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Judgment
14, 1965

No. 57 of 1964

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IN THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN :-

ANDREW JOSEPH O'TOOLE Appellant

- and -

JACK SCOTT and GEORGE STEPHEN
WILLIAM SMITH Respondents

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CASE FOR THE SECOND RESPONDENT

Record

1. This is an appeal, by special leave, from a Judgment of the Supreme Court of New South Wales (McClemens J.) dated the 12th August 1964 whereby the Appellant's application, for a writ of prohibition against both Respondents that they should not proceed upon an order, made by the First Respondent as Stipendiary Magistrate for Redfern, New South Wales, on the 3rd July 1964 that the Appellant pay £2 fine and £1 costs for a breach of the Regulations made under the Motor Traffic Act, 1909 on an information laid by the Second Respondent, was dismissed, and whereby a rule nisi for such prohibition made by McClemens J. on the 16th July 1964 was discharged.

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pp. 22-25.

p. 18.

pp. 1, 2.
p. 26.

2. It is contended for the Appellant that a police officer, who is not the informant, can not be permitted to conduct the case for the prosecution in summary proceedings in a Magistrates' Court.

3. The relevant statutory provisions are:

Justices Act, 1902 of New South Wales

PART IV

PROCEDURE BEFORE JUSTICES

Division 1 - Indictable Offices

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WITNESSES AND EVIDENCE

- 36(1) Every witness shall have the usual oath administered to him before he is examined.
- (2) 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. 10
- (3) The defendant may himself, or by his counsel or attorney, make full answer and defence, and may give evidence himself, and may examine and cross-examine the witnesses giving evidence for or against him respectively. 20

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DIVISION 2. - Offences punishable on summary conviction and complaints.

INFORMATION AND COMPLAINTS

52. An information may be laid before a Justice in any case where any person has committed or is suspected to have committed an offence or act in New South Wales for which he is liable upon summary conviction before a Justice or Justices to be punished by fine, imprisonment, or otherwise. 30

53. A complaint may be made to a Justice in any case where a Justice or Justices has or have authority by law to make an order for the payment of money, or otherwise.

54. An information or complaint may be laid or made by the informant or complainant in person, or by his counsel, attorney, or other person authorised in that behalf.

WITNESSES AND EVIDENCE

70. (1) Every witness shall have the usual oath administered to him before he is examined.

10 (2) The prosecutor or complainant 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 and may if the defendant gives any evidence or examines any witness as to any matter other than as to his general character, call and examine witnesses in reply.

(3) The defendant may himself, or by his counsel or attorney, make full answer and defence and may give evidence himself and may examine and cross examine the witnesses giving evidence for or against him respectively.

HEARING

20 77. If, upon the day and at the time and place appointed for hearing or to which the hearing or further hearing has been adjourned, both parties appear in person or by their respective counsel or attorneys the Justice or Justices shall proceed to hear the case.

30 4. The Appellant was summoned to answer a charge, laid in an information by the Second Respondent on the 4th June, 1964, that he had owned a motor car which was driven by one Maddocks in a public street 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. p. 3.
pp. 1, 2.

5. The summons was heard before the First Respondent on 12th June and 3rd July 1964, at the conclusion of which the Appellant was found guilty and fined £2 and ordered to pay £1 costs. Mr. Maddocks of Counsel sought leave to appear as amicus curiae.

40 Evidence was given for the prosecution by P.C. Lacey who said that he had seen the vehicle in Harris Street, Ultimo on the 26th February 1964 with the front nearside tyre bare. The Appellant gave evidence. P.C. Lacey was examined in evidence by a Police Sergeant Curry, who also cross-examined the Appellant and addressed the First Respondent. pp. 4-6.
pp. 7-11.

Record

P. Sergeant Curry was not the informant nor was he a qualified barrister or solicitor.

pp. 11-15. 6. After the end of the evidence and during his final address counsel for the Appellant objected to the participation of P. Sergeant Curry in the case. The First Respondent then gave P. Sergeant Curry leave to appear on behalf of the informant in respect of the whole of the proceedings.

pp. 15-17. 7. In giving his decision, the First Respondent pointed out that it was given impromptu, without having consulted the authorities which had been mentioned in argument. In the knowledge that for many years it had been the practice in the Courts for police matters to be prosecuted by police officers other than the informants, and that it was now desired to challenge that practice, his main function was to make findings as to the facts. It was conceded that if the Court had any power to permit a police officer other than the informant to conduct the case for the prosecution, such leave had been effectively given in respect of the whole proceedings. The Court had had no knowledge whether the informant had been present during the proceedings, but had treated P. Sergeant Curry as conducting the prosecution irrespective of whether he was or was not the informant.

The offence was found proved on the facts.

pp. 19,20. 8. The Appellant applied to the Supreme Court of New South Wales for a writ of prohibition to restrain both Respondents from acting further upon the order of 3rd July 1964, and filed an affidavit deposing as to the course of the hearing of the Summons before the First Respondent. The Supreme Court (McClemens J.) on the 16th July 1964, granted a rule nisi upon the Appellant's said application.

pp. 20,21 9. On the 12th August 1964 the Supreme Court (McClemens J.) discharged the said rule nisi with costs.

pp. 22-25. In giving his reasons, the learned Judge outlined the facts and the objection taken by the Appellant's counsel to the appearance made by P. Sergeant Curry as prosecutor. He held that the contention made on behalf of the Appellant that such an appearance was prohibited by Section 70(2) of the Justices Act, 1902, was ill founded.

The great variety of business transacted in a magistrates' court, often under circumstances of great pressure and difficulty, and the wide variety of persons resorting thereto called for a wide flexibility of procedure: the Court often heard wives, relations, friends, and solicitors clerks on behalf of parties to proceedings before it.

10 The learned Judge held that the persons described in Section 70(2) had a right to be heard: in regard to other persons, it was a matter for the discretion of the Magistrate whether he heard them or not. He could refuse to hear a police officer who was not the informant, but he was certainly entitled to hear him if he wished.

20 Before 1848, by the common law justices could permit anyone to appear before them as an advocate or take part in the proceedings with their permission, and this right had not been out down by later statutory enactment granting a right of audience to parties, their solicitors and counsel. This practice had been confirmed in New South Wales and other Australian States. There was no excess of jurisdiction or denial of natural justice in permitting a police officer, not the informant, to conduct a prosecution. The almost universal practice in New South Wales of police prosecutions being conducted by police prosecuting officers (but as a matter of discretion not of right) had existed for many years and the learned Judge confirmed that 30 a Magistrate had power to permit it, if he saw fit.

10. The Second Respondent respectfully submits that the judgment of the Supreme Court was right and should be upheld, and that this appeal should be dismissed with costs, for the following, among other

R E A S O N S

1. BECAUSE a Magistrate has the power and discretion to permit any person to appear with his leave to conduct a case on behalf of a party in his Court.
- 40 2. BECAUSE Justices had such power at Common Law and still have such power.
3. BECAUSE such a power is necessary for the practical administration of justice in inferior Courts presided over by Justices.

Record

4. BECAUSE Section 70 sub-section 2 of the Justices Act, 1902, was re-enacted by the New South Wales Legislature after a number of Australian cases which so held and there have been subsequent Australian decisions to the same effect which have settled the law and practice in New South Wales and other States.
5. BECAUSE Section 70 sub-section 2 on its true construction does not lay down a code in the sense of excluding such power and discretion, but merely gives a right (which did not exist at Common Law) to appear by Counsel or Attorney instead of in person.
6. BECAUSE of the other reasons in the judgment of McClemens J.
7. BECAUSE no excess of jurisdiction was involved and the Appellant suffered no denial of natural justice by reason of the fact that the Magistrate granted permission for the case to be prosecuted by a police officer who was not the informant police officer.
8. BECAUSE if the Magistrate erred in this respect the error was procedural merely.
9. BECAUSE no case for a Writ of Prohibition was made out.
10. BECAUSE in any event the Appellant was rightly convicted and has suffered no miscarriage of justice.
11. BECAUSE for the reasons numbered 7 to 10 it is respectfully submitted that it is unnecessary for the Board in this case to express an opinion upon the matters referred to in reasons numbered 1 to 6.

H. A. SNELLING

MERVYN HEALD

D. G. STEWART.

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