14/01; [2000] VSC 368

SUPREME COURT OF VICTORIA

DPP v COLLICOAT

O'Bryan J

7, 14 September 2000 — (2000) 32 MVR 113; (2000) A Crim R 18)

MOTOR TRAFFIC – DRINK/DRIVING – DESCRIPTION OF CHARGE – CHARGE FAILED TO STATE THAT DEFENDANT WAS "THE DRIVER OF A MOTOR VEHICLE" – WHETHER SUCH WORDS SHOULD BE SPECIFIED IN THE CHARGE – CHARGE DISMISSED BY MAGISTRATE AS A NULLITY – WHETHER MAGISTRATE IN ERROR – WHETHER CHARGE SHOULD HAVE BEEN AMENDED: *ROAD SAFETY ACT* 1986, S49(1)(e), 53(1), 55(1); *MAGISTRATES' COURT ACT* 1989, SS27, 50.

C. was charged with an offence of refusing to comply with a requirement to accompany a police officer to a police station for the purposes of a breath test under s49(1)(e) of the *Road Safety Act* 1986 ('Act'). The charge failed to state that C. had been the driver of a motor vehicle. When the charge came on for hearing C. submitted that the charge was a nullity because it contained no allegation in the wording of the charge that C. was driving. The magistrate accepted this submission and dismissed the charge as a nullity. Upon appeal—

HELD: Appeal allowed. Order set aside. Remitted to be heard by a different magistrate.
In the charge and summons, C. had been provided with the details of a motor car registration number and a driver licence number. This information would have conveyed to a reasonable person charged with a s49(1)(e) offence that the requirement to have a preliminary breath test under s53 of the Act resulted from his being the driver of a motor vehicle. The charge and summons when read as a whole enabled the defendant to identify all of the necessary ingredients of the offence under s49(1)(e) of the Act to be proved by the prosecution. The charge was not defective or so uncertain that the defendant could not identify the charge brought against him. Whilst it is desirable that the paragraph in s53 of the Act relied upon should be specified in the charge, the words in the paragraph are unnecessary in the charge. The magistrate had power to amend the charge and summons and his refusal to do so was an error of law.

O'BRYAN J:

1. On 27 April 2000, the respondent was the defendant in the Magistrates' Court at Broadmeadows charged with the following summary offence:

> "The defendant at Mount Macedon on 11 June 1998 after having been required to have a preliminary breath test under s53 of the *Road Safety Act* 1986, and the test in the opinion of the member of the Police Force in whose presence it was made indicated that your blood contained alcohol, you were then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the said Act and for that purpose a requirement was made for you to accompany a member of the Police Force to a Police Station, such requirement you did refuse to comply with."

2. Above the details of the charge, details of the defendant's car registration number and licence number were provided.

3. Below the details of the charge, details of the law which the defendant allegedly breached were provided: Act No. 127/86, s49.1.e, State law.

4. When the matter was called on for hearing a Senior Constable of Police appeared to prosecute the defendant and Mr Hardy of counsel appeared on behalf of the defendant.

5. Before any evidence was led, Mr Hardy submitted that the charge was a nullity because it contained no allegation that the defendant was driving in the wording of the charge and no allegation that the requirement to undergo a preliminary breath test by a prescribed device was made pursuant to s53(1)(a) or (b) or (c) or (d). Mr Hardy submitted that the driving aspect was a fundamental or essential ingredient of the actual offence and the omission could not be cured by amendment pursuant to s50 of the *Magistrates' Court Act* 1989 because an amendment would amount to a fresh charge outside the 12 month time limit applicable to that offence: s26(4) *Magistrates' Court Act* 1989.

6. The Magistrate accepted the submission of Mr Hardy and dismissed the charge as a nullity. He did not consider that he could amend the charge because more than 12 months had elapsed since the offence was committed.

7. The applicant (who represents the informant in the court below) has appealed the decision on questions of law pursuant to s92 of the *Magistrates' Court Act* 1989. On 6 June Master Wheeler made an order that the following questions of law be raised by the appeal.

> (a) Did the Magistrate err in finding that any amendment to the charge would amount to the institution of a fresh charge outside the 12 month limitation period. Particularly as the relevant section of the *Road Safety Act* 1986 (s49(1)(e)) was set out in the body of the charge.
>
> (b) Did the Magistrate err in finding that the charge laid did not describe the offence (s49(1)(e) of the *Road Safety Act* 1986) in the words of the Act.
>
> (c) Is it essential in a charge which alleges a breach of s49(1)(e) of the *Road Safety Act* 1986 where a refusal to comply with a requirement made under s55(1) is alleged that words should appear in the charge that the defendant was either —
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> (i) a person driving a motor vehicle or in charge of a motor vehicle when found by the police; or
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> (ii) was the driver of a motor vehicle that had been required to stop at a preliminary breath testing station under s54(3); or
>
> (iii) a person who the police believed on reasonable grounds has within the last three preceding hours driven or been in charge of a motor vehicle when it was involved in an accident; or
>
> (iv) a person who the police believed on reasonable grounds was within the last three preceding hours an occupant of a motor vehicle when it was involved in an accident if it has not been established to the satisfaction of the police which of the occupants was driving or in charge of the motor vehicle when it was involved in the accident.

8. Mr Just submitted that, for the purposes of the *Magistrates' Court Act*, a charge must allege an offence known to the law, a date and provide reasonable particulars.

9. The Act, in s27, states:

> "(1) A charge must describe the offence which the defendant is alleged to have committed and a description of an offence in the words of the Act or subordinate instrument creating it, or in similar words is sufficient.
>
> (2) 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."

10. It cannot be gainsaid that the information complied with s27(2) for the provision of the Act that creates the offence which the defendant is alleged to have committed was identified by specifying s49(1)(e) of Act 127/86, a State Act. Section 49(1)(e) of the *Road Safety Act* (Act No. 127 of 1986) states:

> "A person is guilty of an offence if he or she—
> refuses to comply with a requirement made under section 55(1), (2) (2A) or 9A."

11. In the statement of the charge the defendant was informed:

> "You were then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to section 55(1) of the said Act and for that purpose a requirement was made for you to accompany a member of the Police Force to a Police Station, such requirement you did refuse to comply with."

12. The charge also specified the place and date of the offence: "Mount Macedon on 11/6/98." In *Kerr v Hannon* [1992] VicRp 3; (1992) 1 VR 43, Nathan J held that, if no date is alleged, a defendant cannot ascertain whether the information complies with what is now s26(4) *Magistrates' Court Act* 1989 (formerly s165 *Magistrates (Summary Proceedings) Act* 1975), the 12 month time limit and an amendment to insert the date cannot be permitted for it would amount to the laying of a fresh information outside the time limit and thus be invalid (page 45). In *Hackwill v Kay* [1960]

VicRp 98; [1960] VR 632 the Full Court held that where the statute provides that an information for an offence shall be laid within 12 months from the time when the matter of such information arose and not afterwards "the date of the alleged offence is therefore a most material matter and is, in our opinion, part of the essence of the offence."

13. Mr Just submitted there is no necessity to include in a s49(1)(e) charge which specified the defendant was required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the *Road Safety Act* a recital to the effect that the member of the police force had formed the opinion that the person's blood contained alcohol. In *Cooper-Baker v His Honour Judge Ross* (2000) VSC 221; (2000) 114 A Crim R 40; (2000) 31 MVR 235, Balmford J on 31 May 2000 held that such an omission did not invalidate the charge. "The formation of the opinion could be dealt with as a matter of evidence". Her Honour held:

> "While the drafting of the charge cannot be described as elegant, I do not find it to be imprecise, ambiguous, duplex, incomprehensible or otherwise bad in law. The plaintiff would have been well aware of what was alleged against her in terms of both s27 and the authorities cited."

14. This authority does support Mr Just's argument but the decision is on appeal to the Court of Appeal. In *Cooper-Baker*, the charge included the words "being the driver of a motor vehicle" which were omitted from the charge in the present case. Mr Hardy contended that the omission of such words rendered the charge invalid or a nullity which could not be cured by amendment. The point I now mention was not raised for discussion during the hearing, but it may be important to note that the Charge and Summons specified both a car registration number and a licence number, presumably those of the defendant's motor car and driving licence. If the words "being the driver of a motor car" were essential to the charge in the present case I would be prepared to find that the defendant would have been aware that what was alleged against him was related to his driving a motor vehicle or being in charge of his motor vehicle at the place and date alleged.

15. Mr Hardy submitted that the defendant was entitled to know from the charge that the requirement to accompany the member of the police force to a police station was a lawful requirement related to driving a motor vehicle, or being in charge of a motor vehicle, rather than related to some activity unconnected with a motor vehicle such as sitting idly on a park bench watching the world go by.

16. But the defendant had been provided in the Charge and Summons a car registration number and a licence number. This information would convey to a reasonable person charged with a s49(1)(e) offence which included the details of the charge earlier specified that the requirement to have a preliminary breath test under s53 of the *Road Safety Act* did not result from an unlawful requirement, but resulted from his being the driver of a motor vehicle.

17. Although the point was not argued by counsel at the hearing, which I regret, I am satisfied that Mr Hardy had the opportunity to develop a very comprehensive argument and said everything that could have been said on behalf of the defendant. In due course I shall refer to the argument of Mr Hardy.

18. I was referred to the decision in *Smith v Van Maanen* [1991] 14 MVR 365, a decision of Tadgell J as he then was. One of several charges specified in the information was an offence against s49(1)(f) of the *Road Safety Act* 1986. To borrow the language of His Honour: "The words used to frame the third information (were) clumsily put together." The third charge did not specify any time or place at which an offence was alleged to have been committed. However, the second charge did so and His Honour concluded that the meaning the draftsman intended was that the second and third charges occurred at the same place on the same day. Thus, the problem found in *Hackwill v Kay* (supra) could be overcome by "striving conscientiously to read any information in a sense that gives it the meaning that the draftsman intended" (p369).

19. This supports the point raised earlier about the defendant being aware that what was alleged against him resulted from his driving a motor vehicle or being in charge of a motor vehicle for the purposes of s53 of the *Road Safety Act*.

20. In *Van Maanen*, Tadgell J accepted that it is necessary that an information enable the

defendant to identify with precision the charge brought. See *Woolworths (Victoria) Limited v Marsh* (No. 104/84, Ormiston J, 12 June 1984, unreported).

21. In *Van Maanen* the learned Judge identified the four necessary ingredients of s49(1)(f) to be proved by the prosecution (371). The five necessary ingredients of s49(1)(e) to be proved by the prosecution are these: that the defendant had been found driving a motor vehicle or in charge of a motor vehicle; that a preliminary breath test by a prescribed device has been undergone pursuant to ss(1) of s53; that a member of the police force has formed an opinion the test made in his presence indicates that the defendant's blood contains alcohol; that the defendant has been required to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose required to accompany a member of the police force to a police station; and that the defendant has refused to comply with the requirement.

22. The draftsman of the Charge and Summons in the present case has clearly omitted the first necessary ingredient or, as was argued by the appellant, telescoped into one ingredient the first two ingredients identified above. The reference to s53 in the Charge and Summons clearly indicated to the defendant that he was required to have a preliminary breath test under s53 and not for any other reason. Whilst it is true that the requirement under s53(1) may be under (a) found driving a motor vehicle or in charge of a motor vehicle, or (b) whilst driving a motor vehicle being required to stop at a preliminary breath testing station, or (c) being suspected of having driven or been in charge of a motor vehicle within the last three preceding hours when it was involved in an accident, or (d) being suspected of being an occupant of a motor vehicle within the last three preceding hours when it was involved in an accident and it is uncertain which occupant was the driver, each of the four circumstances specified in s55(1) focus on driving a motor vehicle or being in charge of a motor vehicle or being an occupant of a motor vehicle.

23. In my opinion, the Charge and Summons sheet, read as a whole, enabled the defendant to identify all of the necessary ingredients of the offence under s49(1)(e) to be proved by the prosecution. The Charge and Summons was not defective or so uncertain that the defendant could not identify the charge brought against him. See *Ex parte Lovell; Re Buckley* (1938) 38 SR (NSW) 153; 55 WN (NSW) 63; *Pointon v Cox* (1927) 136 LT 506.

24. Mr Hardy's submission argued that the charge is fundamentally defective in a way that cannot be cured by amendment because the charge does not allege the statutory basis of the demand for a breath test. Mr Hardy relied upon a number of authorities for the proposition that a Charge and Summons is void as a nullity if an essential factual ingredient of the actual offence is omitted. See *Ex Parte Burnett; Re Wicks* (1968) 2 NSWLR 119; *John L Pty Ltd v AG (NSW)* (1987) 163 CLR 508; *Walsh v Tattersall* [1996] HCA 26; (1996) 188 CLR 77; (1996) 139 ALR 27 at 51; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4. In *Smith v Moody* (1903) 1 KB 56 at 60 the Chief Justice, Lord Alverstone observed:

> "It could not have been intended by that section (s39 of the *Summary Jurisdiction Act* 1879, the equivalent of s27 *Magistrates' Court Act* 1989) to do away with the old rule of criminal practice which requires that fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions. All that is meant by s39 is that the offence itself need only be described in the words of the statute creating it."

25. The principle relied upon cannot be doubted. Its application, in the present case does not require a finding that the charge is fundamentally defective, in my opinion.

26. In finding that the charge is not fundamentally defective I should add that it would have been better if the Charge and Summons had included words such as "being the driver of a motor vehicle" as was done in *Cooper-Baker* or words descriptive of the conduct which led to the preliminary breath test.

27. Should it later be held on appeal that the charge was defective because words such as "being the driver of a motor vehicle" were omitted, Mr Just submitted that the Magistrate could and should have allowed an amendment to correct the defect. Section 50 of the *Magistrates' Court Act* provides a power to amend a charge to correct a defect or error. Mr Just submitted an order for further particulars was appropriate, in the circumstances, and only in the event that further particulars are not provided should a Magistrate dismiss an information. *Marchesi v Barnes*

[1970] VicRp 56; [1970] VR 434. If further particulars were required, Mr Just submitted that the amendment would not make the charge a new charge outside the 12 month limitation period.

28. Mr Hardy submitted that the defect in the charge was fundamental and incapable of correction by amendment. This is so because the 12 month limitation period had expired when the need for an amendment arose.

29. An authority relied upon by Mr Hardy is *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583; [1947] ALR 27. In that case Dixon J drew a distinction between two categories of complaint or information, one where an offence may be clearly indicated but in its statement there may be some slip or clumsiness. Such a charge may be amended. The other is where no offence is disclosed. Such a case is not covered by the power of amendment given by s50. At CLR page 601 His Honour said:

> "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 that in such a case 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."

30. In *Walpole v Byway Pty Ltd* [1963] VicRp 26; [1963] VR 157; 9 LGRA 44, the Full Court upheld an argument that an information did not disclose an offence or state the facts and circumstances which constituted the offence with certainty or precision. No application had been made in the Court below to amend the information. The Court observed that "it may be" the Court had jurisdiction to allow an amendment of the information though it disclosed no offence but did not consider an amendment should be allowed in the Full Court.

31. In *Van Maanen*, Tadgell J had regard to the passage cited above in *Broome* and considered that the Magistrate could have amended the information to cure the errors and defects in the statement of the charge.

32. In my view, the present case was a fit case for amendment, if justice is not to be defeated, and the Magistrate had power to amend the Charge and Summons. His refusal to do so was an error of law. All that was required was to add after s53 the sub-section number and sub-clause: (1)(a) or (b) or (c) as the circumstances required. Alternatively, the words used in the charge in *Cooper-Baker* "being the driver of a motor vehicle" would have sufficed. Support for adding after s53 the sub-section number (1) and the sub-clause can be found in *Van Maanen*, in my opinion.

33. For these reasons I am of the view that the Magistrate erred in law when he discharged the charge as a nullity. In answer to the questions of law raised by the appeal I say: As to (a) the answer is Yes. As to (b) the answer is Yes. As to (c) the answer is No. It is desirable that the paragraph in s53 relied upon should be specified but the words in the paragraph are unnecessary in the charge.

34. The order is, the appeal is allowed. The order in the Magistrates' Court at Broadmeadows is set aside, including the order as to costs. The Charge and Summons is remitted to the Magistrates' Court at Broadmeadows to be heard by a different Magistrate. The respondent is ordered to pay the taxed costs of the appellant including reserved costs.

APPEARANCES: For the appellant DPP: Mr D Just, counsel. Peter Wood, Solicitor for Public Prosecutions. For the respondent Collicoat: Mr G Hardy, counsel. Prescott and Associates, solicitors.
