14/84

SUPREME COURT OF QUEENSLAND — FULL COURT

COOPER v LLOYD

Andrews SPJ, McPherson and Thomas JJ

8 March 1984

PRACTICE AND PROCEDURE – AMENDMENT OF INFORMATION – WHERE EVIDENCE DISCLOSES A COGNATE OFFENCE – WHETHER AMENDMENT BY COURT OF OWN MOTION – WHETHER DEFENDANT SHOULD BE HEARD ON PROPOSAL TO AMEND.

C., a policeman, found L. lying on the roadside injured; 10 metres away, C. found a motor cycle in a soya bean patch in a paddock adjacent to the roadway. L. admitted that he had been riding the motor cycle, and it was later ascertained that he had been in charge of the motor cycle whilst his blood/alcohol content was .130%. At the subsequent hearing, the Magistrate upheld a submission of "no case" on the ground that there was no evidence to show that L. had been riding the motor cycle on a roadway, or that the prosecution had proved that the motor cycle was within the definition of motor "vehicle" in the *Traffic Act (Qld)*. On appeal—

HELD: Order of dismissal set aside.
(1) Notwithstanding that the motor cycle was not rideable, the motor cycle was within the definition of "vehicle" in the Act.

(2) If the evidence establishes that there is a *prima facie* case as to a cognate offence, the Magistrate has a duty to amend the complaint in order to enable justice to be done once and for all.
***Kennett v Holt* [1974] VicRp 79; [1974] VR 644, applied.**

(3) In this case, the Magistrate should have amended the information within the terms of the *Traffic Act*.

ANDREWS SPJ: *[After setting out the facts, His Honour continued]:* ... The Stipendiary Magistrate came to the view that there was no evidence to show really where it was that the respondent had been riding the cycle. He did find that it was not on a roadway, and he seems to have come to the conclusion that there was an onus upon the prosecution to go further in its proof as to the cycle being a motor vehicle within the meaning of the definition in the *Traffic Act*. Now, it should be recalled that this was an application to dismiss the complaint on the ground that there was no *prima facie* case, and the Stipendiary Magistrate has found that there was no *prima facie* case that the cycle was in fact a motor vehicle. If at the end of the case, assuming it had run its normal course, he had entertained a view, on hearing other evidence, which was consistent with its not being a vehicle – this is without referring at the moment to the definitions in the *Traffic Act* – it may very well be that he could have dismissed the complaint provided it was a reasonable doubt. But, *prima facie*, having regard to the definition to which I will refer there was clear evidence that the motor cycle was a vehicle within the definition of the *Traffic Act*.

Section 9 provides that the word "vehicle" includes any ... motor vehicle ... whether or not such vehicle is or is not for the time being capable of being operated or used in a normal manner. It further provides that the term "motor vehicle" includes a motor cycle. "Motor cycle" is defined as any motor vehicle having less than four wheels and having motive power transmitted to not more than one wheel, and the weight of which when unladen does not exceed 400 kilograms. The combined effect of these definitions, it is submitted on behalf of the applicant, is that the motor cycle was a motor vehicle even though it was not in any condition in which it could be ridden. That is in accordance with my view, adopting as I do the reasoning in *Kunze v Vowles* [1955] St RQd 591 at 599.

The Stipendiary Magistrate appears to have concluded that a *prima facie* case on the complaint as laid and as particularised has not been established as there was insufficient evidence at the time that the respondent was driving the motor cycle on the road. That as a matter of reasoning, is in no sense objectionable, but there is little doubt, having regard to the state of the

authorities, that at the time when the respondent was having the conversation with the police officer to which I have already referred, and assuming that the motor cycle was a motor vehicle for the purposes of the Act, as to which I have already expressed a view, he was undoubtedly in charge. The vehicle was not on a road but it was in a place which could, adopting the terminology of the *Traffic Act*, be described as "elsewhere than on a road" namely alongside or nearby a road which in fact is specified in the complaint.

I pause at this stage to point out that no application appears to have been made by the prosecution at this stage for an amendment of the complaint. I am, however, of the view that s48(c) of the *Justices Act* places a duty upon a Magistrate to make appropriate amendments to a complaint and if necessary particulars in an appropriate case. If the evidence establishes that there is a *prima facie* case as to a cognate offence the duty of the Magistrate is plain to amend the complaint in order to enable justice to be done once and for all and to allow the matter to be concluded. We had cited *Fleming v Skerke* [1976] Qd R 48 at 50 and 52, and *Kennett v Holt* [1974] VicRp 79; [1974] VR 644. The statements in *Kennett v Holt* relate to a provision in Victoria which is in terms which are of similar effect to those of s48(c) of the *Justices Act*.

In my view there is evidence to show *prima facie* that as at about 7.20 pm. on the day in question the respondent was in charge of the motor cycle, it being sufficiently proved to be a motor vehicle for the purposes of the *Traffic Act*. In those circumstances, notwithstanding that the evidence did not disclose that the plaintiff was in charge of the vehicle on the roadway, having regard to the duty that is cast upon the Magistrate by s48(c), it was a quite singularly inappropriate time for him to be disposing of the proceedings without hearing evidence from the respondent. It may be that in such a situation he is not called upon to amend the proceedings at that stage without hearing evidence from the defence, but should he be of a disposition to consider at that time whether or not there was a *prima facie* case, it seems to me that there was a duty there and then to make the appropriate amendment.

It is perhaps unfortunate or odd that he was not, having regard to the application that was made, asked to make a suitable amendment to the complaint; but nevertheless that is his duty, and it is a question which he should have faced at some time in the proceedings; whether at the conclusion of the prosecution case or at the conclusion of proceedings may be a matter of some conjecture. I think it is not appropriate for us to be laying down any particular rule in that regard because circumstances do vary quite a deal in cases as they arise. In my view the amendment would have occasioned no injustice and no embarrassment or inconvenience so far as the conduct of the proceedings was concerned, for the respondent. The evidence clearly enough establishes that the necessary blood alcohol concentration to conform with the charge as laid was proved, having regard to the provision of the *Traffic Act* as to culpability relating to the period of two hours prior to the taking of the appropriate specimen.

It was contended on behalf of the respondent to the effect that we should give due weight to the conclusion by the Stipendiary Magistrate that the evidence was unsatisfactory, but the unsatisfactory nature to which he pointed related to the condition of the cycle, also to the question of time, and also, as I understand it, to the fact that the cycle was not on the roadway. He also expressed the opinion that a jury properly directed could not reasonably proceed to convict on the evidence as it was placed before him. This of course may be quite so in relation to the charge as laid, but that does not overcome the duty and the responsibility cast upon him by s48(c) of the *Justices Act* which perhaps I should, as to the material part, set out. It provides:

> "If at the hearing of a complaint it appears to the justices that ... (c) there is variance between such complaint, summons or warrant and the evidence adduced at the hearing in support thereof, then if no objection is taken the justice may make such order for the amendment of the complaint, summons or warrant as appears to be necessary or desirable in the interests of justice."

Although this is discretionary, on the view that I take of the statements in the cases to which I have referred, the discretion clearly should have been exercised by making the appropriate amendment. I am of the clear view that the Stipendiary Magistrate misdirected himself, and that this is a case for continuing with the evidence and proceedings with the matter according to law. It would, in my view, be a sufficient amendment to make the complaint read, instead of the words "on a road" the words "in the vicinity of a road", and then naming the road which is in fact described in the complaint; and the particulars also may be suitably amended simply by inserting

the word "about" ahead of "1910 hours". I would set aside the order dismissing the complaint and order that the matter he remitted to the Magistrates' Court for the hearing to be continued by the Acting Stipendiary Magistrate, with a direction that he make the amendments to the complaint which I have indicated, and that he deal with the matter according to law, and for those purposes that he enter up all necessary adjournments. In the circumstances of the prosecution not having there and then, when the application to dismiss was made, asked that the complaint be amended, I would make no order as to costs of the appeal.

McPHERSON J: I agree.

THOMAS J: I agree. I would add a few remarks to my own. The Stipendiary Magistrate upheld the submission of no case, and discharged the respondent. The charge as laid included the allegation that he was in charge of the motor vehicle on a road. The time was originally particularised at 7.10 pm., but the conduct of the case seems to have related the charge to a time between 7.10 and 7.20 pm. Nothing turns on that 10 minutes' interval, having regard to the evidence. Plainly there was a *prima facie* case that the motor cycle in question was a motor vehicle. The Stipendiary Magistrate's view on this point is simply erroneous, and I agree entirely with what my brother Andrews has said with respect to this point. Plainly the blood alcohol concentration was adequately established for the purposes of a *prima facie* case. Plainly there was a *prima facie* case that he was at the time or times mentioned in charge of the motor cycle. He had admitted to being the driver, and the evidence showed no one else to have taken charge of the cycle thereafter.

The next question was whether he was in charge of the vehicle on a road as particularised. The vehicle was not on a road. It was not very far away from the road, but clearly it was "elsewhere" to use the term that appears in s16(11) of the *Traffic Act*, and in my view the respondent was in charge of it where it was. It follows that amendment was needed. The question then arises as to whether the Stipendiary Magistrate should have amended the charge of his own volition, in view of the fact that the prosecutor made no request to him to do so.

I recognise that he had a duty to make the necessary amendment in circumstances such as the present one in accordance with the principles of *Kennett v* Holt [1974] VicRp 79; [1974] VR 644. At the same time I think it important to remember that our system is an adversarial one, and I would reinforce the rule of caution expressed by Mr Justice Pape in that case at page 649 in the following terms:

> "I think as a general rule it is preferable for a court proposing to make such an amendment to invite the prosecution to apply for it so that the defendant can be heard on such an application."

Perhaps if that had been done in the present case the present proceedings may not have been necessary.
