1912. Mar. 25. Leeuwen *vs.* Spalding.

magistrate has inherent jurisdiction, after he has granted an order of civil imprisonment, to suspend that order, and to alter and vary it in such way as he thinks equitable upon cause being shown. I think we should be wrong if we did not follow the decision of the Cape Court. It has been the practice in the Cape, and under those circumstances I think we ought to adopt it. The appeal will therefore be dismissed.

CURLEWIS J.: I concur. I think the word "discharge" in sec. 21 of the Magistrates' Courts Proclamation must mean unconditional discharge. And though it does not appear very clearly from the report of the case *H.* vs. *Bossi* (4 S.C. 72) that the debtor in that case was in prison when the application was made, it appears clear from the note in *van Zijl's Judicial Practice*, mentioned by the magistrate, that Bossi was in gaol under a wit of civil imprisonment granted by the resident magistrate's court at Cape Town. Therefore, whether Mr. *van Zijl* is referring to a different case from the one quoted by the magistrate, or whether it is identical with *H.* vs. *Bossi* (*supra*) it does appear, from what the author says, that the debtor was in prison at the time of the application. That case is quite applicable to the present, and I see no reason why we should not follow what was there laid down.

[Appellant's Attorneys, KEIZER & LOUW.
Respondent's Attorneys, PIENAAR & NIEMEYER.]

[Reported by GEY VAN PITTIUS, Esq., Advocate.]

DE VILLIERS, J.P., and SMITH, J. March 25th & 26th, 1912.

R. *vs.* COLLINS.

Magistrate's Court.—Criminal jurisdiction.—Summons. — Averment of Statutory Offence. — Reliance on Charge Sheet.—Proc. 21 *of* 1902, *Rule* 74.—*Failing to Report Scab.—Act* 14 *of* 1911.

In averring a statutory offence the section of the statute alleged to have been contravened must be stated.

Where an accused was charged with failing to report the existence of scab in a flock of sheep, in contravention of a statutory regulation which provided that one element of the offence should be that the owner had discovered or suspected or had reasonable grounds for suspecting the existence of scab in his flock, and this element was not averred in the summons:— Held, *that the summons was bad.* (Dada Gia *vs.* R., 1906, T.S. 23, *followed*).

Where a summons averring a statutory offence did not state the section under which the charge had been framed, and there was no evidence to show that the accused at the time of pleading was aware that the said section had been specified in the charge sheet: —Held, *that the prosecution could not rely upon the charge sheet to cure the defect in the summons.* (R. *vs.* Campbell, 1 E.D.C. 189, *distinguished*).

1912.
Mar. 25.
" 26.
R. *vs.* Collins.

Appeal against a conviction by the R.M., Ermelo.

The summons alleged that one Collins (1) on or about the 8th February last, being the owner of certain sheep infected with scab, had wrongfully and unlawfully failed to report such outbreak to the person and in the manner required by law, thus contravening Minister's Order No. 1 published under Government Notice No. 1748/1911, read with Government Notice No. 47/1912 and Act 14 of 1911. (2) That upon or about the date aforesaid the said Collins did wrongfully and unlawfully move or cause to be moved from Rietspruit to Ermelo, certain stock, to wit sheep, then infected with scab, the said Rietspruit being land owned or occupied by the said Collins. The accused pleaded not guilty. He was convicted on both counts and sentenced to pay a fine of £2 or 3 days' imprisonment on the first count and £3 or 7 days' on the second. Against these convictions he appealed on the grounds (1) That the charge did not constitute an offence in law, and (2) That the conviction was against the weight of evidence and bad in law.

1912.
Mar. 25.
" 26.
R. *vs* Collins.

N. J. de Wet, for the appellant: The summons does not set forth the offences sufficiently. It should have alleged that the accused had discovered or suspected, or had reasonable grounds for suspecting that his sheep were affected with scab; see *Dada Gia* vs. *Rex* (1906, T.S. 23) and approved of in *R.* vs. *Glyn* (1911, T.P.D. 500). The day the offence was committed and the section of the Act infringed should also have been stated: *R.* vs. *Silberbauer* (2 R. 21). Sec. 22 of Act 14 of 1911 does not take away the necessity of alleging an essential in an indictment. He then argued on the merits.

F. W. Beyers, K.C., A.G., for the Crown: The onus is on the accused to show that he had no reasonable ground for believing the sheep to be infected with scab. The Crown has merely to allege the wrongful failure to report scabby sheep. The allegation that the accused possessed scabby sheep raised a presumption that he was aware that the sheep were diseased. (He then argued on the merits to show that reports were made by the servants of the accused that the sheep were infected with scab.)

N. J. de Wet replied: The objection to the summons need not be taken in the court below: *R.* vs. *Dixon* (2 E.D.C. 380).

Cur. adv. vult.

Postea (26th March).

DE VILLIERS, J.P.: Mr. *de Wet*, who appeared on behalf of the appellant has raised two points, which may be called technical, but which are of great importance. The first is that the first count does not set forth an offence. In this count the charge was that the accused "on or about the 8th day of Februay last, being the owner of certain sheep infected with scab, had wrongfully and unlawfully failed to report such outbreak to the person and in the manner required by law, thus contravening Minister's Order No. 1, published under Government Notice 1748 of 1911, read with Government Notice 47 of 1912 and Act

14 of 1911." It will be seen that the references are set out with great particularity, and the question for the Court to decide is whether the facts constituting the offence have been sufficiently set forth. The Minister's order, which the appellant is alleged to have contravened, reads as follows: "As soon as the owner of any stock discovers or suspects or has reasonable grounds for suspecting that any of his stock is infected with a disease he shall forthwith report the fact or suspicion in writing in manner prescribed by regulation to the officer in charge of the police at the seat of magistracy of the district in which the stock is." In the charge no mention is made either of "knowledge" or "suspicion," nor is it alleged that the accused had reasonable grounds for suspecting that the stock was infected; and Mr. *de Wet's* argument is that this omission is fatal. The *Attorney-General,* on behalf of the Crown, has drawn the attention of the Court to sec. 22 of the Act, which throws upon the accused the burden of proving that he had no reasonable grounds for suspecting the existence of any fact; and argues that it is therefore unnecessary to allege either knowledge or reasonable grounds of suspicion in the summons. I cannot agree with this contention. It is clear that in order to convict a person of an offence the essential elements of the offence should be clearly and succinctly stated in the summons. The essential elements constituting this offence under sec. 1 are, first, that the person charged must be the "owner," as defined by the Act, about which there is no difficulty in the present case. Secondly, that he must either have discovered, or must have suspected or had reasonable grounds for suspecting that the stock was infected. Thirdly, he must have failed to report the fact to the authorities. It is apparent at once that the second point was not dealt with in the summons, and that, to my mind, is fatal. It has already been laid down, in the case of *Dada Gia* vs. *Rex* (1906 T.S. 23) that in order to find a person guilty of an offence the essential elements of the offence should be stated in the charge. INNES, C.J., said (p. 26): "When a criminal prosecution in a court of resident magistrate is instituted in respect of a statutory offence, the charge sheet, which takes the place of the in-

1912.
Mar. 25.
„ 26.
R. *vs.* Collins.

dictment in a superior court, should set out the particular section of the law which is alleged to have been broken, and should state shortly and distinctly the nature of the offence alleged to have been committed; see sec. 62, schedule B. of Proclamation 21 of 1902. A mere mistake in the number of the statute or section relied on is not necessarily fatal to the proceedings, if the charge contains allegations which if proved would amount to a statutory offence and if the accused is fully notified of the case against him and is therefore not prejudiced by the formal misdescription. But it is essential that the facts alleged in the charge should if substantiated constitute a statutory crime. Otherwise the charge sheet or summons which is supposed to set out the case for the Crown would disclose no breach of the law, and there would be no case for the accused to meet." In this case there certainly is no contravention of sec. 1 of the Minister's Order. It so happens that sec. 9 of the Act, sub-sec. (2) only requires the two out of the three elements to which I have referred. But the appellant was not charged under that section. Seeing that he was charged under sec. 1 of the Minister's Order, all the elements which go to constitute the offence should have been specified in the summons, and that not having been done the summons disclosed no offence. The conviction on the first count must therefore be set aside.

With regard to the second count, Mr. *de Wet* took a similar objection, namely, that neither the section, nor the Act itself, which the accused was alleged to have contravened, were specified in the summons. The second count of the summons reads as follows: "That upon or about the date aforesaid the said William Richard Collins did wrongfully and unlawfully move or cause to be moved from Rietspruit to Ermelo certain stock, to wit, sheep, then infected with disease, to wit, scab, the said Rietspruit being land owned or occupied by the said W. R. Collins." No mention is made of what particular section of the Act or regulations has been contravened. Now section 9 (1) of Act 14 of 1911 provides that "Save as in this Act and the regulations is otherwise provided, no person shall remove, or cause to be removed from any land owned or occupied by him, any stock infected with disease." The

argument on behalf of the appellant is that, seeing that the section of the Act, with the contravention of which the accused was charged, was not specified, such an omission is fatal to the summons. Our Magistrates' Courts Proclamation does not very clearly set forth what is required in a summons. Section 62 of sched. B. says that the public prosecutor, when he has decided to prosecute, shall give to the clerk of the court "a statement in writing of the charge or complaint against the said person describing him by his name, surname, place of abode, and occupation or degree; and setting forth shortly and distinctly the nature of the said crime or offence, and the time and place at which the same was committed." Thereupon the clerk, by sec. 67, is directed to issue the process of the court (namely, a summons), and a form is given according to which that should be done. Now it appears that, although the summons itself did not set forth the section with contravening which the accused was charged, a certain printed form, marked "D.J.18," did set forth that the offence charged was contravention of sec. 9 (1) of Act 14 of 1911; and on this document the magistrate recorded as follows: "The prisoner being arraigned pleaded, to the first count, not guilty, and to the second count, not guilty." The *Attorney-General* has argued that the Court must take it that the accused pleaded to the charge set forth in this document, in which the section is specified. On the other hand, if we refer to rule 74 of the Magistrates' Courts Proclamation, we find that the accused is to be asked not to plead to the charge sheet, where there is a summons, but to the summons. The rule says: "On the day of hearing the Court shall enquire of the accused his name and surname, and thereafter cause the charge or summons, as the case may be, to be read out to him and require him to plead thereto." We must take it that the law was complied with, and that, a summons having been issued, the accused was asked to plead to the summons. There is no evidence, therefore, before the Court that the accused was aware that the section had been specified in the printed form. In the case of *Dada Gia* to which I have referred, INNES, C.J. laid down that the section alleged to have been contravened

1912.
Mar. 25.
" 26.
R. *vs.* Collins.

should be specifically stated; and I do not feel that I can differ from him in that respect. It is true the Proclamation does not say so, but it seems to me that when a public prosecutor decides to charge a person with a crime, that is a serious matter, and what can be reasonably expected of him is that he shall make up his mind, if it be a statutory offence, under what section of the law the accused is to be charged. That is not only a reasonable rule, but an eminently salutary one, because it is only right that the accused should know under what statute, and what section of the statute, he is charged. In this very case, if no section had been specified in count one, the accused could not have known whether he was charged with contravening sec. 1 of the Minister's Proclamation or sec. 9 (2) of the Act. At the same time, under the particular circumstances of this case I doubt whether I would have disturbed the conviction on this count, seeing that the appellant is an attorney of the Court and that he took no exception to the summons, if I had been sure that there had been no prejudice caused to him. For these reasons, I come to the conclusion that, in regard to the second count also, the summons was bad, and that therefore the conviction should be quashed.

SMITH, J.: The appellant was convicted on two counts, charging him with different offences, and Mr. *de Wet*, on his behalf, has raised the same objection to them both, namely, that the counts were bad. The first count was framed under regulation 1 of Government Notice 1748 of 1911, which reads as follows: "As soon as the owner of any stock discovers that any of his stock is infected with a disease he shall forthwith report the fact in writing in manner prescribed by regulation to the officer in charge of the police at the seat of magistracy of the district in which the stock is"; those are the words of the regulation which apply to the present case. Now it is much the simplest and easiest course, when an offer is charged under a statutory enactment, to follow the words of the statute. That has not been done in the present case. If it had been, the charge should have alleged that having discovered, on such and such a date, that his

stock was infected, the defendant neglected to notify the official of the fact of the outbreak. To my mind the intention of the regulation is clear, namely, it is to provide that when an outbreak of disease amongst stock is discovered, a report shall be made of it forthwith. The magistrate, in his reasons for judgment, says that where the language of the statute is doubtful, and an unsound construction may be placed upon it, the duty of the Court is to give it that construction which will give effect to the intention of the legislature, as derived from the other sections of the statute. I cannot see that there can be any doubt upon the language of the regulation. As soon as the outbreak is discovered the owner of the stock has to make a report of it. The charge in the present case does not state that essential fact, namely, that the owner had discovered the outbreak of disease. It was sought, apparently, by the framer of the charge, to get over the difficulty by saying that he "wrongfully and unlawfully" failed to report. But it is clear that where the element of knowledge is essential to an offence that must be specifically stated in the charge, and that it is not sufficient to allege a wrongful and unlawful doing of an act. That has been held by this Court in the case of *Makhato* vs. *Rex* (1905, T.S. 555), which was a charge under a section of a statute making it an offence to wilfully refuse to pay hut tax. In the charge in that case the word "wilfully" was omitted, and the words "wrongfully and unlawfully" inserted in its place; and the Court there felt compelled to hold that the charge was not a charge of an offence under the statute. In the case of *Crawford and Celliers* vs. *Rex* (1909, T.S. 267) a similar judgment was given. That was a case of an alleged offence against the Cruelty to Animals Law, which makes it an offence to wilfully illtreat animals. In that case also the word "wilfully" was omitted from the charge, and the words "wrongfuly and unlawfully" inserted; and again the Court held that the charge was not a charge of any offence, and quashed the conviction. In the present case the charge as laid seems to me to lack the essential element of the offence mentioned in the regulation, namely, that having discovered the outbreak of disease the appel-

1912.
Mar. 25.
" 26.
R. *vs.* Collins.

lant failed to report it. It is true the charge says that he failed to report on the 8th February, and it may be said, perhaps, that there was a technical breach of the regulation. But the facts, shortly, were these. The appellant is the sheriff of the district of Ermelo. The stock was seized by him as part of the assets of an insolvent estate, and pending the sale of the stock by the trustee it was allowed to remain on the appellant's land. When the trustee desired to sell it the stock was sent in to Ermelo, and then it was discovered by the stock inspector that some of the sheep were suffering from scab. The appellant's attention was called by the scab inspector to the fact on the 8th February, and it may be said that it was his duty forthwith to report it to the chief of police of the district. But that would really be an absurdity. It had already been discovered by the stock inspector, and there would be no object whatever in the accused immediately rushing off and reporting the same thing to the chief of police. Although there may be said, therefore, to have been a very technical breach of the regulations, it is not the one the Crown relies upon. As I understand the argument for the Crown, it amounts to this; that the appellant ought to have discovered the disease before; that he had the sheep on his farm, and that there was some duty cast upon him to inspect them and see that they were not suffering from disease. But that is not what the regulation says. The regulation says when he has discovered it he must report it; and in this case it is clear that the appellant did not discover it till the sheep had passed out of his control into that of the trustee.

With regard to the point as to the second count, I think the matter is also quite clear. It is admitted that in this case no mention of the section of the Act, or of the Act itself, under which the charge was intended to be framed, was contained in the summons. This Court has held, both in the case of *Dada Gia* vs. *Rex*, to which the JUDGE PRESIDENT has referred, and subsequently in the case of *Nichelman* vs. *Rex* (1909, T.S. 454), that where the offence charged is a statutory offence it is obligatory to mention both the statute and the section under which the charge is framed. SOLOMON, J., in the last-mentioned

case, says (p. 459): "If it is a statutory offence, then I think the charge should specify the Act and the section of it which has been contravened." Later on in his judgment he says (p. 461): "To set out the section and the Act which the accused is charged with contravening is in my opinion an essential part of the charge." I think it too late for us to go back upon these judgments of the Court, and to say that where neither the section, nor the Act, has been mentioned, the charge is good. The same view seems to have been taken by the Eastern Districts Court, in the case of *Regina* vs. *Vine* (6 E.D.C. 1), where there was a similar omission in the summons to state either the Act or the section of it; and the Court there held that the conviction was bad and must be set aside.

It was said in the present case that the charge against the appellant was sufficiently contained in the form "D.J. 18" attached to the proceedings, which states that he was charged with "contravening sec. 9, sub-sec. (1) of Act 14 of 1911; see attached summons." I think there would be considerable force in that argument if one could come to the conclusion that, although the summons does not state the Act or the section of the Act, when in fact the accused pleaded in Court the Act and the section were called to his attention, and he then pleaded and raised no objection. That view seems to have been taken by the Court in the case of *Queen* vs. *Campbell* (1 E.D.C. 189), where the Act was mentioned in the summons but the section was not. It was, however, established in that case that when the defendant pleaded in the Court the proper section of the Act was called to his attention, and he pleaded to that; and it was held that, having taken no objection, it was too late for him to raise the point when the case came up on appeal. If I were clear that that was the state of the case here, I think I should take the same view, which is, after all, a reasonable one, because the main object of the summons is to bring the accused before the Court. But I have some difficulty in coming to that conclusion, because we must presume that the law had been complied with. The Magistrates' Courts Proclamation (sec. 74, sched. B.) says that when the accused is called upon to plead the summons shall be read out to

1912.
Mar. 25.
" 26.
R. vs. Collins.

him, and that is what he pleads to. That being the case I do not think that I can assume, from the statement of the charge which appears on the form D.J. 18. that that was called to the defendant's attention, and that that was what he pleaded to. In this case it so happened that the defendant is an attorney of the Court, and also the sheriff of the Ermelo district, and one could perhaps assume that he had a good idea of what he was charged with, and that no prejudice would be done to him if we held that the charge was sufficient. But we must not make rules for particular cases. It might be, for instance, that it was a native who was charged with moving stock infected with disease, and I should be very loth to hold, in such a case, that he would not be prejudiced by the fact that the summons served upon him did not contain a reference to the Act and the section. Under these circumstances I think that the objections taken by Mr. *de Wet* to the conviction on both the counts are good, and that the appeal must be allowed, the conviction quashed, and the sentence set aside.

[Appellants' Attorneys, ROUX & JACOBZ.]

[Reported by ADOLF DAVIS, Esq., Advocate.]