17/01; [2000] VSC 396

SUPREME COURT OF VICTORIA

ALWER v McLEAN

Smith J

18, 29 September 2000 — (2000) 32 MVR 125; (2000) 116 A Crim R 364

MOTOR TRAFFIC – PROCEDURE – CHARGE AND SUMMONS – ALLEGATION OF SPEEDING – FAILURE IN CHARGE TO SPECIFY DEFENDANT WAS DRIVING IN A SPEED ZONE – DEFENDANT CONVICTED – WHETHER REGULATION LISTS A SERIES OF MUTUALLY EXCLUSIVE OFFENCES – WHETHER CHARGE OMITTED AN ESSENTIAL ELEMENT OF OFFENCE – WHETHER MAGISTRATE IN ERROR IN FINDING THE CHARGE PROVED: *ROAD SAFETY (TRAFFIC) REGULATIONS* 1988, R1001(1).

1. Regulation 1001(1) of the *Road Safety (Traffic) Regulations* 1988 sets out a number of separate and distinct speed regimes which apply depending on the circumstances. Each of the sub-paragraphs of Regulation 1001(1) should be regarded as creating and defining distinct offences.

2. The law is clear that an information must describe the offence and do so in a way in which the essential ingredients are spelt out. In the present case, the defendant and the court would not have been able to identify the essential elements to be proved from the charge and information but would have had to obtain the Regulations and analyse them to establish all the elements of the offence to be proved.

3. Where an information failed to specify what speed limit was applicable to the section of the highway referred to in the charge and alleged that the defendant breached Regulation 1001(1)(a) but the evidence disclosed a breach of Regulation 1001(1)(c), it was not open to the magistrate to find the defendant guilty of a breach of Regulation 1001(1)(a).

SMITH J:

Background to appeal

1. On 16 March 2000 David Alwer was convicted at the Magistrates' Court of Korumburra on a charge of breaching Regulation 1001(1)(a) of the *Road Safety (Traffic) Regulations* 1988. He was fined $165 and ordered to pay $33 costs.

2. The "charge and summons" stated the charge in the following terms:

> "the defendant at Loch on 09/04/1998 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."

3. In the section of the "charge and summons" in which the law under which the charge is laid is to be spelt out, it was indicated that the charge was brought under State Regulations being *Road Safety (Traffic) Regulations* and reference was made to Regulation 1001(1)(a).

4. David Alwer appeals from the above decision to this court.

Questions of law to be determined

5. By order dated 30 April 2000 Master Wheeler identified the following questions of law as being raised by the appeal, namely

> "(a) whether the charge failed to allege an offence under the *Road Safety (Traffic) Regulations* 1988 in that it failed to specify what, if any, speed limit was applicable to the section of highway referred to in the charge?
>
> (b) in circumstances where the evidence before the Court was that the section of highway referred to in the charge was a speed zone, whether the learned Magistrate erred in finding a charge proved under Regulation 1001(1) (a) of the *Road Safety (Traffic) Regulations* 1988?
>
> (c) whether the learned Magistrate denied the appellant natural justice by:

(i) refusing or omitting to give the appellant by his counsel an opportunity to be heard fully on matters of law (see p2 of the transcript (Exhibit – C); or

(ii) finding the charge proved without affording the appellant the opportunity to lead any evidence, see p11 of the transcript (Exhibit – C)?"

The Regulations

6. The *Road Safety (Traffic) Regulations* 1001(1)(a) provided –

(1) 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 an hour; or

(b) on a highway, (not being a speed zone or a highway in a built-up area)—100 kilometres an hour; or

(c) in a speed zone—the speed in 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 sign 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.

"Speed zone" was defined in Regulation 105 as follows:

"speed zone" means a length of carriageway defined at its beginning by a speed restriction sign, and at its end by—
(a) a speed restriction sign; or

(b) a local traffic precinct sign; or

(c) a dead end; or

(d) the length of carriageway ending at an intersection, not being a cross-road.

Issue common to questions (a) and (b)

7. Counsel for the appellant submits that the charge was defective (question (a)) because it failed to allege an offence known to the law. Counsel argues that the elements of the criminal offence must be described with sufficient particularity for the essential elements of the offence to be identified. In this instance he argues that it failed to do so because it failed to state the additional fact on which the choice of speed limit depended — e.g., "in a built up area" or "in a speed zone" – and the relevant speed limit.

8. In relation to question (b), the appellant submits that the learned magistrate found that the appellant had committed a breach of Regulation 1001(1)(a) and that this finding was not open because the magistrate had to find that the alleged offence occurred in a speed zone and, therefore, while that would constitute breach of Regulation 1001(1)(c), it would not constitute breach of 1001(1)(a).

9. Critical to the resolution of both questions (a) and (b) is consideration of the question whether Regulation 1001(1) lists a series of mutually exclusive offences. Counsel for the appellant, Alwer, submits that it does and relies upon the expressions in sub para.(a) and (b) of Regulation 1001(1) together with the listing of the different types of locations and speeds as pointing to a decision by those responsible for the regulations to set up separate and distinct regimes for each situation described in each paragraph. Those situations are: a highway in a built up area that is not subject to a speed zone, local traffic precinct or a shared zone; a highway not subject to a speed zone or in a built up area; a speed zone, local traffic precinct areas and shared zones.

10. Counsel for the respondent submits that Regulation 1001(1) has as its purpose the setting of speed restrictions or limits. He submits that the purpose of the exception in the bracketed

portions of Regulation 1001(1)(a) is to ensure that limits are fixed for a built up area as distinct from the other areas but are not intended to be mutually exclusive. He says it would be a nonsense if a 60 KPH speed zone area is created in a built up area that a distinction would have to be drawn between charging someone under Regulation 1001(1)(a) or 1001(1)(c). He argues that the regulation should be construed in such a way as to ensure that the exception specified did not apply where the speed was the same in both.

11. It seems to me that the persons responsible for Regulation 1001(1) attempted to create mutually exclusive zones and areas to which different speed regimes were to be applied. In those circumstances it seems to me that it follows that each of the sub-paragraphs of Regulation1001(1) should be regarded as creating and defining distinct offences. There may be a duplication on occasions in fact where, as in the present case, a speed zone is created within a built up area as is alleged. But that situation it seems to me is dealt with by the exception to Regulation 1001(1) (a) which would remove that speed zone from the control of para (a) and place it under para (c).

12. It appears to be common ground that speed zones operate on specific carriageways; for example, a major carriageway passing through a country town. Once one is off that carriageway the speed is controlled by Regulations 1001(1)(a) and (b). Accepting that explanation it may be said that there may be good reason to distinguish between an offence of driving on a highway in a built up area which is not a highway subject to a speed zone and driving on a carriageway subject to a speed zone. To exceed 60 KPH in a built up area which is not a speed zone may well be seen as generally more dangerous than driving at the same speed in excess of 60 KPH on a major highway, for example, passing through a built up area. For that reason it would make sense to have mutually exclusive statements of offences.

13. It is difficult to see any significant hardship to an accused in allowing Regulation 1000(1) (a) and (c) to apply in the same situation but it seems to me the conclusion I have reached follows from the proper construction of the regulation.

Question (a)

14. Counsel for the appellant referred me to a large number of authorities on the question of the circumstances in which an information may be defective where it fails to adequately set out the description of the offence. It is sufficient I think to refer to the High Court judgment in *John L. Pty Ltd v The Attorney General for the State of New South Wales* [1987] HCA 42; (1987) 163 CLR 508; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.

In the majority judgment of Mason CJ, Deane and Dawson JJ, their Honours stated (at CLR 519)

> "... the old authorities established that an information should be quashed as insufficient in law and invalid if it failed to inform the justices before whom it was laid of the nature of the offence and the manner in which it had been committed. The rationale of that requirement has, in more recent times, commonly been seen as lying both in the necessity of informing the court of the identity of the offence with which it is required to deal and in providing the accused with the substance of the charge which he has called upon to meet: 'an accused person could not be required to defend the charge if the information did not supply the particulars necessary to enable him to prepare his defence': *ex parte Lovell; re Buckley* (1938) 38 SR (NSW) 153 at 166; 55 WN (NSW) 63.

15. As noted above, counsel for the appellant submits that the statement of the charge in the charge and summons was inadequate because it did not assert the factual elements which determined under which sub-regulation the appellant was charged. Thus being charged under Regulation 1001(1)(a), it is put that the charge should have asserted that the highway was in a built up area. On the other hand if he was charged under 1001(1)(c) it should have referred to driving in a speed zone. If he was charged under 1001(1)(d) and (da), it should have referred to him having passed a local traffic precinct sign with relevant numerals on it. Finally, if he was charged under 1001(1)(e), the charge should have referred to him driving in a "shared zone".

16. For the respondent it is first submitted that sec 27 *Magistrates' Court Act* applied and the charge satisfied its requirements. That section provides as follows:

> "**Descriptions in charge**
> (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 provision of the Act or subordinate instrument (if any) that creates the offence which the defendant is alleged to have committed."

Counsel for the respondent submits that the charge was in words that were similar to the words in the Act and therefore the charge described the offence in the manner that complied with sec 27 of the Act. He said further that it implies the words of the regulation.

17. It was common ground that sec 27 of the *Magistrates' Court Act*, does not remove the obligation to identify the essential factual ingredients of the offence (see *John L Pty Ltd v Attorney General New South Wales*, above, at 519 and the cases there cited including *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467 at 486-487; [1938] ALR 104). In seeking to apply s27, however, the respondent is faced with a situation where the charge and summons did not describe the offence in the words of the regulations; for it omits words of the regulation that spell out an essential element. This was, in effect, recognised by counsel for the respondent who submits that, in any event, the missing ingredient was to be implied. He cites the case of *Bell v Dawson* [2000] VSC 169; (2000) 114 A Crim R 26; (2000) 31 MVR 111, 9 May 2000, Balmford J. It seems to me that more is required here than implication to deal with the omission (cf *Bell v Dawson*, above). It is true that the description of the offence in referring to it being committed "on a highway" draws attention to 1001(1)(a) but that is an expression that could be used in respect of other offences under Regulation 1001(1)(a) (see definition of "highway", Reg. 105). In my view s27 does not assist the respondent.

18. Counsel for the respondent also draws attention to the fact that Regulation 1001(1)(a) is referred to in the charge and summons in the section set aside for the description of the law under which the charge is brought. It is put that reference to those regulations made it clear to the accused and the magistrate what elements had to be proved and removed any uncertainty in establishing the essential ingredients of the offence to be proved.

19. While this reference provided information from which the elements could be identified and in that sense protects the accused and informs the court, it seems to me that the law is clear that the information must describe the offence and do so in a way in which the essential ingredients are spelt out. Considering the rationale behind the law, the accused and the court would not be able to identify the essential elements to be proved from the charge and information but would have to obtain the regulations and analyse them to establish all the elements of the offence to be proved. The law's requirements and the rationale underlying it prevent the respondent's above solution being adopted. I note that the strict approach of the law and the justification for that approach were discussed by Kirby J in *Walsh v Tattersall* [1996] HCA 26; (1996) 188 CLR 77; [1996] 139 ALR 27, 51, 52; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4. While in the circumstances of this case, a less strict approach may not have in fact caused an unfair trial, that is not the test. The law is of general application and must be applied.

Question (b)

20. It is common ground that the case proceeded on the basis that what was being alleged was breach of Regulation 1001(1)(a). It is also common ground that on the evidence the alleged offence occurred in both a built up area and in a speed zone and that the Magistrate had to so find on the evidence before him.

21. Counsel for the respondent argues that the purpose of the regulation was to set speed restrictions or limits and that Regulation 1001(1)(a) expressly defined circumstances for a 60 KPH restriction. He argues that it is the only one that does so. He further argued that the purpose of setting out the exceptions in Regulation 1001(1)(a) was to permit limits other than 60 KPH to be fixed within a built up area. He submits that it would be a nonsense and serve no purpose to prevent Regulation 1001(1)(a) applying in circumstances where there was a 60 KPH speed zone created in a built up area. He submits that the words "not being a speed zone" should be interpreted as meaning "not being a speed zone indicating otherwise". On that basis he submits that the person could be charged under both Regulation 1001(1)(a) and 1001(1)(c) in circumstances where there was a speed zone specifying 60 KPH in a built up area in which the accused is alleged to have exceeded 60 KPH.

22. I have already indicated that in my view Regulation 1001(1) attempted to set out mutually exclusive provisions for controlling speed.

23. Ultimately, the problem facing the respondent's argument is that it requires the addition of words to the statement of the offence in Regulation 1001(1)(a), words which a drafter could obviously have included if it was intended that it should have the meaning now alleged by the respondent.

24. Accepting that the appellant was driving in a speed zone, the relevant offence was breach of Regulation 1001(1)(c). Because he was driving in a speed zone he could not breach Regulation 1001(1)(a). Therefore it was not open to the learned magistrate to find him guilty of breach of that regulation.

Question (c)

25. In light of the conclusions I have reached on questions (a) and (b), it is unnecessary for me to consider the arguments advanced on question (c). If the appellant were successful in demonstrating a denial of natural justice the remedy would be to refer the matter back to the Magistrates' Court for re-trial. The conclusions I have reached in respect of questions (a) and (b), however, require that the convictions be quashed and for the reasons given above, there is no basis for returning the proceedings for re-trial in the Magistrates' Court.

APPEARANCES: For the appellant Alwer: Mr SP Hardy, counsel. Stonnington & Zervas, solicitors. For the respondent McLean: Mr D Just, counsel. Solicitor for Office of Public Prosecutions.
