35/91

SUPREME COURT OF VICTORIA

SMITH v VAN MAANEN

Tadgell J

3-5 July 1991 — (1991) 14 MVR 365

PROCEDURE – SUMMONS CONTAINING THREE INFORMATIONS – DATE AND PLACE OF THIRD OFFENCE OMITTED – INCORRECT REFERENCE TO SECTION IN INFORMATION – WHETHER AMENDMENT APPROPRIATE – NECESSARY INGREDIENTS OF S49(1)(f) OFFENCE: *ROAD SAFETY ACT* 1986 S49(1)(f).

In a summons containing three informations, the informant failed to specify a time and place at which the third offence was alleged to have been committed. Further, in the description of the offence, an erroneous reference to s51(1) of the *Road Safety Act* 1986 was made.

HELD:

1. Although the expression of the information was clumsy, the document intended to allege that the third charge occurred at the same time and place as the second. Further a reference to s55(1) as part of the formulation of the terms of the information is unnecessary. In the circumstances, in order to ensure that justice was not defeated, it would have been appropriate for a magistrate pursuant to s50 of the *Magistrates' Court Act* 1989 to amend the summons to correct the defect or error.

2. The necessary ingredients of s49(1)(f) to be proved by the prosecution are:
- **that the defendant has been driving a motor car within the last three hours relevant to the time of the alleged offence;**
- **that a preliminary breath test has been undergone pursuant to subsection (1) of s53;**
- **that the defendant has been duly required to furnish and has furnished a sample of breath for analysis;**
- **and that the result of analysis of the sample as recorded by the breath analysing instrument indicates that more than the prescribed concentration of alcohol was present in his or her blood. The furnishing of the sample has to be proved to be one for analysis by a breath analysing instrument, as defined, and, the requirements must be one to furnish under s55(1).**

TADGELL J: [*After dealing with a preliminary matter not relevant to this report, His Honour continued*] ... **[3]** I turn now to the substance of the case. The appeal is against an order of the Magistrates' Court sitting at Werribee convicting the appellant on 25 October 1990 on an information for an offence against s49(1)(f) of the *Road Safety Act* 1986. It is no doubt common ground that the information arose out of a series of alleged offences which occurred on 2 June 1989 although, as I shall indicate, there is some considerable argument whether the offence which produced the order of the Magistrates' Court resulting in this appeal was properly alleged to have occurred on that date. At all events, at the relevant date, s49 of the *Road Safety Act* 1986 provided by sub-section 1(f) that:

> "A person is guilty of an offence if he or she—
>
> (f) .... within three hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under s55(1) and the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood ..."

A breath analysing instrument is defined in s3(1) of the Act in terms that I need not now cite, and the prescribed concentration of alcohol means, in this case, a concentration of alcohol present in the blood of 0.05 grams per one hundred millilitres of blood.

In order to understand s49(1)(f) it is necessary **[4]** to refer also to s53 and s55. Section 53(1), so far as is relevant, provides by sub-section (1) that -

> "A member of the police force may at any time require—
> (a) any person he or she finds driving a motor vehicle or in charge of a motor vehicle ... to undergo a preliminary breath test by a prescribed device".

Then s55 builds upon s53(1) by way of saying in sub-section (1) -

> "If a person undergoes a preliminary breath test when required by a member of the police force ... under s53 to do so and—
>
> (a) the test in the opinion of the member... in whose presence it is made indicates that the person's blood contains alcohol in excess of the prescribed concentration of alcohol ... the member of the police force .. may require the person to furnish a sample of breath for analysis by a breath analysing instrument ..."

Sub-section (3) of section 55 provides that a breath analysing instrument must be operated by a person authorised to do so by the Chief Commissioner of Police. Sub-section (4) prescribes certain steps which must be taken by the person operating an instrument after he has performed the test.

It is obviously the breath analysis contemplated by s55 that is referred to in s49(1)(f), and the furnishing of a sample of breath for analysis referred to in s49(1)(f) is that furnishing which is referred to in sub-section (1) of s55. It follows, because the undergoing of a preliminary breath test under s53 is a prerequisite to a breath analysis under s55, that it is necessary, in order to prove an offence under s49(1)(f), that a preliminary breath test has **[5]** been undergone as well as the furnishing of a sample of breath under s55.

Now, the relevant summons in this case purported to bring the appellant to court charged with three offences. The first was an offence under regulation 1001.1(c) of the *Road Safety (Traffic) Regulations.* This was an offence of exceeding the relevant speed limit on which the appellant was convicted. It is not the subject of this appeal. The appellant was also charged with an offence against s49(1)(b) of the *Road Safety Act* 1986, namely, that he drove a motor vehicle whilst more than the prescribed concentration of alcohol was present in his blood. That charge was withdrawn. The third offence charged was that the subject of this appeal.

The three offences with which the appellant was charged were, or purported to be, particularised in a document which was headed "Summons with Information". The document was evidently designed to explain with child-like simplicity, and in so-called plain English, what was alleged against the appellant. The document entitled "Summons with Information" is addressed to the appellant at his address at 3 Tamar Court, Leopold, Victoria, 3224. It contains the injunction "Bring this with you to Court". Beneath his name and address appears the following piece of information: "You have been charged with breaking the law. Read both pages to see what you must do". There follows a heading "Details of the charge against you", and then against the expression in the margin "What is **[6]** the charge? (information)", there is a box in which there is printed the number 1. In a space opposite that box containing the figure 1 were particulars of the first charge, which was that under the *Road Safety (Traffic) Regulations*, or so one is to assume. It read in this way:

> "At Laverton on Friday, the 2nd day of June 1989:- YOU being the driver of a vehicle in a speed zone on the highway to wit Princes Highway between the 21 and 23 kilometre posts at a speed exceeding the speed in kilometres per hour to wit 110, indicated by numerals on the restriction sign at the beginning of and during the speed zone".

And then in brackets, "Speed 130 kilometres per hour". That is scarcely sensible or grammatical, but apparently no objection was taken to it. Beneath it, in a series of boxes, one divines that the charge is laid under a State regulation, "RSTR" (which one assumes signifies *Road Safety (Traffic) Regulations* clause 1001.1(c). Beneath that again there is another box against the legend "Type of offence", and there is an "x" in it against the expression "Summary offence (You should go to court)". Another box: "Indictable offence (You must go to court)" is left blank. Then follows the question, "Are there more charges?" There is a box against the word "No", which is blank, and a box against the word "Yes", which contains an "x". There follow particulars of the informant and particulars stating where the case will be heard, and some various other particulars. Opposite the words "Are there more charges?", one sees another box marked "x" and then "Yes -

See continuation of charges **[7]** attached". Going over the page, one sees an attached page which is headed "Continuation of charges", and again the injunction, "Bring this with you to Court". That page, which is numbered 2, begins by saying, in print, "Person charged", and opposite that is the appellant's name, Graham Smith. On the next line, there is another box which was initially blank, but has had typed in the figure "2", signifying, presumably, the second charge. Opposite the figure 2, there is the expression, "At Laverton in the said State on Friday, the 2nd day of June 1989", and then beneath that there is a statement of a charge under s49(1)(b) of the *Road Safety Act*, or so one assumes from the abbreviations there set out. Beneath that there is a box opposite the word "Summary offence", and the box contains an "x". Beneath that is another box with the figure "3" typed in, and there follow, presumably, the particulars of the third charge, which read as follows:

> "YOU did within 3 hours after driving a motor vehicle and after a requirement to undergo a preliminary breath test you were further required to furnish a sample of your breath for analysis by a breath analysing instrument pursuant to s51(1) of the *Road Safety Act* 1986, the result of which analysis indicated more than the prescribed concentration of alcohol was present in your blood".

There follows another series of boxes indicating that the charge is laid pursuant to s49(1)(f) of the *Road Safety Act*. It seems plain enough that the document of which I have just read a portion is designed to appeal to the lowest common denominator of intelligence and **[8]** literacy. There is a real question, I think, whether what it sets out in the first charge, that is the speeding charge, was properly framed. There is no point now made about that.

There is also a real question whether the third charge which is the subject of the appeal was properly framed. The object of plain English is presumably to convey a clear message. That object is unlikely to be achieved by the slipshod use of clear words. The informant, or the person or persons who was or were responsible for the preparation of the so-called summons with information, ran very close, I think, to allowing the form to take charge of the substance. I doubt very much that the object of plain English was achieved by virtue of the use of the peculiar printed form of "summons with information". Nevertheless, as will appear, in my opinion, the object was achieved, perhaps in spite of the form.

There were two principal objections taken on behalf of the appellant to the form of the charge which is the subject of this appeal. They were intended to be comprehended within question (f) of those set out in the Master's order. Question (f) reads: "Did the third information disclose any offence known to the law?"

The first criticism under that heading advanced on behalf of the appellant was that the third charge did not specify any time or place at which an offence was alleged to have been committed. That was said to be fatal, because sub-section (1) of s27 of the **[9]** *Magistrates' Court Act* 1989 requires that a charge must describe the offence which the defendant is alleged to have committed, and says that a description of an offence in the words of the Act or subordinate instrument creating it, or in similar words, is sufficient.

I was referred also to a copy of what purported to be part or a summary of a judgment of Ormiston J in a case of *Woolworths (Victoria) Limited v Marsh* decided on 12 June 1986. His Honour is there reported to have said that it is necessary that an information enable the defendant to identify with precision the charge brought. So much may be conceded. It was further pointed out for the appellant that the *Magistrates' Court Act*, in effect, requires that a charge such as that under s49(1)(f) of the *Road Safety Act* must be brought within twelve months of the date of the alleged offence. It was said here that the charge did not state when the alleged offence occurred, or where, and that no amendment was possible because twelve months from the date of the offence had run. I was referred to the decision of the Full Court in *Hackwill v Kay* [1960] VR 632, as authority for the view that, in a case such as this, the date is part of the essence of the offence. If no date is stated, it was argued, it is too late to insert one now by way of amendment, and the Magistrate could not have allowed it.

It is necessary to strive conscientiously to read any information in a sense that gives it the meaning **[10]** that the draftsman intended. Here I think it may be said that, although the expression was clumsy, the document clearly intended to allege that both the second and the third charge occurred at Laverton on 2 June 1989. I should not think that strictly any amendment to what is

set out on page 2 of the document, clumsy and perhaps careless though it is, is necessary.

I should take a view of the document similar to that which was taken by two of the three members of the Full Court of the Supreme Court of South Australia in the case of *R v Jiri Fiali ex parte GJ Coles & Co Ltd* (1987) 46 SASR 47. That was a case involving a review of a conviction upon nine counts laid against the defendant under s32 of the *Packages Act* 1967 of South Australia. The complaint stated that the defendant, on the 21st day of February 1985 at [a stated address] sold an article ... the weight of which was less than the weight of the article on the pack containing the article; Contrary to section 32 of the *Packages Act* 1967."

The informant went on to say: "2. sold an article the weight of which was less" *et cetera*, sold an article, the weight of which was less" *et cetera*, and so on up to count 9. Upon one reading of the information, only the first charge specified a date at which the alleged offence occurred, and counts 2 to 9 did not. The Magistrate allowed an amendment to the information to a form which made the date specified in respect of the first charge apply also to each of the other eight. The Full Court upheld the **[11]** Magistrate's course. Mr Justice Jacobs at page 60 of the report said:

> "In the context of the present case, to read this complaint, as drawn, as though counts 2 to 9 disclosed no offence is to allow a literal technicality and an obvious mistake to defeat the ends of justice. In my opinion the learned special magistrate did not err in deciding that he had power to correct that mistake".

The question whether a complaint or information may be amended if, technically read, it discloses no offence has been, as Dixon J pointed out in *Broome v Chenoweth*, [1946] HCA 53; (1946) 73 CLR 583 at p601; [1947] ALR 27, the subject of some difference of judicial opinion. His Honour went on to make a statement which has often been adopted in this Court and others. He said:

> "An offence may be clearly indicated in an information, but, in its statement, there may be some slip or clumsiness, which, upon a strict analysis results in an ingredient in the offence being the subject of no proper averment. Logically it may be said that in such a case no offence is disclosed and yet it would seem to be a fit case for amendment if justice is not to be defeated".

I think that applies here, although I think that the second sheet of the document being the summons with information can be read as I have indicated, without amendment, that is to say, without physical amendment, to indicate that both charges 2 and 3 are alleged to have taken place at Laverton on 2 June 1989. That result can be achieved simply by treating the figure 2 in the box opposite the expression "At Laverton" *et cetera*, as being one line lower than it is; alternatively, by treating the words "At Laverton" *et cetera* as being one line higher than it is, so that it **[12]** extends to cover the offences referred to against boxes numbered 2 and 3. Even if it were thought that a physical amendment were necessary, I think it ought to have been allowed by the Magistrate had he been asked, in accordance with the *dictum* of Dixon J to which I have referred.

For those reasons, I do not uphold the first objection taken on behalf of the appellant to the form of the information.

The second objection refers to the inclusion in the description of the alleged offence of a reference to s51(1) of the *Road Safety Act* 1986. This is an obvious error for a reference to s55(1). I may say that it escaped the attention of everybody at the hearing before the Magistrate, including counsel for the appellant who appeared both before the Magistrate and before me. Both this error and the error in layout of the second sheet referable to the date were detected only after conviction, and presumably during the course of preparation of this appeal. It was said on behalf of the appellant that because s55(1) is necessary to be referred to, as I have indicated, for an understanding of s49(1)(f), the failure to refer to it in the information was sufficient to render the information bad. Accordingly, it was said, the information discloses no offence known to the law.

In association with that criticism, I think there is another, which was not referred to by counsel during the course of argument. It is this: that the third information is quite ungrammatical.

It does not, as expressed, distinctly say what the defendant **[13]** was alleged to have done or not to have done. The gist of s49(1)(f), as I read it, is that the defendant within three hours after driving or being in charge of a motor car furnishes a sample of breath for analysis, and that the result of an analysis of the sample indicates more than the prescribed concentration of alcohol to be present in the defendant's blood.

What the information should have alleged properly and grammatically was that the defendant furnished a sample. It does not say so. The question, however, is whether it ought to be treated as though it did say so to allege an offence by the defendant against s49(1)(f). I have found this question not an easy one, and it is to be resolved, I think, by reference to one's impression and also as a matter of degree.

When one looks at the words that are used to frame the third information, clumsily put together though they are, one does discern, first of all, that there is a charge laid under s49(1)(f) of the *Road Safety Act*. The information to that extent, therefore, satisfies the requirements of sub-section (2) of s27 of the *Magistrates' Court Act* 1989. That is to say, it identifies the provision of the Act that creates the offence which the defendant is alleged to have committed.

A more difficult question is whether the information satisfies the requirements of sub-section (1) of s27, namely, that the charge must describe the offence which the defendant is alleged to have committed. The words used in the information are **[14]** not the words, in the proper order at all events, used in s49(1)(f). As I have said, the gist of s49(1)(f) is that the defendant furnishes a sample and analysis of the sample produces a result of a certain description.

It seems to me that the necessary ingredients of s49(1)(f) to be proved by the prosecution are these: that the defendant has been driving a motor car within the last three hours relevant to the time of the alleged offence; that a preliminary breath test has been undergone pursuant to sub-section (1) of s53; that the defendant has been duly required to furnish and has furnished a sample of breath for analysis; and that the result of analysis of the sample as recorded by the breath analysing instrument indicates that more than the prescribed concentration of alcohol was present in his or her blood. The furnishing of the sample has to be proved to be one for analysis by a breath analysing instrument, as defined, and, of course, the requirements must be one to furnish under s55(1).

It is to be noted, however, that section 55 is the only section of the *Road Safety Act* which entitles a member of the police force to require a person to furnish a sample of breath for analysis by a breath analysing instrument. It seems to me that, strictly, a reference to s55(1) in terms is not necessary in the information alleging an offence against s49(1)(f). I think the information, as drawn, would have been no worse off had the words "s51(1) of" been omitted so that it read, "a sample **[15]** of your breath for analysis by a breath analysing instrument pursuant to the *Road Safety Act* 1986". Had that been said, the description of the offence would have been no less plain than it now is and, of course, it would, in a sense, have been plainer because it would have omitted the confusing reference to s51(1).

I have said that the reference to s51(1) is confusing and it is, because if one looks at s51(l), it really has nothing to do with anything by way of an offence under s49(1)(f). The next question must be, I think, whether the insertion of the reference to s51(1) in the information is sufficient to make the information so confusing and so obscure that it is not an information which describes an offence under s49(1)(f).

In my opinion, it is not. Some support for that conclusion, I think, is to be gained from the fact that no one at the hearing was confused by it. No one adverted to the point, and the case was dealt with as one involving an allegation of a breach of s49(1)(f). I think the information, as drawn, taking a not unfair view of it, is to be understood as reading thus, or in some such form.

> "That at Laverton on Friday, 2 June 1989, within three hours after you had driven a motor car and after undergoing a preliminary breath test, you were required to furnish and did furnish a sample of breath for analysis by a breath analysing instrument pursuant to the *Road Safety Act* 1986 and the result of the analysis indicated that more than the prescribed concentration of alcohol was present in **[16]** your blood contrary to s49(1)(f) of the *Road Safety Act* 1986".

It will be noted that in that formulation I have omitted reference to s55(1). I have done so because, as it seems to me, the reference to s55(1) as part of the formulation of the terms of the information is unnecessary. It is unnecessary because it must be implied, s55(1) being the only provision pursuant to which a breath analysis of the defendant could be required. It was put that the Magistrate, had his attention been drawn to the matter, could not have allowed any amendment if one had been sought, because to do so would have been to charge a different offence from that which had been intended by the information and twelve months from the date of the offence would have elapsed.

I do not accept that submission. It seems to me that one derives from the information as drawn all the ingredients of it, expressly or by implication, that I have included in the reformulation of it as the way in which I think it may be fairly understood. I think that if the Magistrate had been asked for leave to amend, he could properly have granted it.

The *dictum* of Dixon J in *Broome v Chenoweth*, which I have cited, being again applicable, I think it would have been appropriate that a Magistrate grant leave in accordance with the power committed to him by s50 of the *Magistrates' Court Act* 1989, in order to ensure that justice was not defeated. [*His Honour dealt with the facts of the case and dismissed the appeal*].

APPEARANCES: For the applicant Smith: Mr PJ Billings, counsel. Carey Scanlan & Warren, solicitors. For the respondent Van Maanen: Mr RJ Maidment, counsel. JM Buckley, Solicitor for the DPP.
