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Judgment  
14, 1965

IN 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

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RECORD OF PROCEEDINGS

\_\_\_\_\_

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~~PC~~  
~~GD166~~

UNIVERSITY OF LONDON  
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FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :

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STEPHEN WILLIAM SMITH        Respondents

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RECORD OF PROCEEDINGS

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In the Court  
of Petty  
Sessions  
Redfern

No.1

Information -  
Police v.  
O'Toole.

4th June 1964  
- continued.

South Wales, George Stephen William Smith, a  
Sergeant of Police (hereinafter called the Infor-  
mant), of the Police Traffic Branch, Sydney,  
appears before me, the undersigned, one of Her  
Majesty's Justices duly assigned to keep the Peace  
of our Lady the Queen in and for the State, and on  
oath informs me that on the twenty-sixth day of  
February, in the year of our Lord one thousand nine  
hundred and sixty-four,

one Andrew Joseph O'Toole,

10

(hereinafter called the Defendant) at Sydney, in  
the State of New South Wales, did own a motor  
vehicle, to wit, motor car No. BRK-589 which was  
driven by John David Maddocks, upon a public  
street, to wit, Harris Street, such motor vehicle  
being then equipped with tyres, which said equip-  
ment did not conform with the requirements speci-  
fied in Schedule F to the Regulations made under  
the Motor Traffic Act, 1909 as amended.

contrary to the Act or Regulation in such case made  
and provided; whereupon the said Informant prays  
that I, the said Justice, will proceed in the  
premises according to law.

20

SWORN at the Court of Petty )  
Sessions Redfern, in the )  
said State, on the day )  
first above written, before )  
me, - )

Geo. S.W. Smith

S.V. Jackson  
Justice of the Peace.

30

No.2

Summons.

4th June 1964.

No. 2

SUMMONS

S U M M O N S

(Divisions 1 and 2, Justices Act, 1902, As Amended)

To Andrew Joseph O'Toole,  
25 Pitt Road,  
of NORTH CURL CURL, in the State  
of New South Wales,

WHEREAS on this fourth day of June in the year of our Lord one thousand nine hundred and sixty-four at Redfern, in the State of New South Wales, George Stephen William Smith, a Sergeant of Police (hereinafter called the Informant), of the Police Traffic Branch, Sydney, appears before me, the undersigned, one of Her Majesty's Justices duly assigned to keep the Peace of our Lady the Queen in and for the State, and on oath informs me that on the twenty-sixth day of February, in the year of our Lord one thousand nine hundred and sixty-four

In the Court  
of Petty  
Sessions  
Redfern

No.2

Summons.

4th June 1964  
- continued.

10

one Andrew Joseph O'Toole,

(hereinafter called the Defendant) at Sydney, in the State of New South Wales, did own a motor vehicle, to wit, motor car No. BRK-589 which was driven by John David Maddocks, upon a public street, to wit, Harris Street, such motor vehicle being then equipped with tyres, which said equipment did not conform with the requirements specified in Schedule F to the Regulations made under the Motor Traffic Act, 1909 as amended.

20

These are therefore to command you, in Her Majesty's name, to be and appear on FRIDAY, the TWELFTH day of JUNE 1964 at ten of the clock in the forenoon, at the COURT OF PETTY SESSIONS TOWN HALL, 73 Pitt Street, Redfern, in the said State, before such Stipendiary Magistrate for the said State as may then be there, to answer to the said information, and to be further dealt with according to law.

30

GIVEN under my hand and Seal the day and year first above written, at Redfern, in the said State.

S.V. Jackson  
Justice of the Peace

Magistrates'  
Seal

\_\_\_\_\_

In the Court  
of Petty  
Sessions  
Redfern

No. 3

OPENING OF TRIAL

S.C. 45

No.3  
Opening of  
Trial.  
12th June 1964.

Police -V- Andrew Joseph O'TOOLE.

Smooth Tyres.  
-----

PP.Sge. CURRY.  
MR. MADDOCKS UNINSTRUCTED FOR DEFT.  
MR. MADDOCKS For reasons to be given I am asking  
leave to appear as Amiscus Curia  
The matter is defended. Should only be short.  
About 20 minutes.

10

TO REMAIN IN LIST FOR MENTION AT 2 P.M.

LATER. 2 P.M. Appearances as before.

Matter of Law involved.

MR. MADDOCKS. PLEA NOT GUILTY.

MY CLIENT IS HERE.

No. 4

No. 4

Evidence of  
Barry Robert  
Leacy.

EVIDENCE OF BARRY ROBERT LEACY

12th June 1964.

THIS DEPONENT SWORN STATES

My full name is BARRY ROBERT LEACY.

I am a constable of Police stationed at REGENT  
Street.

20

At about 10.15 a.m. on 26th February, 1964 I saw  
vehicle No. BRK-589 being driven east in Harris  
Street, Ultimo, at a speed of about 5 miles per  
hour and approaching the intersection of the Iron  
Bridge where I was performing traffic duty.

As the vehicle approached I noticed that the front  
nearside tyre was smooth and in fact, compleatly  
devoid of any tread marks on that part of the tyre  
which comes in contact with the road surface.

30



The vehicle was pulled to the nearside kerb and a conversation followed in which the driver told me something.

As a result of this I made inquiries at the Department of Motor Transport.

Subsequently I interviewed Mr. Andrew Joseph O'Toole on 21st May, 1964, the Defendant in this matter.

That was at Regent Street Police Station.

10 I said "Were you the owner of Motor car No. BRK-589 on February 26th, 1963.

He said "Yes.

I said "Did you permit John David Maddocks of 11 David Street Clifton Gardens to drive that vehicle on that date?" He said "Yes."

I said "Would he have been driving that vehicle at about 10.15 a.m. on that date." He said "Yes."

I don't recall saying anything to him about the tyre being devoid of tread pattern.

20 I informed Mr. O'Toole that the matter would be reported.

Harris Street, Ultimo is a public street in the State of New South Wales.

I tender the Regulations which were in force at the date of the alleged offence and are still in force, specifically Regulation 92(2) and Schedule F.82.

ADMITTED AND MARKED EXHIBIT "1"

EXH "1"

BY MR. MADDOCKS

30 Q. You remember giving evidence a month ago in another case arising out of these facts. A. Yes.

Q. You remember an interview on the smoothness of the tyres. A. Yes.

Q. Would you agree that what you said then would be more likely to be right than what you said now.  
A. I said exactly the same then as I said now.

In the Court  
of Petty  
Sessions  
Redfern

---

No.4

Evidence of  
Barry Robert  
Leacy.

12th June 1964  
- continued.

In the Court  
of Petty  
Sessions  
Redfern

MR. MADDOCKS. I WOULD LIKE THE DEPOSITIONS OF THE  
PREVIOUS MATTER TENDERED.

CROSS EXAMINATION CONTINUED.

No.4

SHOWN DOCUMENT.

Evidence of  
Barry Robert  
Leacy.

Q. That is your signature. A. Yes.

12th June 1964  
- continued.

Q. It is your signature to a deposition relating  
to a matter given by you on the 15th May, 1964.

A. Yes.

Q. That is proceedings in relation to car BRK-589.

A. Yes.

10

TENDERED

Q. On that day you said that the tyres in rela-  
tion to the particular vehicle were completely  
smooth. A. Yes.

P.P. I WILL TENDER THEM IN MY CASE.

B/C ADMITTED AND MARKED EXHIBIT "2".

IN RE EXAMINATION.

Earlier when I stated in my evidence earlier today  
I know I said about the front near tyres being  
devoid of all tread. This is correct. Then the  
vehicle was pulled to the nearside kerb, I then  
inspected the vehicle and found that both front  
tyres were smooth and compleatly devoid of any  
tread pattern on that part of the tyre which came  
into contact with the road surface.

20

READ BY WITNESS. grl. B.R.Leacy.  
Pro.Const.10759

TAKEN and SWORN at the Court  
of Petty Sessions, Redfern,  
this 12th Jun 1964  
before me,

30

JACK SCOTT  
Stipendiary Magistrate.

---

EVIDENCE OF THE APPELLANT

In the Court  
of Petty  
Sessions  
Redfern

---

No.5

Evidence of  
the Appellant.

12th June 1964.

THIS DEPONENT SWORN STATES.

My full name is Andrew Joseph O'TOOLE.

I live at 25 Pitt Road, North Curl Curl

On 26th February, this year I was the owner of  
motor vehicle no. BRK-589.

Q. Did you at the time have reason to look at the  
front tyre. A. Not really.

10 Q. Do you now remember what the condition of the  
tyres was at the time. A. They were getting pretty  
bad, getting a bit smooth.

Q. Would you accept the Constable's statement  
that they were completely smooth in all parts com-  
ing into contact with the road. A. Not all parts.  
There was a faint tread on the outside.

BY P.P.

Q. The constable saw you in May. Is that  
correct. A. It would be about then.

20 He said on oath it was May. Do you accept that.  
A. Yes.

MR. MADDOCKS. I suggest that the matter is com-  
plete now. The record is before the Court.

P.P. I was under the impression that the deposi-  
tions tendered were the depositions of the Constable.

EXAMINES PAPERS IN PREVIOUS MATTER.

P.P. It appears that the right of a Police Pro-  
secutor to appear before Your Worship in this  
matter is being contested.

30 BENCH. I don't propose to proceed further with  
the matter at this stage.

In the Court  
of Petty  
Sessions  
Redfern

No.5

Evidence of  
the Appellant.

12th June 1964  
- continued.

MR. MADDOCKS. This is as far as is necessary to  
take the evidence in this matter. There is evi-  
dence and there is now an issue.

BENCH. I am not going to continue with it today.  
It is now somewhat beyond 4 p.m.

READ BY WITNESS. grl  
-----

Taken and sworn at this  
Court of Petty Sessions,  
Redfern this 12th day of  
June 1964  
before me..

A.J.O'TOOLE.

JACK SCOTT  
Stipendiary Magistrate.

10

No.6

No. 6

Submissions  
by Appellant's  
Counsel.

SUBMISSIONS BY APPELLANT'S COUNSEL

SUMMONS CASE 5. 45

12th June 1964.

Police -V- Andrew Joseph O'TOOLE.

SMOOTH TYRES  
-----

PP. I would expressly request permission to  
appear before Your Worship on the next occasion  
this matter is before the Court and continue to  
assist Your Worship in this matter.

20

MR. MADDOCKS. I don't object to that.

MR. MADDOCKS. It is a matter which must be dealt  
with. It is of great importance.

BENCH. Had it been envisaged that this position  
was going to arise some special provision could be  
made for it. I would only list it for mention for  
three weeks at this stage.

MR. MADDOCKS. Perhaps it could be listed for  
mention in this Court early next week. Between

30

now and then we may be able to sort out a day on which Your worship will be here.

BENCH. There is no point mentioning it before anyone else. I will be presiding in a Country Circuit for a fortnight from 16th inst.

In the Court of Petty Sessions Redfern

No.6

PART HEARD BEFORE MR. J. SCOTT. S.M.

ADJOURNED FOR HEARING AT THIS COURT ON 3rd JULY, 1964 AT TEN A.M. FOR MENTION ONLY.

Submissions by Appellant's Council.

12th June 1964 - continued.

10

JACK SCOTT  
STIPENDIARY MAGISTRATE

No. 7

CONTINUATION OF HEARING

S.C.4.

Police -v- ANDREW JOSEPH O'TOOLE

Smooth tyres  
-----

PP. SGT. CURRY  
MR. MADDOCKS FOR AND WITH DEFENDANT

No.7  
Continuation of Hearing.

3rd July 1964.

REDFERN  
3-JUL 1964  
Traffic Court

BENCH. This matter is in the list today for mention only.

20 MR. MADDOCKS. I have spoken to my friend and we are agreed that it is a quite short matter and I am asking your Worship to proceed.

BENCH. Has the evidence been completed.

P.P. I have not yet finished cross examination.

SEE EVIDENCE WITHIN

In the Court  
of Petty  
Sessions  
Redfern

No. 8

CROSS-EXAMINATION OF THE APPELLANT

No.8

ANDREW JOSEPH O'TOOLE SWORN STATES

Cross-  
examination  
of the  
Appellant.

CROSS EXAMINATION BY POLICE PROSECUTOR CONTINUED.

3rd July 1964.

BENCH. PERHAPS AT THIS STAGE IT MIGHT BE CLARIFIED AS TO WHAT PORTION OF THE PREVIOUS EVIDENCE HAS BEEN ADMITTED.

P.P. I TENDERED THE CONSTABLE'S EVIDENCE ONLY ON THE LAST OCCASION.

BENCH. I UNDERSTAND THAT TO BE THE POSITION

10

WITNESS CROSS EXAMINED BY POLICE PROSECUTOR.

P.P. FOR THE SAKE OF PROCEEDINGS I TENDER THE WHOLE OF THE RECORD OF THE PROCEEDINGS AGAINST JOHN DAVID MADDOCKS ON 15th MAY, 1964.

BENCH. ARE WE NOT AT PRESENT IN THE CASE FOR THE DEFENCE.

MR. MADDOCKS. IN THOSE CIRCUMSTANCES I WILL TENDER THE WHOLE OF THE BALANCE OF THE COURT RECORD OF THE PREVIOUS PROCEEDINGS ON 15th MAY, 1964.

P.P. I CONSENT TO THAT.

20

EXH "2"

BY CONSENT. ADMITTED AND MARKED EXHIBIT "2"

BY POLICE PROS.

Q. You said on the last occasion that you were the owner of the vehicle concerned on 26th February, 1964. You said the tyres were getting pretty bad about that time, getting a bit smooth. A. Yes.

TO BENCH.

Q. You also said did you not, that you hadn't specifically looked at them for some time. A. Yes.

BY POLICE PROSECUTOR.

30

Q. You agree that you hadn't looked at them for

some time prior to this date and at the time of the occurrence the tyres would have got progressively worse. A. Yes.

Q. You agree that they would have been getting worse after the time you looked at them. A. Yes.

Q. So that you can't say how they were on this day. A. No.

Q. Then they may have been in the condition as described by the Constable. A. Yes.

10 TO MR. MADDOCKS

Q. Soon after the date of this incident did you make arrangements about replacing the tyres. A. Yes.

Q. Were they at that time still in condition to be retreaded. A. I had one done straight away and two more were in the process.

READ BY WITNESS. grl.

A.J. O'TOOLE

20 TAKEN AND SWORN at the Court of Petty Sessions, Redfern, this 3rd JUL 1964 before me

JACK SCOTT  
Stipendiary Magistrate.

No. 9

SUBMISSIONS BY APPELLANT'S COUNSEL

POLICE -V- ANDREW JOSEPH O'TOOLE

SMOOTH TYRES  
-----

MR. MADDOCKS. That is my case.  
POLICE PROSECUTOR. No evidence in reply.

In the Court  
of Petty  
Sessions  
Redfern

No.8

Cross-  
examination  
of the  
Appellant.

3rd July 1964  
- continued.

No.9

Submissions  
by Appellant's  
Counsel.

3rd July 1964.

In the Court  
of Petty  
Sessions  
Redfern

No.9

Submissions  
by Appellant's  
Counsel.

3rd July 1964  
- continued.

MR. MADDOCKS. The allegation in relation to facts are tied up with the....in this particular case I feel it is a matter of credit for Your Worship who will determine on what your worship heard in evidence and the general manner related in evidence as they were effected by the Part of Sgt Curry an advocate.

BENCH. Am I to take it that you are making any concession on the evidence as it stands as to whether an offence is shown by the evidence and then rely on fact that that evidence shouldn't be there.

10

MR. MADDOCKS. Yes.  
Perhaps I might be going too far there. My submission is that Your Worship is not entitled to consider the facts from this evidence if my submission is right that the prosecutor has no right to appear as an advocate. If Your Worship takes the view that he does have that right then it is a matter to be considered on the evidence as it stands.

20

The submission which I put is that the right to appear in this particular matter is derived from Section 70(2) of the current Justices Act, and that Sgt Curry is neither the Informant, a solicitor within section 15 of the Legal Practitioners Act or a member of the Bar. Your Worship has purported to allow him to appear by granting leave.

BENCH. If I might interrupt. The question of leave has never arisen until the conclusion of the proceedings on the last day.

30

MR. MADDOCKS. I concede that your worship has the power to grant leave to appear.

My submission is that the right of appearance is not a procedural matter. It is a matter of law whether or not he possesses those rights and if that right isn't present no procedural powers can cure the defect...or secondly if it is a procedural right then it should not be exercised in favour of a police officer where the complainant is also a police officer.

40

BENCH. Your submission is not affected by the question of whether or not the actual informant George Stephen William Smith was or was not present



in the court on the day.

MR. MADDOCKS. My submission is that the Informant in person would be the appropriate officer. That the Informant in person would have a right to conduct the matter.

BENCH. Do you wish to say anything Mr. Maddocks as to the position of the court having proceeded to this extent without objection to the appearance of the prosecutor.

10 MR. MADDOCKS. The objection was taken at the stage when it could only be said that the pro..... that the Sergeant was acting in no other capacity than that of an advocate.

20 BENCH. Is there anything on record before me, even now, to show that the prosecutor, the person who prosecuted is not the Informant. You have intimated (and it is not on the record but only because of the circumstances in which this case was before the court on the last occasion, being hurried on shortly before the court rose in an endeavour to deal with what was said to be a short matter, and at your request and I think it was only at that stage that you indicated you desired to test the decision of this Court if it was against your client, in a higher jurisdiction. I mention that only because  
30 if that is your intention and I know that you mentioned it only for the court's benefit in advance of the submissions you have now made, it is important that the Supreme Court have a proper record and it does occur to me that so far as the record and the proceedings have gone, there is nothing whatever to show that the Informant has not been present.

MR. MADDOCKS. I ask that the Information be exhibited. I know it is recorded that the Sergeant Curry is appearing.

40 POLICE PROSECUTOR SGT. CURRY. Mr. Maddocks has conceded that if I am given leave to appear at the stage it was given, that I am given leave to appear in the whole proceedings. Your Worship has given that leave so we then come to the basic issue as to whether Your Worship has the power to grant that leave.

In the Court  
of Petty  
Sessions  
Redfern

No.9

Submissions  
by Appellant's  
Counsel.

3rd July 1964  
- continued.

In the Court  
of Petty  
Sessions  
Redfern

---

No.9

Submissions  
by Appellant's  
Counsel.

3rd July 1964  
- continued.

MR. MADDOCKS. I agree that on my submissions that is the position.

SGT. CURRY. In relation to his submission as to Your Worship having no procedural power to grant leave there are mentioned in the exhibit tendered, the record of the proceedings at Redfern Court on 15th May, 1964, several cases mentioned. I don't intend to re-iterate them for the purposes of this record, except to say that they act individually and collectively as a guide to Your Worship and as a precedent set as to other matters in this State and otherwise and they do in effect allow your worship a discretionary power, which Your Worship has exercised, to grant leave to anyone to appear in any matter.

10

Mr. Maddocks has further submitted that if your worship has that procedural right or power, the submission was that it should not be to a police officer, but if your worship has the right to grant leave for one person to appear on behalf of another, Your Worship has the right to grant leave to anyone to appear, Police Officer or otherwise, and there is no reason why a police officer should be excluded.

20

That is all I have to say on that matter.

BENCH. I have no desire to hear you on the facts.

SGT. CURRY. I might say this, it has been the practice in the Courts in the jurisdiction in which your Worship sits to allow Police Officers, popularly designated Police Prosecutors to appear to assist the court for over half a century past, possibly in thousands of cases each year in numerous courts. This practice has never been upset in any judicial decision to my knowledge. Even on the cases mentioned Busato and Dempsey was a case in the High Court of this Country and was not upset in that Court.

30

BENCH. I might say again that this matter was of course in the list for mention only to-day but I understand you are pressing me to make a decision on the matter forthwith.

40

MR. MADDOCKS. Yes, I am.

BENCH. And the fact is of course that I have not the benefit of having applied myself to the cases that have been quoted by the Prosecutor and generally of course the Court should at least make itself familiar where it is not already familiar with the specific purported authorities.

In the Court  
of Petty  
Sessions  
Redfern  

---

No.9

Submissions  
by Appellant's  
Counsel.

3rd July 1964  
- continued.

10 AS I see the matter however, and in view of your intimation that it is desired to test this matter further and in the knowledge of expectation that if my conclusions went in your favour the prosecution I feel would undoubtedly also desire to test it, it seems to me that it would be more important for me in my decision to make clear the whole circumstances in which the matter has been dealt with rather than lend my effort by a deeply considered opinion which will not in fact be of any great purpose to anybody and if you agree that that is the position I will be prepared to give a decision to-day without referring to the specific authorities mentioned.

20

MR. MADDOCKS. Yes.

I would press your worship to a decision being in agreement with what your worship says in that regard. Because of the matter of time it is somewhat important to me in the matter of my intended test.

---

No.10

No.10

CONCLUSIONS OF J. SCOTT, ESQ.

Conclusions  
of J. Scott,  
Esq.

30 BENCH. In those circumstances I will proceed to give my conclusions forthwith.

3rd July 1964.

At the outset I might say that these proceedings were listed today for mention only, having previously been before me on 12th June, 1964, a date when Mr. Maddocks of Counsel was pressing me to a conclusion of the proceedings on that day. It was however a matter which was returnable for the first time on that date and although Mr. Maddocks was informed early on that day and on more than one occasion throughout the day that there was little prospect

In the Court  
of Petty  
Sessions  
Redfern

No.10

Conclusions  
of J. Scott,  
Esq.

3rd July 1964  
- continued.

of it being reached he informed the court it was such a short matter he preferred to wait in the hope that it would be disposed of.

It was in fact commenced only a short time before the court normally rises and with the concurrence of counsel in another matter who was then part heard before me in that matter, in the hope that it could be disposed of. At a time beyond the normal court rising time I declined to continue with the matter and in view of the fact that I was then to be engaged on a country circuit until 29.6.64 the matter was put in the list for to-day as the first convenient day when it could be listed, to choose another day when it would be heard.

10

At the conclusion of the proceedings on the previous day (and although it is not recorded) Mr. Maddocks did inform me that my decision in the matter if adverse to his client would be tested in a higher jurisdiction. This statement of course was made for the advance information of the Court. Not envisaging that this matter would proceed to-day I have not at this stage had the benefit of reference to cases that have been referred to and which are contained in the record of earlier proceedings which are an exhibit in this case. The defence of course is, or rather, raises an important point of law and that is, the power of the court to allow the proceedings to be prosecuted by a person other than mentioned in section 70 of the Justices Act, and normally I would not proceed to a conclusion of the matter without giving attention to those authorities as quoted.

20

30

Being pressed to make the conclusion however to-day and in the knowledge also that it has been the practice for very many years for police matters to be prosecuted in the Courts by police officers other than the Informants in cases, and in the knowledge that a finding against the validity of this course would almost surely result also in a test of the matter if my decision were against the practice, it seems to me that the reasons for my conclusions will not really be of any importance to anyone. I would therefore consider it of greater moment that I make it clear what in fact has taken place in these proceedings. Mr. Maddocks has conceded that if there is power in the court to grant leave for the prosecution of the matter by a person

40

other than the Informant that I have in fact in these proceedings granted leave to the prosecutor Sgt. Currey at the conclusion of the earlier days PROCEEDINGS AND THAT IS IN EFFECT LEAVE GRANTED in respect of the whole proceedings or in other words tantamount to the situation where the prosecutor did in fact at the outset seek leave and was granted leave. The fact is as I see it that any error of law, if such has been made, has already  
 10 been made and that there is nothing that the Court could in fact do to alter that position. I must therefore deal with the evidence as it stands and on that evidence I find the offence charged has been made out.

In the Court  
 of Petty  
 Sessions  
 Redfern  
 \_\_\_\_\_

No. 10

Conclusions  
 of J. Scott,  
 Esq.

3rd July 1964  
 - continued.

I feel perhaps that it also should be made clear on the record that no objection was taken at the outset of the proceedings to the conduct of the proceedings by the officer who is in fact a  
 20 Sergeant of Police but not the Informant. I might say also that it has not been in fact, until today that my own mind has been turned at all to the question of who was the Informant. It is a fact also that the Informant was not called by the court before the commencement of the proceedings. It is also a fact that I personally did not even know the name of the prosecuting Sergeant until to-day. It is to me, also a known fact, although this does not of course appear from these proceedings, that it  
 30 has been a practice in many places for many years for the officer who in fact will prosecute the proceedings to lay the information, and I believe that this practice does continue largely, at least outside the metropolitan area. I, as the court do not in fact know whether the Informant George Stephen William Smith was present in or at the court on 12.6.64. Although not in fact knowing and the fact not having been raised in any way as to who was the Informant or the particular person purporting to prosecute, or without in any way  
 40 turning my mind in that direction, it can be properly said that I accepted that latter officer's appearance as a prosecutor irrespective of whether or not he was also the Informant. I have already done what Mr. Maddocks submits I should not have done. It is now too late for me to cure that position, if I have been wrong, and even if it is not also, that Mr. Maddocks' complaint or objection has come too late. The offence is found proved.

In the Court  
of Petty  
Sessions  
Redfern

No. 11

VERDICT

S.C.4.

No. 11

POLICE -V- ANDREW JOSEPH O'TOOLE

Verdict

SMOOTH TYRES

- - - - -

3rd July 1964.

PP.

This Court August, 1963. Speeding. £12 and costs.

Penrith 1962 - speeding £10 and costs.

Two others for speeding back to 1960 and 1953.

A matter of driving a motor vehicle under influence  
of intoxicating liquor and on appeal discharged  
under Section 556A.

10

Licensed 1947.

Nothing prior to equipment.

BENCH. The deft has been driving for almost 20  
years and although he has four previous convictions  
for driving offences he has nothing for equipment  
previously. Only one tyre was involved.

FINED £2 COURT COSTS £1 IN DEFAULT SIX DAYS  
IMPRISONMENT WITH HARD LABOUR.  
ALLOWED ONE MONTH TO PAY.

20

JACK SCOTT  
STIPENDIARY MAGISTRATE

REDFERN  
3.7.64  
TRAFFIC COURT

-----

No. 12

AFFIDAVIT OF THE APPELLANT

In the Supreme  
Court of New  
South Wales

IN THE SUPREME COURT }  
OF NEW SOUTH WALES }

No. T 250 of 1964

No.12

Affidavit of  
the Appellant.

16th July 1964.

Ex parte ANDREW JOSEPH O'TOOLE

Re JACK SCOTT and GEORGE STEPHEN  
WILLIAM SMITH

AND in the matter of the Supreme  
Court and Circuit Courts Act  
1900-1948, Sec. 20.

10

ON the 16th day of July One thousand nine hundred  
and sixty four ANDREW JOSEPH O'TOOLE of 25 Pitt  
Road, North Curl Curl in the State of New South  
Wales Clerk being duly sworn makes oath and says as  
follows:

1. I am the defendant in the matter in which  
George Stephen William Smith, a Sergeant of Police,  
is the informant.

20 2. This matter was determined by J. Scott,  
Esquire, Stipendiary Magistrate on 3rd July 1964  
when I was fined £2. and £1. costs for an alleged  
breach of the regulations under the Motor Traffic  
Act 1909 as amended.

3. At the hearing of the Information the said  
George Stephen William Smith did not appear and the  
case was conducted for the informant by Police  
Sergeant Currey by leave of the learned magistrate.

30 4. Counsel who appeared for me at the hearing,  
objected to the said Sergeant Currey assuming the  
functions of an advocate and submitted that the  
learned Magistrate had no power to invest the  
Sergeant with a right of audience by granting leave  
or that if there were such a power it should not be  
exercised to allow a police officer, not coming  
within Section 70 (2) of the Justices Act 1903-1957,  
to appear on behalf of another officer.

In the Supreme  
Court of New  
South Wales

No. 12

Affidavit of  
the Appellant.

16th July 1964  
- continued.

5. The said Sergeant Currey cross-examined me and led evidence for the informant from a Police Constable which raised an issue on credit between the said Constable and me.

6. Counsel appearing for me and the Police Sergeant who purported to appear for the informant both addressed the learned Magistrate at the conclusion of the evidence and both had addressed when the objection was taken on the first day of hearing on 12th June 1964.

10

7. It was submitted the issues of credit with the Police Constable might well have been affected by the appearance of a Police Officer as advocate and I respectfully ask that this Honourable Court direct that a writ of Prohibition be issued to restrain the learned Magistrate and the informant from proceeding upon this finding by the said Magistrate.

SWORN by the Deponent on the }  
16th day of July 1964 }  
at Sydney. Before me: }

A.J. O'TOOLE

20

J.B.L. WATTS J.P.

A Justice of the Peace.

No. 13

Order Nisi.

16th July 1964.

No. 13

ORDER NISI

IN THE SUPREME COURT }  
OF NEW SOUTH WALES }

T No. 250 of 1964.

EX parte ANDREW JOSEPH O'TOOLE

Re JACK SCOTT and GEORGE STEPHEN  
WILLIAM SMITH

30

AND in the matter of the Supreme  
Court and Circuit Courts Act  
1900-1948, Sec. 20.

The 16th day of July 1964.

Upon motion made this day WHEREUPON AND UPON



10 READING the affidavit of Andrew Joseph O'Toole sworn the 16th day of July 1964 and UPON HEARING Mr. Maddocks of Counsel for the applicant IT IS ORDERED that the abovenamed Jack Scott, Esquire, Stipendiary Magistrate, and George Stephen William Smith, Sergeant of Police, do show cause before Mr. Justice McClemens on Tuesday the 4th day of August 1964 at the hour of ten o'clock in the fore noon or so soon thereafter as the business of the Court permits, why a writ of prohibition should not issue out of the Court directed to the said Jack Scott and George Stephen William Smith to restrain them from proceeding upon the order made the 3rd day of July 1964 on the grounds that:

1. That the Police Officer who purported to appear for the abovementioned George Stephen William Smith had no right of audience before the learned Magistrate.
- 20 2. The abovenamed Jack Scott, Esquire, exceeded his powers as a Stipendiary Magistrate in purporting to invest the Police Officer with a right of audience before him.
3. If there is such a power in the learned Magistrate it should not have been exercised in favour of a Police Officer to appear on behalf of another officer.
- 30 4. The appearance of a Police Officer as advocate might well have prejudiced the defendant on issues of credit with such other Police Officer involved in the case.

and IT IS FURTHER ORDERED that service upon the Metropolitan Superintendent of Traffic, Sydney, be deemed service on the abovenamed George Stephen William Smith.

BY THE COURT

John H. McClemens, J.

JUDGE

---

In the Supreme  
Court of New  
South Wales

No. 13

Order Nisi.

16th July 1964  
- continued.

In the Supreme  
Court of New  
South Wales

No. 14

JUDGMENT OF McCLEMENS J.

No. 14

IN THE SUPREME COURT )  
OF NEW SOUTH WALES )  
IN CHAMBERS. )

cm/crm.5

Judgment of  
McClemens J.

CORAM: McCLEMENS, J.

12th August  
1964.

Wednesday, 12th August 1964

EX PARTE ANDREW JOSEPH O'TOOLE re JACK SCOTT  
AND GEORGE STEPHEN WILLIAM SMITH

JUDGMENT

10

HIS HONOUR: This is a rule nisi for a writ of prohibition which I deal with as a matter of exigency.

The applicant was charged before a Stipendiary Magistrate on 3rd July 1964, with a breach of Regulations made under the Motor Traffic Act, 1939, as amended, and was fined £2 and £1 costs.

The informant was a sergeant of police, and as usual, another police sergeant appeared to prosecute by leave of the Magistrate. The evidence was given by a police constable and, although the affidavit does not say so clearly, it would seem that the officer who reported the breach was not Sergeant Smith who laid the information, the latter doing this as part of the ordinary routine of traffic prosecutions. 20

When the matter came on before the Magistrate Mr. O'Toole's counsel objected to Police Sergeant Currie prosecuting, claiming that the provisions of s.70 (2) of the Justices Act, No. 27 of 1901 laid down a code, and that no one but the prosecutor or complainant in person or his counsel or attorney can be permitted to appear. 30

Mr. Maddocks, who appeared for the applicant, and who argued the case very well indeed, has said that on a true construction of s.70 (2) it operates

so as to prevent anyone who does not fall within s.70 (2) from appearing even by leave. In my opinion this contention cannot be supported. In the first instance the legislature must be deemed to have legislated against absurdity, and must be presumed to know the great variety of business that Magistrates' Courts transact often under circumstances of great pressure and great difficulty. Some cases involve matters of the most trifling sort, but the wide scope of the Magistrates' work also brings to their Courts cases of complexity and of great importance. To these Courts come all sorts of conditions of men and women with all types of cases. Sometimes wives come because their husbands cannot be there, there are cases of parents and children, friends coming with and for the illiterate, crippled and ill; solicitors' clerks coming to get adjournments and so forth.

10

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40

If a party appears in person he must be heard and allowed to conduct his case. If he is represented by Counsel or solicitor, his representative must be heard and allowed to conduct the case on behalf of the client. Prescinding from the special cases where agents are given the right to appear, the only people who have a right to be heard are those mentioned in s.70 (2) and (3) and on committal proceedings those referred to in s.36(2) and (3). 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 that is a matter for him. If he allows a friend to appear for an illiterate person, then that again is a matter for him. If the Magistrate is prepared to hear a prosecutor who is a member of the Police Force and not a counsel or attorney, it is matter for him. He could refuse to hear the police officer if he thought it was undesirable to do so. But he is certainly entitled to hear him.

In the Supreme  
Court of New  
South Wales

No. 14

Judgment of  
McClemens J.

12th August  
1964 -  
continued.

Apparently before 1848 no one had by law a right to act as an advocate before justices of the peace without their permission. In *Collier v. Hicks* ((2) B & A 668) Lord Tenderden, C.J. dealt with the position of justices at common law. He said:-

In the Supreme  
Court of New  
South Wales

No. 14

Judgment of  
McClemens J.

12th August  
1964 -  
continued.

"...who shall be allowed to take part in the proceedings, must depend on the discretion of the magistrates; who, like other Judges must have the power to regulate the proceedings of their own courts."

Then he goes on to say:

"On the hearing of an information, the magistrates, having the discretionary power to regulate the proceedings of their own courts, may decide who shall appear as advocates, and whether, when the parties are before them, they will hear any one but them. It may be, and is, in some cases, very convenient that magistrates should hear counsel or attorneys as advocates, and allow them...but it has never been decided that any one can claim, as a right, to act in that capacity, without the consent, and against the will of the magistrates."

10

In England in 1848 by the Statute 11 and 12 Vic. Ch.43 s.12 the right of audience before justices was given to counsel and attorneys. The right of audience of counsel and attorneys was subsequently provided for by statute in this State and now finds expression in s.36 and s.70 of the Justices Act 1902-55, which give both prosecutors, complainants and defendants in preliminary inquiries as to indictable offences (s.36) and on the hearing of matters involving offences punishable on summary conviction and complaints (s.70) a right of representation. But these sections do not give an exclusive right of audience and there is nothing in them that cuts down the ordinary common law rule.

20

30

In Ex parte Graves (8 W.N.45) Innes, J., with whom Stephen, J. agreed, said: "A justice might permit any person to conduct the case for one of the parties, as for instance, if the party in the case had an impediment in his speech".

In Victoria in the case of Ritter v. Charlton (29 V.L.R.558) it was said by the Victorian Full Court that s.77 of the Justices Act 1890, which gives a right of audience to parties, their Counsel or attorneys, in Courts of Petty Sessions, does not preclude justices in Petty Sessions from allowing

40

any person whom they may think fit to conduct a prosecution under special circumstances. The judgment there points out that the justice cannot exclude the counsel and attorney for the prosecution nor the counsel and attorney of the defendant, and went on to say:

In the Supreme  
Court of New  
South Wales

                      
No. 14

10            "It cannot be contended with any show of reason where the prosecutor has no counsel or attorney that the justice is not to accept the aid of any other fit and proper person in discharging his duty of hearing the evidence and dealing with the charge."

Judgment of  
McClemens J.

12th August  
1964 -  
continued.

20            In the Canadian case of R.V. Fenton (47. 2 D.L.R. 759) a conviction was sought to be set aside on the ground that a Royal Canadian Mounted Police Officer was permitted to question the informant. There the statute applicable provided "the informant shall be at liberty to conduct the complaint or information and to have the witnesses examined by counsel or attorney on his behalf". The Chief Justice of New Brunswick agreed with the view that "this sub-section is merely permissive and does not make it obligatory for the prosecutor to be represented by counsel", though he did go on to say "but the practice of police officers acting as counsel is not encouraged by the courts". (Page 762).

30            Mr. Maddocks pressed on me that there has been a denial of natural justice here, in that to permit a police officer, not the informant, to conduct a police prosecution is to create a situation in which it cannot be asserted that justice is done to the defendant. In my opinion this submission has no foundation.

40            Whether the almost universal practice in this State of police prosecutions being conducted by police prosecuting officers is desirable or not, or whether it should be changed or modified, is not for me to say. The fact is it exists and has existed for many years. It is true that the police prosecutor has no right to demand to be heard unless he is the informant, but equally the Magistrate if he sees fit has a power to hear him.

This application fails and the rule nisi is discharged with costs.

---

In the Supreme  
Court of New  
South Wales

No. 15

DISCHARGE OF ORDER NISI

No. 15  
Discharge of  
Order Nisi.

IN THE SUPREME COURT }  
OF NEW SOUTH WALES }

T No. 250 of 1964

12th August  
1964.

Ex parte ANDREW JOSEPH O'TOOLE  
re JACK SCOTT and GEORGE STEPHEN  
WILLIAM SMITH

AND in the matter of the Supreme  
Court and Circuit Courts Act  
1900-1948, Sec. 20.

10

The twelfth day of August, 1964.

This matter coming on for hearing on the 4th and  
6th days of August 1964 pursuant to the Rule Nisi  
herein dated the 16th day of July, 1964 WHEREUPON  
AND UPON READING the affidavit of Andrew Joseph  
O'Toole sworn the 16th day of July, 1964 and filed  
herein AND UPON HEARING Mr. Maddocks of Counsel for  
the applicant and Mr. O'Brien of Counsel for the  
respondents IT WAS ORDERED that the matter stand  
for judgment and the same standing in the list this  
day for judgment accordingly IT IS ORDERED that the  
said Rule Nisi be and the same is hereby discharged  
AND IT IS FURTHER ORDERED that the costs of the  
respondents of and incidental to the suit be taxed  
by the proper officer of this Court and that the  
applicant do pay the said costs as so taxed.

20

By the Court

FOR THE PROTHONOTARY

E.F. Lennon (L.S.)

30

CHIEF CLERK

\_\_\_\_\_

No. 16

In the Privy  
Council

ORDER IN COUNCIL GRANTING SPECIAL  
LEAVE TO APPEAL

No.16

(L.S.)

AT THE COURT AT BUCKINGHAM PALACE

Order in Council  
granting Special  
Leave to Appeal.

The 22nd day of December, 1964

22nd December  
1964.

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

10	Lord President	Mr. Jenkins
	Lord Chesham	Mr. Willey
	Mr. Secretary Stewart	Mr. Du Cann
	Mr. Secretary Griffiths	Sir Kenneth Pickthorn

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 23rd day of November 1964 in the words following viz.:-

20 "WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Andrew Joseph O'Toole in the matter of an Appeal from The Supreme Court of New South Wales between the Petitioner and (1) Jack Scott and (2) George Stephen William Smith (Respondents) setting forth that the Petitioner desires to obtain special leave to appeal to Your Majesty in Council against a Judgment of The Supreme Court of New South Wales in which the Court on the 12th August 1964 dismissed the Petitioner's Application and discharged the Rule Nisi made by the Court on the 16th July 1964 to prohibit the Respondents and each of them from proceeding upon an Order made on the 3rd July 1964 by the first Respondent a Stipendiary Magistrate for the State of New South Wales sitting at Redfern in the said State that the Petitioner pay a fine of £2 and £1 costs for a breach of the Regulations made under the Motor Traffic Act 1909 upon an Information laid by the second Respondent a Sergeant of Police: that a question of law arises as to the extent of Magistrates' powers generally: And humbly praying Your Majesty in Council to grant him special leave to appeal against the Judgment of the Supreme Court of New

30

40

In the Privy  
Council

---

No. 16

Order in Council  
granting Special  
Leave to Appeal.

22nd December  
1964 -  
continued.

South Wales dated the 12th August 1964 and the Order of the Court of Petty Sessions Redfern in the State of New South Wales dated the 3rd July 1964 or for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof no one appearing at the Bar on behalf of the Respondents Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Supreme Court of New South Wales dated the 12th day of August 1964:

10

"AND Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

20

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of the State of New South Wales and its Dependencies in the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

30

W.G. AGNEW

---



E X H I B I T SExhibitsEXHIBITRECORD OF EXHIBITSRecord of  
Exhibits

POLICE versus ANDREW JOSEPH O'TOOLE

3rd July 1964.

(Offence) Smooth Tyres

10	Disting- uishing Number	Description of Exhibit	Produced In by Prose- whose cution or custody Defence as or how case may disposed be of
	1.	Deposition of Const. Barry Robert Leacy taken in Summons Case No.45 at Redfern on 15th May, 1964.	P  Filed with Court Papers, Town Hall
20	2.	Balance of record of proceedings in Summons Case No.45 at Redfern on 15th May, 1964	D  Traffic Court Redfern on 15th May,1964

G.R. Leader  
Deposition Clerk  
Redfern Town Hall

3. 7. 64.

Exhibits

EXHIBIT

Information  
in Police  
v. Maddocks

INFORMATION in POLICE v. MADDOCKS

Const. B.R. Leacy

45

15th May 1964

No. 2 Division

FOR HEARING AT THE COURT OF PETTY SESSIONS, REDFERN,

ON .....

I N F O R M A T I O N

FIFTEENTH

MAY

1964

The Motor Traffic Act, 1909 as amended  
Regulation 92 (1) (b) Schedule F 82

10

NEW SOUTH WALES )

REDFERN )

TO WIT )

John David Maddocks,  
11, David Street,  
CLIFTON GARDENS.

O.S.  
FEE 20/-

BE IT REMEMBERED, THAT on this seventh day of May  
in the year of our Lord one thousand nine hundred  
and sixty four at Redfern, in the State of New  
South Wales, George Stephen William Smith,  
Sergeant of Police (hereinafter called the  
Informant), of the Police Traffic Branch, Sydney,  
appears before me, the undersigned, one of Her  
Majesty's Justices duly assigned to keep the  
Peace of our Lady the Queen in and for the State,  
and

20

informs me that on the twenty-  
sixth day of February, in the year of our Lord  
one thousand nine hundred and sixty four one  
John David Maddocks (hereinafter called the  
Defendant) at Ultimo in the State of New South  
Wales, did drive a motor vehicle, to wit,  
motor car No. BRK-589, upon a public street  
to wit, Harris Street such motor vehicle being  
then equipped with tyres which said equipment  
did not conform with the requirements specified  
in Schedule F to the Regulations made under the  
Motor Traffic Act, 1909, as amended, contrary

30

to the Act or Regulation in such case made and provided; whereupon the said Informant prays that I, the said Justice, will proceed in the premises according to law.

Exhibits

Information  
in Police  
v. Maddocks

15th May 1964  
- continued.

10

EXHIBITED at the Court of  
Petty Sessions, Redfern, in  
the said State, on the day  
first above written, before  
me, -

Geo. S.W.Smith

S.V. Jackson

Justice of the Peace.

---

EXHIBIT

SUMMONS

Summons

S U M M O N S

7th May 1964

(DIVISIONS 1 AND 2, JUSTICES ACT, 1902, AS AMENDED)

---

RECEIVED

11 MAY 1964

Court House, Redfern.

20

To John David Maddocks  
11, David Street,  
of CLIFTON GARDENS. , in the  
State of New South Wales,

30

WHEREAS on this Seventh day of May in the year of our Lord one thousand nine hundred and sixty-four at Redfern, in the State of New South Wales, George Stephen William Smith, a Sergeant of Police (hereinafter called the Informant), of the Police Traffic Branch, Sydney, appears before me, the undersigned, one of Her Majesty's Justices duly assigned to keep the Peace of our Lady the Queen in and for the State, and informs

Exhibits

Summons

7th May 1964 -  
continued.

me that on the twenty-sixth day of February, in the year of our Lord one thousand nine hundred and sixty-four one John David Maddocks (hereinafter called the Defendant) at Ultimo, in the State of New South Wales, did drive a motor vehicle, to wit, motor car No. BRK-589, upon a public street, to wit, Harris Street such motor vehicle being then equipped with tyres which said equipment did not conform with the requirements specified in Schedule F to the Regulations made under the Motor Traffic Act, 1909, as amended.

10

These are therefore to command you, in Her Majesty's name, to be and appear on FRIDAY, the FIFTEENTH day of MAY 1964 at ten of the clock in the forenoon, at the COURT OF PETTY SESSIONS, TOWN HALL, 73 PITT, STREET, REDFERN, in the said State, before such Stipendiary Magistrate for the said State as may then be there, to answer to the said information, and to be further dealt with according to law.

20

GIVEN under my hand and Seal the day and year first above written, at Redfern, in the said State.

S.V. Jackson  
Justice of the  
Peace.

MAGISTRATES'  
L.S.  
SEAL

EXHIBIT

Opening  
of trial

OPENING OF TRIAL

SUMMONS CASE NO.45

30

15th May 1964

POLICE versus JOHN D.A. MADDOCK  
OFFENCE : Smooth Tyres

P.P. SGT. Rittick  
DEFENDANT IN PERSON.  
CHARGED.  
PLEA. NOT GUILTY.  
FACTS

REDFERN  
15th MAY 1964  
Traffic Court

Later in No. 3 Court  
Prost. Const. Milne  
P.N.C.

40

SEE OVER.

EXHIBITEVIDENCE OF BARRY ROBERT LEACYExhibitsEvidence of  
Barry Robert  
Leacy

15th May 1964

THIS DEPONENT SWORN STATES  
MY NAME IS BARRY ROBERT LEACY.  
I AM A CONSTABLE OF POLICE STATIONED AT REGENT  
STREET POLICE STATION.

10 At about 10.15 a.m. on Wednesday 26.2.64, I was  
performing traffic duty at the Iron Bridge Gates  
in Harris Street, Ultimo. I had occasion to see  
vehicle BRK-589 being driven east in Harris Street,  
with the front nearside tyre smooth. I spoke to  
the driver and said "You have a smooth tyre".

BENCH. Was the driver the defendant now before the  
Court?

20 A. Yes. I said "Would you pull over to the kerb  
please." On pulling over to the kerb the deft  
got out of his car and I said to him "Upon my  
inspection of your car I see that the 2 front  
tyres are smooth and in fact are devoid of tread  
on that part of the tyre which comes in contact  
with the road". He looked at the tyres and said  
"Yes". I said "What explanation have you". He  
said "It is not my car. I know nothing of it".  
I then asked the deft to produce his license. He  
failed to do so, I informed him I would report  
the matter. Harris St., Ultimo is a public street  
in N.S.W. I TENDER A COPY OF THE REGULATIONS UNDER  
THE MOTOR TRAFFIC ACT IN FORCE ON THE DATE OF THE  
ALLEGED OFFENCE AND STILL IN FORCE .....EXHIBIT ONE.  
30 The speed of the deft when I first saw his vehicle  
was..... NOT CONTINUED ... I don't remember the speed.

Pardon me, Sir. The vehicle was slowing down  
travelling east. It is a dangerous intersection.  
Most vehicles travel slowly there. Weather was  
fine. Roadway was dry bitumen. Traffic was medium  
at the time. I inspected the tyres by looking at  
them and then feeling them with my hand.  
The deft also looked at the tyres with me.  
He did not touch them.

40 Q. Were the tyres clean. A. I do not know.

Q. Any mud on the tyres or such other substance.

A. I don't recall anything outstanding that came  
to my notice.

Q. Can you recall any further conversation with the  
defendant. A. No.

Exhibits

Evidence of  
Barry Robert  
Leacy

15th May 1964  
-continued.

## CROSS EXAMINATION.

Q. When you inspected the tyres no tread was visible.

A. None at all.

Q. Not possible to see where the tread should be.

A. It had no tread on it at all where it came into contact with the roadway.

Q. You examined the tyres on 2 occasions... firstly when the car was first stopped.

10

A. No. The first time I said "I saw the tyre was smooth whilst I was in the middle of the road". The 2nd time I fully examined them.

Q. You saw the tyres for something like 30 seconds.

A. I think the conversation and the time I was there was well in excess.

Q. First time you saw the tyres was when the deft asked you for directions.

A. I first saw the tyre when the car was moving slowly towards me.

20

Q. How long have you been involved with motor cars.

A. I have taken an interest in cars since I was a young boy.

Q. How much experience have you had with equipment.. of cars.

A. As far as the regulations go ... 3 years.

RE EXAMINATION. You said you have had experience with equipment since you were a young boy.

A. Yes.

30

Q. During that time have you on any occasions seen tyres that have been void of all tread pattern on that part of the tyre which normally come into contact with the road surface.

A. Yes, where I lived there used to be an old tip and many tyres were tossed in there.

DEFENDANT .... PERMISSION

Q. Could I have your age please. A. 20 in September.

PROSECUTOR. NOTHING ON THAT.

40

BENCH. HOW LONG HAVE YOU BEEN A CONSTABLE.

A. September last. I was in the cadets before. I joined the cadets in August, 1961.

Read and adhered to. Tmc.

B.R. Leacy

Pro. Const. 10759

Taken and sworn at the court of  
Petty Sessions, Redfern this  
15.5.64 before

J. Byrne

Stipendiary Magistrate.

50

EXHIBITEVIDENCE OF J.D. MADDOCKSExhibitsEvidence  
of J.D.  
Maddocks

PROSECUTOR..THAT IS MY CASE.

15th May  
1964

THIS DEPONENT SWORN STATES

MY NAME IS JOHN DAVID MADDOCKS.

10 I LIVE AT THE ADDRESS IN THE INFORMATION. I AM THE  
DEFENDANT IN THIS MATTER. I AM A PRACTISING  
BARRISTER.

20 On 26.2.64 I was travelling Harris Street, Ultimo  
towards the intersection of the Iron Bridge I  
stopped to ask the constable on point duty  
directions to the Technological Museum which is  
about 100 yards further on. The constable asked  
me to pull over to the kerb at the corner 20 to 30  
feet away. I did that and got out of the car and  
the constable pointed out that he thought the tyres  
on both front wheels were smooth. I looked at the  
tyres. I had never seen them before. I agreed  
with the constable there was not much tread on them.  
I would suggest it was possible to discern where  
the tread marks went.

30 BENCH. Was that on all parts visible to you on  
each tyre. A. Yes, there was an indication on both  
tyres. I will say the tread was uneven...and not  
thick. I explained to the constable that it was  
not my car and I had never seen the tyres before.  
I have been driving this car at the most for ten  
minutes. It belonged to an employee of a company  
of which I am a director. I own a car of the same  
model and year and have driven some 60,000 miles  
in it. There is no suggestion the tyres were in a  
dangerous condition from my feeling of the way the  
car was handling during the ten minutes in which  
I drove it.

40 BENCH... Did each tyre have clearly visible tread  
pattern on all parts of it which normally comes  
into contact with the road surface. A I am not  
prepared to say all parts ... The tread was  
uneven but was discernable.

CROSS EXAMINATION

Q. You remember this incident well. A. Before I

Exhibits

Evidence  
of J.D.  
Maddocks

15th May  
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continued.

answer I object to the officers appearance as an advocate. Will you hear me now, Sir, or at the conclusion.

BENCH. IF YOU STEP DOWN NOW...I WILL HEAR YOU.

MR. MADDOCKS. As I understand it the Complainant is Sgt. Smith. This is not the officer who is prosecuting. As I understand it the officer is not in the role of a barrister of the Supreme Court nor does he come within the Section 15 of the Legal Practitioners Act. I would say it is a matter for the officer to say it is right for him to appear in this matter.

10

PROSECUTOR...In this matter, Sir, concerning the right of appearances of police prosecutors in these courts it has come under notice before many s.m.'s. I refer you, Sir, to some well known cases which gives us right to appear before you, Sir, to assist you and the Court in the presentation of the facts.  
Ritter -v- Charlton 29 V.L.R. at 558

20

MR. MADDOCKS. If he would like to tender the document I do not object  
Brennan -v- Alexander 1932 S.A.S.R. Vol.12 at 346  
Busato -v- Dempsey 1909 11 W.A.L.R. at 238.  
In the High Court F.E.D.F.A. -v- B.H.P. LTD. 16 CLR at 248

Those are the .... there/is one Sir, ex parte Grieves 8 W.N. at 44

30

It has been stated, Sir, in most of...in all of those cases I have submitted various aspects concerning the rights of appearance of persons before Court of Petty Sessions.

BENCH. I grant leave to the prosecutor to appear to assist the court.

CROSS EXAMINATION.

A. Reasonably well.

Q. You did immediately the constable spoke to you drive your vehicle to about 20 to 30 feet from where you spoke to him. A. Yes.

40



Q. You then got out and accompanied the constable to the front of your vehicle. A. Yes.

Q. Did you see how he inspected the tyres. A. I must have seen him. I don't remember.

Q. You said you remembered this reasonably well. A. Yes.

Q. You said you have never seen the tyres before this occasion. A. Yes.

10

Q. In fact on some parts of those tyres there was no visible tread. A. Yes.

I think you could see where the tread ran in all parts. It was uneven.

Q. Did you understand my first question. A. You might repeat it.

Q. On some parts of the tyres it is fact there they were void of all tread. A. That is possible on odd spots.

Q. You had never seen the constable before.

A. No.

20

Q. What he has told the court is substantially correct. A. I don't have any special memory of the conversation. Apart from that I agree the evidence is substantially correct.

RE EXAMINATION...NIL.

READ AND ADHERED TO....Tmc.

J. Maddocks

Taken and sworn before

J. Byrne

Stipendiary Magistrate.

Exhibits

Evidence  
of J.D.  
Maddocks

15th May  
1964 -  
continued.

Exhibits

EXHIBIT

Submission  
of Mr.  
Maddocks

SUBMISSION OF MR. MADDOCKS

S.C. 45

15th May  
1964

THE COMMISSIONER FOR POLICE

-v-

JOHN D.A. MADDOCKS  
"SMOOTH TYRES"

AT THE CONCLUSION OF EVIDENCE.  
MR. MADDOCKS ADDRESSES ON THE FACTS. 10

This is a proceeding under Section 70 of the  
Justices Act. Section 72 is the part which  
relates only to summary proceedings before  
Justices..READS.

I put it, Sir, there is no other finding in  
relation to this matter than that it is a  
proceeding under S.72 and that this police  
officer is not within the category set out in  
the Section.

In fact at the time when he came to cross 20  
examine he was clearly adopting the role of an  
advocate and that at the time he swore the  
constable and asked him to present his  
evidence, it may be said he was merely an  
officer of the Court but certainly by the  
stage of having entered on cross examination  
he had taken the part of an advocate.

I put it Sir, that under S.72 he is not within  
his rights as set out in that Section.

Your Worship, I submit has no discretion to 30  
grant leave to him to appear. This is a  
judicial proceeding as against an administrative  
proceeding such as a committal.

BENCH. I did grant leave to the prosecutor to  
appear.

In regard to the facts of this case the constable  
gave positive evidence of an examination of  
the 2 tyres and that the tyres were not in  
conformity with F.82 of Reg. 92(I)(b) under the  
Motor Traffic Act, 1909. In that each did not 40  
have a clearly visible thread pattern on all  
parts of the tyre which normally come into  
contact with the road surface.

The deft. in cross examination said that on  
some parts of the tyres there was no visible  
thread and then qualified it by saying "I think

you could see where the thread ran on all parts...  
It was uneven". He said later "On some parts  
of the tyres it is a fact they were devoid of all  
threads". He said that was possible on odd spots.  
On the evidence before me I must find the offence  
has been proved.

PRIOR CONVICTIONS....NIL....LICENSED 1949

BENCH. I do not desire to hear you Mr. Maddocks.

10 MR. MADDOCKS. The constable has put before the  
court a number of matters. It will not be heard  
finally in this Court. Would your Worship impose  
a clear penalty. The infringement notice suggests  
£3. Perhaps your Worship might impose such a  
penalty. It might facilitate the matter.

20 BENCH. I think the function of the court is to  
deal with the matter by way of penalty having  
regard to all the facts connected with the matter.  
You have been driving 15 years and have no prior  
convictions. I accept the fact you have been driv-  
ing the vehicle for 10 minutes and had no  
knowlege of the tyres.

Exhibits

Submission  
of Mr.  
Maddocks

15th May  
1964 -  
continued

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VERDICT

S.C. 45

Verdi

15th May  
1964

THE COMMISSIONER FOR POLICE

--v--

JOHN DAVID MADDOCKS  
"SMOOTH TYRES"

OFFENCE FOUND PROVED

30 HAVING REGARD TO THE DEFENDANTS PRIOR GOOD RECORD  
AND TO THE EXTENUATING CIRCUMSTANCES THE INFORMATION  
IS DISMISSED UNDER SECTION 556A OF THE CRIMES ACT.  
NO ORDER FOR COSTS.

MR. MADDOCKS. I apply for witness expenses.

40 BENCH. I have found the offence proved. I have no  
power to order witness expenses to the defendant.  
Such expenses would not be available to the  
Defendant but may be available to the prosecution  
in accordance with Section 81(3) of the Justices  
Act.

J. Byrne  
Stipendiary Magistrate

Court of Petty Sessions  
Redfern  
15.5.64.

IN 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

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RECORD OF PROCEEDINGS

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GALBRAITH & BEST,  
10, Bell Yard,  
London, W.C.2.  
Solicitors for the  
Appellant.

LIGHT & FULTON,  
24, John Street,  
Bedford Row,  
London, W.C.1.  
Solicitors for the  
Respondents.