31/04; [2004] VSC 416

SUPREME COURT OF VICTORIA

CIORRA v COLE

Redlich J

14, 16 September, 20 October 2004 — (2004) 150 A Crim R 189; (2004) 42 MVR 547

PRACTICE AND PROCEDURE – DEFECT IN CHARGE – SPEEDING – CHARGE REFERRED TO REPEALED REGULATIONS – WHETHER CHARGE VOID *AB INITIO* – CHARGE AMENDED BY MAGISTRATE ON HEARING IN ABSENCE OF DEFENDANT – WHETHER MAGISTRATE HAD POWER TO MAKE AMENDMENT – WHETHER DEFENDANT SHOULD HAVE BEEN NOTIFIED OF AMENDMENT – FAILURE TO USE THE WORDS "SPEED LIMIT" IN CHARGE – WHETHER NECESSARY TO DESIGNATE THE MEANS BY WHICH SPEED TO BE DETERMINED: *ROAD SAFETY (ROAD RULES) REGULATIONS* 1999, R20; *MAGISTRATES' COURT ACT* 1989, SS26-28, 50.

The defendant was charged that being the driver of a vehicle on a highway namely the Mornington Peninsula Freeway did exceed 100 kilometres per hour (alleged speed 145km/h). The charge specified that the offence was in breach of the *Road Safety (Traffic Regulations)* 1988, r1001(1)(b). At the time of the alleged offence, these Regulations had been revoked by the *Road Safety (Road Rules) Regulations* 1999 ('Road Rules'). At the hearing in the defendant's absence the prosecutor applied to amend the charge by substituting Road Rule 20 of the Road Rules for the reference to the revoked Regulations. This amendment was allowed by the magistrate and after hearing evidence convicted the defendant. Upon appeal—

HELD: Appeal allowed. Remitted to the magistrate for further hearing according to law.

1. The source of the power to amend contained in s50 of the *Magistrates' Court Act* directs the court not to allow an objection to the form or substance of the charge. The power must be exercised judicially and is subject to limitations. But compliance with the rules of criminal practice that the charge set out the essential ingredients of the offence, or that the offence be alleged with sufficient particularity to reveal the manner in which it is said to have been committed, is not a pre-condition to the power's proper exercise. Where a charge is deficient in either of these respects, the circumstances may justify the amendment of the charge. The power to amend enables the court to see that these common law requirements are met if the charge is not to be dismissed. The reference to the repealed regulation in the present charge was not an incurable defect if the description of the offence in the charge disclosed the nature of the offence. The nature and substance of the offence under the repealed and current regulation was essentially the same. The appellant would have been in no doubt that he was charged with the offence of driving in excess of the speed limit. It was open to the Magistrate to make the amendment to substitute Road Rule 20 for the repealed regulation.

2. It is sufficient that a charge alleging a breach of Road Rule 20 employ the words, or words similar to, the words used in Road Rule 20. Though the words "the speed limit of" did not precede the words "100 kilometres per hour" in the charge that is the only reasonable meaning that could be given to the words used. Interpreting the charge in the manner in which "a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context" left no doubt as to what the draftsman intended.

3. The essence of an offence under Road Rule 20 is that a driver has driven at a speed over the speed limit. An essential factual ingredient of the offence is the speed limit which the driver is said to have exceeded. The speed limit which applies to the driver will depend upon which of Road Rules 21 to 25 apply. As the evidence disclosed that it was speed limit signs which determined the speed limit referable to the appellant's driving, it would have been preferable that the charge specified that 100 kilometre per hour speed limit signs applied. The defence would be entitled to particulars of such a matter if it was not referred to in the charge. There is a distinction between legal elements of the offence, essential factual ingredients and particulars required by the defendant to prepare his or her defence which bear upon the validity of the charge as expressed. It was not necessary that the charge specify that 100 kilometre per hour speed limit signs applied. The basis upon which the speed limit is to be determined need not be set out in the charge. Though it be a fact necessary to be proved by the prosecution, it is not an essential ingredient for the purpose of identifying the offence. The submission that the charge was a nullity because of the absence of these words cannot be sustained. The offence and its essential elements were sufficiently identified in the charge.

4. Whether or not the amendment should be viewed as resulting in a new or different charge, justice required that it should have been served upon the defendant in its amended form. Until the prosecutor applied for an amendment the defendant was entitled to assume that the case which would be presented by the prosecution and which he had to answer was that as specifically pleaded. The defendant was entitled to an opportunity to be heard on the charge as amended. Accordingly, the magistrate was in error convicting the defendant in circumstances where the defendant had not been served with the amended charge.

REDLICH J:

1. The appellant appeals against an order made by the Magistrates' Court at Frankston on 5 February 2004 whereby the Court convicted the appellant of driving in excess of the speed limit and imposed a fine of $300 with $35 costs and suspended the appellant's driver's licence for a period of six months.

2. The charge stated that the appellant's driving was in breach of the *Road Safety (Traffic) Regulations* 1988. These regulations had been repealed before the date of the alleged offence. At the commencement of the hearing, the prosecution was permitted to amend the charge to refer to the relevant current regulation which had been allegedly contravened. The Magistrate proceeded to hear the charge and convict the appellant in his absence.

3. This appeal raises for consideration the questions whether the charge was void *ab initio* because it contained a reference to the repealed regulation; whether it was an improper use of the power to amend to substitute the current regulation for the repealed regulation; whether the details of the charge sufficiently referred to the ingredients of the offence and whether the amended charge should have been served on the Appellant.

4. The charge detailed the offence alleged against the appellant in these terms:

> "The defendant at McCrae on 6/4/2003 being the driver of a vehicle on a highway namely the Mornington Peninsula Freeway did exceed 100 kilometres per hour. Alleged speed was 145 km/h."

5. In the section of the charge headed "Under what Law" crosses were inserted in the boxes entitled "State" and "Act". In the box headed "Act or Regulation No." there was inserted "R.S.T.R. 30/1988". It was common ground that this was a reference to the *Road Safety (Traffic) Regulations* 1988. In the box headed "Section/Clause" there was inserted "1001(1)(b)". The charge bore the date 23 June 2003. These regulations had been revoked by Regulation 104 *Road Safety (Road Rules) Regulations* 1999 which had been introduced on 28 October 1999, and which I shall refer to as the Road Rules. At the time of the appellant's driving and at the time the charge was laid, Rule 20 of the Road Rules made it an offence to drive at a speed in excess of a speed limit. At the commencement of the hearing at the Magistrates' Court, the prosecutor applied to amend the charge by substituting Road Rule 20 of the Road Rules for the reference to 1001(1)(b) of the repealed Regulations. Although it was not conceded by counsel for the appellant, it is plain that the amendment was allowed.

6. The charge laid against the appellant was said to be a nullity or void *ab initio* on two grounds. First, it was said that the charge did not allege an offence known to the law as the regulation referred to in the charge no longer existed. Second, it was submitted that the details of the charge failed to expressly state that the appellant had exceeded the speed limit and did not specify by what means the applicable speed limit was to be determined.

7. On 5 March 2004, the Master ordered that the questions of law raised by the appeal were:

> "(a) Did the Learned Magistrate err in law in convicting the Appellant of an offence not known to law in that the charge alleged a breach of Regulation 1001(1)(b) *Road Safety (Traffic) Regulations* 1988 which at the time of the alleged offence had been revoked? (b) Did the Learned Magistrate err in law in convicting the Appellant in circumstances where the charge failed to allege all the essential elements of an offence under Road Rule 20 or under Regulation 1001(1)(b), in that the charge failed to allege whether any speed limit, default speed limit, speed zone, speed limit sign, area speed limit sign or built up area applied to the appellant? (c) Did the Learned Magistrate err in law in convicting the Appellant of an offence against Rule 20 of the Road Rules in circumstances where the Appellant had not been served with the substituted charge?"

8. Shortly after the appeal commenced before me, it became apparent that Mr Hardy, who appeared on behalf of the appellant, wished to submit that the learned Magistrate had no power to amend the charge to substitute Road Rule 20 for the repealed Regulation. He foreshadowed an application to amend question (c) to insert the words "in amending and" before the words "in convicting". As the respondent had been given no notice of the proposed amendment the appeal was adjourned to enable both parties to prepare submissions and file outlines of argument in relation to the proposed amendment.

9. On the resumption of the appeal on 16 September 2004, application was made on behalf of the appellant to amend question (c) as adumbrated. Both parties proceeded upon the basis that s109(3) *Magistrates' Court Act* 1989 (hereafter "the Act") which required an appeal to be brought "in accordance with the *Rules of the Supreme Court*" enabled the Court pursuant to Order 58, Rule 13 of the *Supreme Court Rules* to amend or add to the questions of law ordered by the Master. It being conceded that the proposed amendment to question (c) did not raise the question which the appellant now wishes to argue, the application to amend the existing question was not pursued. Instead, application was made to permit the following further question to be argued:

> "(d) Did the Learned Magistrate err in law in amending the charge when it was a nullity."

The application was not opposed and no argument was addressed to whether it was appropriate under Order 58 to add such a question. Adopting the approach favoured by Ashley J in *Hodgkinson v Yarra Valley Country Inc*[1], I permitted the further question to be argued as it related directly to the Magistrate's decision to permit the amendment. The appellant had submitted to the Master that such a question should be allowed. The questions as ordered by the Master, were intended to raise the issue.

The proceedings before the Magistrate

10. At the commencement of the proceeding, the learned Magistrate was informed by the prosecutor that the appellant's solicitors, who had obtained a number of previous adjournments of the hearing of the charge, were no longer representing the appellant. The appellant was not present. The prosecution informed the Court that it wished to withdraw the existing charge and proceed on a new charge and summons for the offence of speeding, or alternatively amend the existing charge. The Magistrate would not allow the prosecution to proceed with the new charge as it had not been served upon the appellant. The prosecutor then sought to amend the existing charge of speeding by substituting Road Rule 20 of the Road Rules for the repealed Regulation 1001(1)(b) *Road Safety (Traffic) Regulations* 1988. The Magistrate amended the charge accordingly saying he would proceed as the charge "remained the same." The Magistrate was informed that the facts relied upon by the prosecution remained the same. He was told that the appellant had been served with a brief of evidence.

11. It appears that the Magistrate exercised the power to amend because he considered that the amendment did not alter the nature and substance of the offence. No other interpretation of the Magistrate's brief reason for allowing the amendment was suggested during the appeal.

12. The informant gave evidence and testified inter alia that he had observed the appellant travelling at approximately 145 kilometres per hour on the freeway in an area where 100 kilometre per hour speed signs applied. The Magistrate found the charge proved and made the order to which I have referred. The certified extract of the order of the Magistrate which was exhibited to the affidavit of the appellant in support of the appeal describes the nature of the charge in these terms:

> "Defendant at McCRAE on 6/4/2003 did commit a breach of Act SR99/120.RR 20 DRIVE AT SPEED OVER THE SPEED LIMIT."

13. Having read a transcript of the proceedings before the Magistrate which was exhibited to the affidavit of the appellant, I am satisfied that the Magistrate proceeded to hear the information in its amended form. I do not accept the submission, only faintly pressed on behalf of the appellant, that the Magistrate did not make the amendment requested by the prosecutor and proceeded with the information in its original form. As question (a) is predicated on the amendment not having been made, I need not consider that question further.

Was it open to the Magistrate to make such an amendment?

14. It is convenient to deal with Ground (d) first. In support of the contention that the Magistrate had no power to amend, it was argued for the appellant that the charge as initially laid alleged an offence under the repealed regulation and was therefore a nullity.

15. Where a person wishes to bring proceedings against another for an offence, they will ordinarily file a charge identifying the offence alleged to have been committed. In this State the procedure applicable is that prescribed by the *Magistrates' Court Act* 1989 as amended – ss26 to 28 of the Act. The Magistrate's jurisdiction to hear and determine summary offences (s25(1)(a)) is enlivened by the filing of a charge with a Registrar of the Court (s26(1)(a) and s3).[2] The content of the charge is prescribed by s27 of the Act. Upon the filing of a charge under s26 of the Act, an application may be made to the appropriate Registrar for the issue of a summons to answer the charge and to compel the attendance of the defendant. The Registrar must, if satisfied that the charge discloses an offence known to law, issue a summons to answer the charge – s28(4)(a).[3] I assume, without deciding, that if a summons be said to be irregular because the charge does not disclose an offence known to the law, the summons' validity will depend upon the charge and whether the irregularity in the charge may be ignored or cured by amendment. No argument was addressed to this issue.

The power to amend a charge which does not comply with s27 of the Act or common law requirements as to the content of a charge

16. It was submitted that, by referring to the repealed regulation, the charge did not comply with s27(1) or s27(2) of the Act. Section 27 provides:

> "(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 provisions of the Act or subordinate instrument (if any) that creates the offence which the defendant is alleged to have committed."

The charge was undoubtedly irregular because it did not identify the subordinate instrument that created the offence. Apart from this statutory requirement, a person charged with a criminal offence is entitled to know the legal nature of the offence which they are alleged to have broken and to be provided with reasonable particularity as to how they are alleged to have broken that law.[4]

17. It was submitted on the appellant's behalf that the power to amend under s50 of the Act could not be used to cure such defects. Section 50 provides:

> "(1) On the hearing of the proceeding the Court must not allow an objection to a charge, summons or warrant on a count of any defect or error in it in substance or in form or for any variance between it and the evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error."

18. It was argued for the appellant that as the charge did not comply with s27 of the Act it was a nullity incapable of amendment. Counsel for the appellant particularly relied upon passages from the majority judgment of the High Court in *John L Pty Ltd v Attorney-General* (NSW)[5], the well known *dicta* of Jordan CJ in *Lovell; Ex parte; Re Buckley*;[6] *Hackwill v Kay*;[7] and *Woolworths (Victoria) Ltd v Marsh.*[8] It was submitted that these cases establish that non-compliance with statutory or common law requirements as to the adequate charging of a criminal offence cannot be cured by amendment.

19. In *Hackwill v Kay* the power to amend was not in doubt, the case turning upon whether the dismissal of a charge because it was laid more than twelve months after the date of the alleged offence supported a plea of *autrefois acquit* to a freshly issued information.

20. *Woolworths (Victoria) Ltd v Marsh*[9] concerned a defective information which was uncertain because the defendant could not identify the charge brought against him. Ormiston J set aside the conviction and refused to remit the information for amendment, or to amend it himself, as it would be unjust to allow the amendment, the time for laying a new information having expired and the charge not disclosing the nature of the offence.

21. Jordan CJ in *Lovell; Ex parte*[10] considered the statutory provisions in New South Wales intended to enable technical defects in informations to be overcome. His Honour, referring to s65 *Justices Act* 1902 (NSW) – it conferring no power to amend – observed that it did not enable a Magistrate to convict upon an information which discloses no offence.

22. *John L Pty Ltd v Attorney-General (NSW)*[11] was an appeal arising out of the exercise of summary jurisdiction of the Supreme Court of New South Wales. Section 6 *Supreme Court (Summary Jurisdiction) Act* 1967 (New South Wales) was a provision similar to s50 of the Act, but it contained no power to amend. The majority of the High Court, for reasons not presently relevant, found that s6 had no application to the proceeding there in question. The joint judgment of Mason CJ, Deane and Dawson JJ refers to the need for a charge to inform the court of the nature of the offence and provide the accused with the substance of the charge which he is called upon to meet.[12] The majority found that the charge suffered from an incurable defect by reason of its failure to identify material particulars in which an alleged statement was said to be false or misleading. The charge thus failed to comply with the common law requirement that an information identified the essential factual ingredients of the offence alleged to have been committed.[13] Brennan J alone considered that s6 did have application in relation to a defective information and considered it a conclusive answer to the complaint that the charge was defective. In Brennan J's view, the Supreme Court should not have entertained the objection to the defect in the charge but should have ordered appropriate particulars.

23. In New South Wales the provisions of the *Justices Act* 1902, construed literally, authorise inferior tribunals to ignore objections of particular kinds but, in contrast to the powers of a Victorian Magistrate, confer no power to amend. In New South Wales, informations which do not disclose an offence because they omit essential ingredients of the offence have an incurable defect to which the term "void" has ordinarily been applied.[14]

24. Whilst the *dicta* of Jordan CJ in *Lovell; Ex parte* and the judgment of the High Court in *John L* provide invaluable guidance to the Courts as to the requirements of the common law, neither case was concerned with the court's power by amendment to overcome such defects.

25. The authorities to which the appellant referred do not support the proposition that the power to amend cannot be employed where there has been non-compliance with common law or statutory requirements as to the contents of a charge.

The power to amend where the charge does not disclose an offence known to the law

26. The starting point of any examination of the law is to recognise that there is no exhaustive or definitive statement as to what is essential or adequate for the offence to be sufficiently disclosed in the charge.[15]

27. It is settled that the power to amend may be available where a charge discloses no offence.[16] But the circumstances in which a Magistrate may do so are not easily resolved by reference to principle or authority.

28. The power to amend was adverted to by Dixon J in *Johnson v Miller*[17]. After referring to the South Australian provisions which followed the provisions in *Jervis' Act* 1848 (11 & 12 Vict. c.43 sec. 1) his Honour said:

> "If it appears to the Court of summary jurisdiction that the defendant has been prejudiced by such a defect or variance or that the complaint fails to disclose any offence or matter of complaint, then, unless a complaint is amended, the Court must dismiss it....."[18]

29. In *Broome v Chenoweth*[19] Dixon J spoke of the power to amend in these terms:

> "... 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 in such a case that 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..."[20]

30. The source of the power to amend contained within s50 of the Act directs the court not to allow an objection to the form or substance of the charge. The power must be exercised judicially and is subject to limitations. But compliance with the rules of criminal practice that the charge set out the essential ingredients of the offence, or that the offence be alleged with sufficient particularity to reveal the manner in which it is said to have been committed, is not a pre-condition to the power's proper exercise. Where a charge is deficient in either of these respects, the circumstances may justify the amendment of the charge. The power to amend enables the Court to see that these common law requirements are met if the charge is not to be dismissed.

31. Question (d) is not concerned with defects of such a nature. I shall return to such considerations when dealing with question (b) as the appellant submits such defects are also present in the charge.

32. The respondent relied upon the decision of the Court of Appeal in the *Director of Public Prosecutions Reference No. 2 of 2001*[21] as demonstrating the breadth of the power conferred by s50 of the Act to cure defects of substance. The Court stated that it did not need to consider whether there was a power of amendment where an essential ingredient of an offence has been omitted from the charge and where more than twelve months has elapsed since the date of the offence.[22] The Court of Appeal made no criticism of the approach adopted by O'Bryan J in *DPP v Collicoat*.[23] It was submitted by the respondent, that it was implicit in the judgement of the Court in *DPP Reference No.2 of 2001* that a Magistrate has the power to amend a charge within the limitation period where an essential ingredient of the offence has been omitted. I do not think it is open to doubt that such a power exists.

33. The power to amend within the limitation period may be utilised by a Magistrate where the defendant is able to identify the nature of the charge brought against him and where no injustice will be brought about by the making of the amendment. The degree to which the charge departs from the requirement that the charge identify the nature of the offence charged will be a critical factor in deciding whether an amendment should be permitted.[24]

34. To amend a charge where it would result in the formulation of an offence different to the offence charged where the time for laying of a charge has expired has often been viewed as an improper exercise of the power.[25] Ormiston J in *Woolworths (Victoria) Ltd* left open the question as to whether there was a discretion to allow an amendment after the expiration of the time period.[26] An amendment may be permitted outside the twelve month period where the offence remained the same notwithstanding the amendment.[27]

35. In *Gigante v Hickson*[28], the Court of Appeal considered the validity of an amendment allowed by a Magistrate outside the twelve month limitation period to change the place at which the offence of failing a breath test had occurred. The place of offending was not viewed as an essential element of the offence. Batt JA delivering the judgment of the Court distinguished circumstances where an amendment has been permitted as a consequence of a defect in substance or form in the words used or omitted from the charge, or where the evidence led differed in some respect from the charge as specified, and cases where the charge alleged differed to the charge established on the evidence.

36. The authorities extensively referred to in *Nash on Victorian Courts*[29] indicate that where a charge sufficiently discloses the offence and where no injustice will be done to the defendant through amendment and the matter proceeding, the Court's obligation is to hear and determine the matter.[30] Where, as a matter of substance and ordinary language, the offence with which the defendant is charged is clear, the complaint will not be bad. It may be otherwise, if the omission misleads the defendant as to the offence with which he is charged.[31] But amendments to a charge have been refused where to do so would raise an entirely new case for the defendant to answer.[32]

Was the offence sufficiently disclosed? Does the amendment create a different offence?

37. The appellant's contention is that the charge did not disclose the offence sufficiently, or at all, because it referred to a regulation which did not exist. Further, it was submitted that the substitution of the Road Rule for the repealed regulation raised a new and different case for him to answer.

38. The appellant places substantial reliance on *Flanagan v Remick*.[33] Eames J was required to consider the validity of a charge which, like the present case, alleged that the defendant exceeded the speed limit contrary to Regulation 1001(1)(a) *Road Safety (Traffic) Regulations* 1988 when the Regulations had in fact been repealed prior to the date of the alleged offence. The Magistrate had, outside the twelve month period from the commission of the offence (s26 of the Act), permitted an amendment to the charge substituting Rule 20 of the Road Rules for Regulation 1001(1)(a). Over objection of counsel, the Magistrate permitted the amendments and convicted the defendant. Before Eames J, it was submitted that the original charge alleged an offence not known to the law and did not comply with s27(1) and (2) of the Act. It was further submitted that the defendant could not be charged with the offence under the new law because the limitation period had expired and the amendments circumvented the limitation period as prescribed in s26(4) of the Act. Eames J found that the defect in the charge was fundamental and held the charge to be a nullity. His Honour stated that:

> "... the case before me could not be regarded as an instance of a cognate offence being substituted for the original offence, but, rather, was an instance of an entirely distinct offence being substituted for a different (and non-existent) offence under repealed legislation ..."[34]

Later his Honour observed:

> "... that the process which was adopted in this case, by purported amendment of the charges so that entirely new charges were substituted (notwithstanding their similarity to the repealed offences) sought, in an impermissible way, to avoid the limitation period which applied in both instances. In my opinion, the learned magistrate should have refused to allow the amendment of the charges and they should have been dismissed ..."[35]

39. His Honour did not regard the defect as one that could be amended to defeat the limitation period in contravention of s26(4) of the Act. It was unnecessary for his Honour to consider whether there would be a power to amend such a charge within the limitation period.

40. Mr Gibson, who appeared on behalf of the respondent, submitted that the charge disclosed an offence and was not a nullity. He alternatively submitted that if the information did not disclose an offence known to the law, s50 of the Act permitted an amendment to rectify such an error. Mr Gibson submitted that the decision in *Flanagan* was distinguishable from the present case because the amendment made there was outside the limitation period.

41. It was submitted on behalf of the respondent that Eames J's description of the charge as an entirely new charge was stated in the context of the limitation period having expired and was not concerned with the power to amend.

42. Counsel for the respondent submitted that in the present case the factual particulars of the charge remained unaltered despite the amendment and any observation by Eames J in *Flanagan* to the contrary was *obiter dicta* and should not be followed. It was argued for the respondent that there was no "new case" raised as a consequence of the amendment. It was said that the appellant would have clearly understood that the charge involved an allegation of speeding on the nominated highway in excess of the speed limit of 100 kilometres per hour.

43. In support of the contention that the appellant could have been in no doubt as to the nature of the offence alleged against him[36], the respondent referred to the affidavit filed on its behalf in this appeal that the informant had issued a traffic infringement notice alleging that the appellant had exceeded the prescribed speed limit in a 100 kilometre per hour zone; that the appellant had been provided with the whole of the police brief of evidence and that the appellant's solicitors had twice adjourned the hearing of the matter in October 2003 and January 2004. I was invited to infer that the appellant and his lawyers had absented themselves on the day of the hearing before the Magistrate in an endeavour to obtain a forensic advantage in the event that a new charge was to be served or an amendment made to the existing charge. I am not persuaded that I should take any of these matters into account even if they were factually correct. Insofar as it is relevant to consider whether the appellant should have been in any doubt as to the nature of the offence alleged against him, the Court's attention should be confined to the content of the charge and what occurred during the proceedings which took place before the Magistrate.

Adding or altering a reference in the charge to the law contravened

44. There are numerous instances of amendments which were permitted, to insert or change, the Act or subordinate instrument referred to in the charge as the law alleged to have been contravened. Such changes have not been viewed as altering the nature or ingredients of the offence disclosed in the charge.

45. Amendments of the charge have been allowed to charge a cognate offence to that originally charged similar in "origin and quality and allied in nature to the offence originally charged." *Kennett v Holt*[37]; *Thomson v Lee*[38]. In *Kennett v Holt*, the defendant had been charged with failing to comply with a traffic control signal displaying a red circle alone and upon the evidence satisfying the Magistrate that the defendant had proceeded through an amber light the information was amended by substituting amber for red and the defendant was convicted. Pape J following *Mitchell v Myers*[39] found that such a rule would not permit an offence of a different nature and character to be substituted, but would permit an amendment similar in some way to that charged or which would be constituted by facts which would themselves be part and parcel of the offence originally charged.[40]

46. In *Heddich v Dike*[41] Gobbo J found the power to amend sufficient to permit a Magistrate to substitute a charge under s81 *Crimes Act* 1958 for an offence under s72 of the same Act as the facts and the elements of each of the offences were the same. Gobbo J considered that the power to amend was not limited to what might be described as cognate offences within the same section.

47. The defect in a charge which failed to allege the law said to be infringed, though required by statute to do so, was ignored in *Parkinson; Ex parte*[42] where the statute required the court to reject objections to the form or substance of the information. It was held that an information was not bad though it failed to allege "the by-law" which had been contravened. It was an omission constituting a defect in substance or form which would be cured by the operation of s65 *Justices Act* 1902 (New South Wales). Delivering the judgment of the Court, Simpson ACJ thought that, if the applicant had been deceived in any way in his defence, then it would have been the duty of the Court to grant him an adjournment, but there was no suggestion that the applicant was prejudiced.

48. In the case of *Walter Edward Tuttle*[43] Avory, Roche and Humphreys JJ were of the opinion that an indictment alleging that an offence had been committed on 9 March 1916 against the *Larceny Act* 1916, when it did not come into force until January 1 1917, was defective on its face. That could be amended to charge the offence against the Act then in force where there would be no injustice to the accused. The offence under the earlier Act was in the same words as the offence under the Act originally referred to in the indictment. The offence being the same, no injustice could be done to any defence by virtue of the amendment.

49. In *Meek v Powell*[44] the defendant was convicted on two charges under the *Food and Drugs Act* 1938 which had been repealed at the time of the offence and which had been re-enacted in identical terms in the *Food and Drugs Act* 1950. The defendant successfully appealed against summary convictions to Quarter Sessions, it being held that the informations were bad as an offence was charged under a repealed statute. Court of Sessions refused to amend the informations. On appeal it was held that the Quarter Sessions had no power to amend the informations as it was exercising the powers of the court of summary jurisdiction which would have had power to amend the charge before conviction, but which had no power to do so once it had recorded a conviction on the information.

50. Byrne J stated:

> "It seems to me to be quite plain that if a person is charged before justices under a repealed statute, they have a choice which they can exercise. They can say, in effect, to the defendant: 'If you do not object to an amendment, this summons can be 'amended forthwith,' and if there is no objection that can be done. They can say: 'We will adjourn this case so that this 'summons may be amended,' and put the prosecution on whatever terms they please as the result of the adjournment. Or they can dismiss the summons, leaving it to the prosecution to charge the offence under the correct statute in a fresh summons ... The question which falls for decision here is whether that power in that section is sufficient to enable quarter sessions hearing an appeal to exercise a power which the petty sessional

> court would have had — namely, that of amending a summons which is defective on the terms I have indicated. In my view that provision gives no power to quarter sessions to exercise, after a conviction has been recorded which is bad on its face, a power which the justices at petty sessions could not exercise (for once the justices at petty sessions have recorded a conviction on a summons which is before them, they have no power after that to amend the summons)... "[45]

51. Lord Goddard CJ agreed with Byrne J and added:

> "... If this were a conviction on indictment and the indictment had charged an offence under the wrong section, although the Court had power to amend the indictment before the trial and put the right section in, it seems clear that if the conviction took place without the indictment being amended, the Court of Criminal Appeal would have no option but to quash the conviction ..."[46]

52. In *Garfield v Maddocks*[47] Lord Widgery CJ delivering the judgment of the Court applied the decision in *Meek v Powell* holding that the Crown Court was not invested with the powers possessed by a Magistrate to amend the information. His Lordship referred to the powers possessed by a Magistrate, very similar in terms to s50 of the Act, observing that the Magistrate would have been entitled to accede to the prosecution's original application to amend the information so that the appellant was no longer charged with the same offence.[48]

53. The Victorian Court of Appeal in *McMahon v DPP*[49] rejected a submission that the abbreviation "RSA" appearing in the box provided in the printed form of charge for the identification of the Act creating the offence did not comply with the provisions of s27(2) of the Act. The Magistrate had held the charges to be invalid and ruled that they could not be amended because more than twelve months had passed since the date of the defendant's driving. The Court found that the failure to comply with s27(2) was not an incurable defect.[50] Brooking JA delivering the judgment of the Court observed:

> "I have no doubt that these charges were capable of amendment. Defects or errors both in substance and in form are comprehended by s50(1). There has never been any doubt about the criminal conduct with which the appellant was charged. The offence would remain the same notwithstanding the amendment and the magistrate's reliance on the running of time under s26(4) was erroneous. The only right exercise of discretion was to amend these charges, assuming them to be defective in the respect suggested. The magistrate erred in law in concluding the date of the offences meant that the amendment could not be made."[51]

54. In *McMahon's* case, Callaway JA made the additional observation that non-compliance with s27(2) of the Act does not deprive a Magistrate of the jurisdiction to make amendments under s50 of the Act and that where there has been insufficient identification of the provisions upon which the charge is based, s50 of the Act is still applicable.[52]

55. In *DPP v Ross*[53] where a charge identified the offence by reference to the wrong section and a second charge referred to a sub-section which did not exist and a third charge referred only to the Act but no section, Beach J held that the power to amend should have been utilised. This approach is consistent with the view expressed in McMahon that non-compliance with s27(2) of the Act is curable by amendment. Beach J observed that:

> "These were not cases in which the defence was in any doubt as to the nature of the charges brought against the respondent; nor were they cases in which the charges did not disclose an offence; nor were the applications made on behalf of the informant seeking to amend the charges attempts to commence new proceedings outside the twelve month limitation period provided by section 26(4) of the *Magistrates' Court Act*. Any consequential errors in the wording or description of a charge and inconsequential omissions from a charge are not, of themselves, sufficient justification for dismissing a charge. The correct numeration of a section in a charge is not an essential element of the offence in question; nor is the numeration of the section in relation to the charge an essential element of the offence. Where such defects or errors occur, the charge is to be amended in accordance with the provisions of section 50(1)."[54]

56. In *Thornley v Clegg*[55] the information did not make reference to the relevant Act or section despite the requirements of the *Magistrates' Court Rules* 1981 that the section be referred to. The justices amended the information to include words referring to the section which had been allegedly contravened. The defendant appealed against conviction on the ground that the information in its original form was void *ab initio* and could not be amended. On appeal it was

held that the amendment was appropriate, the power to amend being conferred to avoid purely technical objections. Ormrod LJ held that as the words of the information followed the wording of the section the defendant could not have been mislead and that there was no real risk of injustice in the amendment having been allowed.

57. In *D v Cordwell*[56] Blow J considered the validity of a Magistrate's refusal to dismiss a charge where it was contended that the complaint was a nullity because it did not refer to any legislative provision which was alleged to have been contravened. The relevant Tasmanian legislation contained provisions similar to s27 of the Act requiring that the complaint should specify the Act or Regulation alleged to be contravened. Blow J accepted that the omission of a reference to the section contravened was a defect or irregularity. Relying upon the provisions of s31 *Justices Act* 1959 (Tasmania) which is in similar form to s50 of the Act, his Honour concluded that the information was not void *ab initio* and was a mere irregularity that did not render the proceedings a legal nullity. His Honour concluded that the Magistrate was right not to have dismissed the information and to adjourn it for hearing.

58. The decision in *Cordwell* followed that of the South Australian Full Court in *Willing v Hollobone (No. 2)*.[57] Chief Justice Bray, with whom Walters and Wells JJ agreed, was of the opinion that the failure to comply with a statutory requirement that the charge contain a reference to the section of the statute creating the offence was an irregularity:

> "... capable of waiver and of cure when the defect can be cured without injustice to the other side. Very often in such cases any such injustice can be avoided by granting an adjournment, if necessary at the expense of the party at fault."[58]

59. The case of *DPP v Whittleton*[59] concerned an appeal from a Magistrate who refused to permit the prosecution to amend a charge and summons to change the sections referred to in the summons. The description of the charge referred to the defendant having been required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s51(1) *Road Safety Act* 1986. In the description in the charge box on the form of the summons it was stated that the law under which the charge was brought was s49(1)(a) *Road Safety Act* 1986. The prosecutor sought leave to amend the summons by substituting, in the statement of the charge, the expression s55(1) for the expression s51(1) and by substituting in the box stating the law under which the charge was brought the expression s49(1)(f) instead of s49(1)(a). The amendments had been opposed before the Magistrate on the ground that the summons did not disclose an offence and that the amendments were an attempt to commence new proceedings outside the twelve month limitation period. The Magistrate refused the amendments. In dealing with the appeals, Smith J was prepared to assume that if the summons did not disclose an offence, an amendment should not be allowed as it would permit the commencement of proceedings outside the limitation period specified by s26(4) of the Act. Smith J concluded that, despite the error in referring to s51 of the Act in the description of the charge, the substance of the charge was plainly set out and that a reader of the document would not be misled as to the substance of the charge. His Honour said:

> "... The reader familiar with the legislation would immediately realise an error had been made. The reader of the summons who was familiar with the road safety act would, on reading the Act, realise that section 51(1) was plainly recited in error, and that it was s55(1) that was intended to be referred to in the statement of charge. A reader of the summons, having read the statement of charge would then move to the box section of the charge which is entitled 'Under the law?' ... Again the reader should not be mislead. A reader familiar with the legislation would realise the wrong paragraph had been named. One unfamiliar with the legislation would, on reading the Act, realise that an error had been made in referring to paragraph (a) and the reference should have been to para (f). The detailed statement of the actual charge must, on any fair reading of the summons, be given primacy, and to the extent that it conflicts with other information given, the prima facie conclusion should be that the latter is wrong, and that the statement of the charge records the substance of the charge laid. It seems to me that this is the only reasonable interpretation of the summons in this case, and that, accordingly, it did disclose an offence. In its statement, however, slips and clumsiness occurred which, while requiring amendment, did not detract from the proposition that an offence was disclosed in the details stated in the charge. If, strictly speaking, it did not disclose an offence, the summons would, nonetheless, come within the category of case described by Dixon J in *Broome v Chenoweth* (1946) 73 CLR 583 at p601 for which amendment should be permitted in a proper exercise of the discretion. The amendments would not be substituting a new charge but clarifying the charge that had been laid ..."[60]

60. The authorities to which I have referred have in common that, where the details of the charge are sufficient in that the defendant is not left uncertain as to the nature of the offence charged, an amendment to substitute the correct statutory provision will be permitted where no injustice would otherwise be done to the defendant. That is to say an amendment could be made where the charge sufficiently discloses the nature of the offence so that it can be identified as an offence known to the law[61], notwithstanding that the charge either referred to the wrong provision or referred to none. In such cases the description of the offence sufficiently apprised the defendant of the nature of the offence.

61. If, upon a reasonable reading of the description of the offence, an offence known to the law is disclosed which enables the defendant to identify the nature of the charge, the exercise of the discretion to amend would not have miscarried to correct an error as to the relevant statutory provision or subordinate instrument. The belief of the informant as to the legal basis upon which the charge is laid, as reflected in the provision inserted in the charge, will not affect such a conclusion.

62. It seems, both as a matter of principle and by reference to authority, that the charge suffering from such a defect should not be viewed as a legal nullity or as void ab initio because it omits or mis-states the applicable law which creates the offence.[62] Such a defect may be cured by amendment. The Court's jurisdiction to entertain the charge is not derived from the correct identification in the charge of the law alleged to be contravened.

63. The reference to the repealed regulation in the charge was not an incurable defect if the description of the offence in the charge disclosed the nature of the offence. The nature and substance of the offence under the repealed and current regulation was essentially the same. The appellant would have been in no doubt that he was charged with the offence of driving in excess of the speed limit. It was open to the Magistrate to make the amendment to substitute Road Rule 20 for the repealed regulation.

Did the charge sufficiently refer to the essential elements?

64. Under question (b) the appellant contends that the learned Magistrate erred in convicting the appellant when the charge failed to allege the essential elements of the offence under Road Rule 20 in that the charge failed to allege whether any speed limit, default speed limit, speed zone, speed limit sign, area speed limit sign or built up area applied to the appellant.

65. As the matter has been fully argued and is likely to arise before the Magistrate, I should state my opinion on the further question.

66. Road Rule 20 provides as follows:

> "Obeying the Speed Limit A driver must not drive at a speed over the speed limit applying to the driver for the length of road where the driver is driving. Penalty: In the case of drivers of large vehicles, 10 penalty units; in the case of drivers of vehicles other than large vehicles, 5 penalty units."

67. Counsel for the appellant submitted that the charge as amended failed to describe an offence under Road Rule 20. He submitted that the charge failed to specify essential ingredients of the offence in that it did not allege that the appellant drove over any speed limit nor did it state what speed limit was applicable and how it was to be determined. He submitted that no offence known to the law was disclosed by the charge.

Failure to use the words "speed limit"

68. Charles JA delivering the judgment of the Court in *DPP Reference No. 2 of 2001* observed that despite the strict rules imposed upon the prosecution in the drafting of criminal charges:

> "... a charge should be interpreted in the manner a reasonable defendant would understand it, giving reasonable consideration to the words of the charge in their context."[63]

His Honour referred with approval to the following passage from the judgment of Tadgell J in *Smith v Van Maanen*[64]:

> "It is necessary to strive conscientiously to read any information in a sense that gives it the meaning that the draftsman intended."

69. In *Preston & Gordon v Donohoe*[65] the defendant was charged and convicted with being master of a ship from which a prohibited immigrant had entered the Commonwealth. It was submitted that the information was bad as it did not expressly state that the defendant was master of the ship when the immigrant entered the Commonwealth and that the date of the immigrant's entry was not stated. The information, it was said, failed to disclose an offence known to the law as it did not recite all of the essential ingredients of the offence. Griffiths CJ delivering the judgment of the Court stated:

> "Various objections were taken to the conviction some of which may be shortly disposed of. The first was that it was not alleged by the information that the appellant was the master of the ship on the day when Mahomet Mithoo entered the Commonwealth. It would have been better if the word `then' had been used in information, but the defect, assuming that the information ought not to be read after the conviction as if the word had been inserted, is cured by secs 65 and 115 of the *Justices Act* 1902, which authorised the Court, on an appeal brought in the mode adopted in the present case, to amend the conviction according to the evidence. The next objection was that the particular class of prohibited immigrant within which Mahomet Mithoo was alleged to fall was not specified in the information. It may be convenient, but we doubt whether it is necessary, that this should be stated in the information. Assuming that it is strictly speaking necessary, which we do not decide, this objection also is cured by the sections of the *Justices Act* 1902 already mentioned."[66]

70. The conviction was held to be right notwithstanding that there had been no amendment to cure the imperfections in the information. The Court was satisfied that the essential ingredients of the offence had been stated in the charge, there being a finding that there had been a full averment of the matters that required proof, the defendant not being prejudiced by the omissions.

71. Though the words "the speed limit of" did not precede the words "100 kilometres per hour" that is the only reasonable meaning that could be given to the words used. The respondent further relies on the fact that the charge then specifies the speed at which the appellant is alleged to have travelled, namely 145 kilometres per hour. There is considerable force in the submission of the respondent that an allegation that an offence has been committed by driving in excess of a particular nominated speed implies that the nominated speed is the speed limit applicable. Interpreting the charge in the manner in which "a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context"[67] leaves no doubt as to what the draftsman intended.

Is there a need to designate the means by which speed limit is determined?

72. The Road Rules set out the speed limits which apply where a speed limit sign applies (Road Rule 21), in a speed limited area (Road Rule 22), in a school zone (Road Rule 23), in a shared zone (Road Rule 24) and where none of the preceding speed limits apply, a default speed limit (Road Rule 25).

73. The appellant relied upon the decision of Smith J in *Alwer v McLean*[68]. In that case the appellant had been convicted of breaching Regulation 1001(1)(a) *Road Safety (Traffic) Regulations* 1988. The charge was in these terms:

> "... the defendant at Loch on 9/4/1998 being the driver of a vehicle on a highway namely the South Gippsland Highway did exceed 60 kph between the Loch Fire Station and Smith Street."

74. Smith J was required to determine whether the charge failed to allege an offence under the regulations in that it failed to specify what, if any speed limit was applicable to the section of highway referred to in the charge. Regulation 1001(1) provided:

> "A person must not drive a vehicle at a speed exceeding— (a) on a highway in a built-up area (not being a speed zone, a local traffic precinct or a shared zone) – 60 kilometres per hour; or (b) on a highway, (not being a speed zone or a highway in a built up area) – 100 kilometres per hour; or (c) in a speed zone – the speeding kilometres an hour indicated by numerals on the speed restriction sign at the beginning of, and during the speed zone; or (d) after passing a local traffic precinct with the numerals '40' – 40 kilometres an hour until the driver passes an end local traffic precinct sign; or (da) after passing a local traffic precinct sign with the numerals '50' – 50 kilometres an hour until the driver passes an end local traffic precinct sign; or (e) in a shared zone – 10 kilometres an hour."

75. His Honour found that Regulation 1001(1) created mutually exclusive speed zones to which

different speed regimes were to be applied. His Honour concluded that the information was defective in that it did not provide the essential factual element which would determine under which sub-regulation the appellant was charged. The fact that the charge referred to Regulation 1001(1)(a) in the box set aside for the description of the law under which the charge was brought, did not, his Honour found, meet the requirement that the information set out the essential ingredients of the offence.

76. Counsel for the respondent submitted that Regulation 1001(1) was in a quite different form to Road Rule 20. Road Rule 20 was described as an "umbrella provision" requiring that a driver not drive over the speed limit which applies to the length of road where the driver is driving by contrast to the repealed regulation which had been "ambulatory" in nature[69] in that it referred to contraventions otherwise appearing in the regulations.

77. In my opinion, unlike Regulation 1001(1) which by its sub-parts created a series of mutually exclusive offences, Road Rule 20 creates the relevant offence. It is sufficient that a charge alleging a breach of Road Rule 20 employ the words, or words similar to, the words used in Road Rule 20.

78. The essence of an offence under Road Rule 20 is that a driver has driven at a speed over the speed limit. An essential factual ingredient of the offence is the speed limit which the driver is said to have exceeded. The speed limit which applies to the driver will depend upon which of Road Rules 21 to 25 apply. As the evidence disclosed that it was speed limit signs which determined the speed limit referable to the appellant's driving, it would have been preferable that the charge specified that 100 kilometre per hour speed limit signs applied. The defence would be entitled to particulars of such a matter if it was not referred to in the charge.

79. In *DPP Reference No. 2 of 2001* Charles JA, with whom the President and Chernov JA agreed, observed that:

> "... there are a number of facts which must be established as part of the proof of such an offence, such as for example that the instrument used was a breath analysing instrument within the meaning of the Act and that the person who operated the instrument was duly authorised to do so. Of course it does not follow that all such facts, necessary though they may be to proof of the offence under s49(1)(f), must be alleged in the charge. In my view the essential elements for the offence under s49(1)(f) are prescribed by the section itself and do not by direct or indirect reference incorporate any other allegation of fact necessary to exist in order to create the offence. In my view this Court, indeed, decided to the contrary in Foster and Bajram, in the passages last cited. It follows that while there must be evidence led as to the practical operation of ss53 and 55 in circumstances of a prosecution under s49(1)(f), as a necessary precondition of proof of the relevant offence, these matters do not constitute essential elements of the offence so as to require individual particularisation in the charge. I conclude, therefore, that the charge as drawn referred to each of the matters capable of identification as an essential element in the charge under s49(1)(f) and was therefore neither defective or a nullity... But I do not think that the prosecution is obliged to follow slavishly the wording of the section in the formulation of the charge in this respect. The defendant cannot, I think, have been left in any doubt as to the nature of the offence alleged against him simply because the expression 'pursuant to' was used. In the event that the terminology was considered by the magistrate to be of any moment, an amendment should have been made so as to give effect to s50(1) of the *Magistrates' Court Act.*"[70]

80. There is a distinction between legal elements of the offence, essential factual ingredients and particulars required by the defendant to prepare his or her defence which bear upon the validity of the charge as expressed.[71] I do not accept the contention of the appellant that it was necessary that the charge specify that 100 kilometre per hour speed limit signs applied. The basis upon which the speed limit is to be determined need not be set out in the charge. Though it be a fact necessary to be proved by the prosecution, it is not an essential ingredient for the purpose of identifying the offence. The submission that the charge was a nullity because of the absence of these words cannot be sustained.

81. In my view the offence and its essential elements are sufficiently identified in the charge. Had either of the matters raised by question (b) been considered to be of significance, the Magistrate's power to amend under s50 of the Act was available.

Service of amended charge

82. Question (c) raises the contention that if the Magistrate had power to amend the charge

as he did, the Magistrate erred in convicting the appellant of an offence against Rule 20 of the Road Rules when the "substituted charge" had not been served. The reference, in the question, to the "substituted charge" was treated by both parties as the charge as amended.

83. After the Magistrate had permitted the amendment, he was informed that the appellant "would be aware" that the charge was to be amended. It was argued for the appellant that there was no factual basis for the prosecutor's assertion and I should not take it into account. In the absence of any affidavit material bearing upon this issue, I have proceeded upon the basis that the appellant was not aware that application was to be made to amend the charge.

84. The respondent contends that if the amendment was proper and the appellant elected not to be present on the hearing date, he could not now be heard to complain about what was a lawful exercise of the Court's power to amend the charge. I do not agree.

85. The learned Magistrate had correctly refused to allow the prosecution to proceed on the second charge which had not been served. He should have followed the same course in relation to the amended charge. In *Wickham v Cole* Burbury CJ stated:

> "... An amendment of substance either to the legal nature of the offence or to the material facts relied upon as the foundation to the charge could not properly be allowed without giving the defendant full opportunity to answer the newly framed charge ..."[72]

86. Whether or not the amendment should be viewed as resulting in a new or different charge, justice required that it should have been served upon the appellant in its amended form. Until the prosecutor applied for an amendment the appellant was entitled to assume that the case which would be presented by the prosecution and which he had to answer was that as specifically pleaded. The appellant was entitled to an opportunity to be heard on the charge as amended. *Parkinson; Ex parte*[73]; *Lovell, Ex parte; Re Buckley*[74]; *Willing v Hollobone (No. 2)*[75]; *Garfield v Maddocks*[76].

87. As the answer to question (c) is in the affirmative, the appeal must be allowed and the conviction of the Magistrates' Court at Frankston made on 4 February 2004 quashed. Having heard further from the parties, I order that the matter should be remitted to the Magistrates' Court at Frankston for further hearing according to law.

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[1] [2001] VSC 364 at [40].
[2] *Loughnan v Magistrates' Court of Victoria Sitting at Melbourne* [1993] VicRp 49; [1993] 1 VR 685; *DPP v His Honour Judge Fricke* [1993] VicRp 27; [1993] 1 VR 369.
[3] *Mortimore v Stecher* [1971] VicRp 106; [1971] VR 866.
[4] *Pointon v Cox* (1926) 136 LT 506 per Salter J at 509-510; *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104 per Dixon J at CLR 489-490; *Woolworths (Victoria) Ltd v Marsh*, Unreported VSC per Ormiston J 12 June 1986, No. 104 of 1984.
[5] [1987] HCA 42; (1987) 163 CLR 508; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.
[6] (1938) 38 SR (NSW) 153 at 173; 55 WN (NSW) 63.
[7] [1960] VicRp 98; [1960] VR 632.
[8] *Supra* Footnote 4.
[9] *Supra* Footnote 4.
[10] *Supra* Footnote 6.
[11] *Supra* Footnote 5 at 520-522.
[12] *Supra* Footnote 5 at 519.
[13] Williams, Neil J. (1987) *Supreme Court Civil Procedure*, Sydney, Butterworths, Vol. 1, at 58.06.150.
[14] *Boral Gas (NSW) Pty Ltd v Magill* (1993) 32 NSWLR 501 per Mahoney JA at 517; (1993) 53 IR 21; *Taylor v Environment Protection Authority* [2000] NSWCCA 71; (2000) 50 NSWLR 48 at 57; *Smith v Moody* [1903] 1 KB 56; [1900-3] All ER Rep Ext 1274; *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104; *Stanton v Abernathy* (1990) 19 NSWLR 656; 48 A Crim R 16 per Gleeson CJ at NSWLR 666.
[15] *Boral Gas Pty Ltd v Magill*, *supra* Footnote 14 per Mahoney JA at 515.
[16] *Stait v Collenzo* [1903] VicLawRp 43; (1902) 28 VLR 286; *O'Donnell v Hitchen* [1902] VicLawRp 114; (1902) 27 VLR 711; *R v Hare; Ex parte Newport* [1887] VicLawRp 61; (1887) 13 VLR 310; See the discussion of cases by Cussen J in *Knox v Bible* [1907] VicLawRp 87; [1907] VLR 485 at 498-500; 13 ALR 352; 29 ALT 23 (on appeal [1907] HCA 74; (1907) 4 CLR 1462); *Banks v Watford* [1922] VicLawRp 51; [1922] VLR 531; 28 ALR 272; 44 ALT 15; *Davies v Andrews* (1930) 25 Tas LR 84 per Clarke at 107; *Lehmann v Russell*, Unreported VSC, per Smith J December 1961; *Wickham v Cole* [1957] Tas SR 111 per Burbury CJ at 114; *Walpole v Bywool Pty Ltd* [1963] VicRp 26; [1963] VR 157; 9 LGRA 44 per O'Bryan J at VR 159; *Lillyman v Pinkerton (No. 2)* [1982] FCA 279; (1982) 45 ALR 543; (1982) 71 FLR 135; (1982) 7 ACLR 471; 1 ACLC 637

per Woodward and Keely JJ at 479.
[17] *Supra* Footnote 14.
[18] *Supra* Footnote 14 at 486.
[19] [1946] HCA 53; (1946) 73 CLR 583; [1947] ALR 27.
[20] *Ibid* at 601.
[21] [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[22] *Ibid* [2001] VSCA 114 at [21]; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[23] [2000] VSC 368; (2000) 32 MVR 113; (2000) 115 A Crim R 187 at 192-193.
[24] *Broome v Chenoweth*, *supra* Footnote 19 per Dixon J at 601.
[25] *Woolworths (Victoria) Ltd v Marsh*, *supra* Footnote 4, per Ormiston J at 18; *Linehan v Australian Public Service Association* [1982] FCA 198; (1982) 44 ALR 289; (1982) 66 FLR 90 per Fitzgerald J at 112-113; *Australasian Meat Industry Employees Union v Sunland Enterprises Pty Ltd* (1987) 36 A Crim R 418; *Starling v Ostrowski* [2001] WASCA 74; (2001) 24 WAR 61 at [22]; *R v Jiri Fiala; Ex parte G J Coles & Co Ltd* (1986) 46 SASR 47.
[26] *Supra* Footnote 4 at 18.
[27] *McMahon v DPP* (Unreported, VSCA, Brooking, Charles and Callaway JJA 20 June 1995 at [5]); *DPP Reference No 2 of 2001*, *supra* Footnote 20 at [20]; *Kerr v Hannon* [1992] VicRp 3; (1992) 1 VR 43 at 45; *Clarke v La Franchi & Anor*, Unreported, VSC per Gobbo J, 6 April 1993; *Chaudhary v Ducret* (1986) 11 FCR 163.
[28] [2001] VSCA 4; (2001) 3 VR 296; (2001) 120 A Crim R 483; (2001) 33 MVR 51.
[29] Nash, G, *Victorian Courts*, North Ryde, NSW, Law Book Co, Vol. 3, para 3.1480-1492.
[30] *Martin v Purnell* [1999] FCA 872; (1999) 93 FCR 181 [29].
[31] *Wickham v Cole* , *supra* Footnote 16 at 114.
[32] *Burvett v Moody* [1909] VicLawRp 23; [1909] VLR 126; 15 ALR 91; 30 ALT 160; *R v Templeton; Ex parte England* [1877] VicLawRp 149; [1877] 3 VLR (L) 305; *Warner v Sunnybrook Icecream Pty Ltd* [1968] VicRp 11; [1968] VR 102 at 105; (1967) 15 LGRA 135; *Meeking v Crisp* (1988) 8 MVR 170 per Crockett J at 177.
[33] [2001] VSC 507; (2001) 35 MVR 289; (2001) 127 A Crim R 534.
[34] *Ibid* [2001] VSC 507 at [45]; (2001) 35 MVR 289; (2001) 127 A Crim R 534.
[35] *Ibid* [2001] VSC 507 at [49 - 50]; (2001) 35 MVR 289; (2001) 127 A Crim R 534.
[36] *DPP Reference No. 2 of 2001*, *supra* Footnote 21 at [24]; *DPP v Collicoat*, *supra* Footnote 23 per O'Bryan J.
[37] [1974] VicRp 79; [1974] VR 644 - Headnote.
[38] [1935] VicLawRp 65; [1935] VLR 360; [1935] ALR 458.
[39] (1955) 57 WALR 49.
[40] *Kennett v Holt*, *supra* Footnote 37 at 648.
[41] (1981) 3 A Crim R 139 - Headnote.
[42] (1909) 26 WN (NSW) 7; 9 SR (NSW) 174 per Simpson ACJ at 178.
[43] (1929) 21 Cr App R 85 at 89.
[44] [1952] 1 KB 164.
[45] *Ibid* at 167. In *R v DD* (2002) 5 VR 243; [2002] VSCA 112 at [31-33], these cases were referred to and distinguished without criticism in the judgment of the Chief Justice with whom Charles and Chernov JJA agreed.
[46] *Supra* Footnote 44 at 167-168.
[47] [1973] 2 All ER 303 at 306; [1974] QB 7.
[48] Ibid at 308.
[49] *Supra* Footnote 27.
[50] *Supra* Footnote 27 at 4.
[51] *Supra* Footnote 27 at 5.
[52] *Supra* Footnote 27 at [6].
[53] [1993] MC 246; Unreported, VSC per Beach J, 7 January 1993.
[54] *Ibid* Unreported VSC per Beach J 7 January 1993 at 3-4.
[55] [1982] Crim LR 523; [1982] RTR 405; Unreported, QBD 16 March 1982 per Ormrod LJ and Forbes J.
[56] [2002] TASSC 90.
[57] (1975) 11 SASR 118; (1975) 34 LGRA 236.
[58] *Ibid* at 121.
[59] (1991) 15 MVR 105; [1991] MC 193; Unreported, VSC, per Smith J 14 November 1991.
[60] *Ibid* Unreported VSC per Smith J 14 November 1991 at 3-5.
[61] *Johnson v Miller*, *supra* Footnote 4 at 486-7; *Broome v Chenoweth*, *supra* Footnote 19 at 601; *DPP Reference Number 2 of 2001*, *supra* Footnote 21 [2001] VSC 114 at [17-19].
[62] cf New South Wales where a charge is treated as void because there is no power to amend.
[63] *Supra* Footnote 21 [2001] VSCA 114 at [40]; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[64] (1991) 14 MVR 365 at 369.
[65] [1906] HCA 43; (1906) 3 CLR 1089; 12 ALR 426.
[66] *Ibid* at 1096.
[67] *DPP Reference No. 2 of 2001*, *supra* Footnote 21 [2001] VSCA 114 at [40]; *Smith v Van Maanen*, *supra* Footnote 63 per Tadgell J at 369.
[68] [2000] VSC 396; (2000) 32 MVR 125; (2000) 116 A Crim R 364.
[69] cf *Woolworths v Marsh*, *supra* Footnote 4 per Ormiston J at 15.
[70] *Supra* Footnote 21 [2001] VSCA 114 at [23-24]. See also at [29-30]; (2001) 4 VR 55; (2001) 122 A Crim

R 251; (2001) 34 MVR 164.
[71] *Preston & Gordon v Donohoe, supra* Footnote 65 at 1096; *Taylor v The Environment Protection Authority, supra* Footnote 14 at 56-57.
[72] *Supra* Footnote 16 at 118.
[73] *Supra* Footnote 42 at 178.
[74] *Supra* Footnote 6 at 173.
[75] *Supra* Footnote 57 at 121.
[76] *Supra* Footnote 47 at 306.

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