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Judgment  
14, 1965

UNIVERSITY OF OXFORD  
- 8 FEB 1966  
LONDON, W.C.1.

80952

THE PRIVY COUNCIL No. 57 of 1964.

ON APPEAL  
FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :-

ANDREW JOSEPH O'TOOLE ... Appellant  
- and -  
JACK SCOTT and GEORGE  
STEPHEN WILLIAM SMITH ... Respondents

C A S E FOR THE APPELLANT

RECORD

10 1. This is an appeal by special leave of the  
Judicial Committee of the Privy Council dated on  
22nd day of December, 1964, allowing the appell-  
ant to appeal to Her Majesty in Council against  
the judgment delivered on the 12th day of August  
1964 by Mr. Justice McClemens sitting as the  
Supreme Court of New South Wales pursuant to  
Section 20 of the Supreme Court and Circuit Courts  
Act 1900-1948. The said judgment discharged the  
20 rule nisi for prohibition made by His Honour  
during vacation of 16th July, 1964 to prohibit the  
respondents and each of them from proceeding upon  
an order made on the 3rd day of July, 1964 by the  
respondent Scott, a Stipendiary Magistrate for the  
State of New South Wales sitting at Redfern near  
Sydney in the said State that the appellant pay a  
fine of £2. and £1. costs for a breach of the  
regulations made under the Motor Traffic Act 1909  
(as amended) upon an information laid by the  
30 respondent Smith a sergeant of police.

p.22

2. At the hearing before the respondent Magistrate  
commencing on the 12th day of June, 1964 there was p.p.12-13

RECORD

no appearance of the respondent Smith, the informant named in the summons in person, but a police officer, Sergeant Curry, appeared as advocate for the informant. Counsel for the appellant, the defendant named in the summons objected to the appearance of Sergeant Curry, but the respondent Magistrate allowed him to conduct the case as advocate. A third police officer, Constable Leacey gave the only evidence for the informant, and the appellant gave the only evidence for the defendant.

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3. The question of importance to be decided in this appeal is what persons may appear to conduct a police case at Petty Sessions and what powers a magistrate has to authorise such persons to appear.

p.18

4. The appellant was fined £2. and £1. costs for permitting a vehicle owned by him to be driven upon a public street such vehicle being then equipped with tyres which did not conform with the requirements specified in Schedule F to the Regulations made under the Motor Traffic Act 1909 as amended. The issue before the respondent magistrate was whether two tyres were worn to a degree sufficient to bring them within the restriction set out in the regulation applicable to this item of equipment. The appellant and the police constable mentioned, gave conflicting evidence on this issue.

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p.12

It was put to the respondent magistrate, on behalf of the appellant, that it was not open to him to decide on this issue, because his view of the evidence and the credit of the appellant as against the police constable might well have been affected by the conduct of the case by a police sergeant. The respondent magistrate held that if he had been in error in allowing the police sergeant to prosecute it was too late to cure his error and proceeded to a finding on the facts.

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p.17

5.(a) The relevant legislation in New South Wales in summary proceedings is contained in Section 70(2) of the Justices Act 1902 (as amended):-

"The prosecutor or complainant may himself, or by his counsel or attorney, conduct his case, and may examine or cross-examine the witnesses giving evidence for or against him, and may, if the defendant gives any evidence

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or examine any witness as to any matter other than as to his general character, call and examine witnesses in reply"

Section 79 of the said Act states:-

10 "The practice upon hearing of any information or complaint shall, in respect of the examination or cross examination of witnesses and the right of addressing the Justice or Justices upon the case in reply or otherwise, be as nearly as possible in accordance with that of the Supreme Court upon the trial of an issue of fact in an action at law."

Section 70 (2) is derived from the Imperial Act 11 & 12, Victoria ch. 43 Section 12, specifically adopted in New South Wales in 1850, which is the basis of current legislation in Great Britain and and most of the Australian States.

20 5.(b) The relevant legislation in New South Wales in relation to indictable offences is contained in Section 36 (2) of the Justices Act 1902 (as amended):-

"The prosecutor may himself, or by his counsel or attorney, conduct his case, and may examine and cross-examine the witnesses giving evidence for or against him.

The relevant paragraph under Schedule F of the Regulations under the Motor Traffic Act 1909 is:-

30 "Every tyre fitted to a motor vehicle shall have a clearly visible tread pattern on all parts of it which normally come into contact with the road surface."

40 6. It is the practice in New South Wales to allow sergeants in the Prosecuting Branch of the Police Department to appear in uniform to conduct any police matter before a magistrate. These sergeants are experienced advocates paid a salary by the Police Department and have no other ordinary police duties. Promotion in the New South Wales Police Force is entirely on seniority but if a prosecutor has not attained the rank of sergeant

RECORD

he is invested with this acting rank and wears sergeants stripes before the Court. His status has no professional qualification or supervision attached to it but the Police Department conducts a series of courses for these officers and they then qualify according to the departmental standards. It is the invariable practice for magistrates to permit a right of audience to such officers.

7. The practice of allowing police officers to appear as advocates was originally based upon questions of convenience throughout the State dating from the middle of the last century. It would appear to have been founded upon the direction expressed in an opinion of the Attorney General, Sir James Martin in 16th April, 1864, 10

"Attorneys have no right to appear for and conduct the defence of persons charged with a crime, when such persons are before a justice acting ministerially in taking the evidence preliminary to a committal. 20  
Attorneys can only appear in such a case by permission of the magistrates, which permission is generally accorded so long as it does not lead to the obstruction of public business.... The justices may prevent anyone appearing, and they may also permit anyone. The magistrates are supposed to conduct the inquiry themselves, but to save time it has been the custom to permit the police, who are conversant with the facts. This is the practice all through the interior, and should be carried out in Sydney also. 30  
Attorneys have no power to object to a policeman putting questions, if the magistrates permit it, any more than they have any right to appear themselves without the Magistrate's consent."

Shortly afterwards the succeeding Attorney General, Mr. W. B. Dalley extended this in the following terms:-

"There is no objection to the conduct of prosecutions before magistrates by members of the Police Force. It is entirely within the power and discretion of the magistrates themselves, to permit or refuse the 40

the appearance of any person, in either the conduct of prosecutions or defence of persons charged before them. And this rule applies equally to professional men (barristers and attorneys) as to others. The invariable practice is to permit the police to conduct their own cases."

The police officers mentioned were the ordinary officers conducting the case. The Prosecuting Branch was formed in 1927, and now contains about 80 sergeants.

10 8. Where the offence alleged is a breach of the Motor Traffic Act and Regulations the decision to lay an information is made by a police officer in the Traffic Branch of the Police Department. He is not the officer who has investigated and who gives evidence, but makes his decision upon the report of such officer or officers. He has no legal qualification or supervision and has no experience as an advocate. After making such a decision, he ceased to have any further part in the case. The information is then laid by a  
20 sergeant such as the respondent Smith, who is a clerical officer with no legal training, having no part in the decision to prosecute, is not an advocate and who takes no further part in the proceedings. No professional costs are awarded on a successful prosecution by a police officer and in practice none are ever awarded to a successful defendant having professional representation, though power to grant such costs is provided for under Section 81 of the Justices Act.

30 9. Courts of Petty Sessions in New South Wales are presided over by a Stipendiary Magistrate appointed under the Justices Act. Such magistrate is at the present time sometimes qualified as a barrister or solicitor but has never practiced as such and sometimes has no such qualification. He has always been and remains a Public Servant employed by the Department of Justice and subject to the direction and disciplinary powers of the  
40 Under-Secretary of Justice and/or the Public Service Board. He has not practiced in any professional capacity and is not experienced beyond his departmental duties. There is no qualified Clerk to the Magistrates, the only other court

RECORD

official apart from police officers being the Departmental depositions clerk.

p.12. 10. It was submitted on behalf of the appellant:-

- (a) That a police officer has no right of audience to prosecute at Petty Sessions on behalf of another police officer informant.
- (b) That a magistrate has no powers beyond those arising expressly or by necessary implication in the Justices Act and cannot invest a police officer with such a right of audience by granting leave to appear. 10
- (c) If there is a discretion in a magistrate to permit a police officer to appear it should not be exercised on behalf of a police officer unless the exigencies of justice demand this.
- (d) That the appearance of a police officer as advocate might well prejudice the defendant on an issue of credit with any other police officer involved in the case. 20
- (e) There is a denial of natural justice where a police officer is allowed to conduct the case of the informant in a court constituted in the form of a Court of Petty Sessions in New South Wales. 30

11. The respondent was not called upon to make submissions before McClemens, J. but did give case references.

p.p.22-24 12. McClemens, J. in his judgment dated the 12th day of August, 1964, held as follows:-

- (a) A common law power exists in a magistrate to grant leave to appear to a person not included in Section 70 (2) of the Justices Act 1902 (as amended)

and in the judgment His Honour said:

RECORD

p.p.22-24

(i) "In all other circumstances it is a matter for the magistrate to decide whom he will hear and whom he will not hear. If he in the exercise of his discretion decides to allow a solicitor's clerk to conduct the matter on behalf of a client, then it is a matter for him"

10 (ii) "He could refuse to hear the police officer if he thought it undesirable to do so. But he is certainly entitled to hear him"

(iii) "But these sections (Section 36 and Section 70 of the Justices Act) do not give an exclusive right of audience and there is nothing in them that cuts down the ordinary common law rule"

20 (b) The Justices Act is not designed as a code and does not limit the existence of further common law powers in a magistrate.

(c) There is no denial of natural justice in permitting a police officer not the informant, to conduct a police prosecution.

(d) That a police prosecutor has no right to demand to be heard unless he is the informant, but a magistrate, if he sees fit, has a power to hear him.

30 13. The appellant repeats the submissions made in paragraph 10 hereof, and further submits that in the events which happened that the respondent Scott followed a practice and did not exercise a discretion based upon the exigencies relating to the particular occasion.

40 14. The appellant therefore submits that the decision of the Supreme Court given by McClemens, J. is erroneous and ought to be reversed, and that this appeal should be allowed and the judgment of the Supreme Court set aside and the rule nisi for prohibition to be made absolute with costs for the following (among other)

R E A S O N S

RECORD

- (a) BECAUSE the police officer had no right of audience to prosecute at Petty Sessions on behalf of another police officer informant.
- (b) BECAUSE the magistrate had no powers beyond those arising expressly or by necessary implication in the Justices Act and cannot invest a police officer with such a right of audience by granting leave to appear. 10
- (c) BECAUSE if there is a discretion in a magistrate to permit a police officer to appear it was not exercised in relation to the police officer as the exigencies of justice demanded.
- (d) BECAUSE the appearance of a police officer as advocate might well have prejudiced the defendant on an issue of credit with any other police officer involved in the case. 20
- (e) BECAUSE there was a denial of natural justice in that the police officer was allowed to conduct the case of the informant in a court constituted in the form of a Court of Petty Sessions in New South Wales.
- (f) BECAUSE in the events which happened the respondent Scott followed a practice and did not exercise a discretion based upon the exigencies relating to the particular occasion. 30

J. M. Maddocks

No. 57 of 1964.

IN THE PRIVY COUNCIL

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OF NEW SOUTH WALES

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B E T W E E N

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... Appellant

- and -

JACK SCOTT and  
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SMITH ... Respondents

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CASE FOR THE APPELLANT

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