information otherwise disclosed to the defendant.[39] It is different where the question is whether to allow an amendment. Then the issue is not whether the charge is in proper form – if it were in proper form there would be no need to amend it – but whether it is just to allow it to be put into proper form.[40]

29. It may be thought that the decision of Eames J (as he then was) in *Flanagan v Remick*[41] is opposed to that conclusion. In that case, the defendant was charged with an offence under regulation 1001(1)(a) of the *Road Safety (Traffic) Regulations* 1988 (of having driven at 130 kph on a road which was subject to a 60 kph speed limit) and with a further offence under regulation 225(1) of the *Road Safety (Drivers) Regulations* 1999 of failing to display a P plate. It was later discovered that both sets of regulations had been repealed before the offences were committed and replaced with differently worded provisions to similar effect. At the hearing, the magistrate allowed the charges to be amended outside the 12 months' limitation period by substituting, for regulation 1001(1)(a) of the *Road Safety (Traffic) Regulations* 1988, a reference to Rule 10 of the *Road Rules Victoria* and, for regulation 225(1) of the *Road Safety (Drivers) Regulation* 1999, a reference to regulation 217 of the *Road Safety (Drivers) Regulations*. Eames J reversed the magistrate's decision.

30. There was no dispute that the amended provisions relied on were those which appropriately applied to the conduct which had previously been proscribed by the earlier legislation. The repealed regulation 1001(1)(a) prohibited exceeding 60 kph in a 'built up area' and Rule 20 prohibited driving 'at a speed over the speed-limit applying to the length of the road where the driver is driving [and it was presumed that 60 kph was the applicable speed limit]'. The repealed regulation 217(1) required P plates to be displayed conspicuously 'on the front and rear' of the motor vehicle, and the new regulation 225(1) required P plates to be 'facing out from the front and rear' of the motor

vehicle. Even so, Eames J held that the magistrate had erred in allowing the amendments. His Honour considered that the charge as originally constituted was 'a nullity from the outset'[42] and, therefore, that:

> The purported amendments were not for the purpose of more accurately identifying the statutory basis for the charges which had been laid against [the defendant] by the informant, but were intended to allege what amounted to entirely new offences against him.[43]

31. Eames J added that it made no difference that the defendant had not been misled by the misdescription of the offences charged. His Honour said that the defendant was required to be charged with 'offences which were known to the law' and those which were alleged were not:[44]

> The situation before me is not one where the appellant contended that he was misled by any omission of material words or misdescription of the offences with which he was charged. There is no doubt that he was well aware that the allegations against him were that he had driven at 130 kph on a road which was subject to a 60 kph speed limit, and that he was not displaying P plates at all. He was, however, required to be charged with offences which were known to the law. The offences, here, were brought by the laying of a charge and summons (which identified them) before the Registrar of the Magistrates' Court on 9 February 2000. In commencing the proceedings by that process the informant was following the requirements of s26(1) of the *Magistrates' Court Act*. Had the errors in the identification of the offences (by virtue of their reference to repealed legislation) been noticed by the Registrar he would have been entitled to refuse to accept filing of the charge, on the ground that it was a nullity. A proceeding can only be commenced by a valid charge.[45] The defect in the charge in this case was not a merely technical one, but was fundamental, in a way no less significant than would be the case where the charge omitted an allegation of an essential factual ingredient of the offence.[46]

32. With respect, I take a different view of the matter. The reasoning in *Flanagan* assumes that the High Court's analysis in *John L* (which was concerned with the position at common law) applies where the common law has been modified by a provision like s50 of the *Magistrates' Court Act*. In fact it does not. As has been explained, although failure to allege an element of an offence may result in invalidity which at common law is incapable of being cured by amendment, that is not so under s 50.[47] Flanagan also treats an amendment which substitutes a reference to legislation which was in force at the time of the commission of the alleged offence for a reference to legislation which had not come into force at that time as tantamount to alleging an 'entirely new offence'. The better view is that, where the terms of the two pieces of legislation are the same or substantially the same, it is not a case of substituting a different offence.[48]

33. Further, if *Flanagan* were correctly decided, it is distinguishable. There the charge alleged an offence under legislation not in force at the time of the offence and, in that sense, an offence that was 'not known to the law'. Here the offence alleged in the charge was an offence under s49(1)(e) of failing to comply with a requirement under s55 (to accompany a member of the police force for the purpose of furnishing a breath sample). Since s49(1)(e) provides for several different offences of failing to accompany a police officer for the purpose of furnishing a breath sample, what was alleged in the charge was unquestionably an offence which is known to the law. The only defect was in failing to make clear which of the several offences for which s49(1)(e) provides was the one alleged.

34. The decision of Brooking JA[49] in *McMahon v Director of Public Prosecutions*[50] is instructive. In that case, a magistrate held a charge[51] to be invalid because it used the abbreviation 'RSA' instead of referring in full to the *Road Safety Act* 1986. Since the 12 months' limitation period[52] had expired, the magistrate also refused to allow the charge to be amended to include reference to the short title of the Act. Brooking JA considered that use of the abbreviation was not a defect but, more importantly for present purposes, if the charge were defective, that it was a clear case for amendment:

> I have no doubt that these charges were capable of amendment. Defects or errors both in substance and in form are comprehended by s50(1). *There has never been any doubt about the criminal conduct which the appellant with which the appellant was charged.* The offence would remain the same notwithstanding the amendment and the Magistrate's reliance on the running of time under s26(4) was erroneous. The only right exercise of discretion was to amend these charges, assuming them to be defective in the respect suggests. The Magistrate erred in law in concluding that the date of the offences meant that the amendment could not be made.[53]

35. In *Flanagan*,[54] Eames J said that Brooking JA's observations should not be taken to mean that 'the mere fact that the defendant knew what conduct of his was regarded as being criminal in character would be sufficient to convert a charge which was a nullity into one which was not'. With respect, I agree.[55] Nevertheless, what Brooking JA said in McMahon is relevant here because, for the reasons already given, the charge in this case was not a nullity. Although the failure to include a reference to sub-section (1) of s55 of the *Road Safety Act* was a defect, it was the sort of defect which, at least up until the expiration of the limitation period, could have been cured by amendment.[56] Nor is there any reason to suppose that the charge in this case became a nullity upon the expiration of the limitation period. Although a defective summons may not be amended in order to allege a new and different charge after the expiration of the limitation period, that is not because the defective summons is regarded as a nullity. It is the result of a rule of practice – akin to the civil procedural rule in *Weldon v Neal*[57] – that an amendment will not be allowed if it would result in an improper avoidance of the limitation period.[58] And the rule is predicated on the summons not being a nullity.

36. Admittedly, what Brooking JA said in *McMahon* was directed to a situation in which, despite the supposed defect in the charge, the true nature of the offence alleged was apparent from the face of the charge. That is not so here. But, logically, his Honour's reasoning applies with equal force where, although the true nature of the offence alleged is not necessarily apparent from the face of the charge, it is otherwise made clear to the defendant before the expiration of the limitation period.

37. As *McMahon* shows, if a charge is defective for failing to aver an essential element of the offence alleged, but contains sufficient information to enable a reasonable defendant to determine the true nature of the offence alleged, it may be amended (even after expiration of the limitation period) in order to accord to what was always understood to be the true nature of the offence alleged. Until such a charge is so amended, however, it remains ineffective.[59] Where, therefore, such a charge is not so amended until after expiration of the limitation period, it will not be until after the expiration of the limitation period that there exists an effective charge.[60] So, therefore, where such an amendment is made after expiration of the limitation period it will defeat the limitation period. The point of McMahon is that such an amendment is regarded as acceptable; for the reason that it is not unfair so to defeat the limitation period where the defendant has been made to understand the true nature of the offence alleged before the limitation period expired.

38. Logically, the same reasoning applies to a charge which is defective in that it fails to aver an essential element of the offence (and does not otherwise disclose ex facie the true nature of the offence) if, before the expiration of the limitation period, the true nature of the offence alleged is otherwise conveyed in writing to the defendant; for example, by particulars, or letter or even provision of the police brief. In terms of what is just, there is no difference. In each case, the defendant is made to understand, before expiration of the limitation period, the true nature of the offence alleged and, in each case, the amendment does no more than make the charge accord to that understanding.

39. Arguably, there are reasons of certainty and convenience to restrict the power of amendment to cases where the true nature of the offence is apparent from the face of the charge and summons. Otherwise, there may be disputes as to the particulars, letters, briefs of evidence and other written communications which are sent and received and thus as to the facts of which defendants have been apprised. But they do not strike me as sufficient reasons to decline to exercise the power of amendment in cases where the position is clear. To take a clear case, there could have been no doubt about the true nature of the offence alleged in this case if there had been served with the charge, or even subsequently before the expiration of the limitation period, particulars stating in terms or effect that the requirement under s55 with which the defendant was alleged to have failed to comply was one made after the defendant had undergone a preliminary breath test and in the opinion of the informant it indicated the presence of alcohol in the defendant's breath.

40. Perhaps, there is more room for doubt where, as here, the Director relies on the police brief of evidence. But that is a question of fact and degree. If upon examination it is seen that the brief was served before the expiration of the limitation period, and that its contents made clear the true nature of the offence alleged,[61] why should it matter that the means of communication lacked the formality of a set of particulars?[62]

41. At all events, I consider that, if the police brief in this case were provided to the respondent before the expiration of the limitation period, and its contents were such as to enable the respondent to understand that the case alleged against him was one of failing to comply with a requirement to accompany the informant to a place for the purposes of a breath test, which requirement was made because the respondent had undergone a preliminary breath test and in the opinion of the informant it indicated that the respondent's breath contained alcohol, it would be open (and, other things being equal, it would be appropriate) to amend the charge to make clear that the reference to s55 is a reference to sub-section (1) of s55.

The prosecutor's failure to seek an amendment

42. It remains to determine whether the judge below was right to hold that, because the prosecutor did not apply to amend the charge, the magistrate was not at fault in failing to consider the possibility of amendment.

43. As to that, there are three points to be mentioned. First, as Brooking JA said in *McMahon*, the imperative terms in which s50 of the *Magistrates' Court Act* 1989 is drafted suggest that, whether or not a prosecutor applies to amend, there is a duty on the magistrate to amend in an appropriate case.[63] That notion also derives support from judicial observations in some earlier decisions as to the duty of justices of the peace under s5 of the *Police Offences Act* 1891. For example, in *Stait v Colenso*[64] Williams J, when commenting on a defect in a charge which failed to allege an element of the offence, said:

> Having regard to sec 187 of the *Justices Act* 1890 I think it is not open to a defendant to take any objection to an information for any defect therein in form or substance. I think the utmost the defendant or his adviser in this case could have done was to point out this defect to the justices, and having done that the justices, who are presumed to know the law, should have decided there and then whether willfulness was a necessary ingredient in this offence, and then, if they were of opinion that it was necessary, it was their duty to at once amend and insert the word 'wilfully', and proceed to try the case, and then say if the evidence was sufficient to support the charge. It seems to me to be perfectly plain when this objection was raised the justices ought to have amended the information whether the informant refused to amend or not. They ought to have said 'We think it is necessary and we will amend'.[65]

44. Secondly, it has long been accepted that a magistrate has power to amend of his or her own motion, which is to say whether or not the prosecutor applies to amend. As Mann CJ observed in *Thomson v Lee*:[66] 'The magistrates have full power to amend, upon or without application'. Similarly, in *Kennett v Holt*,[67] Pape J said:

> I have already held that the court was not wrong in law in amending the original information, but I think as a general rule it is preferable for a court proposing to make such an amendment to invite the prosecution to apply for it so that the defendant can be heard on such an application. Nevertheless, the court has power to make the amendment of its own motion, for as was said by Mann CJ, in the passage from *Thomson v Lee* which I have already cited, the court has full power to amend 'upon or without application'. Further, s200 of the *Justices Act* confers a discretion on the court to order an amendment and does not say that such an amendment can only be made upon application by one of the parties.

45. Thirdly, and contrary to what appears to have been the judge's understanding of the facts, the magistrate in this case did consider the question of amendment and concluded that the charge should not be amended. According to the transcript, his reasons were as follows:

> I don't believe it should be amended. There's been no specific application to do so but I don't believe it should be. I apply the reason[ing] of the County Court [in *R v Christine Kidd*], which we all know ... was, effectively, an appeal brought by the DPP ... and I apply the reasoning where it does apply [of] the *DPP Reference No 2*. I'm stating the obvious, that both in *Collicoat* and *Bell* the material ... in [the] charge itself [was] far more expansive than that referred to in this particular matter'.

46. *R v Christine Kidd* concerned an application to amend a charge (which, like the charge in this case, failed to identify the sub-section of s55 of the *Road Safety Act* under which the requirement was alleged to have been made). The County Court judge refused the application for reasons which he expressed thus:

> In the proposed amendment no sub-section is nominated. The appellant is not in a position to

> assess as to which charge she is being required to face. Accordingly, I find that there is an element of duplicity as the charge presently laid against the appellant might be for the purpose of sub-s.(1) or sub-s.(2) not allowing the appellant to know the precise nature of the charge.[68]

47. With respect, the County Court judge's reasons appear to be unexceptionable. Assuming, as his Honour said, that the proposed amendment failed to nominate the sub-section of s55 which was relied upon, it would have been an incompetent amendment and, therefore, one for which leave was rightly refused. But that is hardly determinative of the issues as to amendment which fell to be decided in this case. Here, there was no suggestion of an amendment which eschewed reference to s55(1). To the contrary, the prosecutor was never afforded a chance to propose an amendment. If he had been given an opportunity to draft an amendment (as Pape J's observations in *Kennett v Holt* suggest should have been the case), he would surely have sought to substitute 'sub-section 55(1)' for 'section 55'.

48. The magistrate having embarked on a consideration of whether the defect in the charge in this case should have been amended, as he was right to do, I consider that the questions which the magistrate needed to decide were as follows:

> a) Whether, before the expiration of the limitation period, the police brief was supplied to the defendant or his representatives and whether it made clear that the case alleged against the defendant was one of failing to comply with a requirement to accompany the informant to a place for the purposes of a breath test, which requirement was made because the respondent had undergone a preliminary breath test and in the opinion of the informant it indicated that the respondent's breath contained alcohol;
>
> b) If so, whether the defendant was able to point to anything which showed that he could not reasonably have been understood that the case alleged against him was one of failing to comply with a requirement to accompany the informant to a place for the purposes of a breath test, which requirement was made because the respondent had undergone a preliminary breath test and in the opinion of the informant it indicated that the respondent's breath contained alcohol; and
>
> c) If not, whether there was any reason, in those circumstances, which would render it unjust to allow the charge to be amended so as to make specific reference to s55(1) (and thereby to make the form of the charge accord to the case which the defendant had always understood was alleged against him)?

49. I add, for the sake of completeness, that the magistrate can hardly be criticized for failing to adopt that course. Hitherto, there has not been any guidance on the point. But now that the point has arisen and been decided, in my view that is what needs to be done.

Conclusion

50. In the result, I would allow the appeal and set aside the judgment below. In lieu thereof, I would order that the magistrate's order dismissing the charge be quashed and that the matter be remitted to the magistrate for reconsideration of whether the charge should be amended.

ASHLEY JA:

51. I have had the opportunity of reading in draft the reasons for judgment of Nettle JA and Tate JA.

52. I am not in doubt that the charge and summons was defective, for the reasons which their Honours explain. The only question which could then arise is whether the charge and summons was capable of amendment pursuant to s50 of the *Magistrates' Court Act* 1989, notwithstanding the elapse of the limitation period set by s26(4) of that Act. That question could only fall for determination if the language of s272(1) of the *Criminal Procedure Act* 2009 was satisfied. That provision empowers a party to a criminal proceeding to appeal 'on a question of law, from a final order of the Magistrates' Court in that proceeding'.

53. It has been said of like words that the question of law must have arisen, as a matter of substance, in the Court of first instance.[69]

54. Whether a particular question of law arose is not answered by considering grounds of appeal. In the present case, one of the grounds relied upon in the Trial Division, and repeated in this Court, was that –

> The learned Magistrate erred in law in dismissing the charge.

55. Senior counsel for the Crown relied upon that ground as encompassing a complaint that the Magistrate erred by not permitting – or at least considering – amendment of the charge. I am prepared to assume, although unsatisfactorily imprecise, that the ground could extend to such a complaint. But, as I have said, that does not answer the question whether the question of amendment arose in a substantive way before the Magistrate.

56. It is apparent from paragraphs 12 and 13 of the affidavit of Adrian Mark Castle sworn 23 March 2010, and exhibit EK 1 to the affidavit of Eugene Kantos sworn 26 March 2010 that the argument advanced by the prosecutor in the Magistrates' Court was that the charge was sufficient. The prosecutor relied upon several authorities in that connection, and argued that a decision in the County Court, *R v Kidd*,[70] it being adverse to the argument which he advanced, was not binding on the Magistrate. The prosecutor did not apply to amend the charge. So the Magistrate was not called upon by a party to determine whether to grant or refuse amendment. As matters stood at the time, it has not been shown – and here I accept the reasoning of Nettle JA – that he was bound to do so. For whether there was any basis for him doing so depended upon there being evidence that the true nature of the charge had been made apparent to the respondent within the period of limitation; and so far as the Court is presently aware, there was no such evidence.

57. But, for a number of reasons, that is not the end of the matter.

58. First, as Nettle JA points out,[71] the Magistrate was empowered to amend on his own motion.

59. Second, in deciding to dismiss the charge, the Magistrate stated that he adopted the reasons of the County Court judge in *Kidd*. He said this:

> I adopt the reasoning of Judge White and I think when you look at the authorities that are referred to by him, directly and indirectly, this strengthens my finding that in the long run, the information is invalid. It failed to sufficiently identify the ingredients of the actual events. I don't believe it should be amended. There's been no specific application to do so but I don't believe it should be.

60. Third, it is related to the second matter, application to amend was refused in Kidd. It was refused because the amendment sought would not have disclosed the particular provision within s55 of the *Road Safety Act* 1986 upon which the informant relied. But the County Court judge did not decide that amendment could never be granted outside the limitation period.

61. Fourth, in argument, before determining to dismiss the charge, the Magistrate referred to *Kidd* and asked, rhetorically –

> [The County Court Judge] took the view that it was a nullity, and couldn't amend it. Why shouldn't I take the same view?

62. It may be that this dissuaded the prosecutor from seeking to amend. But it would be speculation so to conclude.

63. In the end, I consider, the question resolves to this: did the Magistrate's reasons amount to a conclusion that the charge was defective and must be dismissed because it was incapable of amendment? Supervisory courts have been, and should be, careful not to permit on appeal the agitation of questions of law which might have been, but were not, agitated at first instance. But, that said, I have concluded that the answer to the question which I posed is 'yes'. It seems likely to me that the Magistrate took Kidd to say something which it did not. It follows that the question whether the charge was susceptible of amendment was a question of law which arose, in substance, in the Magistrates' Court, the answer being integral to the final order made in that Court. Thus it was a matter which could be agitated on appeal.

64. The matter being properly before this Court, I agree with Nettle JA that amendment in this case was, conceptually, possible. Whether it proves on examination to be possible is another matter.

65. Both Nettle JA and Tate JA refer to possible documentary material which might persuade a magistrate or judge that a defendant had been on notice of the true nature of the charge within the

limitation period. I regard it as being of first importance that notice should be both in documentary form, and unambiguous. What is potentially involved is the remedy of defective criminal process outside the prescribed limitation period. The commencement of criminal proceedings by defective process, whatever be the explanation for doing so, must be discouraged. Permitting defective process to be remedied, specifically outside the period of limitation, should not be understood as something which is available as a matter of course, on scant material, or upon oral assertion that a defendant was put on notice of the true nature of the charge. It need hardly be said that the consequences of remedy being permitted are potentially serious for a defendant.

66. I agree in the orders proposed by Nettle JA.

TATE JA:

67. I have had the advantage of reading in draft form the judgment of Nettle JA. I agree with his Honour that the appeal should be allowed, substantially for the reasons he gives. I wish to add some brief observations of my own.

68. As his Honour makes clear, in a statutory regime that contains a power of amendment,[72] a charge which is defective because it fails to refer to the relevant statutory provision alleged to be contravened ought not to be treated as a nullity, whatever its status might be at common law. The relevant question to ask is whether an amendment can cure the irregularity by clarifying the charge that had been laid, without injustice to the defendant.[73] As Callaway JA said in *McMahon v Director of Public Prosecutions*:[74]

> Failure to comply with s27(2)[75] does not, in my opinion, deprive the Magistrate of jurisdiction to make amendments under s50.

69. There may be a variety of reasons why in an individual case an amendment can be made while avoiding injustice. One of those reasons, as recognised in McMahon, is where there 'has never been any doubt about the criminal conduct with which the appellant was charged. The offence would remain the same notwithstanding the amendment'.[76] The approach of asking whether the offence charged is the same, pre- and post- amendment, is clearly difficult to apply where, as here, the problems lies in the uncertainty, or latent ambiguity, in the initial charge. The charge here referred only to s55 of the *Road Safety Act* which is in itself insufficient to identify any particular offence. As the problem lay in being unable to ascertain, on the face of the charge, which offence was alleged, either a refusal to comply with a requirement made under s55(1) or one made under s55(2),[77] it would not be to the point to ask whether an amendment should be granted because the offence would remain the same notwithstanding the amendment. In other words, the circumstances arising here cannot be resolved by asking whether an amendment would have the impermissible effect of 'charging a different offence'.[78]

70. Another reason for concluding that no injustice would flow from the grant of an amendment is where the details of the charge, albeit defective, are nevertheless sufficient to disclose the nature of the offence alleged. As Redlich J (as he then was) said in *Ciorra v Cole*:[79]

> [W]here the details of the charge are sufficient in that the defendant is not left uncertain as to the nature of the offence charged, an amendment to substitute the correct statutory provision will be permitted where no injustice would otherwise be done to the defendant. That is to say an amendment could be made where the charge sufficiently discloses the nature of the offence so that it can be identified as an offence known to the law, notwithstanding that the charge either referred to the wrong provision or referred to none. In such cases the description of the offence sufficiently apprised the defendant of the nature of the offence.
>
> If, upon a reasonable reading of the description of the offence, an offence known to the law is disclosed which enables the defendant to identify the nature of the charge, the exercise of the discretion to amend would not have miscarried to correct an error as to the relevant statutory provision or subordinate instrument.

71. In *Ciorra* the error in the charge lay in the allegation that the defendant did exceed 100 kilometres per hour by driving at 145 kilometres per hour in contravention of certain road safety regulations when those regulations had been repealed and replaced by other regulations which prohibited the same conduct. In holding that it was open to the magistrate to make the amendment

substituting the new regulation for that repealed, Redlich J emphasised that the original charge containing the error, although defective, was not to be treated as void. He said:[80]

> It seems, both as a matter of principle and by reference to authority, that the charge suffering from such a defect should not be viewed as a legal nullity or as void ab initio because it omits or mis-states the applicable law which creates the offence. Such a defect may be cured by amendment. The Court's jurisdiction to entertain the charge is not derived from the correct identification in the charge of the law alleged to be contravened.

72. A third reason is where there are errors in the identification of the relevant statutory provision but the errors are obvious and the intended meaning plain. This was so in *Director of Public Prosecutions v Whittleton*[81] where Smith J was faced with the following defective[82] charge:

> The defendant at Mornington on 26 May 1990 did within 3 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 s51(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. BAC 0.190%.

73. His Honour held that the charge disclosed the substance of the offence and that the mistaken reference to s51(1) of the *Road Safety Act* rather than s55(1) did not detract from the information conveyed. He held that, in any event, if the charge did not disclose an offence it was susceptible to amendment, despite the 12 month limitation period having expired. He said:[83]

> 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 3 hours of driving the motor vehicle on the day in question, the defendant furnished a sample of breath for analysis by breath-analysing 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 0.190%.
>
> 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 statement of 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 para (a) and the reference should have been to para (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 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, none the less, come within the category of case described by Dixon J in *Broome v Chenoweth*, [1946] HCA 53; (1946) 73 CLR 583 at 601, 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.

74. There are many other examples supporting an exercise of the power of amendment in circumstances where the proposed amendment cures the irregularity in a charge by clarifying the charge that has been laid (rather than impermissibly substituting a new charge) while avoiding injustice to the defendant.[84]

75. The charge laid against Mr Kypri alleged that he committed a contravention of s49(1)(e) of the *Road Safety Act*,[85] as was stated in the box headed 'Section/Clause'. Section 49(1)(e) creates multiple distinct offences,[86] the offence of refusing to comply with a requirement made under s55(1), the offence of refusing to comply with a requirement made under s55(2), the offence of refusing to comply with a requirement made under s55(2AA), the offence of refusing to comply with a requirement made under s55(2A) and the offence of refusing to comply with a requirement made under s55(9A).[87] The charge failed to specify the precise sub-section of s55 that was relevant to the commission of the offence. It was cast in these terms:

> The defendant at Doncaster on 27 November 2005 having been required to furnish a sample of breath pursuant to section 55 of the *Road Safety Act* 1986 and for that purpose a requirement was made for him to accompany a member of the police force to a police station did refuse to comply with such requirement to accompany the member of the police force prior to three hours elapsing since the driving of a motor vehicle.

76. To identify which of the multiple offences created by s49(1)(e) is alleged to have been committed by a defendant, it is necessary to specify the relevant sub-section of s55 that is the source of the requirement with which the defendant has refused to comply. Identifying the relevant sub-section is an essential element of the offence. I agree with Nettle JA that the charge laid against Mr Kypri was defective in failing to provide the necessary specificity.

77. What the charge did make clear, however, was that the requirement with which Mr Kypri allegedly refused to comply was the requirement made 'for him to accompany a member of the police force to a police station' for the purpose of furnishing 'a sample of breath for analysis by a breath analysing instrument', that is, a requirement to accompany and furnish. Such a requirement can be made under s55(1) or s55(2). It is not a requirement that can be made under the other sub-sections of s55 referred to in s49(1)(e). The relevant requirement that can be made under s55(2AA) is a requirement to remain at the place where a drug assessment is to occur (not to accompany a police officer). The relevant requirement under s55(2A) is a requirement to furnish one or more further samples if the breath analysing instrument is incapable of measuring the alcohol in a sample already given or is otherwise defective, without any requirement to accompany. Under s55(9A) a person may be required to allow a registered medical practitioner to take from him or her a sample of blood (not breath)[88] for analysis. The requirement specified in the charge was thus not consistent with it having been made under s55(2AA) or s55(2A) or s55(9A). The defect in the charge lay only in the failure to specify under which of the two sub-sections, s55(1) or s55(2), was the requirement made to accompany a police office for the purpose of furnishing a sample of breath for analysis by a breath analysing instrument.

78. Considered from the perspective of Mr Kypri, any uncertainty created by the charge was thus limited to the differences that exist between the two sub-sections. Section 55(1) relevantly reads as follows:[89]

> If a person undergoes a preliminary breath test when required by a member of the police force ... under s 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 breath 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 place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and any further sample required to be furnished under sub-section (2A) 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.*

79. Section 53 relevantly permits a member of the police force to require a person to undergo a preliminary breath test by a prescribed device in certain circumstances, including any person found driving a motor vehicle.

80. Section 55(2) relevantly reads:[90]

> A member of the police force may *require any person* whom that member reasonably believes to have offended against section 49(1)(a) or (b) *to furnish a sample of breath for analysis by a breath analysing instrument* (instead of undergoing a preliminary breath test in accordance with section 53) and *for that purpose may further require the person to accompany a member of the police force to a place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and any further sample required to be furnished under sub-section (2A) and been given the certificate referred to in subsection (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.*

81. Section 49(1)(a) is the offence of driving or being in charge of a motor vehicle while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor vehicle. Section 49(1)(b) is the offence of driving or being in charge of a motor vehicle while the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood or breath.

82. The italicised portions in the extracts above show the extent of the commonality of language in the two sub-sections. The differences that remain relate principally to the belief of the police officer who imposes the requirement; in each case the reasonable belief of the police officer is a pre-condition to the officer imposing the requirement that the person furnish a sample of breath for analysis by a breath analysing instrument. In the case of s55(1) the police officer may believe that the preliminary breath test indicated that the person's breath contained alcohol or that the person refused or failed to exhale continuously into the device used to obtain the preliminary breath test.[91] By contrast, under s55(2) the relevant belief of the police officer is that the person has committed the offence of being incapable of proper control of the vehicle he or she is driving or is in charge of, because he or she is intoxicated, or a belief that the alcohol concentration in the person's blood or breath equals or exceeds the prescribed limit.

83. The differences between s55(1) and s55(2) are significant. They reveal differences in the context in which the requirement to accompany and furnish has been made. They demonstrate that the charge here is not analogous to that considered by Redlich J in *Ciorra v Cole* where the details were at least sufficient to disclose the nature of the offence alleged. They also show that the charge is not analogous to that considered by Smith J in *Director of Public Prosecutions v Whittleton* where the charge contained obvious errors.

84. Nevertheless, I consider that Nettle JA is correct to conclude that it would be open to the magistrate, on remitter, to amend the charge to clarify that the reference to s55 should be a reference to s55(1) if it is proved that the police brief was provided to Mr Kypri before the expiration of the limitation period and that its contents removed any uncertainty by making it plain that the requirement to accompany and furnish was made because Mr Kypri had undergone a preliminary breath test and, in the opinion of the informant, it indicated that Mr Kypri's breath contained alcohol. If that were made plain, a perusal of the legislation would indicate unequivocally that, as between s55(1) and s55(2), the requirement had been made under the former. The charge would have been clarified, no new offence would have been substituted, and (other things being equal and, if necessary, an adjournment being granted) the amendment could be granted without injustice to Mr Kypri.

85. In my opinion, such an amendment, if it were to be granted, would not 'defeat' the limitation period.[92] While the amendment would be made out of time, its justification would depend upon what information had been provided in the police brief within time. Moreover, the amendment would take effect as at the date on which the charge had initially been laid. In those circumstances, in my opinion, the limitation period is not avoided or overcome.

86. The limitation period would be defeated if an amendment sought to substitute a new offence (not one contemplated by the contents of the police brief) after the limitation period had expired. This would be so, for example, if it were now proposed to amend the charge to refer to s55(2).

87. Another example where I would consider the limitation period had been defeated was if the police brief had not been provided until after the limitation period had expired because it was only when its contents were revealed that the uncertainty of reference in the charge could be resolved (if it was resolved). Until that time the charge, being defective, could not have sustained a conviction. To provide the disambiguating information in the police brief after the limitation period

had expired would be too late. By then the 12 month period from the date on which the offence is alleged to have been committed to the commencement of proceedings, provided for under s26(4) of the *Magistrates Court Act*,[93] would have expired without the uncertainty facing Mr Kypri being resolved.

88. Whether an amendment of a defective charge should be permitted is thus a matter of fact and degree. It may depend on matters such as the contents of a police brief and the timing of its disclosure. This is perhaps unsurprising given that Dixon J said in *Broome v Chenoweth* in 1946:[94]

> Whether an information disclosing no offence can be amended has been the subject of some difference of judicial opinion. ... Probably it is necessary to deal with the question as a matter of degree and not by a firmly logical distinction. An offence may be clearly indicated in an information, but, in its statement, there may be some slip or clumsiness, which, upon a strict analysis results in an ingredient in the offence being the subject of no proper averment. Logically it may be said in such a case that no offence is disclosed and yet it would seem to be a fit case for amendment, if justice is not to be defeated. By contrast, at the other extreme, an information may contain nothing which can identify the charge with any offence known to the law. Such a case may not be covered by the power of amendment.

89. I agree with Nettle JA that the judgment below should be set aside, the magistrate's order dismissing the charge be quashed and the matter remitted to the magistrate for reconsideration of whether the charge should be amended in the light of the three questions Nettle JA has identified.

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[1] (Unreported, County Court of Victoria, Judge White, 20 August 2007).
[2] [2001] VSCA 114; (2001) 4 VR 55.
[3] [2010] VSC 400, [4]–[5] (Pagone J).
[4] (2002) 4 VR 220; [2002] VSCA 49.
[5] (Unreported, Supreme Court of Victoria, Court of Appeal, Batt and Buchanan JJA, 23 August 2002) [12]–[15].
[6] Ibid [11] (Buchanan JA).
[7] *DPP Reference No 2 of 2001; Collicoat v DPP* [2001] VSCA 114; (2001) 4 VR 55, 59 [12], 68 [40]; (2001) 122 A Crim R 251; (2001) 34 MVR 164; *Smith v Van Maanen* (1991) 14 MVR 365, 369 (Tadgell J).
[8] Compare *Taylor v Environment Protection Authority* [2000] NSWCCA 71 (Unreported, Meagher JA, James and Sperling JJ, 25 August 2000); *Smith v Moody* [1903] 1 KB 56, 63; [1900-3] All ER Rep Ext 1274 (Channell J); *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 479, 486–7, 489–90; [1938] ALR 104 (Latham CJ and Dixon J).
[9] *Magistrates' Court Act* 1989 (Vic) s50(1); *Rodgers v Rodgers* [1892] 1 QB 555, 556–7 (Hawkins J and Wills J); *Hedberg v Woodhall* [1913] HCA 2; (1913) 15 CLR 531, 535–6; 19 ALR 95 (Griffith CJ); *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 567, 590 (Dixon J).
[10] [2010] VSC 400, [8].
[11] [1937] HCA 77; (1937) 59 CLR 467, 486, which was recently referred to with approval by the High Court in *Kirk v Industrial Court (NSW)* [2010] HCA 1, [26].
[12] [2002] VSCA 49; (2002) 4 VR 220; (2002) 128 A Crim R 144; (2002) 35 MVR 466.
[13] (Unreported, Supreme Court of Victoria, Court of Appeal, Batt and Buchanan JJA, 23 August 2002).
[14] (1972) 2 SASR 529; (1972) 19 FLR 322, 345; see also *Day & Riggs v Ruala* (1978) 20 ACTR 3, 8–9; 33 FLR 208 (Blackburn CJ).
[15] (Unreported, Supreme Court of Victoria, Ormiston J, 12 June 1986) 15.
[16] *DPP Reference (No 2 of 2001)* [2001] VSCA 114; (2001) 4 VR 55, [40]; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[17] *McMahon v DPP* (Unreported, Supreme Court of Victoria, Court of Appeal, Brooking, Charles and Callaway JJA, 10 June 1995) 4.
[18] *McMahon v DPP* ibid; *Heddich v Dike* (Unreported, Supreme Court of Victoria, Gobbo J, 24 March 1981) 9; *DPP v Ross* (Unreported, Supreme Court of Victoria, Beach J, 7 January 1993) 4.
[19] [2000] VSC 396; (2000) 116 A Crim R 364; (2000) 32 MVR 125.
[20] See *John L Pty Ltd v Attorney General New South Wales* [1987] HCA 42; (1987) 163 CLR 508, 519; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228 and the cases there cited including *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 486–487; [1938] ALR 104.
[21] [2000] VSC 169; (2000) 114 A Crim R 26; (2000) 31 MVR 111 (Balmford J).
[22] Cf *Bell v Dawson* [2001] VSCA 114; (2000) 114 A Crim R 26; (2000) 31 MVR 111, above.
[23] [2000] VSC 396; (2000) 116 A Crim R 364, 368 [16]–[17] (emphasis added).
[24] Presumably, pursuant to s37 of the *Magistrates' Court Act* 1989.
[25] *DPP Reference (No 2 of 2001)* [2001] VSCA 114; (2001) 4 VR 55, 68 [40]; (2001) 122 A Crim R 251; (2001) 34 MVR 164; *Meek v Powell* [1952] 1 KB 164, 176; *Ciorra v Cole* [2004] VSC 416; (2004) 150 A Crim R 189, 200 [43]; (2004) 42 MVR 547.
[26] *Walsh v Tattersall* [1996] 188 CLR 77, 109–110; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4 (Kirby J, in dissent but not on this point).

[27] *John L Pty Ltd v AG (NSW)* [1987] HCA 42; (1987) 163 CLR 508, 519 and 522; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.
[28] *Ex Parte Lovell, Re Buckley* (1938) 38 SR (NSW) 153; 55 WN (NSW) 63.
[29] As his Honour then was.
[30] [2004] VSC 416; (2004) 150 A Crim R 189, 209 [80]; (2004) 42 MVR 547 (based on a thorough examination of relevant authorities and principles).
[31] Ibid [25], [36] and [60].
[32] *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, 601; [1947] ALR 27 (Dixon J).
[33] *Gigante v Hickson* [2001] VSCA 4; (2001) 3 VR 296, 302 [18]; (2001) 120 A Crim R 483; (2001) 33 MVR 51 (Batt JA).
[34] *R v Wakely* [1920] 1 KB 688, 691; *R v Jiri Fiala; Ex parte G J Coles & Co Ltd* (1986) 46 SASR 47, 64; *Kerr v Hanson* [1992] VicRp 3; [1992] 1 VR 43, 460.
[35] *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, 601; [1947] ALR 27 (Dixon J); *DPP Reference No 2 of 2001*; *Collicoat v DPP* [2001] VSCA 114; (2001) 4 VR 55, 58–59 [12], 68 [40]; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[36] *Alwer v McLean* [2000] VSC 396; (2000) 116 A Crim R 364, 368 [17]; (2000) 32 MVR 125.
[37] (Unreported, Supreme Court of Victoria, Ormiston J, 12 June 1986) 18.
[38] [2001] VSCA 114; (2001) 4 VR 55, 62 [20]; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[39] *Walsh v Tattersall* [1996] HCA 26; (1996) 188 CLR 77, 110-111; (1996) 139 ALR 27; (1996) 70 ALJR 884, (Kirby J, in dissent but not on this point); *Alwer v McLean* [2000] VSC 396; (2001) 116 A Crim R 364, 369 [19] (Smith J).
[40] *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, 601; [1947] ALR 27 (Dixon J).
[41] [2001] VSC 507; (2001) 127 A Crim R 534; (2001) 35 MVR 289; (2001).
[42] Ibid 540 [23].
[43] Ibid 538 [20].
[44] Ibid 547 [47].
[45] *John L Pty Ltd v A-G (NSW)* [1987] HCA 42; (1987) 163 CLR 508, 520.27; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.
[46] As was the case in *John L Pty Ltd v A-G (NSW),* 520; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.
[47] *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, 594 and 600; [1947] ALR 27.
[48] *R v Tuttle* (1929) 21 Crim App R 85, 90; *R v DD* [2002] VSCA 112; (2002) 5 VR 243, 249 [31]–[32].
[49] With whom Charles and Callaway JJA agreed.
[50] (Unreported, Supreme Court of Victoria, Court of Appeal, Brooking, Charles and Callaway JJA, 20 June 1995).
[51] Alleging offences under s64(1) and ss49(1)(b) and 49(1)(f) of the *Road Safety Act* 1986.
[52] Set by s26(4) of the *Road Safety Act* 1986.
[53] (Unreported, Supreme Court of Victoria, Court of Appeal, Brooking, Charles and Callaway JJA, 20 June 1995), 5 (emphasis added).
[54] [2001] VSC 507; (2001) 127 A Crim R 534, 538 [20]–[21]; (2001) 35 MVR 289.
[55] As Eames J went on to note, the question in *McMahon* was whether the statutory provision creating the offence charged had been sufficiently identified, not whether a new offence had been substituted.
[56] Under s50 of the *Magistrates' Court Act* (to make clear that the reference to s55 of the *Road Safety Act* was intended as a reference to sub-s (1) of s55): see and compare *Ciorra v Cole,* [2004] VSC 416; (2004) 150 A Crim R 189, 209 [80]; (2004) 42 MVR 547.
[57] [1887] 19 QBD 394.
[58] *R v Wakely* [1920] 1 KB 688, 691.
[59] It would not sustain a conviction in unamended form.
[60] Albeit that its effect is then taken to date back to the date of issue: Ibid.
[61] To refer specifically to sub-s50(1).
[62] Especially given that it is sometimes a sufficient reason to dispense with further and better particulars that a statement of the evidence has been provided.
[63] Ibid 4.
[64] [1903] VicLawRp 43; (1903) 28 VLR 286.
[65] Ibid 288.
[66] [1935] VicLawRp 35; [1935] VR 360, 364.
[67] [1974] VicRp 79; [1974] VR 644, 649.
[68] *R v Christine Kidd* (Unreported, County Court of Victoria, Judge White, 20 August 2007) 18.
[69] See, for instance, *Transport Accident Commission v Hoffman* [1989] VicRp 18; [1989] VR 197, 199; (1988) 7 MVR 193; *Frugtniet v Secretary to Department of Justice (No 2)* (1996) 10 VAR 314, 317 (Tadgell JA), *Green v Victorian WorkCover Authority* [1997] 1 VR 364, 369–370 (Tadgell JA), *Mond v Lipshut* [1999] VSC 103; [1999] 2 VR 342, 349–351 [40]–[46], *Victorian WorkCover Authority v Game* [2007] VSCA 86; (2007) 16 VR 393, 396 [15] (Ashley JA). See also *B & L Linings Pty Ltd & Anor v Chief Commissioner of State Revenue* [2008] NSWCA 187; (2008) 74 NSWLR 481.
[70] *R v Kidd* (Unreported, County Court of Victoria, Judge White, 20 August 2007).
[71] [44] above.
[72] Eg, in Victoria, s50(1) of the *Magistrates' Court Act* 1989.
[73] See *Willing v Hollobone (No 2)* (1975) 11 SASR 118, 121; (1975) 34 LGRA 236 (Bray CJ, with whom Walters and Wells JJ agreed). There the charge alleged that the defendant had allowed a motor vehicle to remain

stationary in a street but failed to state the by-law which was alleged to have been violated. The Court held that the charge was defective in form but could be amended as no prejudice flowed to the defendant that an adjournment could not remedy.

[74] (Unreported, Supreme Court of Victoria, Court of Appeal, Brooking, Charles and Callaway JJA, 20 June 1995).

[75] Section 27(2) of the *Magistrates' Court Act* provides: '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.'

[76] (Unreported, Supreme Court of Victoria, Court of Appeal, Brooking, Charles and Callaway JJA, 20 June 1995). There the charge used the abbreviation 'RSA' instead of the *Road Safety Act* 1986.

[77] This is discussed further below.

[78] *Gigante v Hickson* [2001] VSCA 4; (2001) 3 VR 296, 300 [16]; (2001) 120 A Crim R 483; (2001) 33 MVR 51 (Batt JA, with whom Tadgell and Callaway JJA agreed). There the Court declined to answer a case stated as to the jurisdiction of the County Court to hear an appeal from a magistrate on the ground that if the County Court had jurisdiction it must have upheld the decision of the magistrate to amend a charge which erroneously named the suburb at which the offence took place (Deer Park rather than Yarraville), pursuant to s50 of the *Magistrates' Court Act.* As the answer would not assist the accused on an appeal from his conviction, the Court considered an answer would have no utility. Batt JA said (at 300): 'Since the suburb was not essential to the offence, the substitution of a different suburb did not amount to charging a different offence.' The amendment was made after the limitation period had expired.

[79] [2004] VSC 416; (2004) 150 A Crim R 189, 205–6 [60]–[61]; (2004) 42 MVR 547.

[80] Ibid 206 [62].

[81] (1991) 15 MVR 105.

[82] The charge was also ungrammatical.

[83] (1991) 15 MVR 105, 106–7.

[84] See also the discussion of the power to amend in *Director of Public Prosecutions Reference No 2 of 2001; Collicoat v Director of Public Prosecutions; Bell v Dawson* [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164 where the Court held that the charges as framed either had alleged all of the essential elements of the offences and thus were not defective or, in the instance where an essential element had been omitted (the Bell appeal), the charge had otherwise implicitly conveyed the subject matter of the charge and its essential ingredients.

[85] Section 49(1)(e) provides that a person is guilty of an offence if he or she 'refuses to comply with a requirement made under section 55(1), (2), (2AA), (2A) or (9A)'.

[86] *Director of Public Prosecutions v Greelish* [2002] VSCA 68; (2002) 5 VR 349, *Clarke v Goodey* (Unreported, Supreme Court of Victoria, Court of Appeal, Batt and Buchanan JJA, 23 August 2002).

[87] I leave to one side the question of whether s49(1)(e) creates more than five distinct offences, there being as many offences as there are requirements under any of the relevant sub-sections.

[88] The pre-condition to the operation of s55(9A) is that the person from whom a sample of blood is sought has already been required to give a sample of breath. Sub-section (9A) does include a requirement to accompany but it is to accompany a police officer for the purpose of giving a blood sample.

[89] Emphasis added.

[90] Emphasis added.

[91] Section 53(3) relevantly provides: 'A person required to undergo a preliminary breath test must do so by exhaling continuously into the device to the satisfaction of the member of the police force'.

[92] On this aspect of the proceeding, I would, with great respect, differ from Nettle JA.

[93] Section 26(4) relevantly reads: 'A proceeding for a summary offence must be commenced not later than the 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'.

[94] [1946] HCA 53; (1946) 73 CLR 583, 601; [1947] ALR 27.

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