

24/06; [2006] VSC 257

SUPREME COURT OF VICTORIA

DPP v HOGG; DPP v CYBERMAN

Williams J

21 March, 11 July 2006 — (2006) 162 A Crim R 564

PROCEDURE – CHARGE AND SUMMONS – CASE ONE: SUMMONS ISSUED AT TIME OF SIGNING THE CHARGE SHEET – CHARGE AND SUMMONS NOT FILED WITH REGISTRAR WITHIN 7 DAYS – STATUTORY REQUIREMENT THAT CHARGE MUST BE STRUCK OUT – ON HEARING OBJECTION TO FACT THAT ACT NOT COMPLIED WITH – WHETHER PROCEEDING COMMENCED – CHARGE STRUCK OUT – REINSTATEMENT APPLICATION LATER MADE – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR – CASE TWO: SUMMONS NOT ISSUED UNTIL 26 DAYS AFTER SIGNING CHARGE-SHEET – WHETHER PROCEEDING COMMENCED – CHARGE STRUCK OUT ON HEARING – LATER APPLICATION FOR REINSTATEMENT REFUSED – WHETHER MAGISTRATE IN ERROR – POWER OF COURT WHERE CHARGE STRUCK OUT: *MAGISTRATES' COURT ACT 1989*, s30(2)(b) (3).

1. Where a charge has been struck out, whether it be an information, charge, summons, proceeding or appeal, the general principle is that it may be restored or reinstated, because the legal effect of striking out is merely to take the subject matter out of the court lists.

DPP v Moore [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323,

R v McGowan [1984] VicRp 78; [1984] VR 1000, and

Thiessen v Fielding [1890] VicLawRp 138; (1890) 16 VLR 666, applied.

2. Where a summons was issued at the time of signing the charge-sheet but not filed within 7 days with the appropriate Registrar, the proceeding had commenced and continued despite any non-compliance with s30(2)(a) of *Magistrates' Court Act 1989* ('Act'). Where the summons was later struck out for non-compliance with the provisions of s30(3) of the Act, the magistrate was in error in refusing an application for reinstatement of the charges on the ground that there was no proceeding on foot and that the general principle did not apply where a charge had been struck out in accordance with the mandatory requirements of s30(3) of the Act.

3. Where a summons was not issued within 7 days of signing the charge-sheet, no proceeding was commenced and accordingly the provisions of s30(2)(a) and (3) of the Act did not mandate the striking out of the charges. However, a magistrate was in error in refusing an application for reinstatement of the charges on the ground that there was no proceeding which could be reinstated and that the general principle did not apply.

WILLIAMS J:

The applications

1. There are applications before the Court in each proceeding which can be conveniently dealt with together. The plaintiff in each proceeding seeks relief in the nature of *certiorari* and *mandamus* in relation to orders made on 24 June 2005 in the Magistrates' Court at Ringwood dismissing applications for the reinstatement of charges against the second defendant. The charges had been struck out under s30(3) of the *Magistrates' Court Act 1989* ("the Act"). The plaintiff asks the Court to quash the decision to make the orders and to remit the reinstatement application to the Magistrates' Court for further hearing according to law.

2. The applications raise issues as to the effect of s30 of the Act. Section 30 appears in Division 2 of Part 4 of the Act. Part 4 deals with criminal proceedings in the Magistrates' Court and Division 2 with the procedure in those criminal proceedings. The *Magistrates' Court General Regulations 2000* ("the Regulations") also relevantly supplement the provisions of the Act.

The Act

3. The Act provides as follows for the commencement of criminal proceedings in the Magistrates' Court:

"26. How criminal proceeding commenced

(1) A criminal proceeding must be commenced by filing a charge—

(a) with a registrar; or

(b) if the defendant is arrested without a warrant and is released on bail, with a bail justice.

(1A) If a proceeding is commenced under sub-section (1)(a) by filing a charge with a registrar other than the appropriate registrar, the informant must file a copy of the charge with the appropriate registrar within 7 days after the commencement of the proceeding.

(2) A charge must be on a charge-sheet signed by the informant. ...

(4) A proceeding for a summary offence must be commenced not later than 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. ...

28. Compelling attendance

(1) On the filing of a charge under section 26 an application may be made to the appropriate registrar, or to the registrar at the venue of the Court at which the charge is filed if a copy of the charge has not yet been filed with the appropriate registrar, for the issue of—

(a) a summons to answer to the charge; or

(b) a warrant to arrest—

in order to compel the attendance of the defendant.

(2) An application under sub-section (1)(b) must be made by the informant but an application under sub-section (1)(a) may be made by the informant or a person on behalf of the informant.

...

(4) On an application under sub-section (1), the registrar must, if satisfied that the charge discloses an offence known to law, issue—

(a) a summons to answer to the charge; or

(b) subject to sub-section (5), a warrant to arrest.

(5) A registrar must not issue in the first instance a warrant to arrest unless satisfied by evidence on oath or by affidavit that—

(a) it is probable that the defendant will not answer a summons; or

(b) the defendant has absconded, is likely to abscond or is avoiding service of a summons that has been issued; or

(c) a warrant is required or authorised by any other Act or for other good cause.

29. Magistrate may exercise registrar's powers

A magistrate may exercise any of the powers of a registrar for the purpose of issuing criminal process.

30. Prescribed persons may issue summons

(1) Without limiting the power of a registrar in any way—

(a) a member of the police force; or

(b) in the case of a charge for a prescribed summary offence, a prescribed person—
may, at the time of signing a charge-sheet, issue a summons to answer to the charge.

(2) If a member of the police force or a prescribed person issues a summons under sub-section (1)—

(a) he or she must file the charge and 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) Subject to sub-section (4), if it appears to the Court that sub-section (2)(a) has not been complied with in relation to a proceeding, the Court must strike out the charge and may, in addition, award costs against the informant.

(4) If a member of the police force or a prescribed person issues a summons under sub-section (1) and files the charge and summons with the registrar at a venue of the Court other than the proper venue, sub-clauses (2A) and (2B) of clause 1 of Schedule 2 apply to the hearing and determination of the charge, whether or not the charge is for a summary offence.

...

33. Summons to answer to a charge

(1) A summons to answer to a charge must direct the defendant to attend at the proper venue on a certain date and at a certain time to answer the charge.

(2) On the application of the informant at any time before the service of a summons to answer to a charge, the mention date specified in the summons may be extended without cause—

(a) before the mention date; or

(b) within one month after the mention date—

by the appropriate registrar on one occasion and thereafter may be extended—

(c) before the current mention date; or

(d) within one month after the current mention date—

by the appropriate registrar if he or she is satisfied by evidence on oath or by affidavit that reasonable efforts have been made to serve the summons."

The Regulations

4. Regulation 801 of the *Magistrates' Court General Regulations* 2000 ("the Regulations") provides that a member of the police force of more than two years' standing is a "prescribed person" who may issue a summons to answer a charge at the time of signing a charge-sheet. Regulation 802 designates a summary offence against the *Road Safety Act* 1986 and any subordinate instruments as a "prescribed summary offence" for the purposes of s30(1). Regulation 1301 provides that the forms to be used in criminal proceedings are set out in Schedule 5 to the Regulations. Form 5 is a form entitled "Charge" and Form 7, a "Charge and Summons".

5. It is common ground that the police informants, Senior Constable Andrew Jones, in the case of Mr Cyberman, and Senior Constable David Kealy, in that of Mr Hogg, were at relevant times prescribed persons within the meaning of s30(1), under reg 801 of the Regulations.

The charges

6. The charges against Mr Cyberman related to one alleged prescribed offence under each of s49(1)(b) and s49(1)(f) of the *Road Safety Act* 1986 and another under r20 of the *Road Rules*^[1]. Mr Hogg, similarly, was charged with one prescribed offence under each of s49(1)(b) and s49(1)(f) of the *Road Safety Act* 1986.

7. The respective charge-sheets were signed by Senior Constable Jones and Senior Constable Kealy. Senior Constable Jones and Senior Constable Kealy each purported to compel the defendant's attendance to answer the charges, by issuing a summons using the process under s30(1) of the Act.

The chronology of events

8. The chronology of events is significant, in light of the statutory requirements with regard to the time of the signing, issuing and filing of relevant documents. There was no dispute about the facts upon which the applications for review are premised.

Jones v Cyberman

9. On 27 January 2004, Senior Constable Jones signed a document entitled "Charge and Summons" in the form of Form 7 prescribed by the Regulations. The details of the charges indicate that they relate to alleged offences on 9 November 2003. Senior Constable Jones issued a summons directing Mr Cyberman to attend a hearing on 19 March 2004 at the Ringwood Magistrates' Court. The summons refers to "S 30" and indicates that it was issued by the police informant.

10. On 12 February 2004, the Charge and Summons was filed at the Magistrates' Court at Ringwood.

Kealy v Hogg

11. On 13 September 2003, Senior Constable Kealy signed a Form 7 "Charge and Summons" in relation to alleged offences by Mr Hogg on 5 September 2003. The document shows that it was, however, not until some 26 days later, on 9 October 2003, that Senior Constable Kealy, described as a "Prescribed Person" issued the summons to attend a hearing on 10 November 2003. Although it is not apparent from the document in evidence, it is common ground that the Charge and Summons was filed at the Ringwood Magistrates' Court on 9 October 2003.

12. (A further charge-sheet was signed on 22 December 2004 by Senior Constable Kealy purporting to relate to the charges against Mr Hogg. The charge is described in the charge-sheet as follows: "Duplicate charge as filed on 9 October 2003 at the Ringwood Magistrates' Court - see attached certified photocopy - case number R 02352855 refers". The learned Magistrate was satisfied that the 22 December 2004 charge did not disclose an offence known to the law. The plaintiff does not take issue with that decision in this application.)

The striking out of the charges — Jones v Cyberman

13. On 16 February 2005, a Magistrate at the Ringwood Magistrates' Court conducted a hearing in relation to the charges against Mr Cyberman. Mr Cyberman appeared under protest and argued that the charges against him ought to be struck out for non-compliance with s30(2)(a) of the Act. The Magistrate struck out the charges under s30(3).

Kealy v Hogg

14. The charges against Mr Hogg were heard at the Magistrates' Court at Ringwood by a different Magistrate on 21 April 2005. Counsel for Mr Hogg appeared under protest, submitting that the charges should be struck out under s30(3) of the Act or, in the alternative, that the proceeding was a nullity.

15. The Magistrate concluded that there had been what he described as a "breach" of s30(1) of the Act, because Senior Constable Kealy had not issued the summons until some 26 days after the time at which he signed the charge-sheet. His Honour relied upon the decisions of the Court in *Sinclair v the Magistrates' Court at Ringwood & Anor*^[2] and *Gahan v Frahm*^[3] to conclude that strict compliance with s 30(1) was required for the adoption of the alternative procedure under that provision. He supported this interpretation of the legislative intent by noting that a summons would be issued under s28(4)(b) of the Act contemporaneously with the filing of a charge under s26(1)(a) when a criminal proceeding was commenced under that sub-section. Referring to the requirement under s26(4) for a proceeding to be commenced within 12 months of the date of the alleged offence the subject of the relevant charge, he expressed the view that it would be "unconscionable and an abuse of process" for an informant to be permitted to commence a proceeding under s30(2)(b) by signing a charge-sheet within the twelve month period and to delay the issuing of a summons until after the expiration of that period. The Magistrate considered that the elapse of 26 days between the signing of the charge-sheet and the issuing of the summons meant that the contemporaneity required by s30(1) was absent. As a result of the failure to issue a summons under s30(1) there was no proceeding commenced under s30(2)(b).

16. The Magistrate also expressed the view that no proceeding had ever been commenced against Mr Hogg, on the basis that its commencement was conditional upon compliance with s30(2)(a).

17. Despite his conclusion that there was no proceeding on foot because of the non-compliance with s30(1), the Magistrate determined that s30(3) obliged the court to strike out the charge for failure to comply with the mandatory requirements of s30(2)(a). He stated:

"It is open to the court to strike out the charges variously because of the mandatory requirement of s30(3), for want of strict compliance with a mandatory provision (*Sinclair v The Magistrates' Court of Victoria at Ringwood & Anor*) or for want of jurisdiction. Accordingly, the charges are struck out."

18. The Magistrate did not specifically address the issue as to whether a proceeding had been commenced against Mr Hogg, under s26(1), upon the filing of the Charge and Summons.

The reinstatement applications

19. On 6 May 2005, applications were made for the reinstatement of the charges against Mr Hogg as well as those against Mr Cyberman, to the Magistrate who had conducted the hearing in relation to the charges against Mr Hogg. On 24 June 2005, his Honour handed down his reasons for decision in relation to the reinstatement applications, immediately after stating his reasons for striking out the charges against Mr Hogg. Under s10 of the *Administrative Law Act* 1978, his Honour's reasons form part of the record upon which the plaintiff argues errors of law appear.

Kealy v Hogg

20. Having decided that no proceeding had been commenced against Mr Hogg, the Magistrate concluded that there was "nothing capable of reinstatement". He did not distinguish between the reinstatement of a *proceeding* after the striking out of a charge under s30(3) and the reinstatement of the struck out *charge*.

21. He went on to consider the application on the alternative basis that he was wrong in concluding that a proceeding had never been commenced against Mr Hogg and that therefore there was nothing to be reinstated.

22. The learned Magistrate noted the prosecution's reliance upon Kellam J's conclusion in *DPP v Sabransky*^[4] that it is open for an application to be made in the Magistrates' Court for the reinstatement of a proceeding struck out without adjudication on the merits. He quoted the following passage from the judgment of Batt JA in *DPP v Moore*^[5]:

"The general principle is that what has been struck out, whether it be an information, charge, summons, proceeding or appeal, may be restored or reinstated, because the legal effect of striking out is merely to take the subject matter out of the court lists ... I have in the end come to the conclusion that the principle discerned by Kaye J in *R v McGowan* ([1984] VicRp 78; [1984] VR 1000 at 1003) from the decision of the Full Court in *Thiessen v Fielding* ([1890] VicLawRp 138; (1890) 16 VLR 666) that a court of summary jurisdiction has power to set aside an order striking out a complaint or information which has been made in error, is applicable to the order striking out the charge under s49(1)(f) here. Accordingly that order was interlocutory and the primary judge had no jurisdiction to hear an appeal from it."

23. The Magistrate, however, concluded that the principle applied by Batt JA was inapplicable to a situation in which a charge had been struck out in accordance with the mandatory requirements of s30(3). He also characterised an order made under that sub-section as final rather than interlocutory. As a result, he concluded, he had no power to reinstate the charge.

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24. The learned Magistrate also refused the application for reinstatement of the charges against Mr Cyberman, stating that he did so for the reasons for which he had rejected the application to reinstate those against Mr Hogg.

Both cases

25. The Magistrate stated that, in the circumstances, it was unnecessary for him to decide in either case what, if any, would be the proper mechanism to bring an offender back before the court in circumstances where a charge had been struck out under s30(3).

The alleged errors of law

26. The originating motions in each proceeding set out the alleged errors of law, upon the basis of which orders in the nature of *certiorari* and *mandamus* are sought. The statements of the alleged errors were amended in the course of submissions by counsel for the plaintiff. Although the originating motions in each case also sought declaratory relief, the plaintiff does not pursue the applications for declaratory relief.

27. By the amended statement of the alleged errors, the plaintiff seeks a determination as to whether the learned Magistrate erred in refusing to reinstate the proceedings on the grounds that:

(a) in the case of Mr Hogg:

"(i) non-compliance with s30(1) and s30(2)(a) of the *Magistrates' Court Act* 1989 has the effect of invalidating the proceeding and in this particular case the proceedings were never commenced, so the Magistrate did not have power to reinstate them;

(ii) the charges were a nullity, so the Magistrate did not have power to reinstate them; and

(iii) there was no power to reinstate the charges";

and

(b) in the case of Mr Cyberman:

"(i) non-compliance with s30(2)(a) of the *Magistrates' Court Act* 1989 has the effect of invalidating the proceeding and in this particular case the proceedings were never commenced, so the Magistrate did not have power to reinstate them;

(ii) the charges were a nullity, so the Magistrate did not have power to reinstate them; and

(iii) there was no power to reinstate the charges".

Submissions

28. The plaintiff submits that there could have been proceedings commenced under s30(2)(b) against each defendant, notwithstanding any failure to comply with the requirements of s30(2)(a). Further, counsel for the plaintiff contends that an order striking out charges under s30(3) does not have the effect that the subject proceeding was a nullity. The plaintiff also argues that the Magistrate, in the circumstances of each case, did have an inherent power to reinstate the charges struck out.

Kealy v Hogg

29. Counsel for the plaintiff concedes that Senior Constable Kealy did not issue a summons in accordance with the procedure under s30(1) within sufficient time for a proceeding to have been commenced against Mr Hogg under s30(2)(b). He makes this concession on the basis that Senior Constable Kealy failed to issue a summons to Mr Hogg within seven days of signing the charge-sheet, rendering compliance with s30(2)(a) impossible.

30. He submits that s30(1) of the Act provides an alternative procedure to compel the attendance of a defendant to answer a charge by giving a prescribed person power to issue a summons at any time after the charge-sheet has been signed and before the seven day period for the filing of the charge-sheet and summons under s30(2)(a) has expired. He relies upon the legislature's use of the word "may" in s30(1) in support of his argument.

31. Counsel for Mr Hogg, on the other hand, submits that, as the procedure under s30 (1) had not been followed, the Magistrate was correct in refusing to reinstate the charges against him on the basis that no proceeding had ever been commenced. He contends that the informant did not purport to commence a proceeding under s26, by the filing of the charge against Mr Hogg, having attempted to instigate the process under s30. Accordingly, there was no proceeding to reinstate against his client, notwithstanding that the charge and summons had been filed.

32. Counsel for Mr Hogg supports what he contends is the Magistrate's view that a proceeding struck out under s30(3) of the Act cannot be reinstated, because it was a nullity by reason of the failure to comply with s30(2)(a).

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33. Counsel for the plaintiff submits that, in the case of Mr Cyberman, the proceeding was commenced at the time of signing the charge-sheet, by the operation of s30(2)(b), because Senior Constable Jones did issue the summons against Mr Cyberman in accordance with the procedure set out in s30(1). He goes on to argue that the proceeding was "potentially on foot" for seven days, pending the filing of the charge and summons in accordance with s30(2)(a). It follows, he argues, that the Magistrate erred in concluding that the proceeding in that case had never been commenced or was invalidated or nullified and could not be reinstated.

34. Counsel for the plaintiff, however, concedes for the purposes of this case that, after reinstating a charge struck out under s30(3), it would not be open to the Magistrate (acting under s29) to compel the defendant to answer a resurrected charge, by the exercise of a registrar's power under s28 to issue a summons. The issue was not canvassed before the court.

35. Counsel for Mr Cyberman responds that it was open to the Magistrate to construe s30 as providing that no proceeding against his client had been commenced as a result of the non-compliance with s30(2)(a).

36. In the alternative, he submits that, even if a proceeding had been commenced, any power of reinstatement of the charges would be discretionary. He goes on to contend that the factors relied upon by the Magistrate in reaching his conclusion that there was no proceeding on foot would constitute proper grounds for refusing to reinstate the charges in the exercise of the discretion.

Conclusions

37. In my view, the statutory scheme under s30 provides an alternative procedure for the issuing of a summons by a prescribed person to compel a defendant to answer a charge in relation to a prescribed summary offence. Section 30(2)(b) of the Act has the effect that a criminal proceeding commences in the Magistrates' Court upon the signing of the charge-sheet, once a summons has been issued under s30(1).

38. The proceeding commences and continues, despite any non-compliance with s30(2)(a). In other words, compliance with s30(2)(a) is not a condition precedent to the commencement of a proceeding, nor does a failure to comply with the sub-section constitute a breach of a condition subsequent automatically terminating, invalidating or nullifying the proceeding. This view finds support in the terms of s30(3) which refers to the court's obligation to strike out a charge: "if it appears to the court that sub-section (2)(a) has not been complied with *in relation to a proceeding*" (emphasis added).

39. Before its amendment by s7 of the *Magistrates' Court (Amendment) Act 1994*, s30(3) provided that non-compliance with s30(2)(a) resulted in the proceeding being a nullity. That is no longer the case. However, as was common ground, the consequence of non-compliance is now the mandatory requirement that the charge must be struck out.

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40. It follows that I conclude, in relation to ground (i), that the learned Magistrate erred in law by concluding that no proceeding had ever been commenced against Mr Cyberman and that he had no power to reinstate the charges against him, as a consequence. At the time of the strike-out order made under s30(3), there was a proceeding on foot against Mr Cyberman by the operation of s30(2)(b). In any event, it was the charges which were the subject of the reinstatement application, not the proceeding.

41. As far as ground (ii) is concerned, the Magistrate's reasons for decision do not indicate to me that he also decided that he had no power to reinstate the charges against Mr Cyberman because they were nullities. But, had he done so, he would also have erred because there is no warrant for such a conclusion in s30.

42. As for ground (iii), in my opinion, the learned Magistrate erred in concluding that he had no power to reinstate the charges against Mr Cyberman, in light of the mandatory requirement to strike them out under s30(3). The application for reinstatement amounted to an application for the setting aside of the previous strike-out order. As Batt JA made clear in *DPP v Moore*^[6], the Magistrates' Court has an inherent power to set aside an order striking out a charge, and thereby reinstate the charge, if the strike-out order has been made in error. The inherent power exists in relation to an order erroneously made, before the merits are entered into, regardless of the legal justification for the making of the order, absent such error. In *Thiessen v Fielding*^[7], for example, it was held that the justices had jurisdiction to reinstate a case which had been struck out by justices who mistook the effect of evidence relating to the service of a debtor's summons upon the defendant^[8]. In *R v McGowan*^[9], Kaye, J cited *Mason v Ryan*^[10] as authority for the proposition that the exercise of the power to set aside, recognized in *Thiessen v Fielding*, is not limited to a situation in which an order made in error resulted from a factorial misrepresentation to the court.^[11] Kaye, J upheld a magistrate's order setting aside a previous order striking out an information on the erroneous basis that the court lacked jurisdiction.

43. I am not persuaded by the argument by counsel for Mr Cyberman that the principles established by the authorities to which I have referred are inapplicable to orders striking out charges in accordance with a mandatory statutory provision, as opposed to those striking them out for failure to comply with procedural or regulatory requirements. The Magistrate's error lies in his conclusion that, because of the mandatory nature of s30(3), he lacked the inherent power to exercise a discretion to set aside his former order.

44. Considerations relating to the mandatory nature of the requirements of s30(3) would, however, have been relevant to the exercise of the Magistrate's discretion. In my opinion, s30(3) would require the striking out of any reinstated charges against Mr Cyberman in relation to which Senior Constable Jones had issued a summons under s30(1). (I note, in this regard, the significant concession by counsel for the plaintiff to the effect that the operation of the sub-section could not be avoided by an application to the Magistrate seeking his exercise, under s29, of the registrar's power under s28(1)(a) to issue a summons to compel the defendant's attendance. He concedes that any such application in relation to the proceeding commenced against Mr Cyberman under s30(2)(b) would not succeed.)

45. In all the circumstances, I am satisfied that, although the Magistrate's decision in relation to the reinstatement application should be quashed for error of law on the face of the record, it would be futile to remit the application for reinstatement to the Magistrates' Court for consideration according to law. The application for relief in the nature of *certiorari* will be granted and the application for an order in the nature of mandamus refused.

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46. The situation in relation to Mr Hogg is different. In that case, Senior Constable Kealy had not properly adopted the alternative procedure under s30(1). He did not issue a summons until some 26 days after signing the charge-sheet.

47. In my view, it must logically follow from the provisions of s30(2)(a) that the summons issued in accordance with s30(1) must be issued within seven days of the signing of the charge-sheet. Indeed, counsel for the plaintiff concedes as much. However, he submits that the summons need not be issued on the day upon which the charge-sheet is signed.

48. It is not necessary for me to decide whether the procedure under s30(1) would have been properly invoked if the summons had been issued on a day other than that upon which the charge-sheet was signed, but before the expiration of the seven days referred to in s30(2)(a). Nevertheless, as the plaintiff bases the argument in favour of such an interpretation of s30(1) on the use of the word "may" in the sub-section, I note my view that that word rather indicates that s30(1) provides an alternative procedure for the issuing of a summons.

49. As the alternative procedure for the issuing of a summons under s30(1) was not followed by Senior Constable Kealy, no proceeding was commenced against Mr Hogg under s30(2)(b) and s30(3) did not mandate the striking out of the charges against him. The learned Magistrate therefore erred in so far as he concluded that he had no power to reinstate the charges against Mr Hogg on the basis of what were the inapplicable provisions of s30(2)(a) and s30(3).

50. As far as the Magistrate's conclusion that there was no proceeding against Mr Hogg which could be reinstated is concerned, I note my view that it is at least arguable that a proceeding was commenced against Mr Hogg by the filing of the charges under s26(1)(a). However, the issue for consideration by the Magistrate related to the reinstatement of the charges, as opposed to any proceeding against him.

51. Counsel for the plaintiff concedes that, in this case, the failed attempt to adopt the s30(1) procedure could not be supplemented by the Magistrate's exercise, under s29, of the registrar's power to issue a summons under s28(1)(a). As a result, notwithstanding the inapplicability of s30(3), it would also be futile in the case of Mr Hogg to remit the application for reinstatement in the exercise of the court's inherent power to the Magistrate for consideration according to law.

52. I will exercise my discretion to grant the relief sought in the nature of *certiorari* and quash the learned Magistrate's decision to refuse the reinstatement application in relation to the charges against Mr Hogg. However, in all the circumstances, I will refuse the application for relief in the nature of *mandamus*.

^[1] Rule 201 of the *Road Safety (Road Rules) Regulations* 1999 provides that the *Road Rules* are to be read and construed as part of the *Road Safety (Road Rules) Regulations* 1999 made under s95 of the *Road Safety Act* 1986.

^[2] [1998] VSC 170.

^[3] [1999] VSC 410.

^[4] [2002] VSC 143 at [37].

^[5] [2003] VSCA 90; (2003) 6 VR 430 at [20]; (2003) 39 MVR 323.

^[6] [2003] VSCA 90; [2003] 6 VR 430 at 437; (2003) 39 MVR 323; see relevant passage set out in para [22] above.

^[7] [1890] VicLawRp 138; (1890) 16 VLR 666.

^[8] [1890] VicLawRp 138; (1890) 16 VLR 666 at 668 per Higinbotham CJ, Webb and Hodges, JJ.

^[9] [1984] VicRp 78; [1984] VR 1000.

^[10] [1884] VicLawRp 115; (1884) 10 VLR (L) 335; 6 ALT 152.

^[11] [1984] VicRp 78; [1984] VR 1000 at 1003.

APPEARANCES: For the DPP: Mr G Silbert, counsel. Stephen Carisbrooke, Acting Solicitor for Public Prosecutions. For the defendant Hogg: Mr WJ Walsh-Buckley, counsel. Armstrong Ross, solicitors. For the defendant Cyberman: Mr Marquis, counsel. Robert Stary & Associates, solicitors.