52/89

SUPREME COURT OF VICTORIA

SETKA v GOTTLIEBSEN

Gray J

9 June 1989

SUMMARY OFFENCE – WILFUL TRESPASS AND REFUSING TO LEAVE – WHETHER INFORMATION DUPLEX – WHETHER STATUTE CREATES ONE OR TWO OFFENCES – PROCEDURE – APPLICATION BY ACCUSED FOR ADJOURNMENT – FOUR ADJOURNMENTS PREVIOUSLY GRANTED TO ACCUSED – WHETHER APPLICATION WITHOUT MERIT - WHETHER ERROR SHOWN IN REFUSAL OF APPLICATION: *SUMMARY OFFENCES ACT* 1966, S9(1)(d).

1. Section 9(1)(d) of the *Summary Offences Act* 1966 creates one offence which may be committed by a person's wilfully trespassing and refusing to leave after a warning from one or other of two stipulated persons namely, the owner or occupier of the relevant land or his or her agent.

2. Where a person charged with an offence of wilfully trespassing and refusing to leave had had four previous adjournments (the last being of 16 weeks' duration in order to obtain witnesses), no error was shown in the magistrate's refusal to grant the accused a further adjournment.
[Note also *Young v Verschuur*, MC 2/1989. Ed.]

GRAY J: [1] On 24 August 1988, the applicant was convicted at the Melbourne Magistrates' Court of wilfully trespassing upon a building site in Palmer Street, Fitzroy, on 19 August 1987. The applicant was fined $600 and ordered to pay $100 costs. At the hearing, the applicant was not represented. He pleaded not guilty to the charge but left the court before the proceedings were completed.

Before the hearing of the information started, the applicant sought an adjournment. There is some dispute as to the circumstances surrounding this application. There is no transcript of the proceedings and I proceed upon an acceptance of the answering affidavit of Senior Constable Neville where it conflicts with the applicant's affidavit. It appears that the applicant is an official of the Builders Labourers Federation. The applicant sought an adjournment because of an agreement alleged to have been made between BLF officials and Sergeant Coff that all BLF matters would be adjourned until after a then pending meeting between BLF and the police. Senior Constable Neville, who appeared to prosecute, took instructions from Sergeant Coff and informed the court that there had been no agreement as alleged by the applicant. Senior Constable Neville opposed the adjournment application.

There was some discussion between one John Cummins and the court in which it was alleged that a number of relevant documents had been seized at the office of the BLF and had not been returned. **[2]** Senior Constable Neville offered to call the Supreme Court Prothonotary to prove that all seized documents had been returned, save one not relevant to the present case. The learned magistrate said that it would not be necessary to call the Prothonotary on that point. Senior Constable Neville told the learned magistrate that the information had been before the court on 4 May 1988 upon which occasion the information was adjourned until 24 August at the applicant's request to enable the applicant to obtain witnesses. Senior Constable Neville submitted that as he was ready to proceed and that, as the case was an old one, the matter should proceed. The prosecutor told the magistrate that he was in a position to lead evidence as to the applicant's presence before the court on 4 May and as to the application then made by the applicant.

The magistrate did not require the prosecutor to call evidence on that point and said that he was prepared to go ahead with the hearing forthwith. In the course of giving his ruling the magistrate volunteered the statement that the applicant had obtained four adjournments of the matter and had plenty of time since the last adjournment in which to obtain witnesses. The case then proceeded. The applicant was charged and pleaded not guilty. The prosecutor then led

the evidence in support of the information. During the calling of that evidence the applicant and Cummins left the court. As I have already said, at the conclusion **[3]** of the hearing the magistrate convicted the applicant and imposed a fine.

The conviction is now attacked on two broad bases. The applicant obtained an order nisi to review the magistrate's order on three grounds expressed in the following terms:

> (a) The learned magistrate erred in law in not dismissing the information on the grounds that the information contained two offences and that each offence was not set out in a separate numbered paragraph.
> (b) The learned magistrate misdirected himself and thereby failed to exercise his discretion properly or at all and denied the applicant natural justice in refusing to grant the adjournment of proceedings sought by the applicant.
> (c) The learned magistrate erred in law in finding that the matter should proceed on the day when the applicant had no notice that the matter was listed for hearing that day.

[4] Under the first ground, Mr Willis of counsel, who appeared for the applicant, submitted that the information was duplex in the sense that two separate offences were alleged. The information charged the applicant that "At Fitzroy in the said state on Wednesday, 19 August 1987, did wilfully trespass in a place, to wit, the Palmer Street housing project situated at the intersection Palmer Street and Royal Lane and did neglect/refuse to leave that place after being warned to do so by the owner/occupier/or person authorised by or on behalf of the owner/occupier". That information was laid under s9(1)(d) of the *Summary Offences Act* 1966. That section provides that any person who wilfully trespasses at any place and neglects or refuses to leave that place after being warned to do so by the owner or occupier or a person authorised by or on behalf of the owner or occupier shall be guilty of an offence.

It was submitted that that section creates two separate offences. First the offence of trespassing and refusing to leave when asked to do so by the owner. Second, trespassing and refusing to leave that place after being warned to do so by the occupier. In my view there is no substance in that submission. The section creates one offence of wilfully trespassing and refusing to leave after **[5]** being warned to do so by either the owner or occupier or an agent of either owner or occupier. The offence created by the section is that of trespassing and refusing to leave when one or other of those persons warns the trespasser to do so.

An attempt was made in an able and persistent address by Mr Willis to relate s9(1)(d) to statutory provisions referred to in a number of cases which create charges which are truly in the alternative. Reliance was placed upon the judgment of a Divisional Court in *Cotterill v Lempriere* (1890) 24 QBD 634 where the appellant was charged with being the driver of a certain engine attached to a tram car, the property of the South Staffordshire and Birmingham Districts Steam Tramways Company Ltd did permit smoke to escape from his engine contrary to the by-laws of the Board of Trade. The relevant by-law was expressed in language which can be said to be inelegant in the extreme. The by-law provided:

> "No smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public".

The Divisional Court was disposed to find that the information laid in that case was open to the criticism that it did not specify the nature of the offence charged. The principal judgment was delivered by Lord Coleridge CJ. It is apparent from his Lordship's reasoning that he relied upon a line of **[6]** cases referred to in the judgment, which can be illustrated by reference to the first of the judgments to which Lord Coleridge refers, namely *R v Sadler* (1787) 2 Chitty 519, where information charged the defendant that he did "kill, take and destroy or attempt to kill, take and destroy the fish in a river or stream". This information was held to be duplex. A number of other cases were referred to where the legislation was in similar form. I consider that there is a clear distinction between legislation expressed in the way I have just described, with the legislation with which this court is now concerned.

There is a much greater degree of similarity with such cases as *Gleeson v Ah Houn* [1897] VicLawRp 30; 22 VLR 156 where the information charged the defendant that "he did unlawfully sell or dispose of a ticket by which permission or authority was gained or given to compete or

have an interest in a certain lottery or scheme by which prizes of money were to be competed for by a certain mode of chance". The point was taken that the information was bad for duplicity in that it charged the defendant with alternative offences, namely selling or disposing of a ticket. A'Beckett J held, after considering *Cotterill v Lempriere* (1890) 24 QBD 634; 62 LT 695, that the information expressed in that form was not bad for duplicity or uncertainty.

As I have already said, I do not regard the language of s9(1)(d) as presenting any real **[7]** difficulty. In my view, it clearly provides for one offence which may be committed by trespassing and refusing to leave after a warning from one or other of two stipulated persons, namely the owner or occupier of the relevant land or his or her agent. Accordingly, as the first ground of the order nisi merely attacks the form of the information laid, I am satisfied that the ground has not been made out because the information charges one offence only.

The other two grounds of the order nisi attacked the learned magistrate's discretion in refusing the application for an adjournment. I have already referred to the circumstances in which the application was made. The learned magistrate was clearly satisfied that proceedings had been adjourned from 4 May at the applicant's request to enable him to assemble his witnesses. It is apparent that the applicant knew perfectly well that the information was to be heard on 24 August and, to my mind, the magistrate was perfectly entitled to treat the application which was then made as being without merit.

It was said by Mr Willis that it is a reasonable inference that the applicant believed that the information would not proceed on that day, and that the magistrate should have granted the indulgence sought. As I said in the course of argument, the applicant led no evidence about the alleged agreement **[8]** and the magistrate was, to my mind, perfectly entitled to characterise the application as having no legitimate foundation. It is always difficult to attack the exercise of a court's discretion in relation to the matter of an adjournment. It is sufficient to say that no error on the part of the learned magistrate has been shown to my satisfaction. Accordingly grounds (b) and (c) also fail. The order nisi will be discharged with costs.

APPEARANCES: For the plaintiff Setka: Mr J Willis, counsel. For the defendant Gottliebsen: Mr T Ginnane, Victorian Government Solicitor.
