REPAIRING DEFECTIVE CHARGES OF SUMMARY OFFENCES

by

E. SIKK*

The criminal law owes the legal profession no particular debt of gratitude for its development over the past two centuries. It is true that a few great lawyers have promoted the cause of reform by legislative change and codification. But the attitude of the majority has mirrored the attitude of the common law; indifference and even hostility disguised under the mask of the liberty of the subject:

> The miserable history of crime in England can be shortly told. Nothing worthwhile was created. There are only administrative achievements to trace. So far as justice was done throughout the centuries it was done by jurors in spite of savage laws. The lawyer contributed humane but shabby expedients which did not develop into new approaches.[1]

Nowhere is the hostile stance of the common law more apparent than in its attitude to summary offences, which of course owe their existence not to the common law, but to statute. Summary offences are heard by magistrates or justices of the peace who owe their existence to statute. Summary offences deny the right of trial by jury, the common law method for the determination of criminal issues. For centuries lay justices of the peace virtually had exclusive jurisdiction with regard to summary offences. Until the last century the legal profession did not even have the right of audience before them.

In England, the Fielding brothers began a tradition in the eighteenth century of qualified lawyers acting as stipendiary magistrates, a precedent which was later followed everywhere in Australia. However, to this day every Australian jurisdiction depends, though to a minor degree, upon the assistance of the lay magistracy. The common lawyer still remembers with bitterness the corruption and decadence of the lay magistracy centuries ago and the harshness of magisterial rule in Australian convict days. But the common law did little to alleviate such abuses. Individuals however succeeded in defeating corruption. When Sir Henry Fielding died in 1754, a London newspaper described him as 'a consummate magistrate who was universally allowed to have the head of a philosopher, the heart of a christian and the hand of a hero'.

---

* LL.M. (*Melb*). Magistrate, Tasmania.
Much of the research in this article was made possible by a grant of funds by the Australian Institute of Criminology which is gratefully acknowledged by the author.

1 S. F. C. Milsom, *Historical Foundations of the Law* (2nd Ed., 1982) at p. 403.

Today, the classic problems of the criminal law, for example those relating to the mental element in crime, are respectable and even fashionable topics for academic and judicial debate. It has not always been so. The first narrative text book on criminal law in Australia was published by Professor Howard as recently as 1965. But the law of criminal procedure still presents a disreputable image; a question as to whether a defective complaint for an offence can or should be amended is seen by the academic lawyer as a squalid wrangle over words, as essentially a practical problem involving only sordid matters of time and money. Australia awaits its first national text book dealing with criminal pleading and procedure either in relation to trials before a jury or hearings of summary offences.*

This scholarly neglect of matters of criminal pleading and procedure is indefensible. The computer revolution has arrived, the means are now readily available to evaluate and measure the criminal justice system. Eventually this system will be called to account by society and be required to demonstrate how efficient and just it really is. Criminal pleading and procedure requires critical evaluation, regular monitoring and regular reform if the efficiency of the criminal justice system is to be improved.

In illustration of this assertion it is proposed to examine the law relating to the amendment of defective complaints for summary offences against the general background of the summary jurisdiction exercised by justices in Australia. Two quotations from Dr Richard Burn's book, *The Justice of the Peace and Parish Officer*, illustrate the attitude of the common law to the summary jurisdiction exercised by justices sitting out of sessions, (as they necessarily were when dealing with summary offences). The first quotation is under the heading *Conviction*.[2]

> The power of a justice of the peace is in restraint of the common law, and in abundance of instances is a tacit repeal of that famous clause in the great charter, that a man shall be tried by his equals; which also was the common law of the land long before the great charter, even for time immemorial beyond the date of histories and records. Therefore generally nothing shall be presumed in favour of the office of a justice of the peace, but the intendment will be against it. Therefore when a special power is given to a justice of the peace by act of parliament to convict an offender in a summary

* Since this article was written, J. Bishop, *Criminal Procedure* (1983) has since appeared. *Ed.*

2 The only system Burn could impose upon a ragbag magisterial jurisdiction was by using the alphabet. His subject matter is in alphabetical order. Burns published two volumes of his work which grew to six volumes and went through thirty editions between 1754 and 1869. The quotation above is from volume one of the rare 1785 edition in the magistrates' library at Hobart. It is interesting to note that the volume is inscribed 'William Tarleton' on the front cover. Tarleton was appointed Police Magistrate at Hamilton in Tasmania in 1842 by Lord Stanley. His son became manager of a bank at Jerilderie and was stuck up by Ned Kelly later in the century. Australia's first magistrate and judicial officer, Judge Advocate Collins almost certainly brought with him a copy of *Burn*. It was the leading text book on justices at that time and for many years after.

> manner without a trial by jury, it must appear that he has strictly pursued that power otherwise the common law will break in upon him and level all his proceedings.

The second quotation is from the 28th edition of *Burn* published in 1837 (at page 867 of volume one).

> Statement of the offence itself. All acts which subject men to new and other trials than those by which they ought to be tried by the common law, ought to be taken strictly. The information must, therefore, contain an exact description of the offence, which, in order to give the justice a jurisdiction must appear to be within both the letter and spirit of the statute that creates it, and which must be exactly described, that the defendant may know what charge he is to answer.

As to appeals in criminal matters the common law is silent. There is no appeal available from the decisions or orders of justices exercising a statutory jurisdiction. In the absence of a provision for appeal by statute the only method available to review proceedings before justices in a superior court is by means of the prerogative writs. The prerogative writ of *certiorari* provides the most suitable method available to correct the proceedings of justices. In England the writ issued out of the Court of Chancery or the King's Bench and directed justices to certify or make a return of the record of the proceedings before them. If the conviction was defective then it could be quashed but an error had to be disclosed on the face of the record for the conviction to be upset. At common law the 'conviction' is the whole of the proceedings and includes the charge, the evidence and the order of the justices which the common law presupposes have all been recorded in writing by the justices.

It can be appreciated that the philosophy of the common law was that a justice was simply without any jurisdiction to proceed unless there was a properly laid charge before him alleging that the defendant had committed all the essential ingredients of some offence. No question of amending a charge so as to include some essential ingredient which had been omitted could arise, but immaterial variations between the evidence and the particulars in the information could be ignored. During the reign of Charles II Sir Matthew Hale described an indictment as, '... a plain brief and certain narrative of an offence committed'.[3] Kenny remarks that, '... the growth of technicalities soon destroyed both the brevity and the plainness'.[4]

The technicalities of criminal pleading in jury trials became notorious. The indictment in *O'Connell's* case[5] in 1844 was said to have been one hundred yards long. The root cause of the difficulty of criminal pleading would appear to have been the requirement of the common law that every material fact which formed part of the crime had to be pleaded to have taken place at a specific place and time. This was known as the requirement of special venue and apparently had its origin in the need

3 Hale *P.C.* 169.
4 C. S. Kenny, *Outlines of Criminal Law*, (15th Ed. 1936) at p. 547.
5 C. S. Kenny, *op. cit.*, at p. 547.

dating back to very early times, to establish a connection between the place where the crime was committed and the place from where the jurors were to come to try the case.[6] The facts and the intents constituting the crime had to be stated with certainty, apparently no amendment of the indictment was permitted during the trial. Stephen says that the effect of the pleading rule that the averments in an indictment must be proved as laid was, '... to introduce into the administration of justice an element of arbitrary uncertainty not unlike that which the Roman augurs introduced into Roman public affairs by their supposed knowledge of omens'.[7] In one case in 1790 one Renwick Williams popularly known as *The Monster* was indicted for maliciously assaulting a lady with intent to cut her clothes. It was his habit to assault women in such a manner for no apparent reason. Unfortunately for his future victims the words 'then and there' were not inserted before the words 'cut her clothes', thus leaving open the possibility in the pleading that the assault and the cutting of the clothes occurred at separate times. The indictment was held bad.

Another example from Stephen is instructive.[8] If the offence owed its origin to statute it was mandatory to plead '... against the form of the statute (or statutes) in that case made or provided' at the conclusion to the indictment. When indictments were in Latin it was held sufficient to plead *contra formam statut* without indicating whether there were one or more statutes involved. After the enactment of *4 Geo. 2 c 26* in 1730 indictments were required to be drawn in English so that it became necessary to specify the singular or the plural of the word statute. In order to overcome this difficulty *14 and 15 Vict. c 100* removed the need to specify whether the statute was in the singular or plural. Today we cannot afford to be scornful of these items of apparently useless information. Some knowledge of the history of criminal pleading is essential in order to diagnose the defects latent in the system today.

As to informations or charges heard by justices exercising a summary jurisdiction, it would appear that the common law required much the same rigour in pleading as was required with regard to indictments. The information was required to be pleaded with the same certainty as to the facts and intents forming the ingredients of the offence.[9] It was absolutely requisite that the information and the conviction should state that the offence was against the form of the statute in such case made and provided.[10] For all practical purposes the charge had to fit the evidence at the hearing although certain immaterial variations between the particulars of the offence and the evidence might be ignored. There was no power of amending the charge during the hearing, the idea was foreign to the common law.

---

6 J. F. Stephen, *History of the Criminal Law of England* (1883), Vol. 1, at p. 281.
7 J. F. Stephen, *op. cit.*, at p. 283.
8 J. F. Stephen, *op. cit.*, at p. 282.
9 R. Burn, *Justice of the Peace,* (28th Ed., 1837), Vol. 1, at p. 836.
10 Burn, *op. cit.*, at p. 373.

It can hardly be doubted that, in practice, eighteenth century English justices did not rigidly apply the rules of criminal pleading, but at least the power of review by a superior court did exist even though it may only have been exercised in favour of the powerful and the wealthy.

The first person charged with a summary offence in Australia was one Mary Jackson brought before David Collins Esquire and Augustus Alt Esquire on 19 February 1788 sitting as justices of the peace for the territory of New South Wales.

A written note of the proceedings may be inspected at the office of the State Archives in Sydney and is presumably in the hand of Collins. The note is not a verbatim account, it is rather a summary of what took place. It commences as follows:

> Mary Jackson, a convict was brought before them charged with detaining a shirt, a pair of trousers and a new frock and a pair of stockings the property of Edward Dease, a Seaman belonging to the Lady Penrhyn Transport.[11]

This charge was, and still is, unknown to English and Australian law. Theft as a bailee became a crime in England in 1857 and was copied in all the Australian colonies. However, the essence of every form of stealing was and still is a dishonest intent which the draftsman of the charge has omitted. Basically the jurisdiction of the justices was confined to applying English law — so much of it as was applicable to the circumstances of the new colony.[12]

Governor Phillip, Lieutenant Governor Ross and Judge Advocate Collins were appointed as justices of the peace by the Crown in England before they left. Surveyor General Alt was appointed a justice of the peace by the Governor soon after the commencement of settlement. Today justices of the peace in New South Wales may trace their ancestry and some of their jurisdiction back to the founding of the colony; the only remnant which now remains of the assorted judicial baggage which arrived with the First Fleet.

Was Mary Jackson properly charged? There can be little doubt that she was not. Certainly it may be assumed that Governor Phillip, as the sole source of legislative power in the colony, had authority to make laws for the colony, particularly with regard to the discipline of convicts. These orders were communicated to the convicts at their regular musters and from the beginning it was plain that any disobedience of the Governor's orders was to be treated as a punishable offence.[13] It should be appreciated that in the eighteenth century there were few English laws in existence regulating the conduct of gaols. The idea of a gaol house as a penitentiary or place of permanent confinement for convicts was virtually unknown. No gaol was built in Sydney until 1796, until then it has been said that convicts awaiting trial were chained to a log and

11 State Archives, New South Wales 1/296.

12 See V. Windeyer, 'A Birthright and Inheritance' (1962), *U.Tas.L.R.* at p. 635 for an excellent account of the legal foundation of Australia. See too A. C. Castles, *An Australian Legal History* (1982) Ch. 5.

13 A. C. Castles, *An Introduction to Australian Legal History* (1970) at p. 42.

female convicts were allowed to go free. The new colony was in fact the gaol. Within a few days of settlement a group of convicts were pestering La Perouse's seamen at Botany Bay for a passage back to Europe. They artfully offered the services of their women in exchange for the passage home little knowing that La Perouse was destined for shipwreck and death in the New Hebrides. Despite complaint by La Perouse it seems the offenders were never disciplined — an indication of Phillip's lack of a police force. The episode has a curiously Australian ring to it.

In 1791 the *Imperial Gaols Act* was enacted enabling a local authority to make rules for the governing of gaols, but such legislation would hardly have been applicable to New South Wales.[14] Phillip and the governors who followed him were therefore able to issue orders in a legislative vacuum so far as the exercise of discipline over convicts was concerned. There was no right to question these orders. There was no right of appeal.

There were two other cases before Collins and Alt on 19th February. The second charge was laid against a convict for abusing an overseer. The third charge was brought by one convict against another for a 'breach of trust' the complainant having entrusted him with a possum which he (the defendant) made away with against his wishes. In each of these cases it is hardly likely that the charges were laid as a result of a breach of a specific order of the Governor. Certainly charges were later brought as a result of breaches of the Governor's orders. But from the beginning it seems clear that justices purported to exercise a general disciplinary authority over convicts for which they had no specific legislative authority.

Collins and Alt exercised their power fairly; the charge against Mary Jackson was dismissed with a reprimand to the effect that she ought to have given up the clothing in question when ordered by the duty officer. Unfortunately however their precedent was not followed by others who had no scruples against acting in an arbitrary and capricious manner where convicts were concerned. Thus early in the next century Reverend Marsden charged that Dr Douglas had ordered a convict to be flogged on suspicion of a robbery in order to extract a confession. This accusation brought counter charges against Marsden and McArthur that they had made similar orders when acting as justices. Upon enquiry by Governor Brisbane the practice was traced back to the establishment of

14 *31 Geo. 3 c. 46. s. 2.* Educated colonists were well aware of Blackstone's famous passage in his Commentaries to the effect that they had carried with them so much English law as was applicable to the particular circumstances of the new colony. The question which vexed them and the early governors was how much and when did it cease to apply. The question was not finally settled until the enactment of the *Australian Courts Act* 1828 (*9 Geo. IV, c. 83*), which marked the closing date for the reception of English Law. See A. C. Castles: *An Introduction to Australian Legal History* (1970) at p. 129.

the colony and found to be common to many magistrates.[15] The result was an *Act of Indemnity* introduced by Chief Justice Forbes into the Legislative Council in 1825 acknowledging that magistrates had acted unlawfully in the past and staying criminal prosecutions against them for acts done by them in their capacity as magistrates. The Act was not really directed at convicts but against disputes between factions of free settlers.

With such an inauspicious beginning it may well be asked how New South Wales, and no doubt Tasmania,[16] ever achieved the rule of law so far as the proper laying of charges before magistrates was concerned. No doubt the creation of Supreme Courts in both colonies in 1824 had a good deal to do with it. However it was probably a slow process. It was not until 1832 that the powers of justices over convict offenders were substantially reduced (to a maximum of fifty lashes for a first offence). Governor Bourke was responsible for the change with the approval and assistance of Chief Justice Forbes. Bourke thought the amending legislation was still excessively severe and 'out of place in any but a slave code', but it brought forth a storm of scurrilous protest, particularly from the lay New South Wales country justices. Heavy punishments continued, for example between 1830 and 1837 42,039 convicts were flogged and the total number of lashes administered was 1,865,658 — incomparably more than in England for the same period and a blot on early Australian history.[17]

Another factor limiting the arbitrary and unjust punishment of convicts was the appointment of stipendiary or semi professional magistrates, that is the appointment of a justice of the peace who was expected to devote a major part of his time to the duties of his office in exchange for material reward. In that sense Judge Advocate Collins may, perhaps, lay claim to being Australia's first stipendiary magistrate. However, it would seem historically correct to attribute to D'Arcy Wentworth that honour. He was the first justice of the peace to be paid a salary for duties performed as Superintendent of Police and Police Magistrate. He was Chairman of the Bench of Magistrates in Sydney from 1811 to 1825. He was the first magistrate to sit daily. Tasmania later followed the precedent of appointing stipendiary police magistrates and all the other Australian jurisdictions eventually followed suit.

For many years, the stipendiary magistracy did not consist of qualified lawyers. However today Australia depends chiefly upon the services of a stipendiary magistracy holding professional legal qualifications assisted by relatively few lay justices of the peace to varying degrees in each jurisdiction. In England, the main bulk of work in the summary jurisdiction is still carried out by law justices of the peace assisted by clerks of court holding legal qualifications. There are relatively few stipendiary

15 See C. F. Currey: *Sir Francis Forbes* (1968) for a description of these and other abuses by justices.

16 In Tasmania the early records of proceedings before justices have not survived.

17 See Currey, *op. cit.*, at p. 450.

magistrates, mainly in metropolitan areas. Probably the greatest need in the first half of the nineteenth century in Australia was for a uniform code of procedure regulating hearings before justices. It is difficult now to comprehend how informal and open to abuse proceedings before justices of the peace must have been. There was some attempt to follow the same kind of procedure which applied in a criminal trial before a jury. Mary Jackson for example was not permitted to give evidence on oath but she was permitted to make an explanation (which she did in voluble detail).[18] Her claim was that the complainant gave her the clothing in question on the voyage out in return for her sexual services. When she refused to continue her services he demanded the return of the clothing. Her claim was apparently accepted.

When Tasmania was first settled it was part of the colony of New South Wales. Upon the orders of Governor King, Lieutenant Bowen led a party of soldiers, convicts and a few free settlers to the Derwent in August 1803 and landed at Risdon Cove as Commandant of the new settlement. Curiously Governor King appointed no-one in the party a justice of the peace, though he had the same power of appointing justices as Governor Phillip. When a soldier was detected in a conspiracy with prisoners to steal from the food store, Bowen thought it proper to desert his post and sail to Sydney for the purpose of having the offenders tried. Meanwhile Lieutenant Governor Collins decided to vacate his settlement at Port Phillip and transfer it to the Derwent. He arrived just after Bowen had left in February 1804 and decided to settle at Sullivan's Cove where Hobart now stands. Collins had been commissioned in England to settle at Port Phillip for fear of the French, though he had permission to transfer his settlement to the Derwent provided he secured Governor King's permission, which he did.

Although Collins' power to appoint justices of the peace was doubtful he would appear to have appointed the Reverend Knopwood, Lieutenant Sladden and Surveyor General Harris as provisional magistrates at Port Phillip. He later continued their provisional jurisdiction when he arrived in Tasmania. These provisional appointments were later confirmed by King on 17 March 1804. (Historical records of New South Wales Vol. 5 p. 563). Thus Sladden, Knopwood and Harris were the first Tasmanian magistrates. In his diary Knopwood records that they were sworn in as magistrates by Collins on 30 August 1804. The Deputy Judge Advocate appointed for the expedition (Barbauld) was a justice ex officio but in fact he never sailed from England.

---

18 Until the decision in *Collier* v. *Hicks* (1831) B. & A.D. 663 it was doubted whether defendants appearing before justices or quarter sessions were entitled to legal representation. In that case Lord Tenterden held they were not as of right entitled. In 1836 the *Imperial Prisoners Council Act* provided a right of representation. Lord Glenelg, the Secretary of the State, directed Governor Bourke to implement the Act in New South Wales, but it seems the New South Wales country magistracy persisted in refusing the right to legal representation. See McLaughlin, 'The Magistracy and the Supreme Court of New South Wales 1824-1850', 1976 *Journal Royal Australian Historical Society*, Vol. 62, Pt. 2.

Before the introduction of responsible government in Tasmania in 1856 there were only two Tasmanian Acts of Council regulating the jurisdiction of justices in Tasmania. One of the Acts contains a provision of some interest as follows:

> V. AND BE IT Further Enacted that in all cases (except where a particular form of judgment or conviction shall have been or shall be by any such Act directed to be used in that behalf) a judgment or conviction in the form or to the effect of the form mutatis mutandis (as the case shall happen to be) prescribed by the Schedule to this Act marked A shall be good valid and effectual to all intents and purposes whatsoever without setting forth or stating in any such conviction the name of any informer or witness or the particular place where the offence was committed or whether the defendant appeared or was or was not summonsed to appear and without setting forth or stating the evidence or facts in any further or more particular manner than shall be necessary to show that the offence was one against the true intent and meaning of the Act creating such offence and no conviction whatsoever shall (whether under this or any other Act and whether a particular form shall have been or shall be in that behalf directed or not) shall be quashed in any case for any mere error or mistake in any name or date or title or in any matter of description only but in all cases regard shall be had alone to the substantial merits and justice of the case.[19]

This provision would seem to have been designed to prevent interference on technical grounds with the orders of justices by the Tasmanian Supreme Court which had been constituted only a few years earlier in 1824. Earlier than that Tasmanian justices were virtually free to do as they pleased. Notice the direction to have regard to the '... substantial merits and justice of the case'. This remarkable provision anticipated by twenty years the reforms of Sir John Jervis in England and indeed the correct direction of future reform in criminal pleading.

Sir John Jervis introduced his monumental reforms with regard to the jurisdiction of justices in 1848 in a series of three Acts. Two of the three Acts passed (*11 and 12 Vict. c. 43*) dealt with the duties of justices sitting out of session with regard to indictable offences and summary convictions and orders. The third Act dealt with the protection of justices from legal proceedings in executing the duties of their office. A fourth Act was passed in 1849 dealing with the places at which courts of summary jurisdiction could be held.

Jervis has not been given the credit he deserved. He modestly claimed his reforms were only consolidations of existing law but they were much more than that. Archbold wrote a commentary on the Acts in 1848 and claimed that Jervis had done more for the administration of criminal justice in England than anyone else except perhaps Sir Robert Peel. Jervis's reforms were quickly copied by all the Australian colonial legislatures. To this day they are still part of the basic structure of every statute in Australia regulating the practice and procedure of justices.

19 *9 Geo. IV No. 3.*

Jervis's *Summary Jurisdiction Act* of 1848[20] was copied into Tasmanian legislation in 1855 by the *Magistrates' Summary Procedure Act*,[21] and the *Magistrates Criminal Procedure Act*.[22] The two Acts of Council mentioned earlier were repealed. The legislation of 1855 was subsequently amended up to 1919 when it was repealed and replaced by the *Justices Procedure Act* of 1919. This Act in its turn was subsequently amended until it was repealed and replaced by the *Justices Act* 1959.

It would be a laborious task to explore in detail the reforms introduced by Jervis.[23] Two subjects however are of special interest and may be conveniently considered together: time limits on the institution of proceedings and the power to amend defective complaints.

The common law never developed any doctrine of time limitation for bringing criminal proceedings. Time does not run against the Crown. So far as criminal trials before a jury are concerned the result has been deplorable delay in the hearing and disposal of criminal trials all over Australia. But when Jervis prepared his legislation he found many separate instances of statutory time limitation in respect of specific summary offences. He decided to introduce a standard time limitation of six months. Today s. 26 of the *Tasmanian Justices Act* 1959 is still essentially the same as it was when its ancestor was passed in 1848.

> ... unless some other time is limited for making complaint by the law relating to the particular case, complaint must be laid within six (6) months from the time when the matter of complaint arose.

With some variation with regard to time, a similar provision exists in every other Australian jurisdiction. No doubt Jervis did not foresee the loophole in his provision which merely requires the institution of proceedings within six months by the laying of a complaint and not their termination within six months. To that extent Jervis did not achieve what he intended. By modern standards Jervis's drafting was not first rate. However, there can be no doubt the provision was intended to secure the prompt hearing and disposal of summary proceedings.[24]

As to the amendment of defective complaints, Jervis drafted a somewhat obscure provision. There is no point in quoting it, it is reproduced in almost the same language in s. 100 of the English *Magistrates Court Act* of 1952 as follows:—

> (1) No objection shall be allowed to any information or complaint, or to any summons or warrant to procure the presence of the defendant, for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the prosecutor or complainant at the hearing of the information or complaint.

---

20 *11 and 12 Vict. c. 43.*
21 *19 Vict. No. 8.*
22 *19 Vict. No. 9.*
23 See D. A. C. Freestone and J. C. Richardson, 'The Making of English Criminal Law; Sir John Jervis and his Acts' [1980], *Criminal L.R.*, 5.
24 *R.* v. *Newcastle-upon-Tyne Justices ex parte John Bryce (Contractors) Ltd.* [1976] 1 W.L.R. 517.

> (2) If it appears to a magistrates court that any variance between a summons and a warrant and the evidence adduced on behalf of the prosecutor or complainant is such that the defendant has been misled by the variance the court shall, on the application of the defendant, adjourn the hearing.

Jervis stopped short of conferring an express power of amendment. However, the modern view is that a power of amendment is implied.

> Those extremely wide words, which on their face seem to legalise almost any discrepancy between the evidence and the information, have in fact always been given a more restricted meaning, and in modern times the section is construed in this way, that if the variance between the evidence and the information is slight and does no injustice to the defence, the information may be allowed to stand notwithstanding the variance which occurred. On the other hand, if the variance is so substantial that it is unjust to the defendant to allow it to be adopted without a proper amendment of the informaiton, then the practise is for the court to require the prosecution to amend in order to bring their prosecution into line. Once they do that, of course, there is provision in Section 100 (2) whereby an adjournment can be ordered in the interests of the defence if the amendment requires him to seek an adjournment.[25]

What if there is an application to amend an information which is defective when the application is made after the expiration of the six months time limitation period? The modern English view is that an information may be amended in such circumstances provided there is no injustice done to the defence. The matter is within the discretion of the court.

> In my view the six months limitation provision in section 104 of the Magistrates Court Act 1952 is to ensure that summary offences are charged and tried as soon as reasonably possible after their alleged commission, so that the recollection of witnesses may still be reasonably clear, and so that there shall be no unnecessary delay in the disposal by magistrates throughout the country of the summary offences brought before them to be tried. It is in this context that their power to permit the amendment of an information under section 100 referred to by Lord Widgery C.J. in *Garfield* v. *Maddocks* 1974 Q.B. 7 12 is to be exercised. It must be exercised judicially. It must be exercised so as to do justice between the parties. But where it can be so exercised, where an information can be amended, even to allege a different offence, so that no injustice is done to the defence, I for my part see no reason why the justices should not so exercise it even though the amendment is allowed after the expiry of the six months period from the commission of the alleged offence.[26]

In the Tasmanian *Justices Act* of 1919 the drafting of Jervis's provision with regard to defective complaints was substantially improved.

> 27. Want of form or variance in warrant etc. — No objection shall be taken or allowed to any complaint or to any summons or

25 Per Lord Widgery C.J. *Garfield* v. *Maddocks* [1974] Q.B. 7 at p. 12.

26 Per *Regina* v. *Newcastle-upon-Tyne Justices ex parte John Bryce (Contractors) Ltd.* [1975] 1 W.L.R. at p. 517.

> warrant to apprehend a defendant issued upon any complaint, for any alleged defect therein, in substance or in form, or for any variance between it and the evidence in support thereof, and the justices present, and acting at the hearing, shall at all times make any amendment necessary to determine the real questions in dispute, or which may appear desirable.
>
> 28. Amendment — If any such defect or variance appears to the justices to be such that the defendant has been thereby deceived or misled, they may, and at the request of the defendant shall, upon such terms as they think fit, adjourn the hearing of the case to some future day, and in the meantime may suffer the defendant to go at large or may commit him to some gaol, or discharge him upon recognisance for his appearance at the time and place to which the hearing is adjourned.

Jervis did not expressly confer any power to dismiss the complaint in the absence of amendment. He left it to be inferred as a matter of necessary implication. Nor did the Tasmanian draftsman expressly confer a power to dismiss the complaint in lieu of amendment.

The Tasmanian provision did confer an express power of amendment by justices in order to determine the real question in dispute. But did it confer power to amend a complaint which failed to disclose an offence?

The question was considered by the Full Court of Tasmania in *Davies* v. *Andrews*.[27] The respondent was charged upon a complaint '... that on January, 18, 1930 William Andrews of No. 35 Newdegate Street, Hobart, was the owner of the said premises No. 35 Newdegate Street aforesaid whereon a horse was kept and a stable was provided and used for the accommodation of such horse, the said William Andrews not having obtained a licence, contrary to By-Law No. 27...'. By-Law No. 27 of the Hobart City Council provided '... no stable shall be used for the shelter or accomodation of horses until a licence has been obtained by the owner or occupier of the premises on which the same stands'.

At the hearing before a police magistrate, the evidence was that the respondent was the owner or occupier of the premises in question and in fact used them without a licence. It was objected that the complaint was bad in that it did not state or imply that the respondent used the premises as owner or occupier. An application to amend the complaint was rejected and the complaint was dismissed. On appeal to the Full Court the Chief Justice roundly condemned the complaint.

> The liberty of the subject still is a matter of some concern to the law, and I can see no principle of law or justice, which requires it to be laid down that prosecutors and complainants need not go to the trouble of ascertaining the law and the facts, and, when they charge others with offences, take the trouble to state their facts in such fashion, that their charges shall disclose matters with which the Court whose intervention is sought has power to deal. The right to drag a man to Court to answer a charge involving fine or imprisonment is a right to be exercising intelligently and responsibly, and it still is the duty of the Court to be much more careful

27 [1930] Tasmanian L.R. 84.

> to give their just rights to defendants, than to establish a right for prosecutors to be careless and slovenly or even worse.
>
> ... In the end, to my mind it all comes to this — a complainant must either lay a charge of some offence known to the law or the justice has no jurisdiction to try the complaint. That in my opinion is the only sound rule. And it is based not only upon principles, centuries old and deservedly cherished, but also is in conformity with justice and common sense.[28]

The dilemma which the Full Court considered may be simply stated. If a valid complaint is necessary to confer jurisdiction how may an invalid complaint be amended? Where is the jurisdiction to amend a nullity? This is the classic stance of the common lawyer to the amendment of criminal process.

The same problem had been faced a few years earlier in South Australia in the case of *Tregilgas* v. *Howie*.[29] In that case the Chief Justice of the Supreme Court of South Australia held that a complaint which disclosed no offence could not be amended after the statutory period of time limitation had expired. His Honour said:—

> It is obvious that if the effect of an amendment would be to create a valid information or complaint for the first time after the statutory period for taking proceedings has expired, the amendment cannot be made.

His Honour's judgment necessarily involved a conclusion that the powers of amendment of an information or complaint in ss. 182 and 183 of the South Australian *Justices Act* could not be utilised to amend the complaint. In principle these sections were the same as ss. 27 and 28 of the Tasmanian *Justices Act* of 1919 founded as they were on Jervis's original provisions.

It would appear that as a consequence of the decision in *Tregilgas* v. *Howie* and such decisions as *O'Connell* v. *Lee*,[30] the South Australian *Justices Act* was amended in 1931 by the insertion of a provision which now appears as s. 22 of the South Australian *Justices Act*. This provision was copied into the Tasmanian *Justices Act* by s. 24A of the 1954 amendments. It would appear that no other Australian jurisdiction has copied South Australia in this respect. It would also seem that the 1954 amendment was intended to overcome the decision in *Davies* v. *Andrews*.[31] The provisions which Tasmania copied now appear in s. 30 (1) of the *Justices Act* 1959, as follows:

> 30 (1) — Any complaint, summons, warrant or other document that is laid, issued 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

28 *Per* Nicholls C.J. at pp. 88, 89.
29 [1926] S.A.S.R. 123.
30 [1922] S.A.S.R. 320.
31 *Supra.*

without necessarily stating all the essential elements of the complaint; and

(b) contains such particulars as will give reasonable information of the nature of the matter complained of.

The 1931 amendments in South Australia ought to have struck *Tregilgas* v. *Howie*[32] a death blow. On the contrary, the case is still alive and flourishing; the amendments designed to overcome it seem never to have been argued or even considered judicially in South Australia.[33] In Tasmania, a former Chief Justice of the Supreme Court has referred to the decision in *Tregilgas* v. *Howie* with apparent approval.[34] Moreover in South Australia another test has been developed for deciding whether a complaint is capable of amendment. This is the 'pith and substance' test first enunciated by Chief Justice Napier in *Crafter* v. *McKeogh*.[35] According to this test a complaint may be amended even if an essential ingredient is missing but only if it remains the same in 'pith and substance'. The test would seem to be objectionable if only upon the ground that it is a judicial invention and a substitution for the language of the statute itself. Nevertheless, the test is still good law in South Australia.[36]

The rest of Australia and England has passed South Australia by. Apart from Tasmania no other jurisdiction copied the 1931 South Australian amendments. The legal genius of Sir Owen Dixon eventually solved the dilemma posed in *Tregilgas* v. *Howie*[37] and *Davies* v. *Andrews*.[38]

> Whether an information disclosing no offence can be amended has been the subject of some difference of judicial opinion. Some Victorian cases will be found discussed by Cussen J. in *Knox* v. *Bible* and the matter is very fully examined by Clark J. in *Davies* v. *Andrews* where cases from other jurisdictions are collected. Probably it is necessary to deal with the question as a matter of degree and not by a firmly logical distinction. An offence may be clearly indicated in an information, but in its statement there may be some slip or clumsiness, which, upon a strict analysis results in an ingredient in the offence being the subject of no proper averment. Logically it may be said in such a case that no offence is disclosed and yet it would seem to be a fit case for amendment, if justice is not to be defeated. By contrast, at the other extreme, an information may contain nothing which can identify the charges with any offence known to the law. Such a case may not be covered by the power of amendment.[39]

---

32 *Supra.*

33 *Fred Wakefield Pty. Ltd.* v. *Dowd* (1980) 20 S.A.S.R. 388 and *Robbins* v. *Horton* (1980) N.T.R. L. 1.

34 *Morrison's Tourist Services Pty. Ltd.* v. *Barnett* (Unreported Judgments No. 9 of 1968).

35 [1943] S.A.S.R. 371.

36 *Reedy* v. *O'Sullivan* [1953] S.A.S.R. 114, and *O'Hair* v. *Killian* [1971] S.A.S.R. 1.

37 *Supra.*

38 *Supra.*

39 *Broome* v. *Chenoweth* (1946) 73 C.L.R. 583 at p. 601.

These words of wisdom later were echoed by Lord Parker C.J. in *Hutchinson Cinemas* v. *Tyson.*[41]

> It seems to me that one might find an information which was so defective, so fundamentally bad, that it could not be heard at all and the only proper course would be for justices to dismiss the information. At the other end of the scale there may be informations which are deficient in some minor particular, a misdescription of premises or date, where there could be no prejudice and where no amendment or further particulars are required at all. In between there are informations which are perfectly good as informations, albeit deficient, and can be cured not merely by a formal amendment, but by the delivery of particulars to supplement their contents.

Outside South Australia there is no such thing as the 'pith and substance' test. Assuming that the draftsman of the complaint can be seen to be at least attempting to allege some offence known to law, the question is whether an amendment can be made without undue prejudice to the defendant if necessary upon terms as to an adjournment.

The cardinal sin of the 'pith and substance' test is that it ignores the purpose for which Jervis sought to confer a power of amendment, that is to avoid a miscarriage of justice. There is for example no evil necessarily involved in permitting an amendment from the allegation of one offence to another; often there is only a hair's breadth between saying a particular offence is stated in the alternative in a particular section or saying that a particular section contains two separate offences. Thus if offences are cognate to each other, then in the absence of injustice to the defendant, an amendment can and should be made on terms as to an adjournment if necessary.[40]

So also if an application is made to amend a compaint out of time, the proper approach is as stated in *R.* v. *Newcastle-on-Tyne Justices*[41] and not according to the 'pith and substance' test as applied in *Fred Wakefield* v. *Dowd* and *Robbins* v. *Horton.*[42]

Cases such as *Tregilgas* v. *Howie* and *Davies* v. *Andrews* ought to serve as a reminder how lamentably Jervis's amendments of 1848 have been misunderstood. Today it is generally appreciated (except in South Australia) that the guiding principle as to whether an amendment should be made or not depends essentially upon the question whether it can be effected without injustice. A considerable degree of discretion is thus necessarily vested in a court of summary jurisdiction. But injustice to whom? Jervis intended more. The question is not merely a question of justice between two parties, but a question of justice for everyone involved before the Court. The remarks of the Court in *Regina* v. *Newcastle-upon-Tyne Justices*[43] are a refreshing reminder that Jervis intended the disposal of all summary offences within six months after their alleged

40 (1970) 134 J.P. 202.
41 *Kennett* v. *Holt* [1974] V.R. 644; *Mitchell* v. *Meyers* [1955] 57 W.A.L.R. 49; *Higgon* v. *O'Dea* [1962] W.A.R. 140.
42 *Supra.*
43 *Supra c.f. Hackwill* v. *Kaye* [1960] V.R. 632.

commission. In the abstract an amendment may be made and an adjournment granted apparently without causing injustice. Sometimes however, it may be apparent that a prolonged squabble over a matter of criminal pleading may have been avoided with reasonable care. Prejudice to the parties may not exist but there may be grave prejudice to the witnesses, to other litigants before the Court, and the public generally. Precious court sitting time may be lost, generating further delay. The criminal system at the level of summary jurisdiction is open ended; there is no limit as to the number of people who may be charged and brought before the Court. Therefore, it is entirely fitting that the Court ought to be able to exercise its discretion with regard to the amendment of complaints so as to require a standard of pleading consistent with the due disposal of business before it and the estimates of court time previously given by the parties.[44] The interests of the public and not the parties should be regarded as paramount.

The year 1982 marked the long overdue formation of an Australian Institute of Judicial Administration. The Institute has already turned its attention to the problem of delay in criminal and civil proceedings. The computer is in the process of being introduced into Australian lower court jurisdictions and offers the promise in the near future of being a powerful tool for the measurement of the efficiency of our criminal adversary system. It is therefore an appropriate time for a national review of the rules of criminal pleading and procedure in the entire Australian criminal system.

---

44 *Supra.*

45 *C.f. Brentford Justices ex parte Wong* (1981) R.T.R. 206 [1982] *Criminal L.R.* 593.