17/97

SUPREME COURT OF VICTORIA

HYNES v BUX

Nathan J

10 October, 13 November 1996

PROCEDURE – FILING OF CHARGE – "PROPER VENUE" – "NEAREST TO" – MEANING OF – MAGISTRATES' COURT – A SINGLE ENTITY FOR THE WHOLE OF VICTORIA – SECTIONS 26 AND 26A OF ACT PROCEDURAL IN CHARACTER – DESIGNED TO PUT INTO EFFECT THE MAGISTRATES' COURT JURISDICTION – PROCEEDINGS MAY BE TRANSFERRED TO SUIT THE CONVENIENCE OF PARTIES – WHETHER COURT DEPRIVED OF JURISDICTION IF INAPPROPRIATE VENUE SELECTED: *MAGISTRATES' COURT ACT* 1989, SS1, 3, 4, 26(1)(a), 26(1A), SCHED 2 Cl 1.

When the hearing of a charge against B. came on for hearing at the Melbourne Magistrates' Court, B. submitted that the proper venue to hear the matter was the Magistrates' Court at Moonee Ponds because B. lived, and the offence had allegedly occurred closer to that court. It was also submitted by B. that as a copy of the summons had not been filed with the Registrar of the Magistrates' Court at Moonee Ponds as required by s26(1A) of the *Magistrates' Court Act* 1989 ('Act') the court was deprived of jurisdiction to hear the matter. The magistrate agreed with these submissions and dismissed the summons as a nullity. Upon appeal—

HELD: Appeal upheld. Remitted for rehearing.
1. Sections 1 and 4 of the Act create the Magistrates' Court *of* Victoria, not the Magistrates' Court of Melbourne or Moonee Ponds or anywhere else. The Act has created a single entity which administratively operates from a number of locations, possibly at different times. Sections 26 and 26(1A) of the Act are procedural in character. They are designated to put into effect the jurisdiction of the Magistrates' Court of Victoria and must be interpreted in the light of sections 1 and 4.

2. Section 26(1A) of the Act does not remove the court's jurisdiction if an inappropriate venue is selected. It merely enables the court to transfer the case to the proper location to suit the convenience of the parties. Accordingly, the magistrate was in error in finding that a failure to comply with s26(1A) of the Act meant that the proceedings failed for want of jurisdiction.

3. The expression "nearest to" in the definition of "proper venue" means closest to for all practical purposes and does not mean direct trigonometrical measurement.

[Note: See sections 33(2) and 39 of the* Courts and Tribunals (General Amendment) Act *1996. Ed.]

NATHAN J: [1] Detective Sergeant Hynes, the appellant (Hynes) filed, and issued a Summons addressed to the respondent, Dowie Bux, (Bux) charging him that at Kensington, in Victoria, he engaged in the business of being a private enquiry agent without holding a licence to do so under the terms of the *Private Agents Act* 1966 No.7494 s19B(1)(a). The Summons was made returnable at the Magistrates' Court at Melbourne, although the offence allegedly occurred at Kensington. When the matter came on for hearing before a magistrate at the Melbourne Court, counsel for Bux submitted there was no jurisdiction to hear the case, and it should be dismissed as a nullity. The successful contention was that the "proper venue" to hear the matter was the Magistrates' Court at Moonee Ponds, and not that at Melbourne because the defendant lived, and the offence had allegedly occurred closer to that court. It was further argued that because Hynes had not filed a copy of the Summons with the Registrar of the Moonee Ponds Court which, it was said, he "must" do under the terms of s26(A) of the *Magistrates' Court Act* 1989 (the Act), the jurisdiction of the courts both at Melbourne and Moonee Ponds had not been attracted and consequently the Summons had to be dismissed as a nullity. The magistrate did so. This appeal springs from that decision.

The questions of law raised by this appeal are as follows:

"1.1 Whether the Magistrate erred in finding that failure to comply with Section 26(1)(a) of the *Magistrates' Court Act* 1989 meant that the proceedings failed for want of jurisdiction.

1.2 Whether Schedule 2 of the *Magistrates' Court Act* 1989 and more particularly clause 1 thereof establishes that failure to satisfy the requirement for **[2]** proper venue does not go to jurisdiction.

1.3 Whether the issue being in contest it was open to the Magistrate to make a finding that the charge had not been filed with a registrar pursuant to Section 26(1)(a) *Magistrates' Court Act* 1989 without hearing evidence.

1.4 Whether the Magistrate erred in informing herself without hearing evidence that the proper venue pursuant to Section 3 *Magistrates' Court Act* 1989 was not the Melbourne Magistrates' Court.

1.5 Whether the Magistrate erred in determining that the proper venue was not the Melbourne Magistrates' Court."

These grounds raise matters of statutory interpretation. I recite the relevant provisions. I commence with the Act s26(1) (these provisions appear to be particular to Victoria).

26. "How criminal proceeding commenced
(1) A criminal proceeding must be commenced by filing a charge—
(a) with a registrar; ...
(1A) If a proceeding is commenced under sub-section (1)(a) by filing a charge with a registrar other than the appropriate registrar, the informant must file a copy of the charge with the appropriate registrar within 7 days after the commencement of the proceeding."

This brings me to the definition section, s3(1).

"appropriate registrar" means the registrar at the proper venue of the Court:

and
"proper venue"—
"(a) in relation to a criminal proceeding, means the mention court that is nearest to—
(i) the place where the offence is alleged to have been committed; or
(ii) the place of residence of the defendant ... "

"mention court" means a venue of the Court that is prescribed to be a mention court".

[3] Both the courts at Moonee Ponds and Melbourne are so prescribed (see *Magistrates' Court General Regulations* 1990, Reg 401). It is necessary to have regard to the Act's Schedule 2 cl.1, which reads –

"1. Venue of Court
(1) A criminal proceeding is returnable at the proper venue of the Court, except where otherwise provided by this or any other Act.

(2) If, before any evidence is given in support of the charge—

(a) the defendant objects to the venue of the Court; and
(b) the Court is satisfied, having regard to the convenience of the parties, that the proceeding should be transferred to another venue—

the Court may adjourn the proceeding to another venue of the Court.

(3) A proceeding is not void because it was returnable or heard and determined at a venue of the Court other than the proper venue."

The argument which found favour with the magistrate ran as follows. The "proper venue" was Moonee Ponds because Bux lived at Airport West which is closer to that court than Melbourne, so much was not contested. The next step was that "Kensington" was also closer to Moonee Ponds than Melbourne. There was some argument about that fact, and the magistrate chose to inform herself that it was by privately consulting a street directory. She did not address herself to the precise location in Kensington, i.e. Lloyd Street, at which the offence was said to have happened and whether that street was closer to Melbourne or Moonee Ponds. It was put that the "appropriate registrar" was the one at Moonee Ponds, which was also a "mention court". It was then asserted from the Bar table, but not controverted, that nothing in the case had been filed in that court or with the **[4]** registrar thereof. Therefore, so it was said, there was nothing before the Melbourne court upon which the case could proceed and it should be dismissed as a nullity, it being said that the onus lay with the prosecution to establish jurisdiction.

The prosecutor submitted that the Act directed the magistrate to hear and determine the case in accord with s51, that is, in concordance with the Schedule 2 cl2(3) and s26(1A). This section, so it was put, assumed the right to direct a case, improperly filed to the "appropriate venue", and thus one so filed was not a nullity, but merely defective. The magistrate held that Moonee Ponds was the proper venue, apparently because Bux lived closer to it. This latter finding, albeit implicit, may well be wrong as a matter of fact, but I am not required to answer the point. She also held that Schedule 2, cl.1 related to the actual hearing and not to process, therefore, so she ruled, the section did not apply to the matter before her. She was later asked whether she had taken Kensington to be the named designated area or the actual street (Lloyd Street) as the point from which she measured which court was "nearest to", either residence or crime scene. She replied that she took it from the designated locality and not the specific address.

The magistrate did not entertain argument as to what in fact might have been the appropriate or proper venue, she moved directly to dismiss the information. She should not have done so, for reasons I shall go on to elaborate. It would have been proper for her to have asked for and considered argument as to the location of the Magistrates' Court at which the summons could most conveniently have been **[5]** heard. In any event, the summons was not a nullity, the argument should have been which actual court house was to hear the dispute.

I interpolate my own observations about the phrase "nearest to" as used in the Act s3(1). Arguments about geographical proximity based upon straight lines or broad areas are seldom useful. The designation of a town or suburb means little, as all towns and suburbs cover varying geographical areas. One part may be closer to the court of an adjoining town or suburb, and convenience might best be served by having the matter heard at that place rather than the court of the town bearing the same name. "Proper Venue", because it is defined as being that place "nearest to" the place of residence or locus of the offence, is broad enough to encompass the realities of the size and shape of towns, and locations, and also the local geographical or topographical features. "Nearest to", does not mean that measurement must be taken as the distance drawn in a straight line between two points.

The definition section in the *Interpretation of Legislation Act* s43 of "distance", ie the measurement of a straight line on a horizontal plane, although helpful, does not override the concept of "nearest to" in the Act. Realities and practicalities must be considered. Straight lines drawn between the court house and the place of residence, or the locus of the offence, may fail to take into account intervening chasms or mountains which render access along the straight line impracticable. I find support for these conclusions in *Australian Temperance and General Mutual Life Assurance Society Ltd v Howe* [1922] HCA 50; (1922) 31 CLR 290; 29 ALR 46 wherein the expression "place of residence" was examined *in extenso* **[6]** and the court adopted the view that it had to be interpreted in the context of the legislation which used it. (See also *Yates v Ebert* per Byrne J, unreported, 11 September 1995.) In my view the expression "nearest to" appended as it is to both place of residence, and place where the offence occurred, is to be similarly treated. It means closest to for all practical purposes and does not mean direct trigonometrical measurement.

The first argument put to me why this appeal must fail, was that it was not brought in the name of, or was not being conducted by, the Director of Public Prosecutions in conformity with the Act s92(2). It was argued that the Hynes affidavit did not specifically say he was authorised by the Director to bring this appeal. However, his form of words, in my view, necessarily imply as much. Therefore, I consider myself bound by the authority of *Stiles v Lamont* (1992) 15 MVR 557. There is no substance to this argument. The appeal is competent as instituted.

The next contention went to jurisdiction, it was that as the issue had been raised by the defendant, it then became incumbent upon the prosecution to establish it, which not only had it failed to do, but had actually eschewed making any submissions on the point. *Ward v R* [1980] HCA 11; (1980) 142 CLR 308; 29 ALR 175; (1980) 54 ALJR 271 and *Thompson v R* [1989] HCA 30; (1989) 169 CLR 1; (1989) 86 ALR 1; (1989) 63 ALJR 447; 41 A Crim R 134 were relied on. Of course it is for the prosecution to establish jurisdiction, but this was the very matter before the magistrate. The prosecution did in fact contest the issue, and the affidavit material admits of no other interpretation. In my view the issue is illuminated by *Le Cocq v McErvale* (1908) VLR 69. **[7]** In that case a similar argument to the one before me arose between what were said to be exclusive bailiwicks. The Full Court held it was not necessary for formal evidence to be called to

show that a particular place was within the jurisdiction, and the magistrate should have been satisfied of that fact and have proceeded with the hearing. There is no substance to the argument that the prosecution in this case cannot now be heard to complain or be prevented from advancing argument on the point.

I can now return to the matters of statutory interpretation. The magistrate was wrong. She was wrong for the simple reason that the Act has created the Magistrates' Court **of** Victoria, not the Magistrates' Court of Melbourne or Moonee Ponds or anywhere else. The Magistrates' Court **of** Victoria sits **at** Melbourne or Moonee Ponds or whatever other location may be designated under the terms of the Act. The old notion of bailiwicks, or provinces as they might have been better described, has long been abolished (even so see *Ex parte Maver* (1899) 16 WN (NSW) 98.)
The Act created the Court. Section 1 of it states –

> "The main purposes of this Act are—
> (a) to establish the Magistrates' Court of Victoria; and
> (c) to provide for the fair and efficient operation of the Magistrates' Court; and
>
> (e) to allow for the Magistrates' Court to be managed in a way that will ensure—
> (iii) that optimum use s made of the Court's resources."

Part 2 of the Act sets out the mechanics of the court. Section 4(1) says –

> "There shall be a court to be known as the Magistrates' Court of Victoria."

Section 4(2) says –

[8] "The court shall consist of the magistrates and the registrars of the Court."

Section 5 defines where and when the court is to sit:-

> (1) "The Court is to be held at such places, on such days and at such times as the Governor in Council ... directs."

Sub-section 2 is noteworthy as it says

> "The court may sit and act at any time and place."

For completeness I note the terms of the *Interpretation of Legislation Act* s48(b) which defines a reference to jurisdiction as being, unless a contrary intention is manifest, "of Victoria". The Act does not say, as Bux would suggest, the court shall sit in self-contained divisions each with its own exclusive territorial or residential jurisdiction. It has not created a series of courts. It has created a single entity which administratively operates from a number of locations, possibly at different times. (I note the exception in relation to an Industrial Division, but that has a specialist function, defined and circumscribed by the Act.) Sections 26 and 26A must be interpreted in the light of s1 and s4.

Accordingly, they are procedural in character, designated to put into effect the jurisdiction of the Magistrates' Court of Victoria. Immediately it is appreciated there is one single magistrates' court for the whole of Victoria, the meaning of the Act and Schedule becomes pellucid. Pursuant to s26(1) all criminal proceedings in the court must be commenced by filing a charge with a registrar. The identity and location of that registrar is then narrowed to the appropriate registrar of the proper venue. That venue is not closely **[9]** defined, the charging officer is given a choice which subsequently may be challenged by the person charged. Section 3 recites the proper venue as either the location nearest which the offence occurred **or** the place of residence of the defendant. Of course a person may have more than one place of residence just as easily as a single offence may take place at more than one location. The Act has done nothing more than come to terms with the exigencies of the criminal law, which encompasses variable factors, both temporal and geographical. If it did not do so it would be unworkable. Hedigan J had cause to examine the notion of the "appropriate registrar" in circumstances where the registrar was itinerant, the same person being the registrar at Bairnsdale and also Orbost. He too, looked at the necessity of making the administration of the criminal law actually work, and with respect, I too think that approach must be adopted, (see *Gorman v O'Riley*, unreported, 14 February 1995.)

In order to meet the convenience of the parties and the court itself the Schedule enables both to have the proceedings transferred; not to another court, but as the words say "**to another venue of the Court**". The provision is facultative, and not to be rendered otiose. (See also *R v Antonio Rossi* per Mandie J (1994) 75 A Crim R 411.) The court is invested with jurisdiction itself to transfer cases if the convenience of the parties is better served. This was apparently one such case. However, the magistrate decided she had no jurisdiction whatsoever because the matter had been issued out of a court the defendant chose to suggest was inappropriate. She elected to treat a slip (assuming, perhaps **[10]** unjustifiably, that it was) or else a defect in procedure, into a jurisdictional error. It was not.

I now turn to s26(1A). The section came into the Act in 1994. (Act No.33 s6(2)). Nothing in the Parliamentary Debates about it assist in interpreting s26(1A). However, in my view it is directed toward the vice of magistrate shopping, the equivalent of the old forum shopping. By that I mean, one must assume that most practitioners know which magistrates inhabit what courts at particular locations. The prosecutors can be assumed to have the same knowledge, and perhaps I should add, similar preferences. By obliging an informant to file a charge with the "appropriate registrar" at the "proper venue", should it be that an inappropriate location is selected, the informant must also file the charge at the appropriate one. Thus if a defendant lived only at an address in Coburg, and all the ingredients of the offence occurred north of the Yarra river, it would clearly be inappropriate for the informant to issue out of a court south of the river. The section is facultative, it assists in locating the proper venue. It does not remove the court's jurisdiction if an inappropriate venue is first selected. It merely enables the court to transfer the case to the proper location once the issue is raised.

Returning to s26 it assumes the "appropriate registrar" and hence the "proper venue" will be apparent. In most cases for the reasons I have already given this will be so, however, there will be many cases which become objects of dispute. The scheme of the Act is to allow those disputes to be adjudicated, and an appropriate venue settled upon. It does not mean that when such disputes come forward, and should **[11]** the court find that an inappropriate venue was first selected by the informant, it is divested of jurisdiction. That would be the absurd result, if the decision below was permitted to stand. The appeal will be upheld. The questions of law are answered thus.

1. Yes.

2. It does not go to jurisdiction.

3. Not necessary to answer, but she should not have done so.

4. Not necessary to answer, but yes.

5. Yes, insofar as she dismissed the proceedings as being a nullity.

I shall hear argument whether Bux is entitled to the benefit of the decision below, but as the finding was a nullity, the informant will probably reissue. The matter should be remitted back to the Magistrates' Court for re-hearing before a magistrate other than the one who dismissed the Summons, otherwise I shall make a Declaration reinstituting the Summons, and allow time for a duplicate to be filed at Moonee Ponds should the defendant wish. I shall hear counsel as to the appropriate Orders. I shall hear counsel as to costs, but it is difficult to see why they should not follow the event, although the matter of a certificate is another matter.

APPEARANCES: For the Appellant: Mr G Silbert, counsel. Solicitor for Public Prosecutions. For the Respondent: Mr P Priest, counsel. Solicitors: Kenna Croxford & Co.
