Privy Council Appeal No. 57 of 1964

Andrew Joseph O'Toole – – – – – – – *Appellant*

v.

Jack Scott and another – – – – – – – *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH APRIL 1965.

Present at the Hearing:
LORD REID
LORD MORRIS OF BORTH-Y-GEST
LORD PEARCE
LORD DONOVAN
LORD PEARSON
(*Delivered by* LORD PEARSON)

This is an appeal by special leave from a judgment of the Supreme Court of New South Wales (McClemens J.) given on the 12 August 1964 whereby he dismissed the appellant's application for a writ of prohibition against the respondents and discharged the rule nisi which had been granted.

The first respondent is a stipendiary magistrate. The second respondent is a police officer, and will be referred to as "the informant". On the 4th June 1964 the informant laid an information against the appellant for a breach of Regulations made under the Motor Traffic Act 1909, in that a motor vehicle owned by the appellant had been driven on a public street when it had a worn and defective tyre. On the 12th June and 3rd July 1964 the case was heard by the first respondent in the Court of Petty Sessions at Redfern, near Sydney. With his permission the case for the prosecution was conducted by another police officer, Sergeant Curry, and not by the informant. Objection was taken on behalf of the appellant to this procedure, but the hearing was concluded and the first respondent gave a judgment on the 3rd July 1964, convicted the appellant and ordered him to pay a fine of £2 and £1 for costs. On the application of the appellant a rule nisi was granted on the 16th July 1964 requiring the respondents to show cause why a writ of prohibition should not issue to restrain them from proceeding on the first respondent's order. The grounds of the rule nisi, so far as now material, were (1) that the police officer who purported to appear for the informant had no right of audience before the first respondent, and (2) that the first respondent exceeded his powers in purporting to invest the police officer with a right of audience before him. As has been stated, the rule nisi was discharged by the judgment which is under appeal.

There arises in this appeal a question of general application as to the validity or propriety of a long-established practice in New South Wales, whereby, in a case where a police officer has laid the information for an offence punishable on summary conviction, the magistrates will usually allow another police officer to conduct the prosecution. The appellant's argument against the validity or propriety of the practice is mainly based upon or derived from section 70 subsection (2) of the Justices Act, 1902, of New South Wales.

The provisions of that Act which are most material for the present purpose are as follows:

" *Section 70.*

. . .

(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.

. . .

Section 74. If, upon the day and at the time and place appointed by the summons, or by the order of the Justice or Justices before whom the defendant was brought upon apprehension under a warrant, the informant or complainant does not appear in person or by his counsel or attorney, but the defendant attends voluntarily in obedience to such summons, or is brought up on the order aforesaid, and the informant or complainant has received notice of such order, the Justice or Justices shall dismiss the information or complaint unless for some reason he or they think proper to adjourn the hearing as hereinbefore provided.

. . .

Section 76. If, upon the day and at the time and place to which the hearing or further hearing of the information or complaint has been adjourned, either or both of the parties does, or do, not appear in person or by his or their counsel or attorney, the Justice or Justices, then and there present, may proceed with the hearing as if such party or parties were present, and in cases where it is the informant or complainant who does not so appear may dismiss the information or complaint with or without costs."

Those provisions are contained in Division 2 of Part IV of the Act, relating to " offences punishable on summary conviction and complaints ". The provisions relating to the procedure before justices in respect of indictable offences are contained in Division 1 of Part IV, and the provisions of section 36 subsections (2) and (3) are substantially the same as those of section 70 subsections (2) and (3), except that the latter part of section 70 subsection (2) does not appear in section 36 subsection (2).

The primary contention for the appellant is that section 70 subsection (2) provides fully in express terms and by necessary implication as to the persons by whom a prosecution for an offence punishable on summary conviction may be conducted; the informant may conduct the case himself or by his counsel or attorney; it is not permissible for any other person to conduct the case for the informant; the magistrate has no power to give such permission.

The alternative contention for the appellant is that, if the magistrate has a discretionary power to permit some person, not being the informant or his counsel or attorney, to conduct the case for the informant, such power is properly exercisable only on the facts of a particular case where for some special reason it is necessary for the administration of justice that such permission be given; and that in the present case the purported permission was given merely in accordance with the practice, and not in relation to the facts of the particular case nor for any special reason rendering such permission necessary for the administration of justice; and accordingly there was no valid exercise of the discretion, and the purported permission was of no effect, so that it was wrong for the prosectuion to be conducted by Sergeant Curry who was not the informant.

On the other side the Solicitor-General for New South Wales has challenged the appellant's construction of section 70 subsection (2) of the Justices Act 1902 of New South Wales. He says that the magistrates have had from the

earliest times, as part of their discretion to regulate the proceedings in their courts, a discretion to permit persons to act as advocates for other persons; and that this discretion has not been taken away from them by section 70 subsection (2), which merely qualifies or limits the discretion to the extent that certain persons are to have a right of audience and so do not require permission.

In support of his contention the Solicitor-General has presented a thorough review of the statutes and decided cases, both in England and in Australia, constituting the relevant history.

In *Cox v. Coleridge* (1822) 1 B. & C. 37 it was held that a prisoner, at a preliminary examination before magistrates under a charge of felony, was not entitled as of right to have a person skilled in the law present as an advocate on his behalf, the magistrates having a discretion to decide whether they would admit or exclude an advocate for the accused party.

In *Collier v. Hicks* (1831) 2 B. & Ad. 663 it was held that no person had by law a right to act as an advocate on the trial of an information before justices of the peace, without their permission. Lord Tenterden C. J. said at page 668 " This was undoubtedly an open court, and the public had a right to be present as in other courts; but whether *any* persons, and *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." Parke J. said at page 672 " No person has a right to act as an advocate without the leave of the court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage. In the superior courts, by ancient usage, persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented; but justices of the peace, who are not bound by such usage, may exercise their discretion whether they will allow any, and what persons, to act as advocates before them."

Other cases illustrating the general principle that, subject to usage or statutory provisions, courts or tribunals may exercise a discretion whether they will allow any, and what persons, to act as advocates before them, are *Ex Parte Evans* (1846) 9 Q.B. 279 and *In re Macqueen and the Nottingham Caledonian Society* (1861) 9 C.B. (N.S.) 793. Also *May v. Beeley* [1910] 2 K.B. 722 was cited.

In the year 1836 the statute 6 & 7 William IV c.114 provided by section 1 that "all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law, or by attorney in courts where attornies practise as counsel ", and by section 2 that " in all cases of summary conviction persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney."

That statute gave to the defence a right to be represented by counsel or attorney, but gave no such right to the prosecution.

Then in 1848 three major statutes concerning justices of the peace were passed in England. They were the Indictable Offences Act (11 and 12 Vict. c.42), the Summary Jurisdiction Act (11 and 12 Vict. c.43) and the Justices Protection Act (11 and 12 Vict. c.44).

A New South Wales Statute of the year 1850 (14 Vict. c.43) contained an enactment that these three statutes of 1848 " shall (so far as the said provisions can be applied) be in force and take effect in New South Wales and its Dependencies and be applied and enforced in the administration of justice accordingly."

Part of section 12 of the Summary Jurisdiction Act 1848 was, as the Solicitor-General conveniently called it, the " ancestor provision " of section 70 subsections (2) and (3) of the Justices Act, 1902, of New South Wales. Also part of section 13 of the Act of 1848 was the " ancestor provision " of section 74 of the Act of 1902.

The material part of section 12 of the Summary Jurisdiction Act 1848 was as follows:—

> ". . . and the party against whom such complaint is made or information laid shall be admitted to make his full answer and defence thereto and to have the witnesses examined and cross-examined by counsel or attorney on his behalf; and every complainant or informant in any such case shall be at liberty to conduct such complaint or information respectively and to have the witnesses examined and cross-examined by counsel or attorney on his behalf."

Does that provision wholly abrogate, or merely qualify, the pre-existing discretion of the magistrates to give or refuse permission for a party in proceedings before them to be represented by some other person? On the face of it, the provision has the intention and effect simply of conferring on each party a right to be represented by counsel or attorney. Such right is, in the case of the defendant, a continuation or renewal of the right created by the Act of 1836, and, in the case of the prosecutor, a new right created by the Act of 1848. In this section 12 of the Act of 1848 nothing is said about the discretion of the magistrates in other respects. If the intention had been to abolish the discretion, the Act should have said that no person other than the party himself or his counsel or attorney shall be permitted to appear as advocate for him, or some other express words to that effect should have been used. There is no necessity for implying a provision that the discretion is abrogated: the right for a party to be represented by counsel or attorney could co-exist with the magistrates having a discretion to permit or not to permit any other person to act as advocate for a party. A further reason for not implying such a provision is that it would have been unreasonable in relation to the conditions which can be assumed to have existed in 1848, whether in England or in Australia. In proceedings before magistrates exercising their summary jurisdiction many of the parties, whether defendants or complainants, would be too poor to be able to engage counsel or attorneys to act for them, and some of them might be deaf or dumb, suffering from impediments of speech, illiterate, suffering from illness, or otherwise incapable of conducting a defence or a prosecution. In such cases it might be not only convenient for the dispatch of the court's business but also essential for the administration of justice that the magistrates should have a discretion to allow some relative or friend of the party to conduct his defence or prosecution for him.

If there were any doubt as to the construction and effect of section 12 of the Act of 1848, the wording of section 13 could be taken into account and might give some assistance to the appellant's argument. Section 13 however is dealing with a different subject, namely the need for a party, if not represented by counsel or attorney, to be present when his case is called on. It does not follow that he must personally conduct his own case. Any inference that might be drawn from the wording of section 13 of the Act of 1848 is too weak to displace the clear meaning of section 12.

The view expressed above as to the meaning of section 12 and the absence of any implication that the magistrates' discretion was wholly abrogated, is supported by decided cases. The Solicitor-General cited a number of them to show that in the view of the courts both in England and Australia the discretion of the magistrates persisted after the passing of the Act of 1848 in England, and after the passing of adopting or equivalent Acts in Australia.

In *Ex parte Biggins* (1862) 26 J.P. 244 there was some discussion and there were some relevant dicta but there was no clear decision of the point. More assistance is to be derived from *Ex parte the Local Board of Leamington* (1862) 5 L.T. (N.S.) 637. In that case information had been laid by the Leamington Local Board of Health, but the justices were of opinion that the clerk to the Board of Health was the real informant, and they refused to hear any information unless he were present. The information had been entrusted to the inspector of police. There was a motion for a rule to show cause why the justices should not hear the information without requiring the attendance of the clerk to the Board. The rule was refused. In the course of the argument the members of the court made observations which show that in their view the magistrates had a discretion. Cockburn C. J. said " He must either go himself or send someone properly qualified ". Crompton J. said: " I don't know that there is anything that actually requires it, but it is very reasonable

to require the attendance either of the informant or of his attorney or counsel to assist the justices in the construction of these very difficult acts of Parliament." Cockburn C. J. said " I see no objection to the police superintendent attending if the justices think fit to hear him, but you ask us to compel the justices to hear him."

In the Australian cases there are clear decisions on the relevant question.

The case of *Bhenke v. Wechsel, Johnstone and others* [1885] Q.L.J.85 was decided by the Full Court of Queensland under the Act of 1848 as adopted. Harding J. giving the judgment of the court said at pages 87–8 " The ground of the order *nisi* impugns (1) the power of the justices to permit persons other than counsel or solicitors to appear before them as advocates (2) the power of the justices to award costs to such advocates. (1) The power of the justices to permit persons to appear before them as advocates upon the hearing of informations follows from the discretionary power which they have of regulating the proceedings of their own courts in all cases in which they are not already regulated by ancient usage or statute, subject to which they decide who shall appear as advocates, and whether when the parties are before them they will hear anyone but them, no person having a right to act as an advocate without the leave of the Court (*Collier v. Hicks* 2 B. & Ad. 663) excepting under 11 and 12 Vict. cap. 43 section 12 by virtue whereof each party may have his case conducted by counsel or solicitor on his behalf." He went on to say, however, that there was no power to award costs in such a case under the relevant provisions of the Act.

There was a somewhat similar case in New South Wales. In *Ex parte Graves* (1891) 8 W.N. (N.S.W.) 44 where an articled clerk had appeared at Petty Sessions for a client of his principal, it was held that the justices had no jurisdiction to award professional costs. There was argument as to the right to appear. Counsel for the applicant for prohibition said " An articled clerk cannot appear for his master in Court. The 11 and 12 Vict. c.43 s.12 says that the parties may appear by counsel or attorney." Counsel for the respondent said " It is a common practise for articled clerks to appear, and any layman is at liberty to appear with the justices' permission." Sir George Innes J. in the course of his judgment 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; but there could be no award of professional costs in such a case."

In Victoria the Justices Act 1890 contained in section 40 provisions relating to preliminary examination of indictable offences, and in section 77 provisions relating to the hearing of informations and complaints in cases of summary jurisdiction. The provisions of section 77 (1) are very similar to those of section 12 of the Act of 1848. In *McGrath v. Dobie* (1891) 16 V.L.R. 646 it was held by the Full Court that the magistrates had power in a preliminary examination of an indictable offence to direct an inspector of police, or any other fit and proper person, to conduct the proceedings before them, whether such inspector or other person had sworn the information or not. In *O'Sullivan v. MacMahon* (1896) 22 V.L.R. 55 the Chief Justice distinguished *McGrath v. Dobie*, as decided in relation to a preliminary investigation of an indictable offence, and held that under section 77 on the hearing of an information in a case of summary jurisdiction, the inspector of police, not being the informant, had no lawful authority to conduct the prosecution, and that the prosecution should have been conducted by the informant in person or by his counsel or attorney. But in *Ritter v. Charlton* (1904) 29 V.L.R. 558, where a police officer not being the informant had conducted the prosecution in a case of summary jurisdiction, the Full Court disapproved of the decision in *O'Sullivan v. MacMahon* and adopted and applied the reasoning in *McGrath v. Dobie*. They cited with approval a passage from the judgment in *McGrath v. Dobie*, in which it was said " 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. This is the only ground upon which this application rests, and we think that it is no ground at all, and inasmuch as this is an established

practice of the justices in such cases, and it is a practice free from all objections' this order has no foundation whatsoever."

In Western Australia the Justices Act, 1902, contains in section 68 provisions similar to those of section 12 of the Act of 1848. In *Busato v. Dempsey* (1909) 11 W.A.L.R. 238 one of the grounds of appeal was that the complainant's case was conducted and the witnesses examined by a sergeant of police, who was neither the complainant, nor counsel, nor solicitor. Burnside J. said " This question appears to me to be more one of procedure than of law. There is no statutory enactment that I know of which prevents such a person acting as counsel, and I am told, indeed I am aware that the practice in Courts of Petty Sessions all over this State, and in a great many other places, is to allow police officers to conduct these cases, the importance of which does not justify the retaining of legal assistance. In this case the sergeant of police had the conduct of the proceedings and it appears to me there is nothing in law to prevent him doing so if the Court before whom he appears chooses to allow it."

In South Australia the Justices Act 1921 section 29 contains provisions similar to those of section 12 of 1848 but with some difference of wording. In *Brennan v. Alexander* [1932] S.A.S.R. page 237 Angas Parsons J. said at page 239 " By section 29 of the Justices Act 1921 every party to a proceeding before justices has a right to have the witnesses examined and cross-examined by his counsel or solicitor. Whether any other class of persons may be permitted to do this is a matter for the justices who are hearing the particular case. They granted Constable Homes permission to represent the informant, notwithstanding the defendant's opposition, and the defendant was bound to abide by the decision of the justices."

In *Posner v. Collector for Inter-State Destitute Persons (Victoria)* (1947) 74 C.L.R. 461 in summary proceedings relating to maintenance, a clerk in the office of the Collector had appeared to assist the Court and was allowed to examine and cross-examine witnesses, notwithstanding the defendant's objection that he had no right to appear as he was not the complainant or a qualified practitioner appearing for the complainant. This was only a minor point in the appeal. Starke J. said at pages 477–8 " Another objection taken to the order . . . was that the magistrate was wrong in permitting an unqualified person to appear for the Collector . . . . The magistrate should not, I think, have allowed an unqualified person to conduct the proceedings but the matter is to some extent within his discretion and does not invalidate the order which he made." Dixon J. said at page 485 " There appears to be nothing inconsistent with Victorian practice in the magistrate's permitting the officer so to appear: Paul's Justice of the Peace (1936) page 215."

There is thus abundant Australian authority, and some English authority, to support the view that section 12 of the English Act of 1848, as adopted by the Justices Act of 1850 of New South Wales, did not deprive the magistrates of their pre-existing discretionary power to allow a person, not being the informant or his counsel or attorney, to conduct the case for the informant. The same construction should be given to section 70 subsection (2) of the Justices Act, 1902, of New South Wales. There is no material difference in the language and the same considerations apply.

The Justices Act, 1902, was a consolidating Act: section 2 subsection (1) and the First Schedule repealed the Justices Act 1850 and the adopted English Act of 1848: section 70 (2) re-enacted the relevant provisions of section 12 of the Act of 1848: it is to be inferred that the slight alteration of language (using the word " may " instead of " shall be at liberty ") was not intended to effect any change of meaning.

There remains for consideration the appellant's alternative contention to the effect that, if the magistrate has a discretionary power to permit some person, not being the informant or his counsel or attorney, to conduct the case for the informant, such power is properly exercisable only on the facts of a particular case where for some special reason it is necessary for the administration of justice that such permission be given. There are two points involved, namely (1) that the discretionary power must be exercised specially in a

particular case and not by way of a general practice, and (2) that the discretionary power is properly exercisable only when its exercise is necessary for the administration of justice, and not when it is merely desirable for convenience and expedition and efficiency in the administration of justice. There is however no sound basis for either point. There is no statutory limitation of the discretion; the discretion is not conferred by statute, but is an element or consequence of the inherent right of a judge or magistrate to regulate the proceedings in his court. There is no reason in principle for limiting the discretion as suggested. It can be exercised either on general grounds common to many cases or on special grounds arising in a particular case. Its exercise should not be confined to cases where there is a strict necessity: it should be regarded as proper for a magistrate to exercise the discretion in order to secure or promote convenience and expedition and efficiency in the administration of justice.

Again the decided cases support the view which in principle appears to be right. In *Ex parte Evans* (supra) the Quarter Sessions for Denbighshire had exercised their discretion by making a general rule that barristers should have exclusive right of audience whenever four barristers were present. Their decision was upheld. Moreover the validity of the exercise of the discretion as a general practice was upheld by the Supreme Court of Victoria in *McGrath v. Dobie* (supra) and *Ritter v. Charlton* (supra) and by the Supreme Court of Western Australia in *Busato v. Dempsey* (supra). These cases also do not support, and tend to rebut, the suggestion that the discretionary power is properly exercisable only in a case of strict necessity.

Their Lordships will for the reasons that have been stated humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

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DELIVERED BY

LORD PEARSON

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