36/97

SUPREME COURT OF VICTORIA — COURT OF APPEAL

HOI v LARKMAN

Brooking and JD Phillips JJA and Harper AJA

19 February 1997

PROCEDURE – CRIMINAL PROCEEDINGS – PARTICULARS OF CHARGE – FORMAL WRITTEN PARTICULARS PROVIDED – WHOLE OF POLICE BRIEF PROVIDED – ORAL PARTICULARS GIVEN BY PROSECUTOR BEFORE HEARING – WHETHER SUFFICIENT PARTICULARS.

H. was charged with theft of certain documents. The prosecution case alleged that a short time after the loss of the documents, H. contacted the owner and offered to return the documents in return for $200. Before the matter came on for hearing, requests for further and better particulars of the charge were made by H. Subsequently, written particulars were supplied which alleged that H. had assumed the rights of the owner by failing to take steps to locate the owner. Later, a copy of the whole of the police brief was supplied. Also, when the matter came on for "mention", the prosecution orally supplied further particulars. On the hearing, H. was convicted and later appealed on the ground that the magistrate permitted the prosecution to lead evidence and make findings that were outside the charge as particularised. The appeal was dismissed and upon appeal—

HELD: Appeal dismissed.
1. The prosecution case which was evident not only from the police brief but also the oral statement of particulars was that the owner of the documents was located by H. only for the purpose of obtaining a payment of money in return for the property – a payment to which H. was not otherwise entitled. Accordingly, the magistrate was not in error in failing to confine the particulars as formally given in writing.
***Hoi v Larkman* MC22/1995, affirmed.**

2. Given the fact that the evidence of the charge lay principally in the evidence of the owner of the documents and the facts were of fairly narrow compass, there was no uncertainty arising from the charge and the events giving rise to it.
***Freeman v Brear* (unrep.) Phillips J, 5 November 1992, distinguished.**

BROOKING JA: [1] Mr Justice Phillips will deliver the first judgment.

JD PHILLIPS JA: On 2 October 1992, Ngoc Tuyen Vu was carrying certain personal documents to his local priest to have the priest endorse his passport application with evidence of identification. When the priest declined to do so, Mr Vu returned to his car but, because it was hot, he put the documents on top of the car in order to remove his jacket and jumper before driving off. That done, he drove off but without retrieving the documents, and so he lost them. He reported their loss promptly to the police. That night, at about 7 or 7.30 pm, Mr Vu received a telephone call from a man who inquired about his having lost some documents and the possibility of a reward if they were found. Several calls followed — all, said Mr Vu, by the same man. The caller never identified himself and though reference was at some stage made by the caller to a "bad boy" who, he said, would return the documents for $200, the last call was to arrange a meeting between the caller and Mr Vu on the next day (15 October) for the purpose of the caller's handing over the documents in return for $200. In the meantime, Mr Vu had been keeping the police informed of the calls he was receiving. He attended at the arranged meeting place — a service station — at the specified time, and so did the police. Before any meeting occurred the police arrested the appellant who they found near the service station, apparently waiting and with the missing documents in his pocket. The record of his subsequent interview with the police was ruled inadmissible for reasons not presently relevant.

On 8 December 1992, the appellant was charged with theft. The charge was in these terms:

> "The defendant at Reservoir between the 2nd of October, 1992 and the 15th of October, 1992 did steal documents including four passport photos, Australian Passport Application form, Vietnamese birth certificate, a Certificate of Australia Citizenship, a document for travel in Australia, a letter

from the Department of Immigration Local Government and Ethnic Affairs and a letter from the City of Essendon all relating to Ngoc Tuyen Vu of the value of $30.00 being property belonging to Ngoc Tuyen Vu."

The charge thus identifies the documents lost by Mr Vu and found in the possession of the appellant when arrested. On 10 December 1992, the appellant's solicitor made a formal request for further and better particulars of the charge and, to use the words of the judgment now under appeal, "there followed over the next two years a long history of requests and responses including on 25 October 1993, 29 June 1994 and 20 July 1994 lengthy hearings before the Magistrates' Court". Finally the charge was heard on 18, 19 and 31 October 1994. Much of the hearing was taken up by evidence directed to the question whether the appellant's record of interview was admissible. When that was ruled inadmissible, evidence was led from Mr Vu and further evidence from the police. The appellant called no evidence. His counsel made a substantial submission that the charge was not proved, but the magistrate rejected this. The appellant was convicted and fined $750.

The appellant then appealed to the Supreme Court on a question of law. The appeal was initiated by order of a Master on 8 May 1995 when five questions of law were identified. The appeal was heard by a judge **[2]** on 15 August 1995. It was dismissed by His Honour on 29 August 1995. The appellant now appeals to this Court from that order of dismissal. In the course of his judgment, the learned judge observed that while the essential complaint contained in the first three questions of law identified in the Master's order was that the Magistrate had permitted the prosecution to lead evidence and made findings outside the charge as particularised, no submission was addressed to him in support of that complaint; the argument had been rather as to the sufficiency of the particulars that were supplied.

This summation by His Honour of the argument below was certainly not embraced by the appellant's counsel before us, though he said he was reluctant to debate it if it could be avoided. Perhaps the two issues mentioned by His Honour were more interwoven than the judgment suggests, but we have not heard from counsel for the respondent and, in any event, it does not matter. The appellant's counsel put argument to us in support of what His Honour called "the essential complaint" contained in the first three paragraphs of the Master's order and I am quite satisfied that there is nothing in the point.

It is necessary at this stage to say something of the responses made over two years to the appellant's pressing for particulars. On 10 December 1992, the appellant's solicitor had formally requested particulars as follows:

"(a) State the precise location at which the alleged offence is said to have taken place.

(b) State the time at which the alleged offence is said to have taken place.

(c) State the manner of each of the defendant's alleged acts and/or omissions constituting the alleged offence.

(d) State the particulars of the material facts that will be relied on by the informant as constituting the alleged offences [sic]".

By ones and twos the following responses were obtained:

"(a) The offence occurred between Spring Street and Edwardes Street in Reservoir.

(b) The offence occurred between the 2nd of October 1992 and the 15th of October 1993 which was accepted as being an error for 1992.

(c) The defendant has dishonestly appropriated by finding the mentioned property and further failing to take reasonable steps to locate the owner **[3]** thereof, therefore assuming the rights of the owner.

(d) The informant among other things, relies on the circumstances, witness testimony and admissions by the defendant."

In addition (and before 20 July 1994) the appellant's solicitor was provided with a copy of the whole of the police brief. On 20 July 1994, the continuing wrangle over particulars came

before Magistrate Rodda and, according to the affidavit of the appellant's solicitor in support of this appeal, the magistrate asked the prosecuting officer to "state the facts the prosecution would rely upon to establish the appropriation". The Senior Constable who was prosecuting replied that "he relied on the complainant's assertion that he had lost the documents and that he had received telephone calls concerning the returning of the documents in return for payment of some money". The prosecuting officer also said that "he relied on the admissions of the plaintiff made in his record of interview" — but, of course, that ceased to be relevant when that record was ruled inadmissible in October 1994. According to the deponent, the prosecuting officer also "said other things but I am unable to recall what he said as he spoke too fast for me to write them down" and those "other things", too, have no present relevance.

This affidavit of the appellant's solicitor then describes the exchanges that followed. Apparently, notwithstanding the prosecutor's response to the magistrate's request, the appellant's solicitor still pressed for the charge to be dismissed for non-compliance with an earlier order made by a magistrate that particulars be supplied before the hearing on 20 July, but not surprisingly Magistrate Rodda rejected this submission. He agreed that there had been technical non-compliance with the earlier order, but said "it was minimal and particulars had been provided in Court". The magistrate rejected any suggestion of prejudice because the case was presently before him only as "a mention". His Worship declined to order that particulars be provided in writing, adding that (according to the deponent of the affidavit) "he was not going to restrict the prosecution case to written particulars".

I have set all this out in order to show that by the end of the day on 20 July 1994, the appellant could not properly rely upon the particulars that had been formally supplied in writing to the exclusion of all else; and yet that seems to have been the continuing thrust of the appellant's complaint, both here and below. Thus it was that at the start of his address to Magistrate Cashmore on 31 October 1994 counsel for the appellant (who was not counsel before us) described the charge thus:

> "The charge as particularised in this matter is a theft where the defendant has dishonestly appropriated by finding the mentioned property and further, failing to take reasonable steps to locate the owner thereof, therefore assuming the rights of the owner."

To say this was to confine attention to the particulars that had been supplied formally in writing. It was to ignore altogether the particulars that had been supplied orally on 20 July and it was to ignore altogether such information as could be garnered from the police brief, the whole of which, it **[4]** may be recalled, had been made available to the appellant's solicitor before 20 July. Nothing daunted, appellant's counsel made the particulars provided in writing, to the exclusion of all else, central to his argument before us. Relying upon the formulation of the charge that I have just quoted, counsel contended that there was plainly an inconsistency between the charge "as particularised" and the case that was proved. When pressed, he referred in particular to the reference to the appellant's "failing to take reasonable steps to locate the owner" of the property and the evidence that Mr Vu had first been contacted by telephone very shortly after the loss of the documents. Accordingly, he argued, if the appellant was the finder of Mr Vu's property he had not failed to locate the owner as alleged and the charge was on that account not proved. But this was not how it was put to the magistrate, nor can it fairly be found within the four corners of the Master's order. Nor does the present contention seem to have been so plainly put to the learned judge, or to have been argued before him.

Indeed, the so-called "inconsistency" between the written particulars and the case in evidence may be more apparent than real. The particulars alleged a finding and failing to locate the owner, but it was surely implicit in this that such failing to locate the owner was a failing to locate him for the purpose of returning the property to him. (So much seems to flow from counsel's acceptance that theft involves an intention permanently to deprive the owner of his property.) But if that was implicit in what was formally articulated, then the "inconsistency" disappears. The Crown case, as must have been evident both from the police brief and from what was stated on 20 July, was of the owner's being located — but only for the purpose of the caller's obtaining a payment of money in return for the property, a payment to which the caller was not otherwise entitled.

Thus, it seems to me that there is nothing at all in the point that the magistrate allowed the prosecution to go beyond the charge as particularised. The argument fails as depending wrongly upon the particulars formally provided in writing to the exclusion of all else.

As for the sufficiency of the particulars, any complaint in this respect also falls to the ground once it is held that the particulars that were given to the appellant could not properly be confined to the formal and written responses. Even before 20 July 1994, the appellant had the whole of the police brief and, as the evidence of the charge lay principally in the evidence of Mr Vu, it cannot have been difficult to perceive the case being made. It was nonetheless argued that the police brief was merely evidence and not particulars and that the two were not to be confused. Of this, His Honour said:

> "In the present case, the prosecution erected its case upon inference which depended upon the matters which had been disclosed by it to the defence in the course of the long interlocutory history of this matter. It appears, too, that the solicitor for Mr Hoi had copies of the prosecution statements and, indeed, the whole prosecution brief. In mentioning this, I do not intend to confuse the very different functions of **[5]** particulars and evidence. It is just that in a case such as this, where the facts were of fairly narrow compass, the provision of this material is able to overcome any deficiencies in the particulars provided."

In so concluding, I think that His Honour was plainly correct. In the course of argument on this aspect, appellant's counsel relied below upon a passage in my judgment in *Freeman v Brear* (unreported, 5 November 1992) at page 18 where I said:

> "On behalf of the informant it was contended that as the evidence on behalf of the prosecution has all been led, the plaintiff has much more than the particulars he was seeking; he has the whole of the evidence. But that submission must be rejected, for there is a difference between particulars sufficient to identify the charge which has been laid and the evidence which is to be led in support of the charge. To take an extreme case: the charge which is laid, once fully extrapolated, may be seen to be totally unsupported by the evidence which is then led".

But that must be kept in context. In that case, unlike this, no particulars at all had been given, though they had been offered. More particularly, there was uncertainty arising from the number of charges laid and the events giving rise to the charges. The defendant was said to have been involved in what was, in substance, an affray with police late one night and more than one charge of assault was laid against him. There was uncertainty that could not be removed by supplying the evidence. Hence, I made reference in the course of my judgment to *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467 especially at pp488-490; [1938] ALR 104, per Dixon J. See also *Johnson v Needham* [1909] 1 KB 626; 100 LT 493 to which Dixon J there referred. But that type of uncertainty was not present in the case now under appeal, and I agree with the learned judge that the facts of this case were such that the provision of the police brief was "able to overcome any deficiencies in the particulars provided".

The only other issue on this appeal was the sufficiency of the evidence. One must be careful here because an appeal to the Supreme Court from the Magistrates' Court is authorised only on a question of law. Again as His Honour said below, the questions of law identified in the Master's order in this respect —

> "require a consideration of the question whether the Magistrate fell into error of law in concluding that the appellant was the original finder of the documents and that he was the person who made the telephone calls. In order to make out these errors, the plaintiff must show that there was no evidence upon which a magistrate could have made these findings ... ".

His Honour concluded that both these findings were plainly open to the Magistrate, and again I agree. Some argument was put to us in relation in particular to identifying the person who was arrested at the service station **[6]** with the person who made the calls, including that call which was last made to arrange the meeting, but I found the argument altogether unpersuasive. This is sufficient to dispose of the appeal. I would add only this. In my opinion, there is no more validity in this appeal from the judge's decision than there was in the appeal from the magistrate's decision. Indeed, it is a matter of some concern that a charge which should have been expeditiously brought to trial and quickly despatched became so delayed by a wrangle over particulars. It is also of concern that having finally been despatched in the Magistrates' Court, the matter has

occasioned two appeals without any apparent merit in either.

BROOKING JA: This appeal and the appeal to Byrne J which preceded it have, I am afraid, served to waste a good deal of public and private time and money. For the reasons given by Phillips JA it is plain that this appeal must be dismissed.

HARPER JA: I agree with Phillips JA and with the remarks of the learned presiding judge.

BROOKING JA: The order of the Court is, appeal dismissed with costs, including costs reserved by the Listing Master on 8 May 1995.

APPEARANCES: For the Appellant: Mr D Perkins with Mr M Dear, counsel. Solicitors: Kuek & Associates. For the Respondent: Mr D G Just, counsel. Solicitor for Public Prosecutions.
