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SUPREME COURT OF QUEENSLAND — FULL COURT

COLEMAN v HEYWOOD: ex parte COLEMAN
LAWLOR v MACKERELL: ex parte LAWLOR

Lucas, Hoare and WB Campbell JJ

24-25 May, 30 June 1978 — [1978] Qd R 411

UNLAWFUL PROCESSION – CONSTRUCTION OF STATUES – ONUS OF PROOF OF ISSUE OF PERMIT TO HOLD A PROCESSION: *TRAFFIC REGULATIONS* 1962, R124(4)(b); *JUSTICES ACT* 1886, S76.

Defendant was charged with taking part in a procession for other than funeral purposes, upon a road, a permit not having been issued by the District Superintendent of Traffic. The Magistrate held that there was no case to answer as there was no evidence a permit had been issued – a matter for proof by prosecutor. On appeal—

HELD: Order nisi absolute Matter remitted to the Magistrate to proceed acording to law.
1. The onus of proving that a permit had been issued lay on defendant not the prosecutor.

2. Regulation 124(4)(b) was a regulation made within the power conferred by *Traffic Act*.

WB CAMPBELL J: [with whom Lucas and Hoare JJ agreed) These are appeals from the decisions of two stipendiary magistrates. Both appeals raise similar issues of law and by consent were heard together. The respondent Heywood was charged with an offence under r124(4)(b) of the *Traffic Regulations* that on 11 November 1977, at Brisbane he did upon a road take part in a procession for other than funeral purposes, a permit not having been issued by the District Superintendent of Traffic to hold such a procession. The respondent gave evidence in the Magistrates' Court and, after the conclusion of all the evidence, the magistrate dismissed the charge on the basis that the prosecution had not discharged the onus which was on it to prove that a permit to hold such procession had not been issued.

The respondent Mackerell was also charged with a breach of r124(4)(b) in that on the same day and upon the same road he took part in a procession for other than funeral purposes for which a permit had not been issued. At the conclusion of the evidence for the prosecution the magistrate found that there was no case to answer on the ground that there was no evidence that a permit had not been issued, a matter which fell for proof upon the prosecution.

The grounds of appeal in each case are identical, namely:

> (1) That the said Stipendiary Magistrate was wrong in law in effect finding that the words 'unless a permit has been issued by the District Superintendent to hold such a procession' in paragraph (b) of sub-regulation 4 of Regulation 124 was part of the offence and required the prosecution to establish that no such permit had been issued;
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> (2) The said Stipendiary Magistrate should have found in law that the words 'unless a permit has been issued by the District Superintendent to hold such a procession' were an exemption from liability and the said exemption, having been negatived in the complaint, the said Stipendiary Magistrate should have found in law that the onus of proof was upon the defendant.

Section 76 of *The Justices Act* of 1886 is material to this case and is as follows:

> "If the complaint in any case of a simple offence or breach of duty negatives any exemption, exception, proviso, or condition contained in the Act on which the same is framed, it shall not be necessary for the complainant to prove such negative, but the defendant shall be called upon to prove the affirmative thereof in his defence."

[After setting out the provisions of R124 of the Traffic Regulations *1962 and s76 of the* Justices Act *1886-1978, His Honour continued]* ... The appellants' counsel submitted that the offence described in

r124(4)(b) is contained in the general statement that a 'person shall not upon any road take part in a procession for other than funeral purposes' and that the following words 'unless a permit has been issued by the District Superintendent to hold such procession' constitute an exemption which is negatived in the complaint, so that the onus of proof that a permit was issued is laid upon the respondents. The resolution of this problem depends upon the proper construction of the legislation in order to determine whether the negative element of the non-issue of a permit is a necessary ingredient of the offence described in r124(4)(b).

The leading Australian authority on the point is *Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136, where the High Court considered the matter in relation to the construction to be placed on an offence pursuant to s141(1) of the *Licensing Ordinance* 1939-1952 (N.T.) of selling liquor to a 'half-caste within the meaning and for the purposes of' another N.T. ordinance, the *Aboriginals Ordinance* 1918-1947. Section 3 of the latter Ordinance defined a half-caste, and s3A empowered the Chief Protector to declare that any person 'shall not be deemed to be a half-caste for the purposes of this ordinance.' All the members of the Court were of the opinion that the onus lay upon the prosecution to establish that the person to whom the liquor was sold was not a person not to be deemed to be a half-caste by reason of the making of a declaration by the Chief Protector. The case turned upon the common law principle of which s76 is but a statutory statement. In his reasons for judgment Dixon CJ (Fullagar and Kitto JJ agreeing), said, at pp139-140:

> 'The argument treats the case as governed by the common law doctrine that where a statute having defined the grounds of some liability it imposes proceeds to introduce by some distinct provision a matter of exception or excuse, it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it. The common law rule distinguishes between such a statutory provision and one where the definition of the grounds of liability contains within itself the statement of the exception or qualification, and in the latter case the law places upon the party asserting that the liability has been incurred the burden within the exception or qualification. See *Barritt v Baker* [1948] VicLawRp 85; (1948) VLR 491 at p495; [1949] ALR 144. The distinction has been criticized as unreal and illusory and as, at best, depending on nothing but the form in which legislation may be cast and not upon its substantial meaning or effect. The question, however, where in such cases the burden of proof lies may be determined in accordance with common law principle upon considerations of substance and not of form. A qualification or exception to a general principle of liability may express an exculpation excuse or justification or ground of defeasance which assumes the existence of the facts upon which the general rule of liability is based and depends on additional facts of a special kind. If that is the effect of the statutory provisions, considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it. Cf. *Pye v Metropolitan Coal Co Ltd* [1934] HCA 9; (1934) 50 CLR 614; [1936] UKPCHCA 1; (1936) 55 CLR 138; *Darling Island Stevedoring & Lighterage Co Ltd v Jacobson* [1945] HCA 22; (1945) 70 CLR 635.'

In that case Williams and Taylor JJ referred to passages from the judgment of Jordan CJ in *Ex parte Ferguson; Re Alexander* (1944) 45 SR (NSW) 64; 62 WN (NSW) 15, and to remarks contained in the judgment of Fullagar J in *Barritt v Baker* [1948] VicLawRp 85; (1948) VLR 491; [1949] ALR 144, stating that they were in complete accord with the observations contained in the passages quoted by them.

In the first case, Jordan CJ said, speaking of the common law rule, at pp66-67:

> 'If the offence were defined as consisting of a simple concatenation of factors, all were regarded as necessary ingredients of the offence, whether they were positive or negative in their nature; but if the definition were twofold, in the sense that after a definition of the offence there was a distinct and separate provision exempting from liability in a certain event, only the first part was regarded as defining the ingredients of offence, and the record was regarded as a matter of confession and avoidance available by way of defence.'

After referring to a NSW statutory provision and to s14 of the Commonwealth *Crimes Act*, both of which are analogous to s76 of the *Justices Act* (Qld), Jordan CJ continued at p68:

> ' ... what is meant by s14 of the Commonwealth *Crimes Act*, 1914, is that, as a matter of evidence, it is for the defendant to prove any exception ... and that, as a matter of pleading, it is unnecessary for the prosecutor to specify or negative it, but if he does, it is unnecessary for him to give any proof in relation to it: *Bell v Hyde* [1939] VicLawRp 44; (1939) VLR 300, at p307, 308; [1939] ALR 386. It is, of course, in every case a question of construction whether any particular words are words of exception.'

I interpolate here that s76 by its terms operates only if the complaint negatives the exemption or exception, and that the instant complaints did negative the issuing of a permit.

In *Barritt v Baker* (*supra*) Fullagar J after referring to the Victorian provision broadly akin to s76 (s214 of the *Justices Act* 1928 (Vic)) said, at p495:

> 'But it seems to me that the question must often turn on the form of the legislation. The problem is not a problem of formal logic. The Court is not to undertake the task of classification and to decide what is the logical statement of the rule and the logical statement of the exception. Its task is purely and simply one of statutory construction. It has only to say what are the elements which the Legislature has specified as the *prima facie* ingredients of the offence. When it has determined, as a matter of construction, what those ingredients are, it necessarily follows that the burden of proving the totality of those ingredients rests upon the prosecution. The solution of the logical problem of the classification of things is governed by logical considerations, and logical considerations will determine what is to be stated as a rule and is to be stated as an exception. But the Legislature may formulate its rule or its rule and exception as it pleases. It might, for example, provide that any person who made a bet in a city, town or borough should be guilty of an offence. Or it might provide that any person who made a bet in any municipality other than a shire should be guilty of an offence. The substance might be precisely the same, but it might well be held that sec 214 applied to the latter case but not to the former. This would be because the essential elements in the specification of the offence are differently stated in each case. Here the Legislature has indicated that what it requires to be proved is the making of a bet in a street, And that is not proved unless evidence is adduced to warrant the conclusion that the place is beyond reasonable doubt a street within the statutory definition. It is immaterial, I think, that that definition involves a negative.'

Reference was also made in argument to a number of other decisions the most recent of which is a decision of this Court: *Youngberry v Heatherington* [1977] Qd R 15. These cases are all illustrations of the application of the principles of construction stated in *Dowling v Bowie* (*supra*). Mr Wyvill, for the respondents, submitted that the offence was not one which was described in the material legislation as one of merely taking part in a procession on a road but one of taking part in such a procession for which a permit had not been issued. He contended that, in approaching the manner of construing the provision, a court should have regard to the object of the regulatory power and the purpose to be achieved by it, the other provisions in the Act and the Regulations controlling the movement of pedestrians, and the difficulties of proof by a defendant of the non-issue of a permit.

The *Traffic Act* is, as its name implies and its provisions make clear, an Act which has as its object the regulation and control of traffic. The term 'traffic' is defined (s9) to include the use by any person of any road. or the presence in or on any road of any person; and the term 'pedestrian' to include any person walking, running, standing, sitting, or being otherwise in or upon any road. The Act (s70) empowers the Governor in Council to make regulations that may be necessary or expedient to carry out the objects and purposes of the Act and in respect of matters and things specified in the Schedule. Section 70(7) reads:

> 'The power to make a regulation regulating or controlling any act, matter, or thing shall include power to make a regulation prohibiting that act, matter, or thing, either absolutely or except under the authority of a license under this Act.'

One of the subject matters for regulations in the Schedule stated in cl8(j), as amended by the *Traffic Act Amendment Act* 1977 is: 'Meetings and processions on road, the routes of funeral processions, and of processions generally, or of processions of any particular class or description and appeals against the refusal of permits for meetings or processions on roads'. I think I should refer to s57A which was inserted in the Act by the amending Act (No 35) of 1977. This section provides that any person aggrieved by the refusal of a District Superintendent to issue a permit to hold a procession on any road may appeal against such refusal to the Commissioner of Police, the appeal shall be instituted by lodging a submission in writing, the Commissioner shall reconsider the matter having regard to all the facts including information supplied by the aggrieved person or by the District Superintendent further to information available to the latter in the first instance, and he may issue or refuse to issue the permit, and no appeal shall lie against the District Superintendent, or against the Commissioner's refusal to issue a permit or against the imposition of any condition in respect of a permit issued by the Commissioner. It is s45(1) which creates an offence on the part of any person who contravenes or fails to comply with

any provision of the Act, which includes the Regulations (s36 of the *Acts Interpretation Act*). In construing r124(4)(b) regard must be had to all the parts of the Act and of the Regulations, and that is why I have already referred to s70, s57A and to cl8(j) of the schedule. A consideration of the subject regulation and of other provisions contained in the Act and the Traffic Regulations has led me to the conclusion that the intention of the legislation is that the *prima facie* ingredients of an offence under r124(4)(b) are (1) the taking part in a procession, (2) the procession is upon a road, and (3) the procession is one other than for funeral purposes. Regulation 124(1) states in clear terms that a procession for other than funeral purposes shall not pass along any road unless and until a permit has been obtained. This seems to me to amount to a definite statement that a non-funeral procession is prohibited unless it is undertaken pursuant to a permit. Regulation 124(2) empowers the District Superintendent to define in a permit the time, date and route to apply 'and any other conditions to be observed' by the permit holder or by persons taking part, and r124(4)(c) makes it unlawful for any person to take part in a procession which is conducted other than in accordance with the terms and conditions of the permit.

A procession is defined in the *Oxford Dictionary* (1970 reprint, vol.VIII, p1409) as: 'The action of a body of persons going or marching along in orderly succession, in a formal or ceremonial way.' In *Melbourne Corporation v Barry* [1922] HCA 56; (1922) 31 CLR 174, Isaacs J said, at p196:

> 'Now, as to the word "procession" a procession is *prima facie* a moving assemblage of individuals for a common purpose, and, if on a highway, using the highway for the normal purpose of passage. It is not necessarily unlawful in any way. If other individuals have their way impeded to any extent by the procession, that amounts *prima facie* to a mere conflict of rights which should be reasonably adjusted by the parties concerned. It cannot be regarded, as it has inferentially been suggested in argument, as primarily an outlaw or as a wild beast that needs strict control for the safety of the public. It does not normally denote an unlawful assembly.'

I appreciate that processions are, at common law, *prima facie* lawful, and that persons have a common law right to move along the highway in concert in a reasonable manner subject to their creating a disturbance of the peace or a riot (see now in Queensland the offences described in Ch. IX of the *Criminal Code*): *Lowdens v Keaveney* (1903) 2 St R Qd 82; [1903] 2 IR 82; *R v Clark (No.2)* (1964) 2 QB 315; *Hubbard v Pitt* (1976) 1 QB 142. In my opinion, r124 makes all processions on any road, other than funeral processions, *prima facie* unlawful, and such a procession only becomes a lawful one when a permit has been obtained.

The language of r124(1) does not purport to take away the common law right of a person to walk on or pass along a road, but it seems to me that it does take away the right of a person to walk on or pass along a road if, in such walking or moving on the road, he is taking part in an unauthorised procession for non-funeral purposes on that road. The right to take part in a procession which, at common law, is a right to be exercised reasonably, has now become a more limited right, namely, one which comes into existence and attaches to the person only when that person takes part in a non-funeral procession for the holding of which a permit has been issued. In other words, in this State until the relevant permit has been issued, no person has a right to walk reasonably on a road in conjunction with a moving body of other persons organised so to move for a common purpose, other than a funeral purpose, although that moving assemblage of persons may not be creating a breach of the peace or behaving in an unreasonable fashion.

The intention of the maker of the regulation may be ascertained by a reading of r124 in conjunction with r125, the latter rule being one which deals with funeral processions. Regulation 124(1) excludes funeral processions from the general prohibition that a procession shall not pass along any road unless and until a permit has been obtained, and there is no requirement that a person desirous of holding a funeral procession shall apply for a permit. Regulation 125(1) does not give power to a Superintendent of Traffic to prohibit the holding of a funeral procession but merely empowers him to 'direct the diversion' of such a procession. I think that there is significance in the language of r124 in that it uses the words 'a procession for <u>other</u> than funeral purposes' and goes on to use the words '<u>unless and until</u> a permit to hold such procession' when referring to other sorts of processions. Regulation 42(3) reads: 'A pedestrian shall not proceed along a carriageway abreast of more than one other pedestrian except in a procession or parade <u>authorised</u> by the District Superintendent': and r124(5) provides that a person should not, unless with the consent of and under the direction of a Police Officer, interfere with the progress of any '<u>authorised</u> procession' (underlining mine). The use of the word 'authorised' lends support to

the view that it was the intention of the regulation-maker to prohibit a procession, other than a funeral procession, from proceeding on any road unless the persons holding or taking part in it were authorised or justified in so doing.

In *Choveaux v Hunt* (1962) Qd R 145; 56 QJPR 91, Hanger J, with whose reasons Brown J agreed, referred (at p156) to a 'useful contrast' which may be made between two regulations made under the *Stock Routes and Rural Lands Protection Acts*, 1944 to 1951. Regulation 10(3) provided that: 'No person shall without a stock route permit travel stock on any stock route ...;' and r14 stated that: 'No person in charge of travelling stock shall travel such stock along or across the same section of any stock route ... twice within a period of twenty-eight consecutive days without ... written permission ...' His Honour held that in r10(3) failure to have a permit was the only offence created and that there was in the regulation 'no general rule of liability with an exculpation or excuse dependent upon additional facts of a special kind'; whereas r14 contained a general rule of liability but that additional facts of a special kind, namely written permission, provided an excuse or exculpation. I think that a similar distinction can be drawn, in the instant case, between regs 124(4)(a) and (4)(b) which both provide for an additional fact of exculpation, on the one hand and r124(4)(d) in which the general prohibition or the offence created, is the holding or taking part in a procession the holding of which has been prohibited, on the other.

The object of r124 is to provide for the proper control of vehicle and pedestrian traffic on the roads, and to this end to provide for permits to be issued for the holding of or taking part in processions other than those for funeral purposes. The form of the legislation appears to me to make out a *prima facie* case of liability in the case of a person who takes part in a procession on a road. I am not persuaded that a different construction from that which I place on the regulation is the correct one because of the difficulties of proof that may rest on a defendant to prove that he comes within the exception. Although a permit is issued to the person who seeks to hold a procession and is, therefore, not a personal permit issued to each person who may take part in it, I cannot see any real difficulty in the way of a defendant who seeks to establish that a permit was issued by the District Superintendent, the Superintendent or the Commissioner.

In my opinion, the offence in r124(4)(b) is taking part in a procession on a road 'except' with a permit. It expresses the intention that the obtaining of a permit is a pre-requisite to the holding of or joining in a procession on the road: I consider that the language 'unless a permit has been issued' amounts to words of exception and, the issuing of a permit having been negatived in the complaint, the onus of proving such exception does not lie upon the prosecution.

Mr Wyvill further submitted that r124(4)(b) was *ultra vires.* The argument was based on the language of r124(4) which empowers the District Superintendent or Superintendent to prohibit the holding of a precession if 'for any other reasons whatsoever' it is in his opinion desirable it not be held. It was said that this gives to the relevant traffic officer an arbitrary discretion and one which need not necessarily be exercised *bona fide* and for the purposes of the legislation, so that r124(3) exceeds the power of the regulation making authority; and, because there is a power to prohibit the holding of a procession under s124(3) whether or not a permit has been obtained in respect of such procession, in consequence r124(4) is also invalid because the discretion by the District Superintendent to refuse a permit, it was said, could be exercised for reasons which bear no relationship to the object and purposes of the *Traffic Act* and *Traffic Regulations*.

I have already referred to s70(7) of the Act which, in my view, when read together with cl 8(j) of the schedule, enables a regulation validly to prohibit processions on roads. It may be that, on a proper construction of cl.8(j), a regulation cannot be made prohibiting funeral processions because of the distinction there drawn between 'processions on roads' and 'the routes of funeral processions', but that is not material to the present case. The respondents' contention is met, in my opinion, but the provisions of s28(c) of the *Acts Interpretation Act*, which provides that a regulation shall be read and construed subject to the Act under which it was made, and so as not to exceed the power of that authority to the intent, that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power'. In *Bank of New South Wales v The Commonwealth* [1948] HCA 7; (1948) 76 CLR 1; [1948] 2 ALR 89, Dixon J, when speaking of severability clauses, said at p371 CLR:-

> 'The effect of such clauses is to reverse the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken *prima facie* to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail. To displace the application of this new presumption to any given situation arising under the statute by reason of the invalidation of part, it must sufficiently appear that that invalid provision forms part of an inseparable context. The general provision contained in s15A of the *Acts Interpretation Act* 1901-1941 produces this effect as does s46(b) which similarly deals with severance in subordinate legislation.
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> But in applying s15A and s46(b) the courts have insisted that a provision, though in itself unobjectionable constitutionally, must share the fate of so much of the statute, regulation or order as is found to be invalid, once it appears that the rejection of the invalid part would mean that the otherwise unobjectionable provision would operate differently upon the persons, matters or things falling under it or in some other way would produce a different result. This consideration supplies a strong logical ground for holding provision to be inseverable, whether the *prima facie* presumption be in favour or against severability. It is important where there is no statutory clause like s15A and it is important in using s15A. For the inference in such a case is strong that provisions so associated form an entire law and that no legislative intention existed that anything less should operate as a law.

If the impugned words in r124(3) can be said to be beyond power then, applying the rule of construction in s28(c) of the *Acts Interpretation Act*, I consider that the sub-regulation can be read down so as to be read as being within power. In *Pidoto v Victoria* [1943] HCA 37; (1943) 68 CLR 87; [1944] ALR 1, Latham CJ said, at p115 CLR: 'In such a case also it would be necessary to consider whether such reading down would alter the policy or operation of the statute with respect to the cases which, after the reading down, would still remain within its terms.' Even if the words were excluded from s124(3) the remainder of that sub-regulation would be within the powers given by the Act. It may be that the words commencing 'or if for any other reason' to the end of the sentence should be interpreted as being restricted to such other reasons relating to the control or orderly regulation of traffic as are desirable in the opinion of the Traffic Superintendent. But, whether they be read down in that manner or completely rejected I think that such reading down or severance would leave the remainder of r124(3) standing as a valid provision.

In any event, we are here concerned with r124(4) and I do not consider that any invalidity in r124(3) affects the rest of r124. Regulation 124(1) provides that the District Superintendent may issue or refuse to issue a permit, and the legislative intention in the making of r124(3) is directed not to the discretion 'to issue or refuse to issue' a permit – such words are not used in sub-r(3) - but to the 'prohibiting' by the District Superintendent of the holding of a procession at any time whether or not a permit has been obtained. Regulation 124(4)(d) refers to the holding or taking part in a procession the holding of which has been prohibited by the District Superintendent or the Superintendent. Consequently, r124(3) seems to me not to affect the discretion to issue or refuse a permit and not to have application to the holding or taking part in a procession for which a permit has not been issued; rather does it purport to state the basis or the reasons governing the exercise of a discretion to prohibit.

For these reasons I am of the opinion that r124(4) is a regulation made within the power conferred by the *Traffic Act*. In each case the Order Nisi should be made absolute, the matter remitted to the Stipendiary Magistrate with directions to enter any necessary adjournments and to proceed according to law.
