33/91

SUPREME COURT OF VICTORIA

DPP v EMADEN PTY LTD; DPP v CENSORI

Smith J

3, 20 November 1991

PROCEDURE – SUMMONS ISSUED BY PRESCRIBED PERSON – CARBON COPY FILED WITH REGISTRAR – "ORIGINAL SUMMONS" – WHETHER CARBON COPY AN ORIGINAL – WHETHER PROCEEDING A NULLITY: *MAGISTRATES' COURT ACT* 1989, S30.

Section 30 of the *Magistrates' Court Act* 1989 ('Act') provides (so far as is relevant):

> "(2) If a prescribed person issues a summons under sub-section (1)—
> (a) he or she must file the charge and original summons with the appropriate registrar within 7 days after signing the charge-sheet;...
>
> (3) If sub-section (2)(a) is not complied with, the proceeding is a nullity...."

1. The words "original summons" in s30(2) of the Act mean the 'first strike' document or that document which bears the initial imprint of the typewriter.

2. Where a carbon copy of a summons was issued and filed by a prescribed person with the appropriate registrar a magistrate was not in error in holding that s30(2) of the Act had not been complied with and that the proceeding was a nullity.

SMITH J: [1] Two appeals have been brought by the Director of Public Prosecutions from decisions made in the Magistrates' Court at Melbourne, on the 29th July 1991, that two summonses were each a nullity. The summonses purported to be issued by prescribed persons pursuant to s30 of the *Magistrates' Court Act* 1989 (Act). S30 of the Act provides:-

> '**Prescribed persons may issue summons**
> 30. (1) Without limiting the power of a registrar in any way, in the case of a charge for a prescribed summary offence if the informant is a prescribed person he or she may, at the time of signing the charge-sheet, issue a summons to answer to the charge.
>
> (2) If a prescribed person issues a summons under sub-section (1)—
> (a) he or she must file the charge and original summons with the appropriate registrar within 7 days after signing the charge-sheet; and
>
> (b) the proceeding for the offence is commenced at the time the charge-sheet is signed, despite anything to the contrary in section 26(1).
>
> (3) If sub-section (2)(a) is not complied with, the proceeding is a nullity but the Court may award costs against the informant."

The cases apparently proceeded before the learned magistrate on the basis that Senior Constable Newitt and Constable Martin were prescribed persons and that they signed the relevant charge sheets. Senior Constable Newitt was named as informant in the summonses relating to those charge sheets. The charge sheets were signed and the summonses issued on the 7th November 1990. It was common ground that the informant, Senior Constable Newitt, filed carbon copy summonses headed "Copy for Bench Clerk" on the 9th November 1990. They were the first carbon copy. It is also common **[2]** ground that the summonses bearing the original signature of the informant and from which all carbon copies were made were not filed until the 22nd November 1990. It was common ground that the offences in question under the *Lotteries, Gaming and Betting Act* were prescribed summary offences under the *Magistrates' Court Act* 1989.

The learned Magistrate held that the proceedings were a nullity. They were issued under

the above statutory procedure which required the "original summons" to be filed with the Court within 7 days of the signing of the charge sheets and the issue of the summons. She held that "original summons" did not include carbon duplicates. s30(2)(a) was, therefore, not complied with and, applying s30(3) of the Act, the summons was a nullity. S30 of the Act was introduced in 1989. It created a new procedure which allowed prescribed officers to issue summonses for prescribed summary offences without having to go to the trouble of seeking out a Justice to have the summons issued. It also enabled them to serve the defendant on the spot without having to wait until after a Justice had issued the summons and then to attempt to serve it (see Second Reading Speech, *Hansard* Legislative Assembly 30.10.1987 page 1434). This special procedure was to be additional to the traditional procedure of issuing summonses through the court (s28).

On the 27th August 1991, Master Barker ordered in each proceeding that the following question of law was raised by each Appeal:

[3] "Did the Magistrate err in ruling that a carbon copy summons is not an original summons."

Before me, Counsel for the appellant argued that the construction adopted by the learned Magistrate did not serve the purposes of the Legislation. Regard must be had to those purposes under s35 of the *Interpretation of Legislation Act* 1984. He pointed out that the purposes of the *Magistrates' Court Act* 1989 included (s1(e))—

"To allow for the Magistrates' Court to be managed in a way that will ensure—

(i) fairness to all parties to Court proceedings; and

(ii) the prompt resolution of Court proceedings; and

(iii) that optimum use is made of the Court's resources."

He argued that the purpose of s30(2) was to bring proceedings that had been commenced by a prescribed officer under the administration of the Magistrates' Court promptly and to provide the Magistrates' Court administration with a reliable version of the summons that had been issued. Its purpose was to discourage lower grade versions of the summons. He argued that what he called "the second strike" version (the first carbon copy) was not a lower-grade version and that to require the "first strike" version (the top sheet) only to be filed would create a technical pitfall which would not serve any purpose. He argued that there were other interpretations open on the legislation which would achieve the above purposes.

He advanced two such interpretations. The first was that "original summons" includes any of the summonses **[4]** simultaneously duplicated by writing or printing on a top sheet containing a summons using carbon paper or carbonised paper (as in this case). He argued that the top sheet and all lower sheets should be regarded as originals with the lower sheets being regarded as duplicate originals. He referred to some authorities which look at the questions of the admissibility of duplicates of agreements and other documents where the initial imprint on a document is simultaneously recorded on documents underneath it (*Durston v Mercuri* [1969] VicRp 62; (1969) VR 507 and the cases there cited). For purposes of the best evidence rule, the simultaneous copies have been treated as originals. Ultimately, these cases are not of great assistance because the question that the learned Magistrate had to decide, and which I have to decide, is what, on its proper construction the expression "original summons" means in s30(2).

Counsel for the appellant referred me to the *Shorter Oxford English Dictionary* where the word "original" is defined in its adjectival form as, *inter alia*, "of or pertaining to the original of something; that existed at first, or has existed from the first; primary; initial first" and "that is the original or source of something; primary; originative." It seems to me that applying the word "original" in its ordinary and natural meaning, the expression "original summons" should be construed as applying to the document that bore the initial imprint of the typewriter, in this case, recording the details and the signature of the prescribed officer issuing it – the "first strike document". **[5]** The appellant argues that the interpretation of the expression "original summons" to include duplicate originals such as carbon copies will advance the purposes of the Legislation and should be adopted. It argues that the interpretation of the learned Magistrate does not serve those purposes.

The purposes of the legislation include, in addition to the purposes abovementioned, the purpose of providing for the fair and efficient operation of the Magistrates' Court and the abolition of inefficient and unnecessary Court processes and procedures (s1(c) and (d)). Section 30 creates a new procedure. It empowers certain persons, "prescribed persons" to issue summonses. They are informant police officers not court officials or Justices. It makes the filing of the charge and the original summons with the appropriate registrar within 7 days of signing the charge sheet a matter going to jurisdiction because failure to comply with that requirement renders the proceedings a nullity (s30(3)). Part 4 Division 2, in which these provisions appear, provides for every summons to be served by delivering a true copy to the defendant or by leaving a true copy at the defendant's last or most usual place of business or residence (s34(1)(b)). In respect of prescribed offences, service may also be effected by posting a true copy of the summons to the defendant at the last known place of business or residence (s36).

We are concerned here with criminal proceedings, albeit of a summary nature. Parliament has conferred a power on certain persons to issue summonses in the circumstances **[6]** described in the Statute. A defendant charged under that procedure should be able to challenge the proceedings if the informant was not a prescribed person and should be able to challenge service if not served with a true copy of the summons. Fairness and the efficient operation of the Court dictate that there should be on the Court file the document that purports to be the "first strike" document by reference to which these questions can be resolved. The carbon copy summons (exhibit A to the Affidavits of Snr. Constable Newitt) reveals other issues that might arise and need to be resolved and for which the "first strike" document would be necessary. For example, the first page of the alleged "original summons" in the Censori proceedings, a carbon copy, indicates that there was only one charge in respect of which the summons was issued. Attached to it, however, are "Continuation of Charge Sheets" listing some 108 charges. In addition, while the carbon copy of the summons purports to have been issued by Snr. Constable Newitt and signed by him, some of the charge sheets attached which were purportedly filed in accordance with s30(2) are not signed by him but purport to be signed by Constable Martin who, on one view, did not purport to issue the summons. The statutory procedure requires that the person who signs the charge sheet issue the summons. This issue arises in relation to charges numbered 32 to 82 inclusive. The "first strike" document is needed to resolve the above issue. The alleged carbon copies will not resolve them.

I have come to the conclusion, therefore, that the first interpretation contended for by the plaintiff will not **[7]** address the purposes of the legislation as well as the ordinary and natural meaning that was adopted by the learned Magistrate. The appellant also argued that there was another interpretation that was open and that was that the words "original summons" mean a summons issued by the prescribed person as opposed to a summons issued by the Registrar under s28 – that being the alternative procedure that is available.

Reference was made to the structure of the Legislation in that s28 deals with the issuing of the summons by the Registrar, s29 permits a Magistrate to exercise the power and then s30 creates a separate procedure for prescribed persons to issue summonses for prescribed summary offences which is described as being "without limiting the power of a Registrar in any way". It is argued that if the word "original" was left out then there might be some doubt as to whether s30(2) (a) included summonses issued by the Registrar. I can see no validity in this argument. If the word "original" were omitted from paragraph (a), it would, I think, be plain that the reference to summons is a reference back to the words that appear in the opening phrase of sub-s(2) "If a prescribed person issues a summons under sub-s(1)". That phrase in turn can refer only to summonses issued by prescribed persons and not to summons issued by the Registrar.

Instead, it seems to me that the inclusion of the adjective "original" in the phrase the "charge and original summons" suggests that the draftsman was not troubled about whether an original or duplicate of the charge was filed but **[8]** was particularly concerned to ensure that the "first strike" summons and not a duplicate of the summons was filed. Counsel for the appellant also argued that the interpretation adopted by the learned Magistrate conflicted with the provisions of Part 4, Division 2, relating to service of summonses.

It was argued that if the "first strike" document has to be filed within 7 days, then service will have to be effected within those 7 days to enable an affidavit of service to be sworn deposing

to service of the summons. Reference was made to s34 which contains the provisions relevant to the service of summonses generally. It does not require service within 7 days of signing the charge sheet but requires service at least 14 days before the mention date. It is argued that an inconsistency exists between s34 and s30(2)(a) in its operation if the latter refers to the "first strike" document.

In my view there is no inconsistency. Assuming that the "first strike" document must be available for the affidavit of service, the fact that the summons would have to be served within 7 days so that an affidavit could be sworn, is not inconsistent with s34. It simply means that for a particular category of summons, those issued by prescribed persons, the mention date would need to be fixed in the summons at least fourteen days after the date of service. This could be dealt with by nominating as a mention day a date 21 days after the date of issuing the proceedings. Further, the assumption underlying the argument is, it seems to me, erroneous. S35 sets out methods of proof of service.

The evidence of service must "identify the summons **[9]** served...". To do that, it cannot be necessary to refer to the original. It would, in my view, be sufficient to refer in any affidavit or declaration or evidence on oath to an exhibit in the form of a true copy of the true copy that was served. It could then be compared with the "first strike" version on the file.

It is true that the standard forms used in this case included a pro-forma affidavit of service on the back of the "first strike" summons. This lends some support to the view that the "first strike" document is needed for the affidavit of service. While this form was one developed and authorised under the previous regulations, it is common ground that it was also authorised under the new regulations that were applying at the time of the hearing before the learned Magistrate. Leaving aside the problem faced by the appellant in trying to have the legislation interpreted by reference to forms in regulations, I can see no difficulty in such a form being used in respect of prescribed officer summonses. If the true copy is served within 7 days of issuing the summons, the pro-forma affidavit can be sworn and the first-strike summons then filed. If served after the 7 days period, the affidavit of service could be completed at the Court Registry by gaining access to the "first strike" summons with the permission of the Registrar. Alternatively, an affidavit could be prepared separately and sworn and filed.

I am not persuaded by the appellant that the learned Magistrate erred in her construction of the words "original summons" in s30(2)(a) of the Act. Counsel for the **[10]** respondent raised other issues. It being unnecessary for me to consider those issues, I do not propose to do so. Accordingly, the Appeals in each of the above matters will be dismissed.

APPEARANCES: For the appellant DPP: Mr D Just, counsel. JM Buckley, Solicitor to the DPP. For the respondents Emaden Pty Ltd & Censori: Mr R Kemelfield, counsel. DC Carli Furletti & Scott, solicitors.
