COURT: MAGISTRATES COURT OF TASMANIA

CITATION: *Jerrim v Smith* [2020] TASMC 6

PARTIES: JERRIM, Melanie (Constable)
v
SMITH, Richard Norman

FILE NO: 5090/2016

DELIVERED ON: 7 May 2020

DELIVERED AT: Hobart

HEARING DATE: 31 March 2020

DECISION OF: Webster, CP

CATCHWORDS:

Impersonating a Police Officer – Adequacy of particular of complaint – particulars of complaint – particulars disclose no cause of action – Amendment of particulars of complaint – Amendment of particulars of complaint to disclose cause of action after statutory period for laying of charge expired.

Police Service Act 2003 s 78
Justices Act 1959 ss 30, 31

Tregilgas v Howie [1926] SASR 122;
Starling v Ostrowski 2001WASCA 74; (2001) 24 WAR 61
Davies v Andrews [1930] 25 Tas LR 84;
McKenny v Marshall [1948] Tas SR 114;
Murphy v The Police [2011] SASC 138; 59 MVR 105
Robbins v Horton (1980) 3 NTR 1
Reedy v O Sullivan [1953] SASR 114.

PM St L Kelly *Summary Justice South Australia* Law Book Co Sydney Looseleaf
Mirko Bagaric *Ross on Crime* 6th ed Thomson Reuters Lawbook Co Sydney 2013

REPRESENTATION:

***Counsel*:**
Complainant: J Taws
Defendant: F Cangelosi
Solicitors:
Complainant: Tasmanian Police
Defendant: Edward Coke Chambers

Decision Number: [2020] TASMC 6
Number of paragraphs: 46

CONSTABLE MELAINE JERRIM v NORMAN RICHARD SMITH

REASONS FOR DECISION **WEBSTER, CP**

1 Mr Richard Norman Smith, the defendant, is charged under section 78 *Police Service Act* 2003 with the charge of impersonating a police officer.

2 The particulars of the charge are stated as:

> *"You are charged with on 7 May 2016 at Pontville in Tasmania, not being a police officer and you did without lawful excuse, have in your possession a badge that resembled a police badge namely, you had a police badge wired into your wallet, resembling a police issue warrant card."*

3 At the beginning of the hearing in March 2020 Mr Cangelosi, counsel for the defendant, sought to have the complaint struck out on the basis that it did not contain a valid charge in that the complaint omitted an essential element of the offence.

4 Prosecution gave notice to seek to amend the complaint.

5 Both counsel agreed that the time in which a valid complaint of impersonating a police officer in May 2000 could be laid had now expired.

6 The relevant section of the *Police Service Act* 2003 which creates the offence of impersonation of a police officer states:-

> ***78. Impersonation***
>
> *A person who is not a police officer must not do any of the following without lawful excuse or the approval of the Commissioner:*
>
> *(a) ...;*
>
> *(b) wear or have in possession any uniform or badge that resembles, or is likely to be perceived as, a police uniform or badge;*
>
> *....*

7 That section provides two limbs to the charge of impersonation each of which must be satisfied in order to constitute the offence. They are that the person not a police officer does any of the matters listed:

> a) without lawful excuse; and
>
> b) without the approval of the Commissioner.

8 In order to succeed in any prosecution, on this charge, the prosecution must prove both elements of the charge, that is, both a lack of lawful excuse and a lack of approval by the Commissioner.

9 The burden of proof is upon the prosecution to prove both elements of the charge, beyond reasonable doubt, and the failure to do so will result in an acquittal.

10 If the police did not prove that the defendant did not have the Commissioner's permission to have in his possession the police badge the charge of impersonation of a police officer would fail.

11 There is no evidential onus upon the defendant adduce evidence that he had the Commissioner's permission.

12 The central issue to be determined by the Court is whether or not the complaint as drafted is defective because it discloses no offence because it did not include words similar to "or the approval of the Commissioner" so that the complaint read something similar to:

> *"You are charged with on 7 May 2016 at Pontville in Tasmania, not being a police officer and you did without lawful excuse or the approval of the Commissioner have in your possession a badge that resembled a police badge.....".*

13 The question of whether this is an invalid complaint is of critical importance in this case as I'm satisfied for reasons that I will state that the Court cannot make any amendment to a complaint which discloses no offence known to law after the limitation period for the laying of a complaint has expired so as to make an otherwise defective complaint valid.

14 On 28 February 2020 I gave a decision in the matter of *The Police v James Burrows* 6493/2019 (unpublished) which dealt with the amendment of a defective complaint after the limitation period had expired.

15 In that case Mr Burrows was charged with exceeding the speed limit on 7 April 2019 in that he travelled at 100 km/h in a 140 km/h speed zone.

16 The complaint was clearly defective and the police sought to amend the complaint by changing the complaint to that of driving at 140 km/h in a 100 km speed zone.

17 I did not allow the amendment.

18 I relied on the decisions of *Tregilgas v Howie* [1926] SASR 122and *Starling v Ostrowski* 2001WASCA 74.

19 In the South Australian case of *Tregilgas* Murray CJ stated at 124:

> *"that no offence was alleged in the complaint does not admit of doubt.... Then the question is whether the so-called "complaint" could be amended".*

20 He then considered the law and stated *"...that if no offence is disclosed in the complaint until it is amended, the time from which it becomes a good complaint is the time of making the amendment".*

21 He then concluded that as a result of the amendment the effect would be that the new complaint was out of time and that the amendment could not be made.

22 In the West Australian case of *Starling* the Full Court stated at paragraph 24:

> *"In the present case the complaint describes no offence known to law. To amend such a complaint, in which an essential element of the offence has been omitted, may properly be regarded as amounting to the commencement of fresh proceedings for the purposes of the limitation period, and therefore as being out of time.".*

23 The Full Court did not allow the amendment.

24 Since my decision in the matter of *The Police v James Burrow* I have found further comfort that my view was correct in the cases of *Davies v Andrews* (1930) 25 Tas LR 84, *McKenny v Marshall* [1948] Tas SR 114 and *Murphy v The Police* [2011] SASC 138; 59 MVR 105.

25 In fact the principal that a bad complaint cannot be amended out of time to create a good complaint appears to be accepted by legal text writers as well settled.

26 In *Ross on Crime* at paragraph 1.4415 the author states:

> *"There can be no amendment resulting in a fresh charge after the limitation period has expired"*

27 The author then quotes from the judgment of Gallop J in *Robbins v Horton* (1980) 3 NTR 1 at 5 where his Honour said:

> *"It is now well established that the court should not permit an amendment of a complaint if the consequences of an amendment would be to allow a new offence to be charged out of time".*

28 As stated earlier the real question to be determined in this case is whether or not the complaint as particularised discloses an offence or is a bad complaint.

29 The *Justices Act* 1959 states in section 30:-

> *"(1) any complaint, summons, warrant or other document that is laid, or made for the purposes of, or in connection with, proceedings before justices shall be sufficient if it-*
>
> *(a) describes the matter of complaint with which the defendant is charged or of which he is convicted in ordinary language, avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the complaint; and*
>
> *(b) contain such particulars as will give reasonable information of the nature of the matter complained of."*

30 Section 31 of that Act states:-

> *"(1) an objection shall be not be taken or allowed to a complaint in respect of-*
>
> *(a) an alleged defect therein, in substance or in form; or*
>
> *(b) a variance between it and the evidence in support thereof.*
>
> *(2) notwithstanding the provisions of subsection (1), where-*
>
> *(a) a complaint fails to disclose an offence or matter of complaint; or*
>
> *(b) the defendant appears to have been prejudiced by any defect of variance referred to in that subsection--*
>
> *the justices shall, unless the complaint is amended as provided in subsection (3), dismiss the complaint."*

31 Section 30 provides, *inter alia,* that in order to be sufficient a complaint must describe the matter of complaint and contain such particulars as will give reasonable information of the nature of the matter complained while section 31 provides that a complaint which fails to disclose a complaint shall unless amended be dismissed.

32 There is an apparent contradiction between section 30 (1) which states in part "without necessarily stating all the essential elements of the matter of complaint..." and section 31 (2) which provides a complaint may be dismissed if it fails to disclose an offence or matter of complaint.

33 This apparent contradiction also appeared in the South Australian equivalent to the Tasmanian *Justices Act* 1959 namely the *South Australian Summary Procedure Act* 1921.

34 The author of *Summary Justice South Australia* discusses this contradiction at 3.690 and following.

35 In *Reedy v O Sullivan* [1953] SASR 114 Napier, C.J stated:-

> *"But the question that remains is as to the significance of the words in section 22A "without necessarily stating all the essential elements of the offence". It seems to me that this is intended to allow the charge to be stated without crossing every T and dotting every I but it does not exempt the complainant from telling the defendant what law is alleged to have been broken and telling him in addition and with reasonable particularity, how it is alleged that he has broken it... We are entitled- and the defendant must be expected-- to use common sense in drawing any inference that is apparent on the face of the document, but I can see nothing in the language used in section 22A which discloses the intention to abrogate the principle which underlies any proper system of pleading, namely, that the purpose of pleading is to define the issues for trial, so that the prosecutor, the defendant and the court are left in no doubt as to the facts to be proved".*

36 In the case of *Murphy v The Police* the complaint stated "on 7 August 2009 at Lonsdale in the State being a person who was required under section 47E of the *Road Traffic Act* 1961 to submit to failed to comply with the reasonable directions..."

37 The complaint had omitted to state what the defendant was required to submit to.

38 His Honour Peek J stated:-

> *"79 As can be seen, there was no averment in the complaint as to what it was to which the defendant was required to submit. Indeed there are several possibilities under section 47E(l)(c), namely an Alco test, or a breath analysis, or both and these different possibilities correspond to different charges that might be laid arising out of any given incident.*
>
> *80 in my view, the authorities establish that a complaint which fails to aver an ingredient of this importance in fact charges no offence known to the law and, accordingly, a conviction which purports to be founded on such a complaint is bad. The features of the present case that lead me to this conclusion are that: a critical averment of the charge itself is missing; there was no application for an amendment made by the prosecution at any time; and the complaint may not now be amended since the limitation period has expired thus invoking the principal in Weldon v Neal."*

39 The author of *Summary Justice South Australia* gives a number of examples of cases where failure to state the essential legal requirements in a complaint has been fatal. These include failure to state that the driving was on a public road in the charge of careless driving and charging someone with driving at excessive speed without stating either expressly or implicitly the speed limit but as this text states:

> *"it is very often a matter of degree in determining whether the essential legal elements of an offence charged are being included in the complaint".*

40 In 1991 the South Australian equivalent of section 30 and 31 of the Tasmanian *Justices Act* 1956 was repealed and replaced with section 181 of the *Summary Procedure Act*. That section stated:-

"s181(1) an information or complaint is not invalid because of the defect of substance or of form".

41 Section 181(2) gave the court power to amend any defect and dismiss the complaint if it "cannot appropriately be cured by amendment".

42 The author of *Summary Justice South Australia* in considering this amendment states at 3.760:

"Subject to the possibility of unacceptable prejudice it is available for the amendment to cure a defect of "substance or form". However, no amendment can be made to convert a bad complaint into a good complaint such as where the charge does not specify the essential elements of the offence....An amendment pursuant to s181(2) will not be allowed where the charge is totally deficient in that it does not specify an offence known to law".

43 In the present case I am of the view that the complaint against the defendant does not specify an offence known to law.

44 There is no offence of having in one's possession a police badge without lawful excuse. The offence is that of having a police badge in one's possession without lawful excuse or the approval of the Commissioner.

45 The deletion from the complaint of the words "the approval of the Commissioner" does not satisfy the requirements stated in *Reedy v O Sullivan* "... to define the issues for trial, so that the prosecutor; defendant and the Court are left in no doubt as to the facts to be proved.

46 The complaint is incapable of amendment. The charge is dismissed