17/74

SUPREME COURT OF VICTORIA

AHERNE v FREEMAN (No 1)

Crockett J

11 August 1972

PROCEDURE – SPEEDING CHARGE – INFORMATION ALLEGED OFFENCE OCCURRED AT A PLACE WHICH WAS DIFFERENT FROM THE SWORN EVIDENCE GIVEN BY THE INFORMANT – VARIANCE – AT CLOSE OF PROSECUTION CASE APPLICATION MADE BY PROSECUTOR FOR AMENDMENT TO BE MADE – APPLICATION REFUSED – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR IN REFUSING AMENDMENT APPLICATION – SWORN AFFIDAVIT FILED BY MAGISTRATE – STATUTORY PROVISIONS GOVERNING SUCH AFFIDAVITS – AFFIDAVIT EXCEEDED STATUTORY REQUIREMENT – EXTENT OF WHAT SUCH AFFIDAVITS MAY CONTAIN: *JUSTICES ACT* 1958, SS88(3), (4), 167, 200.

This is an order nisi to review a decision of a Magistrates' Court dismissing an information alleging a breach of the provisions of Regulation 1001(1)(c) of the *Motor Traffic Regulations* 1962 – driving a vehicle on a highway at a speed exceeding 70mph. The applicant had given evidence disclosing excessive speed on the Western Highway between Pyke's Reservoir and Myrniong, but was unable to give evidence of excessive speed at or in the vicinity, alleged in the information i.e. between Melton and Myrniong. At the conclusion of his evidence, it was submitted on behalf of the respondent that there was no case to answer as there was no evidence of the commission of the offence in the terms of the information. The prosecution sought leave to amend the information to conform with the evidence. The Magistrate however, refused leave and dismissed the information.

Leave to review the dismissal was granted on the grounds:-
(i) the Magistrate had erred in refusing to amend the information, and
(ii) having regard to the provisions of *Justices Act* 1958 ('Act') and in particular Sections 88 and 200, the Magistrate erred in dismissing the information on the sole ground that the evidence of the informant was at variance with the information.

[Ed. In his judgment, Mr Justice Crockett in addition to the grounds of the order nisi discussed the contents of the affidavit filed by the Magistrate.]

HELD: Order nisi discharged.
1. The affidavit of a Magistrate or Justice may be a party affidavit or an affidavit filed pursuant to the provisions of s167 of the *Justices Act* 1958. The Supreme Court, however has persistently taken the view that it is as improper for a Magistrate or Justice to swear a party affidavit as it is for a party to obtain and file such an affidavit. There ought, therefore, on review proceedings never to be placed upon the file of the Supreme Court an affidavit sworn by a Justice or Magistrate unless it be so sworn and filed pursuant to the provisions of s167. That section in terms is couched in language of permission and undoubtedly requires that the material contained in such an affidavit should be confined to the matters referred to in that section; that is to say, the affidavit might set forth the grounds of the decision called in question and also (in cases where the evidence has not been taken down in writing and signed, and the exhibits marked as hereinbefore provided) any facts which the Magistrate considers to have a material bearing on the question at issue. It is clear that, unless there are special circumstances justifying departure from such a rule, those words of the section should be treated as confining the material of the affidavit to the reasons or grounds in fact stated by the Magistrate at the time for the decision given, and that the facts set out should be the evidence put before the court below after resort by the deponent to any notes he may have of that evidence or his recollection of it.

2. It is to be hoped that Magistrates performing what is often a signal service to the Supreme Court in this type of proceeding by exercising the powers given them under s167 of the Act, will confine the material to which they depose to that which ought to be no more than is necessary to make clear precisely what was the evidence given (especially where there are areas of dispute) and what were the reasons expressed for the decision under appeal.

3. It was submitted that the application to amend the information in the terms in which it was made by the prosecutor should have been granted by reason of the provisions of section 88(3) and (4) of the Act. Section 88(3) provides that no variance between any information and the evidence adduced

in support thereof as to the place in which the offence or act is alleged to have been committed shall be deemed material if it is proved that such offence or act was in fact committed within the jurisdiction of the court by which such information is heard and determined.

4. The variance between information and evidence in the present case was one as to the place in which the offence was alleged to have been committed. If it was a variance as referred to in that sub-section, then it seemed to be clear that the statutory injunction contained therein would compel the court to continue to hear the information notwithstanding such a variance. It also seemed clear that if that sub-section had application, disposal of the matter, despite the variance, could take place without any amendment to correct the discrepancy. However, not every variance will be one of which it has to be said that it is of a kind that the statute will allow it to be deemed non-material. A variance either as to place and time, even though the question of place and time is not relevant in connection with jurisdiction geographically or temporally, as the case may be, may yet be a variance as to time and place of such a character as to create an offence referred to in the evidence different from that alleged in the information. Whether it is or is not of such a character is a matter of degree.

5. In the present case there was no ground for refusing the application to amend which had been made. Furthermore, on the material that was before the magistrate, the only decision which was proper for him to come to in the circumstances was to accede to the application.

6. Having regard to the statement of the Magistrate as to the opinion he had formed as to the want of credibility on the part of the informant in relation to the commission of the offence alleged, the question arose as to whether the matter should have been remitted for further hearing. The material showed the informant was the only witness for the prosecution and no other witness could in fact be called. Emboldened by the sworn statement of the possession of such a view by the Magistrate, the respondent's solicitor would surely make a submission that he ought not to be called upon to present a defence, and, consistently with such a sworn statement of reasons, the Magistrate would almost certainly, notwithstanding anything the prosecution might say, dismiss the information were it to be remitted to him. Any new hearing that might be directed to take place before another Magistrate would occur almost two years after the alleged offence. None of this delay would be of the respondent's making and it would be oppressive at this point of time to subject him to completely fresh proceedings.

7. In the circumstances, notwithstanding the conclusions reached and the reasons expressed for so reaching them, to discharge the order nisi would save both parties unnecessary expenditure of time, effort and money, and accordingly the order nisi was discharged.

CROCKETT J: ... As is required by the section the Magistrate filed the affidavit by posting it to the Prothonotary for the purpose of its being so filed. I am constrained to observe that compliance with this statutory requirement, which of course is obligatory without there being imposed upon any officer of the court the need to make other parties to the proceedings aware of the contents of the affidavit, is somewhat less than satisfactory. In this, as in other cases where such a course has been followed, I have found that the party or parties concerned have been quite unaware of the existence of the affidavit, and, of course, still less of its contents until after the commencement of the hearing on the return of the order nisi. The result has been that some adjournment had had to granted to permit the parties to become acquainted with the contents of such affidavit, and often to reconstruct the argument that had initially been intended to be put before the court.

It seems to me that it is undesirable that parties should be left in the position of not learning until so late a stage of proceedings the existence and contents of such an affidavit; particularly when the practice of the court is, as has been clearly indicated in a number of reported cases, to give preference to a Magistrate's account as to what was the evidence given before him when there is on other material a dispute as to what that evidence in fact was.

What in fact the Stipendiary Magistrate had to say in relation to the question, other versions of which I have already referred to, was this:

> "He (the respondent's solicitor) submitted that the court did not have any evidence of the speed of the defendant between Melton and Myrniong on the Western Highway as alleged in the information. That this was so had been admitted to by the informant in cross-examination and if the offence exceeding 70 miles an hour had occurred anywhere, it was at Pyke's Creek. The prosecutor then applied for leave to amend the information by substituting, "at Pyke's Creek" for "between Melton and Myrniong". This requested amendment was vigorously opposed by Mr Wilson (the solicitor) who stated that the prosecutor had every opportunity during the evidence of the informant to apply for

> such amendment, had not done so and in fact had closed his case. He further submitted that on the whole of the evidence to date the amendment should not be made. The evidence of the informant was too uncertain on this charge. I then carefully considered this matter. It was obvious to me during the cross-examination of the informant that (apart from his notes) he had a most unsatisfactory memory of the events that had occurred more than seven months previously, The evidence as regards exceeding 70 miles an hour anywhere on the Western Highway was most unsatisfactory in my opinion. I decided that the evidence adduced by the prosecution in this matter had been so discredited as a result of cross-examination, and as regards this charge was so manifestly unreliable, that the amendment should not be made. I therefore upheld the submission and dismissed the charge."

Before dealing with the specific grounds raised in the order nisi I feel bound once more to make some animadversions concerning the affidavit to which I have referred. The affidavit of a Magistrate or Justice may be a party affidavit or an affidavit filed pursuant to the provisions of s167. The court, however has persistently taken the view that it is as improper for a Magistrate or Justice to swear a party affidavit as it is for a party to obtain and file such an affidavit. See *R v Garside; ex parte Mouritz* [1885] VicLawRp 36; (1885) 11 VLR 136, There ought, therefore, on review proceedings never to be placed upon the file of this Court an affidavit sworn by a Justice or Magistrate unless it be so sworn and filed pursuant to the provisions of s167. That section in terms is couched in language of permission and undoubtedly requires that the material contained in such an affidavit should be confined to the matters referred to in that section; that is to say, the affidavit might set forth the grounds of the decision called in question and also (in cases where the evidence has not been taken down in writing and signed, and the exhibits marked as hereinbefore provided) any facts which he considers to have a material bearing on the question at issue. It is clear, in my view, that, unless, as was the case in *De Iacovo v Lacanale (No 3)* [1958] VicRp 98; [1958] VR 628, there are special circumstances justifying departure from such a rule, those words of the section should be treated as confining the material of the affidavit to the reasons or grounds in fact stated by the Magistrate at the time for the decision given, and that the facts set out should be the evidence put before the court below after resort by the deponent to any notes he may have of that evidence or his recollection of it.

It is, in my view, implicit in the remarks of Sholl J, when speaking as a member of the Full Court in *De Iacovo's case*, and which are to be found at page 642, that he was of the view that the material to be deposed to should be so restricted. With such observations I agree.

I have referred to sufficient from the affidavit of the Magistrate for it to be clear that he has in what he has deposed to exceeded that requirement in more than one way. He has in that passage (and in other unquoted passages) made references to the manner in which he says that submissions were made and cross-examination was conducted. There is no more than an expression of an opinion, and, I should have thought an irrelevant opinion at that. Furthermore, the passage contains a comment upon the course that the hearing had taken and a comment that was made by the solicitor in the course of addressing his submission to the court. It is difficult to see how such comments can in any way be of assistance in these present proceedings.

Then, finally, the Magistrate has set out reasons which he has asserted are those which caused him to refuse leave to amend the information as was sought by the prosecutor and then to dismiss that information. In neither of the other affidavits to which I have referred is there any suggestion that those reasons were expressed by the Magistrate at the time as being those which had led to him making the decision which he did in fact make, nor does the Magistrate himself in his own affidavit assert that they were expressed by him. Consequently, I am left, on a reading of all the material, with the view that they were not reasons delivered during the proceedings. I think it quite wrong for such an affidavit to set out such reasons if the fact is they were not expressed. Furthermore, it is clear I think that they should have been communicated to the parties at the time that the decision was given if they then formed the reasons that led to the making of that decision.

The reason why such reasons should not be part of the material before me is that it would be dangerous, in my opinion, for justices to be at liberty to bring before another court on a review of their decisions material containing what is said to have been reasons for such decisions, but which were undisclosed at the time of its making, when those decisions are found at the time of the making of the affidavit, as axiomatically they must be, to be under attack. The Magistrate producing in sworn form such previously undelivered reasons must inevitably be subject to the

temptation of setting out some *ex post facto* rationalisation of the decision he had given and which is thereafter to be reviewed. If the appearance exists that there has been some such subsequent rationalisation, even though the fact is that there has not been, then, of course, the danger is not any less than it would be if the Magistrate in fact was producing at a later stage reasons which had in no way played any part in the production of the decision being reviewed.

The principal attack upon this decision is that it was wrong because in its making the Magistrate failed to pay regard to the plain terms of the provisions of sections 88(3) and (4) and 200 of the *Justices Act* 1958. As it appears from all the material put before me that the Magistrate, in company with all other participants in the hearing, was in ignorance of those sections when their possible application could have arisen for determination. The case is one in which it would be possible for a reader of the material in this proceeding at least to consider it possible that the Magistrate had, after the conclusion of the proceedings below, brought into existence reasons which in fact had in no way played any part in the determination of the matter, leading to the decision which he gave. The affidavit is designed not to be exculpatory but to provide assistance to the Court in arriving at the truth.

It is unnecessary for me to say more, but it is to be hoped, for the reasons I have given, that Magistrates performing what is often a signal service to this court in this type of proceeding by exercising the powers given them under section 167 of the *Justices Act*, will, however, confine the material to which they depose to that which ought to be no more than is necessary to make clear precisely what was the evidence given (especially where there are areas of dispute) and what were the reasons expressed for the decision under appeal.

I turn then to the merits of the matter raised on review. It is said that the application to amend the information in the terms in which it was made by the prosecutor should have been granted by reason of the provisions of section 88(3) and (4). Reliance was also placed upon section 200 of the same Act, although, in my view, that section appears to add no more, at least in the circumstances of this matter, than is to be found in the relevant part of section 88. Section 88(3) provides that no variance between any information and the evidence adduced in support thereof as to the place in which the offence or act is alleged to have been committed shall be deemed material if it is proved that such offence or act was in fact committed within the jurisdiction of the court by which such information is heard and determined.

The variance between information and evidence in the present case was one as to the place in which the offence was alleged to have been committed. If it is a variance as referred to in that sub-section, then it seems to me to be clear that the statutory injunction contained therein would compel the court to continue to hear the information notwithstanding such a variance. It also seems clear that if that sub-section has application, disposal of the matter, despite the variance, can take place without any amendment to correct the discrepancy. (See *Warner v Sunnybrook Ice Cream Pty Ltd* [1968] VicRp 11; [1968] VR 102 at 106; (1967) 15 LGRA 135). However, not every variance will be one of which it has to be said that it is of a kind that the statute will allow it to be deemed non-material. A variance either as to place and time, even though the question of place and time is not relevant in connection with jurisdiction geographically or temporally, as the case may be, may yet be a variance as to time and place of such a character as to create an offence referred to in the evidence different from that alleged in the information. Whether it is or is not of such a character is a matter of degree. (See *Hackwill v Kay* [1960] VicRp 98; [1960] VR 632 and *Warner v Sunnybrook Ice Cream Pty Ltd* (*supra*). It is in determining that matter, and that matter only, that it would seem that the court below would have an element of discretion.

In my view, as what was asserted was driving on 8th January 1972, at a speed in excess of 70 miles per hour on the Western Highway and that was the offence which was proved, the variance in place between one part of the Western Highway and another place a short distance away was a variance of no substance. It was not of such a character that it could be said of it that the offence proved was different from the offence alleged. It clearly was such variance as has been judicially defined to fall within the sub-section. The facts are very similar to those to be found in the case of *Parmeter v Proctor* (1949) 66 WN (NSW) 48. In that case Herron J reached a like decision to that which I have reached in this connection. There is to be found in that case an expression of principle as to why such a decision should be reached, as well, too, reference to authorities justifying such a conclusion.

Sub-section (4) would appear to suggest that in the circumstances of the present case which I have been discussing, it was unnecessary for the prosecutor to seek the amendment which he in fact did seek. Such amendment would appear by virtue of the terms of sub-s(4) of s88 to be required if the variance was one to which sub-s(3) applied if the party charged by such information has been deceived or misled so that an adjournment should be granted. There was no suggestion of deception or misleading in the present case (as I should have thought it was inevitable there could not be) and no adjournment was sought. There was thus no ground for refusing the application to amend which had been made. Furthermore, on the material that was before the magistrate, the only decision which was proper for him to come to in the circumstances was to accede to the application.

What by his affidavit the Magistrate has sought to say in this connection is that, although he did not so announce at the time, what he did in refusing leave to amend was done as, to have done otherwise, would have been pointless because he had determined at that stage that the evidence given in relation to the particular offence was so unreliable that he would not have been prepared to act upon it. What, therefore, he is saying is that his undisclosed process of reasoning in connection with the matter was as follows: as he would ultimately have been driven to the position of dismissing the matter on its merits, it was pointless to regularise the form of the information by amendment. In my view, even though strictly for the reasons to which I have already referred, I think I ought not to have regard to that part of the Magistrate's affidavit which refers to these matters, it is clear that such matters, even if I were to pay attention to them, disclose resort by the Magistrate to quite irrelevant considerations in connection with the exercise of any discretion which he had in relation to the question of amendment.

The Magistrate appears to me to have acted quite prematurely in coming to the decision he did, if he did so in reliance upon the matters that he has set out in his affidavit. What was virtually a refusal to deal at that point with a technical matter cannot, in my view, be justified by a pre-judgment reached in connection with the merits of the case. Even if the Magistrate at that point of time held the views to which he has afterwards deposed, the proper course was to have allowed the amendment. He should then have waited and seen whether or not the respondent's solicitor would have been so bold as to have made a submission that he ought not to have to answer the prosecution case on the ground that the informant's evidence was so unreliable that no credence should be attached to it even in the absence of any sworn denial by the defendant of the commission of the offence alleged by the informant. It would not have been surprising had such submission not been made. Even if it were (possibly at the invitation of the Magistrate himself), the Magistrate could not be certain that he would accede to it unless and until he had heard the prosecutor in argument on that matter. It cannot be said with certainty that, had the matter come to that point, the prosecutor might not have been able to have persuaded the Magistrate to have taken a different view concerning the credibility of the informant. If no, or no successful, such submission had been made, it might be anticipated (and the fact no doubt, having regard to other matters disclosed in the material, would have been) that the defendant would have given evidence about this very matter. Had he done so whilst it may be conceded that it could be expected he would have denied exceeding 70 miles per hour at the relevant time and place when giving his evidence-in-chief, it could not be anticipated with certainty that whilst being cross-examined he would not have made some concession of commission of such an offence and, had he done so, such concession might of itself have been sufficient to justify conviction, or, at all events, to have restored reliance on the credibility of the informant. Now, full consideration of the merits of the matter was entirely denied the parties by the action of the court in prematurely terminating the proceedings with an unjustifiable dismissal of the information following upon a wrongful refusal of leave to amend when amendment was sought.

In those circumstances the normal course would be to make the order nisi absolute and to remit the matter for further hearing by the court below in accordance with the considerations set out in this judgment. However, it would, I think, be idle of me to disregard the statement of the Stipendiary Magistrate as to the opinion he had formed as to the want of credibility on the part of the informant in relation to the commission of the offence alleged. The material shows the informant was the only witness for the prosecution and no other witness could in fact be called. Emboldened by the sworn statement of the possession of such a view by the Magistrate, the respondent's solicitor would surely now make a submission that he ought not to be called upon to present a defence, and, consistently with such a sworn statement of reasons, the Magistrate

would almost certainly, notwithstanding anything the prosecution might say, now dismiss the information were it to be remitted to him. Any new hearing I might direct to take place before another Magistrate would occur almost two years after the alleged offence. None of this delay would be of the respondent's making and it would be oppressive at this point of time to subject him to completely fresh proceedings.

In the circumstances I think that I am entitled, having regard to the wide powers vested in me by section 160 of the *Justices Act*, to discharge the order nisi, notwithstanding the conclusions which I have reached and the reasons that I have expressed for so reaching them. To discharge the order nisi would, I think, save both parties unnecessary expenditure of time, effort and money, and accordingly the order nisi will be discharged.
