[1980–87 Gib LR 356]

SAVIGNON v. AZZOPARDI

COURT OF APPEAL (Spry, P., Blair-Kerr and Law, JJ.A.): March 10th, 1986

Criminal Procedure—prosecution case—case to answer—magistrate not to respond to submission of no case to answer by purporting to convict and precluding defence evidence—case to be decided only after all evidence called and counsel made final submissions

Road Traffic—notice of intended prosecution—defect—notice of intended prosecution defective and invalid if prejudices defendant in preparation of defence—notice not defective if lists several possible offences based on same facts but only one eventually proceeded with

The appellant was charged in the magistrates' court with driving without due care and attention contrary to the Traffic Ordinance (*cap.* 154), s.30(1).

The appellant had been drinking before driving. She lost control of her car in a tunnel when it clipped a kerb-stone. The car hit the tunnel wall on the opposite side of the road and the appellant and her two passengers were thrown out, one of them later dying from his injuries. The police inspected the car and the scene for evidence as to the likely cause of the accident but could find nothing. The car was functioning normally and in good working order and driving conditions were good (the tunnel had been well lit, the road was dry and there were no brake marks on the road). Immediately after the accident, the appellant was semi-conscious and accordingly was not warned that she might later be prosecuted for a road traffic offence, nor did she receive a summons within 14 days of the accident. She did, however, receive a notice of intended prosecution which listed five possible offences for which she might be prosecuted. When she was eventually summonsed, however, the police proceeded with only two of the offences listed and she was subsequently charged in the magistrates' court with driving without due care and attention contrary to s.30(1) of the Traffic Ordinance (*cap.* 154). At the close of the case for the prosecution, the appellant submitted that there was no case to answer. The magistrate, however, ruled that there was a case to answer and convicted her. She unsuccessfully appealed to the Supreme Court against her conviction.

On further appeal, she submitted that (a) she had not been given adequate or sufficient notice that she would be charged with driving without due care and attention contrary to s.30(1) of the Traffic Ordinance (*cap*. 154); (b) at the date on which she received the notice of intended prosecution, the police must have known that they intended to proceed against her in respect of only two of the offences listed in it and the other three offences should therefore have been struck out; (c) the notice did not constitute proper notice as required by s.39(c) of the Ordinance, as it failed to specify adequately the nature of the offence with which she was charged; (d) as a result, the notice had been gravely prejudicial to her in the preparation of her defence; and (e) from the magistrate's judgment, which immediately followed her submission of no case, it appeared that he had made up his mind on the relevant and live issues of the case before she had had an opportunity to give evidence and before counsel had made their final submissions.

The respondent submitted that the appellant should have raised the issue of the adequacy of the notice of intended prosecution as a preliminary issue and it was now too late to do so.

Held, dismissing the appeal:

(1) The appellant's conviction of driving without due care and attention contrary to s.30(1) of the Traffic Ordinance (*cap*. 154) would be upheld. The notice of intended prosecution complied with s.39(c) of the Ordinance (Spry, P. dissenting, at paras. 41–44) as it made it clear to the appellant that, although on the date of receipt of the notice no firm decision as to what charge or charges would be preferred against her had yet been reached, it was likely that she would be charged with one of the offences listed. The test of the validity of a notice of intended prosecution was whether the defendant had been prejudiced in the preparation of her defence by a defect in the notice and here the circumstances were such that there could have been no possible doubt as to the facts on which a charge would be based. It was sufficient for the purpose of preparing her defence that she had understood that there was a possibility that she could be charged with reckless, dangerous or, at the very least, careless driving and the notice had made this clear. It could not therefore be said that she had been in any way prejudiced in the preparation of her defence (paras. 33–36; para. 45).

(2) It had been incorrect for the magistrate to respond to the appellant's submission of no case with a statement in which he said he had found the case proved and would convict. This gave the impression that his decision on whether there was a case to answer precluded the submission of further defence evidence, whereas the proper course would have been for him to state that the evidence adduced by the prosecution was such that a reasonable tribunal might convict. The correct time to make findings of fact and indicate guilt was after all the evidence had been called and counsel had made their final submissions (paras. 38–40).

Cases cited:
(1) *Alston* v. *Nurse*, English K.B.D., unreported, considered.
(2) *Att.-Gen.* v. *Foley* (1952), 86 I.L.T.R. 30, considered.
(3) *Beresford* v. *St. Albans' JJ.* (1905), 69 J.P. 520; 22 T.L.R. 1, referred to.
(4) *Harris* v. *Dudding*, [1954] Crim. L.R. 796, considered.
(5) *Milner* v. *Allen*, [1933] 1 K.B. 698, considered.
(6) *Pope* v. *Clarke*, [1953] 1 W.L.R. 1060; [1953] 2 All E.R. 704; (1953), 37 Cr. App. R. 141; 97 Sol. Jo. 542, applied.
(7) *R.* v. *Edmonton JJ.*, [1960] 1 W.L.R. 697; [1960] 2 All E.R. 475; (1960), 124 J.P. 409; 104 Sol. Jo. 547, considered.
(8) *Venn* v. *Morgan*, [1949] 2 All E.R. 562; (1949), 65 T.L.R. 571; 93 Sol. Jo. 616, considered.

Legislation construed:
Traffic Ordinance (*cap.* 154), s.30(1): "A person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, is guilty of an offence and is liable on summary conviction to a fine of £75 and in the case of a second or subsequent conviction to a fine of £100 and to imprisonment for four months."
s.39: The relevant terms of this section are set out at para. 12.

C. Finch for the appellant;
K.W. Harris, *Senior Crown Counsel*, for the respondent.

1 **BLAIR-KERR, J.A.,** delivering the judgment of the court: On July 19th, 1984, in the magistrates' court, the appellant was found guilty of driving without due care and attention contrary to s.30(1) of the Traffic Ordinance (*cap.* 154), and was fined £30. Her appeal to the Supreme Court was dismissed by the Chief Justice on April 15th, 1985. She now appeals to this court against the dismissal of her appeal to the Supreme Court.

2 On the night of March 3rd, 1984, the appellant went out in her car with her boyfriend, John Chidgey. During the course of the evening they went to various bars. These included the Queen's Hotel, London Bar, Stage Coach Bar, Horse Shoe Bar, and finally the Casino Disco where they remained until shortly after 1.30 a.m. on March 4th, 1984. They left in the appellant's car with a mutual friend, Allàn Van Gelderen who had joined them at the Casino Disco. The car was a left-hand drive. The appellant drove. John Chidgey sat in the front on the appellant's right. Allàn Van Gelderen sat in the back seat. They drove towards Europe Point, turning right before the lighthouse to enter the Keightley Way Tunnel.

3 This tunnel is 30 ft. wide. The carriageway for motor traffic is 23 ft. wide. The footwalk, which is 7 ft. wide, is on the left side of the road

going from south to north. Along the total length of the tunnel there is a series of small concrete blocks (which have been referred to throughout these proceedings as kerb-stones) separating the footwalk from that portion of the road used by motor traffic. The lighting is from the roof of the tunnel. As one approaches the northern mouth of the tunnel there is a bend to the right and a sharp incline down to Camp Bay. It was at this point that the incident occurred which gave rise to the appellant being charged with careless driving.

4 In her statement to the police, the appellant admitted that during the course of the evening she had consumed some alcoholic drinks. There was no independent evidence, however, as to the precise amount of alcohol which she and her friends had actually consumed. The case for the prosecution was that the car hit one of the kerb-stones on the left hand side of the tunnel immediately prior to the bend, that it then careered from this point some 98 ft. across the road and crashed into the wall on the right side of the tunnel severely damaging the rear right hand side of the car. It is thought that the car then scraped along the east wall of the tunnel for a distance of 49 ft., crossed over to the left side of the tunnel over the top of the kerb-stones, travelling some 172 ft. and crashed into the wall on the left side of the tunnel, bounced off that wall, slewed round and again crossed the road coming to rest against the east wall of the tunnel.

5 At some point, the doors on the offside of the vehicle opened. It is thought that this occurred as a result of the vehicle crashing into the east wall of the tunnel. It seems that the impact also caused the door of the hatchback to buckle and the rear windscreen was smashed. As a result of the car's movements, Van Gelderen was flung out of the vehicle and died shortly afterwards. When the police arrived at the scene they found the appellant lying on the road about 15 ft. south of the rear of the car. It appears that she was flung out of the car. From the evidence of Chidgey, it would appear that he also was flung out of the car. The note of his evidence reads: "The car hit the right-hand side at the back at an angle then tossed about—I don't know. I protected my head. I did that as I felt myself thrown off the car after it hit."

6 As a result of the impact against the west wall of the tunnel, the front of the car was extensively damaged. Near the wall, the police found the front right wing of the car, its registration number plate and shattered glass. They also saw scrape marks in the region of the kerb-stones. The police evidence was to the effect that the road was dry, the tunnel was well lit, there were no brake marks on the road, the brakes of the car were in working order and the tyres were in good condition. The police found nothing to indicate what might have caused the accident.

7 There was no medical evidence as to the injuries sustained by the appellant. Police Const. Cruz said that when he saw her, she appeared to

be unconscious. Inspector Azzopardi said that she had injuries to her forehead, that she was bleeding from the face, that she was moving her arm slightly and that she appeared to be semi-conscious. To Police Const. Cruz, Chidgey appeared to be in a state of shock. He and the appellant were conveyed to hospital by ambulance.

8 The police took a statement from Chidgey the following day. He said that the car did not hit a kerb-stone but that it was skidding towards the wall of the tunnel. The police found nothing on the road or from their examination of the vehicle to cause it to skid. He was not called as a prosecution witness. He gave evidence for the defence.

9 The police took a cautioned statement from the appellant in St. Bernard's Hospital on March 10th, 1984. She said that she was driving the car when they entered the tunnel but that she had no recollection of the accident. She did not give evidence. The prosecution relied to some extent on the doctrine of *res ipsa loquitur*, which is a rule of evidence applicable to the tort of negligence. The learned editors of *Wilkinson's Road Traffic Offences*, 11th ed., at 252–253 (1982) discuss the doctrine in a passage under the heading "*Res ipsa loquitur*" which reads as follows:

> "Frequently the only evidence which the police are able to bring is evidence of the defendant's vehicle leaving the road and a collision occurring with a wall or a pole or the vehicle ending up in a ditch or upside down in a field. In the absence of any explanation by the defendant, if the only conclusion which it is possible to draw is that the defendant was negligent or had departed from what a reasonably prudent and competent driver would have done in the circumstances, a court should convict. The doctrine of *res ipsa loquitur* is a rule of evidence applicable to the tort of negligence and as such has no application to the criminal law. But the fact that *res ipsa loquitur* has no application to criminal law does not mean that the prosecution have to negative every possible explanation of a defendant before he can be convicted of careless driving where the facts at the scene of an accident are such that, in the absence of any explanation by the defendant, a court can have no alternative but to convict. Thus in *Rabjohns* v. *Burgar* . . . the defendant's car on a dry road collided with the concrete wall of a bridge on a fine clear day with no other vehicle apparently involved. There were two skid marks behind the car. There were no witnesses to the accident and the defendant gave no explanation as to how the accident occurred. The justices found that there was sufficient evidence for the defendant to be required to answer the prosecution's case but, on the defendant declining to give or call any evidence, ruled that there was insufficient evidence to convict. The Divisional Court held that the facts were so strong that

the defendant should be convicted and pointed out that the prosecution did not have to show there was nothing wrong with the steering as the defendant had not raised the matter."

10 Two of the police officers who gave evidence for the prosecution gave their opinion as to the probable speed at which the car was travelling at the time of the accident. Sergeant Riley said that, in his opinion, the vehicle was travelling at about 25 m.p.h. Inspector Azzopardi said in answer to a question put to him in cross-examination, that he agreed that the speed was between 15 and 25 m.p.h. In her statement to the police, the appellant said that she "must have been doing about 40 k.p.h.," that is to say about 25 m.p.h. The magistrate said that he "concluded" that the vehicle was travelling "at approximately 25 m.p.h. to 30 m.p.h."

11 Having regard to the totality of the evidence, particularly to the fact that the car was so extensively damaged, we would not have been surprised if the magistrate had found that the vehicle was travelling much faster than 25 to 30 m.p.h. Various grounds of appeal were argued before the Supreme Court, but only one of them was included in the final memorandum of appeal to this court. The ground of appeal is stated in the memorandum thus:

"The learned Chief Justice wrongly ruled that adequate or sufficient notice in law was given to the applicant in respect of an alleged driving offence which occurred on March 4th, 1984 as required by s.39 of the Traffic Ordinance."

12 Section 39 (now s.38) of the Traffic Ordinance (*cap.* 154) reads as follows:

"Where a person is prosecuted for an offence under any of the provisions of this Part relating respectively to the maximum speed at which motor vehicles may be driven, to reckless and dangerous driving, and to careless driving he shall not be convicted unless either—

(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or

(b) within fourteen days of the commission of the offence a summons for the offence was served on him; or

(c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person

registered as the owner of the vehicle at the time of the commission of the offence . . ."

13 No warning was given to the appellant at the time of the offence, nor was she served with a summons within 14 days. The summons was served on her on April 6th, 1984. It is para. (c) of s.39, which applied to this case; and on March 15th, 1984, a written notice of intended prosecution was served on the appellant. It was in the following terms:

"Take notice that it is intended to institute proceedings against you for the following offence(s):

On March 4th, 1984, at about 01.50 a.m. at Keightley Way Tunnel, Gibraltar, you did drive a motor-vehicle:

(a) Recklessly, or at a speed or in a manner which was dangerous to the public contrary to s.31(1) of the Traffic Ordinance (*cap*. 154).

(b) Without due care and attention or without reasonable consideration for other persons using the road contrary to s.30(1) of the Traffic Ordinance (*cap*. 154).

(c) At a speed greater than that permitted contrary to s.28(1) of the Traffic Ordinance (*cap*. 154)."

14 Mr. Finch appeared for the appellant throughout these proceedings. His submission to the Chief Justice was to the same effect as his submission to this court and it was accurately set out by the Chief Justice as follows:

"Mr. Finch submits that this notice cannot possibly be considered to be proper notice in that it notifies the appellant that it is intended to proceed against her for five different offences. Mr. Finch submits that by March 15th, the police had carried out all essential investigations and had interviewed and recorded statements from the appellant and the only eye-witness of the accident, John Chidgey. By that date, he said, the police must have known that, of the five possible offences listed in the notice of intended prosecution, the only two with which they would be proceeding were those of careless driving contrary to s.30(1) of the Traffic Ordinance (*cap*. 154) and that, accordingly, the offences contrary to s.31(1) and s.28(1) of the Ordinance set out in the notice should have been struck out.

He submitted that in these circumstances it was both improper and misleading to notify the appellant that proceedings against her were intended in respect of all five possible offences listed in the notice. He continued that this was gravely prejudicial to the appellant in the preparation of her defence and that the notice in the form served on the appellant was bad in that it did not specify the nature of the

alleged offence committed by the appellant and therefore did not constitute proper notice as required by s.39 of the Ordinance."

15 The following English authorities were cited to us by counsel: *Milner* v. *Allen* (5); *Venn* v. *Morgan* (8); *Pope* v. *Clarke* (6); and *Harris* v. *Dudding* (4). Section 21 of the Road Traffic Act 1930 reads as follows:

"Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—

(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or

(b) within fourteen days of the commission of the offence a summons for the offence was served on him; or

(c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence . . ."

16 In *Milner* v. *Allen* (5), the notice which the appellant received ran as follows ([1933] 1 K.B. at 699):

". . . In accordance with the provisions of the Road Traffic Act 1930, s.21, I have to give you notice that you have been reported for the question of prosecution to be considered in respect of your having driven a motor-car, PK 8770, in a manner dangerous to the public in High Street, Rochester, at 9.45 A.M. on Monday, May 2, 1932, by overtaking a horse-drawn vehicle and cutting in between same and a motor-omnibus proceeding in the opposite direction."

17 The appellant, Milner, was not charged with dangerous driving (s.11 of the Act). He was charged with driving without due care and attention (s.12) and it was contended that the notice was bad. The justices, however, were of the opinion that the requirements of s.21 had been complied with and that Milner was not in any way prejudiced in his defence. Accordingly they convicted him.

18 He appealed to the Divisional Court. The record of the submission of his counsel reads as follows (*ibid*., at 700):

"The language of para. (c) of the section is in sharp contrast with that of para. (a). Where the warning is given at the time it is sufficient that it should be a warning that 'the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration.' The constable, in other words, is not to be required on the spur of the moment to commit his superiors, or to say whether they will prosecute, or, if so, on what charge. His duty is to report, and to warn the offender that he is going to report, the alleged offence, for the question of prosecution to be considered.

But when one comes to para. (c), the notice is to be a notice of 'the intended prosecution,' it is to specify 'the nature of the alleged offence' and the time and place where it is alleged to have been committed. The inference is that the Legislature intended that the notice should emanate from the responsible official who had by that time applied his mind to the questions, first, whether the case was a proper one for prosecution; and secondly, having made up his mind to prosecute, what was the proper charge."

19 In other words, counsel submitted that the notice must be as precise as the summons. The record of the submission of counsel for the respondent reads ([1933] 1 K.B. at 701): ". . . [The appellant] knew when he received the summons that careless driving would be the charge. The summons must be precise; the notice is merely to keep in the offender's mind the facts which may be the substance of the charge." At this stage, Avory, J. interjected (*ibid.*, at 701): "Until he receives the summons he is under no obligation to prepare any defence."

20 The appeal was dismissed. Lord Hewart, C.J. agreed with the view expressed by the justices that the appellant was not in any way prejudiced in his defence and part of his judgment reads (*ibid.*, at 702):

". . . [P]ara. (c) of s.21 ought to be read in close connection with para (a) of that section . . . Mr. Vine has spoken throughout as if the words 'in a manner dangerous to the public' were to be regarded as a term of art referring, and referring only, to s.11 of the Act. I do not take that view of it."

21 Agreeing, Avory, J. said (*ibid.*, at 702–703):

"I do not and cannot assent to the argument of Mr. Vine that the words in para. (c) of s.21 'a notice of the intended prosecution specifying the nature of the alleged offence' necessarily mean that the notice must be a notice of the particular section of the Act under which the prosecution is contemplated. Nor do I assent to the argument that at the time when that notice is given it is necessary that the police officer or other authority should have definitely made up his mind which particular charge is to be made. In my opinion, this

notice that was given was a sufficient notice of an intended prosecution and it did specify the nature of the alleged offence and the time and place where it was alleged to have been committed, I do not think that the appellant can be heard to complain, even if the notice did suggest that he might be charged under s.11, that in point of fact he was only summoned for an offence less serious than that under s.11."

22 Agreeing, Branson, J. said (*ibid.*, at 703):

". . . [I]t seems to me that the words 'a notice of the intended prosecution' can in this collocation mean no more than a notice that a prosecution was in contemplation. There is no reason for applying to the word 'intended' the meaning that that intention should have been irrevocably arrived at before the notice is sent out."

23 In *Venn* v. *Morgan* (8) the notice ran thus ([1949] 2 All E.R. at 563):

". . . [I]t is intended to institute proceedings against you for an offence against s.12 of the Road Traffic Act, 1930, namely, that you did drive a motor car on the Cambridge-Linton Road, Babraham, at approximately 4.25 p.m., on Saturday, 29 Jan., 1949."

The words "without due care and attention," or "without reasonable consideration for other persons using the road," were inadvertently omitted from the notice. It was contended before the justices that the notice was bad. The justices agreed and dismissed the information.

24 On appeal to the Divisional Court (Lord Goddard, C.J., Oliver and Stable, JJ.), it was held that the notice complied sufficiently with s.21 of the Act. Lord Goddard, C.J. referred with approval to the decision in *Milner* v. *Allen* (5) and said ([1949] 2 All E.R. at 563): "the notice was adequate, because the section only requires the nature of the alleged offence to be specified, and the nature of the alleged offence here is careless driving, the only offence with which s.12 deals." Oliver, J. said (*ibid.*, at 564):

". . . A notice under s.21(c) should not be considered as a formal document like a summons or a conviction. The object of the notice is to call the attention of the driver of the motor car to the time and circumstances in respect of which he may be charged so as to give him, as my Lord has said, an opportunity, in good time while memories are still fresh, to prepare his defence . . . the notice is sufficient if it merely alludes to the nature of the offence without setting out the offence in detail."

25 In *Pope* v. *Clarke* (6), the notice gave particulars of the intended charge and correctly stated the date and place, but the hour was wrongly stated as 1.15 p.m. instead of 11.15 a.m. The justices acquitted and the

matter came before the Divisional Court by way of case stated. The court (Lord Goddard, C.J., Parker and Donovan, JJ.) held that the notice was adequate. Giving the judgment of the court, Lord Goddard, C.J. referred with approval to the judgment of Oliver, J. in *Venn* v. *Morgan* (8) and said ([1953] 1 W.L.R. at 1062): ". . . '[I]n considering whether a notice purported to be given under section 21 is sufficient we ought to use a modicum of common sense'" and in *The All England Law Reports*, he is reported to have gone on to say ([1953] 2 All E.R. at 706):

> ". . . [The] mere fact that the actual hour was incorrectly stated in the circumstances makes no difference. If a person met with two accidents on the same day at or about the same place, possibly other considerations might apply because he might then say he was misled. Here the respondent, on whom was the onus of showing he was misled, gave no evidence.
>
> In my opinion, the justices came to a wrong decision . . ."

26 *Harris* v. *Dudding* (4) was a decision of the Sittingbourne Magistrates. The notice issued under s.21(1)(c) of the Road Traffic Act 1930 was in much the same form as the notice to the appellant in the case before us. It began thus: "The question of prosecuting you for an offence will be taken into consideration . . ." It then set out a full list of the offences for which a notice was required as a pre-requisite to a conviction. It was contended by counsel for the accused that the notice failed to specify for which type of offence, under the Road Traffic Act, it was intended to prosecute and gave the accused no indication as to the nature of the offence alleged against him. Nevertheless, the magistrates held that the notice was sufficient and, so far as we are aware, there was no appeal from their decision. The law in England is now governed to a large extent by the Road Traffic Act 1972, s.179(2), which is in the same terms as s.21 of the Road Traffic Act 1930. In *Wilkinson's Road Traffic Offences*, 11th ed., at 150 (1982), the learned editors refer to *Beresford* v. *St. Albans' JJ.* (3), a case in which it was held that for the purpose of s.179(2)(c), the notice is intended to give an idea of the offence with which the defendant will be charged and to guard against the possibility of his being taken unawares.

27 Mr. Harris, who appeared for the respondent, commented on the fact that Mr. Finch did not raise the question of the adequacy of the notice of intended prosecution as a preliminary issue. It is clear from the decision in *R.* v. *Edmonton JJ.* (7), however, that while it is a convenient practice to decide this issue as a preliminary point, the issue can be raised at any relevant stage of the proceedings.

28 Section 39 (now s.38) of the Traffic Ordinance (*cap.* 154), is virtually a copy of s.21 of the United Kingdom Road Traffic Act 1930. The language of para. (a) is not altogether clear. The word "some" connotes plurality. The phrase "one or other," viewed in isolation, connotes the

opposite. In *Alston* v. *Nurse* (1), the King's Bench Division upheld as a good warning the words "I will have to report the matter to my superior officer with a view to prosecution," and in *Att.-Gen.* v. *Foley* (2) it was held to be unnecessary to specify for what offences the prosecution would be. Be that as it may, a police officer attending the scene of a serious accident which he suspects has been caused by the manner of driving of one of the persons involved, could not subsequently be criticized if he said to the person at the time, as was the case in *Att.-Gen.* v. *Foley* (2) (86 I.L.T.R. at 30): "I warn you that the question of prosecuting you for reckless, dangerous, and careless driving and for exceeding the speed limit will be taken into consideration."

29 The language of para. (c), however, is in sharp contrast to the language of para. (a). The notice of intended prosecution must specify "the nature of the alleged offence" and "the time and place where it is alleged to have been committed." In *Milner* v. *Allen* (5), the "nature" of the alleged offence was clearly stated in the notice, which read as follows ([1933] 1 K.B. at 699): ". . . [B]y overtaking a horse drawn vehicle and cutting in between same and a motor omnibus proceeding in the opposite direction"; and the Divisional Court held that the fact that Milner was prosecuted for careless driving and not dangerous driving (as stated in the notice) mattered not.

30 On the other hand, in *Venn* v. *Morgan* (8), the notice merely stated that the intention of the police was to institute proceedings ([1949] 2 All E.R. at 563) "for an offence against s.12 of the Road Traffic Act 1930"; and that was held to be an adequate indication of the nature of the offence. In his judgment, Oliver, J. stated (*ibid.*, at 564) that, in his view, a notice under para. (c) is "sufficient if it merely alludes to the nature of the offence without setting out the offence in detail."

31 What then is the position if the notice sets out a full list of the offences for which notice is required as a prerequisite to conviction? *Harris* v. *Dudding* (4) was a decision of a bench of English magistrates and is therefore of very limited persuasive authority; but looking at the decision in the light of earlier decisions of the Divisional Court to which we were referred leads us to think that if there had been an appeal to the Divisional Court, the decision of the magistrates would probably have been upheld.

32 The Gibraltar Traffic Ordinance (*cap.* 154) was enacted after the English Road Traffic Act 1930, and as previously stated, s.39 (now s.38) is virtually a copy of s.21 of the English enactment. When the legislature of one jurisdiction enacts a provision in the same terms as a provision in corresponding legislation in force in another jurisdiction, there is a presumption that it does so with knowledge of how that provision has been interpreted by the courts of that other jurisdiction.

33 Looked at in that way, we are not prepared to say that the notice of intended prosecution which was served on the appellant on March 15th, 1984 is *prima facie* bad. It is clear from the evidence of Insp. Azzopardi that, by March 15th, 1984, no firm decision had yet been reached as to what charge or charges should be preferred against the appellant. It would be surprising if the question of prosecuting for dangerous driving or perhaps a more serious charge was not given careful consideration. Clearly the prosecution were keeping their options open.

34 We were referred to proviso (b) in s.39 which reads: "The requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved." Dealing with the corresponding provision in the English legislation, the learned editors of *Wilkinson's Road Traffic Offences*, 11th ed., at 142 (1982), say this:

> ". . . [I]t is unnecessary for the prosecution to give any evidence that its requirements have been fulfilled. It is for the defence to allege that they have not, and to call evidence to that effect. This was confirmed in *Offen* v. *Ranson* . . . where it was emphasised that the burden of proof was on the defendant on the balance of probabilities."

35 From the decision in *Milner* v. *Allen* (5), it would appear that the English courts take the view that the test of the validity of the notice is whether the defendant is in any way prejudiced in his defence by the defect in the notice, if such exists. In this case, there is nothing in the record to suggest that the appellant was in any way prejudiced in her defence. Not only did she not testify to that effect. There was nothing elicited by way of cross-examination to suggest that she was prejudiced. After all, how could she have been prejudiced? What would the reaction be of any reasonable person receiving a notice such as was served in this case? Surely it would be simply this: the prosecution have not made up their minds as to the charge or charges to be preferred; but I must assume that there is a possibility that I may be charged with reckless or dangerous driving or at the least, careless driving, and perhaps exceeding the speed limit.

36 In our view, the learned Chief Justice did not err in holding that the notice of intended prosecution given to the appellant was a good and sufficient notice. Accordingly, the appeal is dismissed. We agree, however, that it is desirable, as indicated in the footnote to the notice, to specify as clearly as possible for which of the offences it is intended to institute proceedings if this is known at the time when the notice is served.

37 Before leaving this appeal, there is one other matter to which we think reference must be made. At the close of the case for the prosecution, Mr. Finch made a no-case-to-answer submission. The learned magistrate ruled that there was a case to answer; but in doing so he wrote a 5-page

judgment. Having heard the one witness called by the defence and the submissions of counsel, he said: "I find the case proved. I convict."

38 From the language used by the learned magistrate in his 5-page judgment, the impression given was that he had made up his mind on the relevant and live issues in the case before the defence had had an opportunity to give evidence and before counsel had made their final submissions. For example he said that he had concluded that the vehicle was travelling at 25 to 30 m.p.h and that, in his view, there was "no reasonable doubt" but that the car had hit the east wall of the tunnel. He continued "how otherwise" could the red pieces of plastic have broken off the rear red light of the car. As regards the 49 ft. scrape mark on the wall, he said:

> "The other important aspect of this evidence, as I interpret it, is that for these 49 ft., the car was no longer travelling parallel to the road but was sliding down the roadway in a diagonal position. The car was, in my view, already out of control. Having established, in my mind, beyond all reasonable doubt, that the defendant's car made this mark, I have no doubt at all that the defendant's car hit the kerb at point 1. There was no other reason for the car to skid, as the road was dry and not slippery."

39 At the close of the prosecution evidence, the learned magistrate may not have come to a final conclusion on the live issues in the case, but from his language, the defence had ample ground for thinking that he had done so and that it mattered not what evidence the defence called or what counsel said in their closing submissions.

40 On a no-case-to-answer submission, the less said the better. All the magistrate needed to say was that the evidence adduced by the prosecution was such that a reasonable tribunal might convict on it. The time to analyse the evidence and make findings of fact is after all the evidence has been called and counsel have made their final submissions.

41 **SPRY, P.:** I agree that this appeal should be dismissed but I differ from the majority of the court with respect to one issue. In my view, it is of sufficient importance to require a separate judgment.

42 The notice that was served on the appellant is set out in the judgment of the court. In my view, it does not comply with the requirements of s.39(c) (now s.38(c)) of the Traffic Ordinance (*cap*. 154). That paragraph, as I read it, requires that an intention to prosecute shall have been formed and the notice must specify the nature of the offence which is alleged. The paragraph is in sharp contrast with para. (a), in which the warning does not require that any intention shall have been formed and all that is needed is a reference to the offences created by three sections of the Traffic Ordinance (*cap*. 154).

43 Notice served under para. (c) may, of course, specify more than one offence. For example, it might contain allegations of: (a) exceeding the speed limit; (b) driving in a manner dangerous to the public; or, in the alternative, (c) careless driving. Furthermore, the eventual prosecution need not necessarily be for the offence specified in the notice. Additional evidence may have come to light before the summons is served or the advice of the Law Officers may have been sought.

44 It is a simple matter of fact whether, at the time when a notice is served, the responsible officer has formed an intention to prosecute for one or more of the relevant offences. In the present case, the notice is evidence of an intention to prosecute but nothing more. It indicates that the signatory had failed to consider either the nature of the offence that would be charged or the facts which constituted the offence (as in *Milner* v. *Allen* (5)). In my view, it is patently defective and if that is so, para. (b) of the proviso is irrelevant.

45 I am, however, satisfied that the appellant was in no way prejudiced. The circumstances were such that there could have been no possible doubt as to the facts on which a charge would be based. Indeed, it is for this reason that the English Act has been amended so that it is no longer necessary in England to serve a notice when an accident has occurred. In all other respects, I agree with the judgment of the court.

Appeal dismissed.
