SUPREME COURT OF QUEENSLAND

CITATION:	*Moman v Middleton* [2013] QCA 53
PARTIES:	**MOMAN, John William** (applicant) **v** **MIDDLETON, Alan John** (respondent)
FILE NO/S:	CA No 275 of 2012 DC No 149 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	22 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2013
JUDGES:	Margaret McMurdo P and Fraser JA and Martin J Separate reasons for judgment of each member of the Court, Fraser JA and Martin J concurring as to the orders made, Margaret McMurdo P dissenting in part
ORDERS:	**1. Application for leave to appeal granted.** **2. Appeal dismissed.**
CATCHWORDS:	TRAFFIC LAW – OFFENCES – ALCOHOL AND DRUG RELATED OFFENCES – QUEENSLAND – OTHER OFFENCES – where the applicant was intercepted driving a motorbike with a blood alcohol concentration of 0.049 per cent – where the applicant held an open licence for a car, but no licence for a motorbike – where the applicant was convicted under s 72(2A)(a) of the *Transport Operations (Road Use Management) Act* 1995 ('the Act') – where the applicant contended that s 79(2A) of the Act did not apply because the applicant's C class licence was a "driver licence" within the meaning of s 79(2A) of the Act – whether the applicant's C class licence meant that he could not be convicted under s 79(2A)(a) of the Act *Transport Operations (Road Use Management) Act* 1995 (Qld), s 78, s 79(2A) *Transport Operations (Road Use Management – Driver Licensing) Regulation* 2010 (Qld), s 22, s 23

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross (2012) 293 ALR 412; [2012] HCA 56, cited
Chew v The Queen (1992) 173 CLR 626; [1992] HCA 18, cited
Ex parte Fitzgerald; Re Gordon (1945) SR (NSW) 182, cited
Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 87 ALJR 98; [2012] HCA 55, cited
Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd (1983) 155 CLR 129; [1983] HCA 44, cited
Hall v Jones (1942) 42 SR (NSW) 203, cited
Krakouer v The Queen (1988) 194 CLR 202; [1998] HCA 43, cited
The King v Adams (1935) 53 CLR 563; [1935] HCA 62, cited
Stevens v Kabushiki Kaisha Sony Computer Entertainment (2005) 224 CLR 193; [2005] HCA 58, cited

COUNSEL: J A Greggory for the applicant
B G Campbell for the respondent

SOLICITORS: Purcell Taylor Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Fraser JA's reasons save that I do not consider this application raises an important question of statutory construction. In my view, the construction of s 79(2A) *Transport Operations (Road Use Management) Act* 1995 (Qld) adopted by the magistrate, the District Court judge on appeal and Fraser JA is plainly correct when the provision is read in context and in light of the purpose of the Act. I would refuse the application for leave to appeal.

[2] **FRASER JA:** The applicant was found guilty in the Magistrates Court of an offence against s 79(2A)(a) of the *Transport Operations (Road Use Management) Act* 1995. Subsection 79(2A) provides:

> "Any person who is the holder of a learner, probationary or provisional licence or is not the holder of a driver licence, and who, while the person is over the no alcohol limit but is not over the general alcohol limit—
> (a) drives a motor vehicle (other than a motor vehicle to which subsection (2B) applies); or
> (b) attempts to put such motor vehicle in motion; or
> (c) is in charge of such motor vehicle;
> is guilty of an offence and liable to a penalty not exceeding 14 penalty units or to imprisonment for a term not exceeding 3 months."

[3] So far as is presently relevant, the expression "driver licence" in s 79(2A) is defined in sch 4 of the Act to mean "an Australian driver licence", that term is defined to mean "a Queensland driver licence", and that term is defined to mean "a learner, probationary, provisional, open or restricted licence issued under this Act".

[4] The relevant facts were admitted. Police intercepted the applicant driving a motorbike. Analysis of his breath on an authorised device revealed that he had a blood alcohol concentration of 0.049 per cent. He was therefore over the "no alcohol limit" but not over the "general alcohol limit" (0.05 per cent). The applicant did not hold a motorbike licence. He did hold an open C class licence, which authorised him to drive a car.

[5] The Magistrate rejected the argument by the applicant's solicitor that s 79(2A) did not apply because the applicant's C class licence was a "driver licence" within the meaning of that defined term in s 79(2A). The same argument met the same fate when it was advanced by the applicant's counsel in his appeal to the District Court. The same argument is now advanced for a third time in an application for leave to appeal against the decision of the District Court judge. In this Court, the applicant's counsel argued that s 79(2A) unambiguously did not apply where the driver held any form of driver licence; that the construction adopted in the proceedings to date did not give effect to the definition of "driver licence"; and that it inappropriately read into the sub-section the definition of the term "unlicensed driver" in s 78(6) ("…for a motor vehicle, …a person, other than a disqualified driver, who does not hold a driver licence authorising the person to drive the vehicle on the road").

[6] The applicant's counsel also relied upon decisions concerning the construction of penal provisions. The effect of the relevant statements in those decisions is that penal provisions should not be given a wider scope than their language permits,[1] that language which is capable of more than one meaning so that "no sure conclusion can be reached by a consideration of the provisions and subject matter of the legislation…ought not to be construed as extending any penal category",[2] and that caution should be adopted in accepting "any loose, albeit "practical", construction" of a penal provision.[3] That does not require the adoption of an unduly narrow construction; a lenient construction of a penal provision is required only where there is "any real ambiguity persisting after the application of the ordinary rules of construction".[4]

[7] The relevant rule of construction is the fundamental one that the task is to construe the statutory text in its context.[5] In *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross*[6] French CJ and Hayne J said:[7]

> "The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute" (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision "by

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1 *Ex parte Fitzgerald; Re Gordon* (1945) SR (NSW) 182 at 186 (Jordan CJ); *Krakouer v The Queen* (1988) 194 CLR 202 at 223 (McHugh J).

2 *The King v Adams* (1935) 53 CLR 563 at 567-568 (Rich, Dixon, Evatt, McTiernan JJ).

3 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 210-211 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

4 *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 at 145. See also *Chew v The Queen* (1992) 173 CLR 626 at 632 and 642.

5 See *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55 at [39].

6 [2012] HCA 56.

7 [2012] HCA 56 at [24].

> reference to the language of the instrument viewed as a whole", and "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed".

[8] The text of s 79(2A) make it an offence for a person with a described blood alcohol concentration and who holds one of the specified forms of limited driver licence, or does not hold a driver licence, to drive, attempt to put in motion, or be in charge of a motor vehicle. As to relevant context, a preceding provision, s 78(1), provides that "[a] person must not drive a motor vehicle on a road unless the person holds a driver licence authorising the person to drive the vehicle on the road"; and that reflects the scheme under s 150(1)(b), which authorises regulations prescribing "rules about the management of drivers, including … the testing and licensing of drivers". Applications for and the grant of licences are provided for in ss 22 and 23 of the *Transport Operations (Road Use Management – Driver Licensing) Regulation* 2010. The Regulation requires different licences for different kinds of motor vehicles. For example, s 5 of the Regulation provides that the holder of a C class learner licence is authorised to learn to drive a class C vehicle and that the holder of a C class licence is authorised to drive a C class vehicle. Analogous provisions are made for other kinds of vehicles, such as the provisions in s 4 concerning motorbike licences. Thus a licence to drive a certain kind of motor vehicle is issued on the basis of tested competence to drive that kind of vehicle.

[9] In this context, the natural meaning of the text of s 79(2A) is that each licence mentioned in it is one which confers, or would confer, authority in relation to the kind of motor vehicle driven by, attempted to be put in motion by, or in the charge of, the person committing the offence.

[10] That this meaning accurately reflects the legislative purpose is also suggested by the consequences of the competing construction advocated for the applicant, under which each "licence" mentioned in the provision comprehends a licence for any kind of motor vehicle. The licence status element of the offence is satisfied by proof either that the person holds a limited licence ("a learner, probationary or provisional licence") or that the person does not hold any driver licence. Accordingly, upon the applicant's construction:

(a) the offence is not committed by a person with the relevant blood alcohol concentration who (like the applicant) drives a motorbike whilst holding an open licence only for a car and no limited licence for a motorbike, but the offence is committed by a person with the described blood alcohol concentration who drives a motorbike whilst holding an open licence only for a car and a limited licence for a motorbike;

(b) the offence is committed by a person with the relevant blood alcohol concentration who drives a motorbike whilst holding both an open licence for a motorbike and a limited licence for a car; and

(c) the offence is committed by a person with the relevant blood alcohol concentration who drives a car whilst holding both an open licence for a car and a limited licence for a motorbike.

[11] Each of those results of the applicant's construction is absurd and each of them is avoided on the construction adopted in the Magistrates Court and the District Court. That is a very relevant consideration; as Jordan CJ observed in *Hall v Jones*,[8]

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[8] (1942) 42 SR (NSW) 203 at 208.

"a Court is entitled to pay the Legislature the not excessive compliment of assuming that it intended to enact sense and not nonsense".

[12] The applicant challenged the District Court judge's conclusion that the Explanatory Notes to the Bill for the Act which resulted in the current form of s 79(2A) supported his Honour's construction of that provision. It is not necessary to discuss this challenge. The judge's construction was in any event correct for the reasons I have given and the applicant did not submit that any extrinsic material tended to support his construction.

Disposition and orders

[13] The District Court judge accepted that the appeal to that Court involved an important question of statutory construction. It is appropriate to grant leave to appeal, but the appeal should be dismissed. The respondent did not seek a costs order in his favour.

[14] The appropriate orders are:

(a) Application for leave to appeal granted.

(b) Appeal dismissed.

[15] **MARTIN J:** I agree with Fraser JA.