28/93

SUPREME COURT OF VICTORIA

RAU v JACKMAN and ANOR

Eames J

8, 9 June, 2 July 1993

PROCEDURE – PARTICULARS – ALLEGED BREACH OF INTERVENTION ORDER – PARTICULARS OF FACTS ORDERED TO BE SUPPLIED – COPY OF RECORD OF INTERVIEW SUPPLIED – WHETHER SUFFICIENT – DUPLICITY – INFORMATION ALLEGING BREACH BETWEEN DATES – WHETHER BAD FOR DUPLICITY: *CRIMES (FAMILY VIOLENCE) ACT* 1987, S22.

1. Where, in proceedings alleging a breach of an Intervention order a magistrate ordered that the informant provide the defendant with particulars of the facts relied upon as constituting the offence, it was not sufficient for the informant to supply a copy of the record of interview held with the defendant. The defendant should not have been obliged to search through a separate document in order to glean the particulars of the charge.

2. A charge alleging breach of an Intervention Order may be constituted by activity over a continuous period or by a single act. A breach may be constituted by a series of events which together amount to conduct which could be compendiously described as "harassing, threatening and intimidating". Accordingly, where a charge alleged that between certain dates a person contravened an intervention order by "harassing, threatening and intimidating the complainant", the charge was not bad for duplicity.

EAMES J: *[After setting out the facts of the charge and the proceedings before the magistrate, His Honour continued]* ... **[25]** As I have said, it was difficult to glean the precise nature of the complaints made by counsel as to the charge. As best I could understand them he submitted, first, that the charge was defective and/or a nullity because it disclosed more than one offence. Thus, it was said that the offence of contravening the order of the magistrate was one which must occur at a specific time on a particular day. The allegation that the offence occurred between dates which were months apart demonstrated that not one activity, ie. one **[26]** offence, was being alleged but a series of activities, every one of which would constitute an offence.

This complaint was no doubt encouraged by the assertion of the prosecutor that hundreds of charges could have been brought with respect to the plaintiff's conduct but that it had been decided to settle for a single all-embracing charge. Notwithstanding those remarks of the prosecutor it seems to me that only one offence has been alleged on the charge, a single count of having breached the order of the magistrate, and that it was not inappropriate that this single offence may have been constituted by conduct occurring over weeks or months. The particulars already contained in the charge are that the plaintiff committed the contravention of the order by "harassing, threatening and intimidating the complainant" between the dates alleged.

Conduct which is, at once, all of harassing, threatening and intimidating is conduct which is likely to be constituted by activities occurring on more than one occasion. Subject to what I later say in reference to *Daly v Medwell* [1986] 40 SASR 281; 17 A Crim R 68, it is difficult to conceive how, by whatever action or conduct, behaviour on a single occasion by a person could be regarded as harassing another. Whilst it may be conceived that a threat could be made on a single occasion the combining of those two elements with "harassing" can only relate to conduct over a period of time, it being said that such accumulating conduct **[27]** constitutes the single offence of contravening the order. In my view an analogy might be drawn with a charge under s107 of the *Companies Act* 1958 which was considered by the Full Court in *Byrne v Baker* [1964] VicRp 57; [1964] VR 443 and by Gowans J in *Byrne v Garrison* [1965] VicRp 70; [1965] VR 523. That section created an offence of contravening sub-section (1), which required a director, at all times, to act honestly and to use reasonable diligence.

In *Byrne v Baker* the Full Court held that each and every identifiable act or omission

constituted a separate offence against the section and should be the subject of a separate charge. Mr Hooper submitted that the type of offence thus created was of a character similar to that created by s22 of the Act with which I am concerned. Whilst there are undoubted similarities there is a significant difference. The Full Court characterised the section as being one akin to the concept of negligence with respect to the misfeasance of directors and held, at 453, that that concept had reference to "identifiable acts or omissions, not to any general characterisation of the conduct of a director over a selected period. The construction contended for is, in our view, plainly inapplicable to the related requirement of honesty under the sub-section. It is a construction which involves a departure from the important principle that crimes should be so defined as to enable the accused to know with precision what he is charged with; and a construction producing that result **[28]** should not be adopted unless the language of the legislature requires it".

Having thus construed the section, the Full Court held that the charge was defective in that it not only required the accused to defend what amounted to 25 separate charges in the one complaint (the particulars alleging 25 incidents), but it also was defective in that, in breach of s218 of the *Evidence Act* 1958, it failed to acquaint the accused with a precise allegation of the acts, facts or matters constituting the offence. In my view s22 should not be regarded as creating an offence which could only be constituted by a single act or event. There may well be offences under that section which would comprise such a single event but in my view it could also be the case that s22 embraced conduct which might be characterised as forming a continuous offence, or alternatively, conduct whereby a series of acts, when integrated, create a single offence of a contravention of an order. This is not to say that there is not an obligation on the prosecution to supply particulars in either instance; that is a clear obligation (see *Byrne v Baker*, at 456-7).

In *Byrne v Garrison* the actions said to constitute the offence took place over a period of two days (although it must be noted that no one action over those days, of itself, necessarily constituted an offence). Gowans J said of the section, at 534:

> "The offence is therefore (in relation to sub-section (1)) the committing of a breach of the provision of sub-section (1). Any **[29]** particular act or omission of a director at any time which does not answer to the standard of acting honestly in the discharge of the duties of his office is an offence. Any particular act or omission of a director at any time which does not answer to the standard of using reasonable diligence in the discharge of his office is an offence. But a set of acts or omissions so integrated as to constitute a single transaction or dealing or piece of conduct may be one breach and constitute a single offence. Most actions may be fragmented, but common sense would react against the idea that it was permissible to break up such a single piece of conduct into its constituent parts until each presented a neutral aspect in order to support a contention that no single part constituted a breach of the required standard, and therefore no offence."

In *Chugg v Pacific Dunlop Ltd* [1988] VicRp 49; [1988] VR 411 at 415-7 Fullagar J was concerned to interpret a section which created an offence of failing to comply with a provision of the *Occupational Health and Safety Act* 1985. The section said to have been breached required the employer to provide and maintain a safe working environment. Particulars of the charge were capable of being bracketed into four groups, each containing numerous specific complaints of acts or omissions which fell below the required standard. For the prosecutor it was submitted that there was only one offence, being that of failing to keep a safe environment in continuing existence. The accused firm argued that within the meaning adopted by *Byrne v Baker* this was a section which created separate offences, which should be charged separately. Fullagar J held that the section with which he was concerned had a similar effect to that in *Byrne v Baker*. His Honour held that it was not a continuing offence which was created but one which required **[30]** reference to a single identifiable act or omission. His Honour, however, recognised the possibility that the offence may be constituted by conduct of a continuing kind. At page 416, Fullagar J said, speaking of the need to identify the "gist" of the offence created by the section:

> "Using the word "gist" in the same sense as, I think, the Full Court intended in *Byrne v Baker* at 452, I am of opinion that the gist does not lie in a failure to have maintained at all times a constant environment, or even in a failure to have provided at all times the information required by pars (e) of s21(2). Rather, on the true construction of the sections, it is each and every failure by the employer to provide the environment or the information, that is to say, each and every particular act or omission amounting to such a failure, that constitutes an offence under the sections. <u>This position is in no way altered by the circumstances that a failure may sometimes consist of an act of a continuing character, or of an omission persisted in over a period of time.</u> (my emphasis)."

The difference in the present case is that although the offence is a contravention of the order, that contravention is alleged to have been occasioned by activity (harassing, intimidating, threatening) which is as capable in a given case of being seen to be continuing behaviour as it is in other circumstances (in particular if it is alleged only that a threat or intimidation occurred) of being constituted by a single act. As was recognised in the passage emphasised above, it is quite possible, indeed it is common, that a section which creates an offence may at the same time create and provide both for a continuing offence and for **[31]** one which is not (See *R v Hermes; Ex Parte Borg* [1967] ALR 158; (1966) 10 FLR 375). *[After dealing with questions whether the charge contained a latent ambiguity or disclosed an offence or contained a defect, His Honour continued]...* **[40]**

Was the charge bad for duplicity?

The complaint here is that the charge alleged more than one offence. Evatt J, at 496, in *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104 held that once the charge, in *Johnson*, was amended to allege only one person exiting the premises, it was no longer bad for duplicity since it alleged a single offence. It was nonetheless defective because, although it charged a single offence, the particulars demonstrated that there were 30 such offences to be alleged and it was impossible to know which one was the one to which this charge related. In *Bale v Rosier* [1977] 1 WLR 263 at 266 Eveleigh J, with whom Lord Widgery CJ and Peter Pain J agreed, spoke of the different meanings of duplicity and said:

> "The complaint of duplicity when directed against a charge usually involves an uncertainty as to which of two possible alternative activities are concerned in the **[41]** charge laid. It may sometimes involve the possibility of one activity giving rise to two different kinds of legal offence. But the gravamen of the fault of duplicity is that it does not allow an accused to know with precision the charge which he has to face and which is brought against him."

In my opinion in no sense was there duplicity in the charge brought against the plaintiff. The fault which arose from the failure to give particulars was related to the difficulty which the magistrate would have faced in determining questions of admissibility if, without particulars, evidence was sought to be led concerning events taking place in the relevant time period to which the charge related. The prosecution were obliged to identify those activities, whether recorded in the diary or not, which were to be said to form part of the totality of the breach of the order which was alleged.

In a separate argument Mr Hooper further submitted for the plaintiff that s22 creates one offence, contravention of an order, but that the charge as framed in the information alleged contradictory particulars whereby the offence was said to have been committed. Thus, he submitted, if it was said that harassment must be a continuing offence, or, at least, must comprise more than one act, intimidation and threats could each be constituted by a single act. It must therefore be a contradiction, he submitted, to allege in the one charge that the offence was both a continuing and a non-continuing offence. **[42]** In my opinion this argument confuses the distinction to be drawn between an offence which may be constituted by one or more of a number of characteristics of forbidden conduct and a statute which creates two or more offences in the same section. (See *Romeyko v Samuels* (1972) 2 SASR 529; (1972) 19 FLR 322 and *DPP v Williams* [1993] VicRp 15; [1993] 1 VR 238 at 245).) Section 22 ; falls within the first category and there is nothing inherently contradictory in alleging that activity which constitutes one offence may meet the description of being all of harassing, intimidating and threatening.

Effect of a Defect in the Charge

In *Johnson*, *supra*, both Dixon J and Evatt J accepted that there was a common law right of a court to dismiss a charge where, although the charge was laid on its face and properly disclosed an offence, the evidence led before the court created a duplicity or uncertainty as to which particular offence was covered by the charge before the court. The court could then require the prosecutor to elect which offence was addressed by the charge. If the prosecutor refused to so elect then as a last resort the court could dismiss the charge. As Dixon J observed, at 489, the obligation to so elect arose once the evidence led before the court (or once the court was advised what evidence it was intended to lead) meant that an otherwise valid charge, with apparently proper particulars, became thereby "equally capable of referring to a number of occurrences each of **[43]** which constitutes the offence the legal nature of which is described in the complaint".

In the present case it is possible that if particulars were supplied it would become apparent

that the prosecutor intends to lead evidence of more than one offence. There is agreement between counsel that the diary log book refers to telephone calls and conversations initiated by the plaintiff in two time periods, ie between 12 January and 20 February and then on 26 March 1991. Mr Hooper submitted that that material indicated that the defect to which Dixon J referred could and does arise here because:

> (1) Each separate telephone call, or at least each day on which calls were made, was a separate offence; or else,
>
> (2) There are two distinct offences (even if one rejects the first suggestion of multiple offences), namely, conduct in contravention of the order in the period between 12 January and 20 February on the one hand, and conduct on 26 March, on the other.

It may be that delivery of particulars would have disclosed (and will now disclose, if I require such particulars to be given), more than one offence in the sense referred to in the second of those situations referred to above. If that is so then the prosecutor will have to elect which charge he intends to proceed with. Mr Hooper submits that the prosecutor has **[44]** refused the opportunity to so elect or, as alternatives recognised by Dixon J, to amend the charge or else to provide particulars so as to make it clear that he is alleging only one of the range of offences which it is possible that the accused person committed at the relevant time. The prosecutor, having failed to take any one of those three options, has left the court with no option, Mr Hooper submits, but that the charge must be dismissed.

In my view even if there is the defect identified as a latent defect in the charge, neither Dixon J, Evatt J nor McTiernan J suggested that the charge must be dismissed (see Dixon J at 492 "...the complaint may be dismissed"; Evatt J at 496, "...the court is authorised to dismiss the complaint; McTiernan J at 501-2 "the magistrate ... had jurisdiction to dismiss the complaint..."). The context of that case was that the charge had, in fact, been dismissed by the magistrate, who was faced with the prosecutor's refusal to elect. The question before the High Court was whether it was open to the magistrate to adopt that course. It may well also have been open to the magistrate in the present case but he had a discretion not to dismiss the charge. Nothing said by the Court in *S v R* [1989] HCA 66; (1989) 168 CLR 266; 89 ALR 321; 45 A Crim R 221; 64 ALJR 126, to which I was referred, elevated the decision in *Johnson v Miller* to the position where there was an inevitable or mandatory requirement that having established that a latent defect existed, and it not having been cured by **[45]** amendment or election (or particulars), the tribunal must dismiss the charge. That case, as with *Johnson v Miller*, was also concerned with a different situation to the present, namely, one where the evidence of events which was to be led in proof of the offence consisted of a series of separate offences, and where the offence before the court was itself not one of a continuing nature nor one which was constituted by the totality of those activities (see also *R v Levidis* [1991] VicRp 57; [1991] 2 VR 179 at 197; (1990) 51 A Crim R 216).

As matters now stand it has not, as yet, even been considered by the magistrate whether the diary/log discloses (or else whether the evidence to be led will disclose) that there are two separate offences brought under the one charge. If the matter is returned to the magistrate with the further hearing prohibited unless and until further particulars are delivered then if those particulars are not delivered the case will not proceed and the magistrate will be entitled to consider whether it is appropriate to dismiss the charge as an abuse of process. In any event, the charge will be unable to proceed and no risk of conviction based upon a charge which is defective or which denies natural justice to the plaintiff will arise.

I reject the suggestion that I should dismiss the charge myself, even if I was minded to do so, which I am not. No order for *certiorari* or mandamus has been sought, and deliberately so, because it was seen to gain a tactical advantage to the plaintiff not to seek that **[46]** relief. The only relief sought was in the nature of prohibition, so as to restrain the further conduct of the proceedings.

Amendment of the Charge

If it is the case that there be a defect, latent or otherwise, in the charge (which I do not accept to be the case) then it is curable by election as to the charge which will be pressed, or else by particulars clarifying the particular manner in which the law is alleged to have been breached

or, finally, by amendment of the charge to remove any suggestion of ambiguity or duplicity. Any suggestion of ambiguity or duplicity could be removed by providing particulars which identified only one offence, whether that be pleaded as being constituted by ongoing behaviour between particular dates or else as being constituted by activities on a single day. Mr Hooper submitted that such amendment could not be permitted, since the 12 month time limit for the laying of the charge had expired and to allow amendment would be to plead a new material particular in the charge which, he submitted, could not be permitted outside the limitation period. He relied upon *Hackwill v Kay* [1960] VicRp 98;(1960) VR 632. He submitted that the date was an essential ingredient of the offence (see *S v R, supra* per Dawson J at 129; *Ex parte Lovell; Re Buckley* (1938) 38 SR NSW 153; 55 WN (NSW) 63).

[47] I do not doubt that the date of the offence is an essential element of the charge but in my view such amendments as I have discussed (which may or may not be sought if the matter is returned to the magistrate, as I believe it should be) may well be allowed by the magistrate, without denial of any right of the plaintiff. In *Hackwill* the amendment which was sought was to alter an allegation in a charge so that it pleaded an offence which was not statute barred, in substitution for an allegation of an offence which was statute barred. In the present case any amendment would be to narrow down the charge as to dates but not to go outside the range of dates which were initially pleaded. No effect on the limitation period would be caused by such an amendment. Provided that the information is not fundamentally defective, and this is not, then amendment may be permitted to correct a defect, even if that defect was an error of substance.

As Gobbo J observed in *Clarke v La Franchi and others*, unreported, 26 April 1993, at page 22, an amendment will not be permitted outside the limitation period where the effect of the amendment is to substitute a wholly new charge, or where the effect is to bring forward a charge where the original charge alleged an offence unknown to the law. In that case, his Honour allowed an amendment to the date alleged as the date of an offence. He rejected an argument which sought to give to the decision in *Hackwill v Kay* the width which Mr Hooper sought to **[48]** give it in his argument before me. There may be a question of whether an amendment will be permitted before the prosecutor has made an election (See *Chugg v Pacific Dunlop Ltd*, *supra*, at 417) but that is not an issue which has been considered at this stage and will only need to be addressed by the magistrate if the issue is raised before him.

Conclusion

The charge does not provide the plaintiff with the particulars to which he is entitled. If the prosecutor thought that by supplying the record of interview the plaintiff had thereby been provided with particulars then he was wrong, as the plaintiff is not obliged to search through a separate document in an attempt to glean what may constitute particulars contained within it (See *Kerr v Hannon* [1992] VicRp 3; [1992] 1 VR 43 at 46). I find it difficult to understand why the informant and the prosecutor did not adopt the appropriate response to the order made by the magistrate, that the particulars be supplied. It is, no doubt, an unfortunate fact that many charges such as this occupy the time of both the court and the police at Broadmeadows. This legislation was introduced to provide a just but prompt means to provide protection to persons who allege and demonstrate that they have been the subject of domestic violence or threatening behaviour. It is important social legislation and it **[49]** should not be regarded as being less deserving of enforcement than any other legislation which serves the protection of the public.

The supplying of particulars in this case was likely to have been time consuming. But the charge was an important one to have determined promptly, involving as it did allegations of contempt of a court order and of the continuing danger to the safety and well-being of a member of the public who had sought and been assured the protection of the courts. Failure to comply with the order also effectively denied the defendant/plaintiff his rights and was the immediate cause of the appalling delay which has resulted in the disposition of this case.

I propose to make an order in the nature of prohibition against the Magistrates' Court at Broadmeadows. I prohibit that court from proceeding further to hear and determine or otherwise deal with the information of Warren Jackman that the plaintiff in the action herein, Theodore Harry Rau, "did at Sunbury between the 12th day of January 1991 and the 26th day of March 1991, being a person against whom an order has been made, a copy of such order having been served, did contravene that order by harassing, threatening and intimidating the complainant"

unless the informant in that case provide to the plaintiff/defendant a reasonable time before the hearing, particulars of the facts that will be relied upon as constituting the offence. I will hear the parties on costs.

APPEARANCES: For the plaintiff Rau: Mr A Hooper, counsel. HEP Steele, solicitor. For the second-named defendant Mr MJ Colbran, counsel. Victorian Government Solicitor.
