**37/03; [2003] VSC 365**

**SUPREME COURT OF VICTORIA**

# *GUSS v THE MAGISTRATES' COURT of VICTORIA & ANOR*

**Osborn J**

**19, 30 September 2003**

**PRACTICE AND PROCEDURE – SERVICE OF SUMMONS – SUMMONS LEFT AT A PLACE WHERE DEFENDANT WORKED BUT WAS NOT HIS USUAL PLACE OF BUSINESS - EVIDENCE TO SHOW THAT DEFENDANT RECEIVED SUMMONS A FEW DAYS LATER – WHETHER DEFENDANT PERSONALLY SERVED WITH THE COPY SUMMONS – FINDING BY MAGISTRATE THAT COURT HAD JURISDICTION TO DEAL WITH PROCEEDINGS AGAINST DEFENDANT – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S34.**

G. was charged with disposing of property seized under a warrant. Service of the charge and summons was sought to be effected on G. by leaving a copy of the summons with a person over the age of 16 at an address in Clayton at which G. attended in his capacity as a legal consultant. When the charge came on for hearing G. contended that he had not been properly served. G. gave evidence to the Magistrate that he in fact received a copy of the summons a few days after being left at the business address but contended that the summons had not in fact been served by being left at G's "most usual place of business". The magistrate rejected this contention. Upon appeal—

**HELD: Appeal dismissed.**
**1. Section 34(1)(b) of the *Magistrates' Court Act* 1989 ('Act') provides that the copy summons must be served by one of the methods there set out. In the context of criminal proceedings it is clearly Parliament's intention that it be demonstrated that a defendant to a summons has been properly served.**
***Nitz v Evans* (1993) 19 MVR 55, applied.**

**2. The question raised in the present case was whether service was effected in accordance with s34(1)(b) of the Act where evidence given on oath established that a true copy of the summons had been delivered to the defendant personally. The defendant's evidence established not only that a true copy of the summons had been delivered to him personally but also established that he had been served personally in the sense in which that concept has been articulated by authority in this State. Furthermore, there is no underlying purpose which can be identified in the provision which might lead to the conclusion that it should be given other than its ordinary meaning. There is no doubt that once the plaintiff gave evidence that he had in fact received a copy of the summons some days after it was left for him he could not be said to have suffered any lack of procedural fairness with respect to service of the document upon him. The purpose of s34(1)(b)(i) is not that the defendant to a summons be delivered a true copy by a particular person but that he personally receive it. Section 34(1) is not concerned with abstract rituals but with the fact of service. Accordingly, the magistrate was not in error in finding that G. was properly served with the summons.**

**OSBORN J:**

1. The plaintiff in this matter seeks judicial review with respect to a proceeding in the Magistrates' Court at Dandenong. In accordance with accepted practice the firstnamed defendant has indicated that the Magistrates' Court will abide by the order of this Court.

2. The plaintiff has been charged in the Magistrates' Court with disposing of property seized under a warrant pursuant to s111(7)(B) of the *Magistrates' Court Act* 1989 ("the Act"). The property in question comprised two mechanical presses.

3. The charge and summons were filed on 20 February 2002. On the same day service was sought to be effected on the plaintiff by leaving a copy of the summons with a person over the age of 16 at 1 Winterton Road, Clayton.

4. The summons stated an initial return date of 24 April 2002. On that day the plaintiff (who is a solicitor) attended the Court and the proceeding was adjourned administratively by consent to a contest mention date on 29 May 2002.

5. On that day the plaintiff appeared (without protest) before a magistrate and informed the Court that there would be a contest on all issues and that defences were reserved. By consent of the parties the hearing was adjourned to 15 October 2002 being a date convenient to counsel for both parties.

6. When the matter came on for hearing before the magistrate on 15 October 2002 counsel for the plaintiff announced his appearance "under protest" and contended that the plaintiff had not been properly served.

7. Section 34 of the *Magistrates' Court Act* provides:

> "34(1) Every summons to answer to a charge, except where otherwise expressly enacted—
> (a) must be served—
> (i) in the case of a charge of an indictable offence in respect of which the registrar has fixed a committal mention date, at least seven days before that date or such other time before that date as is prescribed by the regulation;
> (ii) in any other case, at least 14 days before the mention date; and
> (b) must be served on the defendant by—
> (i) delivering a true copy of the summons to the defendant personally; or
> (ii) leaving a true copy of the summons for the defendant at the defendant's last or most usual place of residence or of business with a person who apparently resides or works there and who apparently is not less than 16 years of age.
>
> 2. If it appears to the Court, by evidence on oath or by affidavit, that service cannot be promptly effected, the Court may make an order for substituted service..."

8. The plaintiff gave sworn evidence before the magistrate that he was not a director of the company which carried on business at 1 Winterton Road, Clayton and that the premises at which the copy summons was left were not his most usual place of business. He conceded that at the time of purported service he would have attended the premises possibly several days a week but not for a full day at a time. He attended in his capacity as a consultant to the company carrying on business at the premises for which consultancy he was paid. As I have said, the plaintiff is a solicitor and his son further gave evidence that his father acted as a legal consultant to the business. The plaintiff further stated that his principal place of business was located at 140 Queen Street, Melbourne. He agreed that he had in fact received a blue sensitised copy of the summons. He agreed in cross-examination that he was notified of receipt of the copy summons "within the next couple of days" after it was left for him and received the blue copy "some days" later than it was left for him.

9. It was submitted that on the basis of this evidence (and further complementary evidence from the plaintiff's son) that the summons had not in fact been served by being left at the plaintiff's "most usual place of business". In response to this submission the learned magistrate ruled as follows:

> "In my view, s34 of the *Magistrates' Court Act* is directed towards ensuring that a person is properly aware of any charge that may be before them and it is the correct procedure for bringing a person before a court. In my view, in a situation which, as I understand it from the evidence..., Mr Joseph Guss has given evidence that he was not a director of a company at the address at which the summons was served at the time that the summons was served, and technically therefore the summons in my view was not served at the correct address, which would have been his most usual place of business. However, further on Mr Joseph Guss' evidence, he indicated to the Court that he received the summons several days later and there is no other fault that has been raised in relation to the summons, and further, it is my understanding that there have been attendances at the Court and appearances announced in answer to that summons and there has been no complaint raised in relation to the correctness of service on any previous occasion. In my view, in that situation, it is not appropriate for the Court to now rule that the Court does not have jurisdiction to hear this matter simply on the basis that Mr Guss was not – that that address for service was not his most usual place of business at the time of... 20 February 2002."

10. The plaintiff now seeks to restrain the magistrate from proceeding to hear the charge and/or in the alternative seeks an order that the charge be dismissed on the grounds that:

> (a) the plaintiff was not served with a true copy of the summons as required by the Act; and

(b) as a consequence the purported service of the summons is invalid.

11. The case for the plaintiff is put on the basis that once the magistrate concluded that the summons was not served at the plaintiff's most usual place of business then it necessarily follows that the plaintiff was not properly served. This conclusion might well be correct if the only evidence as to service was that the copy summons was left at the relevant address. On the facts however two material complications arise:

(a) prior to the appearance under protest the plaintiff appeared unconditionally at two mention hearings including a contested mention hearing before a magistrate. Such appearance gives rise to the question whether the defect in service was waived; and

(b) at the hearing of the matter on 28 October 2002 the plaintiff gave evidence that he did in fact receive the copy summons some days after it was left for him. This evidence raises the question whether the plaintiff was in fact personally served with the copy summons by delivery to him.

12. The latter question is in my view decisive of this matter. The Magistrates' Court could not exercise its jurisdiction with respect to the charge unless the plaintiff had notice of the proceeding in accordance with the Act. The plaintiff himself gave evidence that he had personally received the copy summons left for him. The evidence of service before the magistrate ultimately did not rest upon the leaving of the document at the premises but upon the fact of personal receipt by the plaintiff.

13. In *Davidson v McCarten*[1] Sholl J traced the history of the predecessors of s34 of the Act. At that time s23(1) of the *Justices Act* 1928 provided:

"(1) Except where otherwise expressly enacted every summons to answer to informations or complaints shall be served at least 72 hours before the time appointed in such summons for the hearing thereof and every such summons may be served by a member of the police force or other person upon the person to whom it is so directed, by delivering a true copy thereof to such person himself or by leaving the same for him at his last or most usual place of abode or of business with some other person apparently an inmate thereof or employed there at and apparently not less than 16 years of age..."

14. It is perhaps a tribute to the plaintiff's determination to avoid a hearing on the merits that it appears that no court has previously been faced with the argument that despite sworn evidence that a person in fact received delivery of a summons left for him nevertheless such summons was not served in accordance with the Act and its predecessors.

15. In *Davidson v McCarten*, Sholl J noted the deliberate use of the word "may" (as distinct from "shall") in the latter part of s23(1) of the then Act. He concluded that the phrase "may be served by a member of the police force..." did not provide for an exclusive mode of service and said:

"If that is right, what other methods of service are permissible? In my opinion, any method which brings the proceedings to the knowledge of the defendant, including the service of the original summons, and the retention and filing of the copy, may be held to be sufficient..."[2]

16. Section 34(1)(b) now provides that the copy summons "must" be served by one of the methods there set out. In the context of criminal proceedings it is clearly Parliament's intention that it be demonstrated that a defendant to a summons has been properly served. In *Nitz v Evans*[3], Hayne J said:

"It would be unthinkable that Parliament should intend that there should be power to hear and determine a criminal charge in a case where a summons has been regularly issued but never served and never brought to the attention of the defendant. Thus the bare facts that a summons has been regularly issued and that a defendant does not appear cannot, without more, ground the exercise of the powers conferred by s41(2). In my view it is implicit in the expression 'if a defendant does not appear to answer to a summons' that the defendant has been afforded the opportunity to appear. Clearly the defendant has been afforded that opportunity if the summons has been served in accordance with the Act. Moreover I do not consider that it can be said 'that a defendant does not appear in answer to a summons' if there has been no service in accordance with the Act but the defendant is, by some means or other, aware of the fact that a summons has been, or may have been issued."[4]

17. In *Smith v Chalmers*[5], Ashley J after referring to the above passage stated:

> "...in any criminal proceeding it is of the first importance that proof of service of process on the defendant be clearly established. Particularly it will be of importance where the defendant does not appear."

18. The present case thus raises the threshold question whether service was effected in accordance with s34(1)(b) in circumstances where the evidence on oath given before the magistrate established that a true copy of the summons had been delivered to the defendant personally.

19. Prior to the current Rules of the Supreme Court the rules did not state what constituted personal service of a document. In *Pino v Prosser and anor*[6], McInerney J had to consider whether personal service of originating process was effected when a copy of the writ was left with the defendant's wife and came into his possession on the same day. After surveying the relevant authorities, his Honour said:

> "'The object of all service,' as was pointed out by the Lord Chancellor in *Hope v Hope*, 'is of course only to give notice to the party to whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required.' A dictum to the like effect by Matthew LJ is to be found in the case of *Kistler v Tettmar*. In *Rudd v John Griffiths Cycle Co. Ltd* [1898] VicLawRp 71; (1898) 23 VLR 350., Holroyd J, delivering the judgment of the Full Court, referred to the history of personal service and said, at p354: 'Before the *Common Law Procedure Act* 1852, 15 and 16 Vict, c76, came into operation the Courts in England were in general very strict in their interpretation of what constituted personal service, but still on several occasions they declined to set aside service where the copy writ had been delivered at the party's residence to a servant or relative of his and from the facts the Judges thought it fair to infer that it came into his hands or to his knowledge so that he did, or could, if he pleased, become acquainted with its contents.' Holroyd J, then cited *Rhodes v Innes*; *Thompson v Pheney* (1832); *Phillips v Ensell;* and *Williams v Pigott*. I have looked at those cases: it is apparent that they justify the comment of Holroyd J, in *Rudd's Case, supra*, and I refer in particular to *Rhodes v. Innes* which was followed and approved in the Court of Exchequer in *Phillips v Ensell* and *Williams v Pigott,* notwithstanding some dicta laying down a strict formula as to personal service in *Thomson v Pheney*. Applying the general principle enunciated in *Hope v Hope* and *Rudd v John Griffiths Cycle Co Ltd,* I am satisfied that in this case the writ, although left with the defendant's wife, came into the possession of the defendant Hassan on the same day and this, I am satisfied, constituted good personal service although the original writ was never made available for the defendant's inspection."[7] (Citations omitted.)

20. In my opinion the defendant's evidence established not only that a true copy of the summons had been delivered to him personally within the ordinary meaning of those words but also established that he had been served personally in the sense in which that concept has been articulated by authority in this State. Furthermore, there is no underlying purpose which can be identified in the provision which might lead to the conclusion that it should be given other than its ordinary meaning.

21. In an early decision of the Full Court of this Court concerning notice of summary proceedings under the *Justices Act*, Madden CJ stated:

> "In the first place statutes are not enacted merely for the purpose of being tricked out of the operation aimed at. It is always the duty of the court to see that a statute should as well as reasonably may be, and consonantly with justice, be enforced and not defeated; and in that view the Legislature, trusting to their sense of justice that they will not take advantage of anybody and will see that embarrassment is not occasioned to accused persons in the administration of justice without giving them every reasonable opportunity of protecting themselves has consequently, while giving the justices great powers of amendment, also given to them a wide discretion as to allowing adjournments, etc, for the protection of defendants."[8]

22. It is apparent that almost 100 years ago this Court recognised that the underlying question raised by the application of provisions such as those in issue in this case is whether an accused person receives procedural fairness in accordance with the intention of the legislature. In my view there is no doubt that once the plaintiff gave evidence that he had in fact received a copy of the summons some days after it was left for him he could not be said to have suffered any lack of procedural fairness with respect to service of the document upon him. The purpose of s34(1)(b)(i) is not that the defendant to a summons be delivered a true copy by a particular person but that

he personally receive it. Section 34(1) is not concerned with abstract rituals but with the fact of service.

23. It follows that the magistrate's decision was correct.

24. Mr Watts contended however that such service could not be valid unless it was proved in accordance with s35 of the Act and that s35(4) required the filing of an affidavit or declaration of service with the registrar prior to the mention date. In my view this submission is plainly misconceived. Section 35(1) provides:

> "Service of a summons to answer to a charge may by proved by—
> (a) evidence on oath; or
>
> (b) affidavit; or
>
> (c) declaration."

The evidence on oath before the magistrate demonstrated the fact of personal service. There was no need for an affidavit or declaration to be filed. The magistrate had direct evidence of the critical facts.

25. No submission was made on behalf of the plaintiff that if receipt by the plaintiff of the copy summons constituted personal service, it did not occur within time. This is hardly surprising. The mention date shown on the summons was 24 April 2002 and service some days after the summons was left for the plaintiff on 18 February 2002 occurred at least 14 days before the mention date.

26. Further, even if this were not the fact short service would in my view result in no more than irregularity for the reasons stated by O'Bryan J in the case of *Sammasimo v Franich and Anor*[9].

27. It follows that the evidence before the magistrate established conclusively that the plaintiff was served properly. In these circumstances it is unnecessary to determine whether a defect in service in accordance with s34(1)(b) can be waived. I observe however that there is longstanding authority to suggest that it might, including the decision of the High Court in *Parisienne Basket Shoes Pty Ltd v Whyte*[10]. Moreover, the authority which was said to provide the foundation for the argument that there could be no waiver clearly does not stand for this proposition as the judgment expressly records that the appellant in that case at no time waived the defect in service of which he complained.

> "The appellant at no time waived the defect in service of which he complained. The respondent did not contend that the appearances under protest amounted to such a waiver nor would such an argument appear to have been open: *Pritchard v Jeva Singh* [1915] VicLawRp 74; [1915] VLR 510; 21 ALR 350; 37 ALT 50; *Ray v Justices of Melbourne and Whitney* [1891] VicLawRp 45; (1891) 17 VLR 186; 12 ALT 208; *Dixon v Wells* [1890] 25 QBD 249; *R v Brentford Justices; ex parte Catlin* [1975] QB 455."[11]

28, It is however unnecessary to decide whether the initial appearances by the plaintiff without protest could or did in fact constitute a waiver in the relevant sense.

29. For the above reasons, the proceeding is dismissed.

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[1] [1953] VicLawRp 96; [1953] VLR 697; [1954] ALR 42.
[2] Ibid at 705.
[3] (1993) 19 MVR 55.
[4] Ibid at 59.
[5] [2003] VSC 236, unreported decision of Ashley J, 25 June 2003 at [26].
[6] [1967] VicRp 107; [1967] VR 835.
[7] Ibid at 838-9.
[8] *O'Donnell v Chambers* [1905] VicLawRp 9; [1905] VLR 43 at 45; 10 ALR 224; 26 ALT 73.
[9] Unreported decision 11 March 1994, Supreme Court of Victoria.
[10] [1938] HCA 7; (1938) 59 CLR 369; [1938] ALR 119, per Latham CJ.
[11] *Nitz v Evans* (1993) 19 MVR 53 at 59 and see further at 60.

**APPEARANCES:** For the plaintiff Guss: Mr L Watts, counsel. Joseph Guss, solicitors. For the second defendant Jacotine: Mr BM Dennis, counsel. Victorian Government Solicitor.