SUPREME COURT OF QUEENSLAND

CITATION:	*Paulger v Hall* [2002] QCA 353
PARTIES:	**KENNETH PAULGER** (applicant/respondent) **v** **BYRON EDWARD HALL** (respondent/applicant/appellant)
FILE NO/S:	Appeal No 3950 of 2002 DC No 35 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	13 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2002
JUDGES:	McMurdo P, Mackenzie and Holmes JJ Separate reasons for judgment of each member of the court, each concurring as to the orders made.
ORDERS:	**1. Leave to appeal granted** **2. Appeal dismissed** **3. Appeallant to pay the respondent's costs of the appeal and the application for leave to appeal**
CATCHWORDS:	APPEAL – GENERAL PRINCIPLES – IN GENERAL AND RIGHT OF APPEAL – WHEN APPEAL LIES – APPEAL TO DISTRICT COURT – S 222 *JUSTICES ACT* 1886 – where applicant/appellant seeks leave from decision of District Court allowing respondent's appeal from magistrate under s 222 *Justices Act* (Qld) 1886 – where magistrate refused amendment of charges and dismissed complaints – whether District Court judge had power to entertain appeal under s 222 – whether appeal lies under s 222 from a ruling made on an incidental application during the hearing of the complaint. APPEAL – GENERAL PRINCIPLES – IN GENERAL AND RIGHT OF APPEAL – WHEN APPEAL LIES – APPEAL TO DISTRICT COURT – S 222 *JUSTICES ACT* 1886 – whether District Court judge was in a position to assess whether a variance existed between the complaints and the evidence adduced – whether District Court judge had heard all the evidence

APPEAL – GENERAL PRINCIPLES – IN GENERAL AND RIGHT OF APPEAL – WHEN APPEAL LIES – APPEAL TO DISTRICT COURT – S 222 *JUSTICES ACT* 1886 – whether amendment to complaint correctly refused at first instance – whether applicant/appellant prejudiced by proposed amendment because the cross-examination of witnesses had been conducted on the basis of the charges and particulars provided

APPEAL – GENERAL PRINCIPLES – IN GENERAL AND RIGHT OF APPEAL – WHEN APPEAL LIES – APPEAL TO DISTRICT COURT – S 222 *JUSTICES ACT* 1886 – whether further hearing of the matter correctly adjourned to the District Court – whether judge had concluded hearing the appeal and set down the matters for separate hearing in the District Court; or whether he had merely adjourned the hearing of the appeal proposing to permit the calling of additional evidence at the further hearing

Bunning v Cross (1978) 141 CLR 54, cited
Ex parte Bignell (1915) 32 WN (NSW) 91, cited
Felix v Smerdon (1944) 19 ALJR 30, considered
Fox v Chiu; ex parte Chiu [1978] Qd R 88, considered
Gerlach v Clifton Bricks Pty Ltd (2002) 76 ALJR 828, considered
Hackwill v Kay [1960] VR 632, considered
Hayes v Wilson; Ex parte Hayes [1984] 2 Qd R 114, considered
Hill v Pinnock & Ors (1879) 1 QLJ (Supp) 45, 50, considered
Mitchell v Myers (1955) 57 WALR 49, considered
O'Beirne v Ramke; Ex parte Ramke, OSC No 8 of 1966, unreported, 24 June 1966, applied
Owen v Cannavan & Anor [1995] QCA 324; CA No 199 of 1994, 4 August 1995, considered
Parameter v Proctor (1948) 66 WN (NSW) 48, cited
Pioneer Industries v Baker [1997] Qd R 514, cited
R v His Honour Judge Dodds and Stipendiary Magistrate at Emerald; Ex parte Smith and Graham [1990] 2 Qd R 80, considered
R v Jacobs [1992] 2 Qd R 541, cited
Ramton v Cassin (1995) 38 NSWLR 88, cited
Schneider v Curtis [1967] Qd R 300, considered
Scott v Mulhall (1947) 64 WN (NSW) 15, cited
Turner v Randall; Ex parte Randall [1998] 1 Qd R 726, considered

Animals Protection Act 1925 (Qld), s 3, s 4(1)(a), s 4(1)(ba), s 4(2B), s 17, s 17(1)(a), s 17(1)(b), s 17(1)(c), s 17(1)(d), s 17(1)(e)
Justices Act 1886 (Qld), s 48, s 48(c), s 222, s 223

COUNSEL: T Martin SC for the appellant

J A Griffin QC, with M T O'Sullivan, for the respondent

SOLICITORS: Butler, McDermott & Egan for the applicant/appellant
Stephens & Tozer for the respondent

[1] **McMURDO P:** I agree with the reasons for judgment of Holmes J and with the orders she proposes.

[2] **MACKENZIE J:** The charges, the evidence, how the charges came to be dismissed, the subsequent events in the District Court and the grounds upon which leave to appeal is sought are set out in the reasons for judgment of Holmes J. The original proceedings underlying the application, which alleged offences between 3 and 6 March 2001, were complicated by the way they proceeded before the magistrate. When the application to amend the complaints by extending the time alleged was refused the prosecution sought an adjournment to test the ruling on appeal. This was refused, correctly in light of *Schneider v Curtis* [1967] Qd R 300, 306 and *Owen v Cannavan & Anor* [1995] QCA 324; CA No 199 of 1994, 4 August 1995. Then there was an application to withdraw the complaints which was also unsuccessful. If it were necessary to decide the correctness of that outcome the principles discussed in *Hill v Pinnock & Ors* (1879) 1 QLJ (Supp) 45, 50 and *Turner v Randall; ex parte Randall* [1988] 1 Qd R 726, 728 would require consideration.

[3] On more than one occasion the prosecutor said that he believed that he did not have evidence to support the charges in the absence of an amendment and finally said that he could not adduce "any further evidence". That statement was not literally true since he had said in submissions on the application for an amendment that he intended to call another witness who could say that he was interested in purchasing the foal, used to go regularly past the property where it was kept and had seen that it was in good condition from about the beginning of February until about the 22 February. In Dr Baker's opinion, the injury was of the order of two weeks old. The statement about not adducing any further evidence related, in context, to the thrust of Dr Baker's evidence that during the period alleged in the complaint none of the forms of treatment particularised with respect to the first charge would have served any purpose in treating the fracture or alleviated the animal's pain since, by that time, Dr Baker doubted whether the foal would have felt much pain because of the nerve damage that had occurred. With respect to the second charge the problem related to inability to prove that during the time alleged in the complaint the foal was caused unnecessary pain and suffering.

[4] While the evidence may seem counter-intuitive given the nature of the injury, the complications that had set in and the interference with the horse's natural mobility, it was nevertheless the evidence as it stood and the basis for the concession that without amendments to the complaints the evidence would not be sufficient to support a conviction.

[5] The evidence given by Dr Baker clearly established that at a time prior to the dates alleged in the complaints the treatment particularised in regard to the first charge would have been appropriate and, in regard to the second, that there was a need to put the foal down to avoid unnecessary pain and suffering. The offences, in their factual context, are examples of the category of continuing offences and in my view it was not a proper exercise of discretion under s 48 of the *Justices Act* 1886 for the magistrate to refuse the amendment. The foal's condition existed over a period of a

number of days, according to the evidence. Having regard to the evidence of Dr Baker it is not a case where the effect of the amendment would be to raise a new case altogether for the defendant to answer.

[6] Nor is it a case where time was a material matter. It was not a case where the prosecution case was fixed to a certain date by the evidence, or where the evidence was that the offences were committed during the period alleged in the charges and no other (*R v Jacobs* [1993] 2 Qd R 541). If the defendant had been put at a disadvantage by an amendment being allowed s 49 of the *Justices Act* provided ample power to protect him (*ex parte Bignell* (1915) 32 WN (NSW) 91, 92-93).

[7] There was also a submission raising the issue whether it was appropriate for an application to amend to be made before all the evidence to be called by the prosecution had been heard. By the time it was made, it was obvious that, on the basis upon which the case was being conducted, the relevant period of failure to treat the foal in the ways particularised and the causing of pain and suffering to it had occurred in a period earlier than that alleged in the complaints. There was by that time an obvious variance within the meaning of s 48.

[8] In *O'Beirne v Ramke*, *ex parte Ramke* (OSC No 8 of 1966, unreported, 24 June 1966), a case where the prosecutor requested at the outset that the complaint be amended, Gibbs J said:

> "Firstly, it was said that there was no jurisdiction at all to amend the complaint. The argument submitted in this respect was that there was no defect within the meaning of Section 48 of the Justices Acts and that there could be no variance between the complaint and the evidence until after the evidence had been adduced.
>
> If this view were correct it would mean that in a case where the prosecution knew that there would be a variance between the complaint and the evidence, the prosecution would be bound to refrain from requesting the Magistrate to amend the complaint until after the evidence had been given. Such a construction of Section 48 would be so inconvenient in practice that I express the hope that it is not a correct one; but in the view that I take it is quite unnecessary to decide the point. Clearly, in a case where there is a variance there is power to amend after the evidence has been given. In a case where the Magistrate amended before the evidence was given, and he would have been fully entitled to grant the amendment at the conclusion of the evidence it seems to me rather difficult to conceive circumstances in which any miscarriage of justice would result."

The commonsense of these observations, the sterility of the opposite view and the inconvenience if the argument were correct are obvious. *Mitchell v Myers* (1955) 57 WALR 49 contains dicta to the effect that an amendment can be made at any time before a final decision is made, although it was concerned with the latest an amendment could be made, not the earliest.

[9] During argument of the application in this Court, an issue was raised whether there was a *prima facie* case on one or both complaints as the evidence stood, without any further evidence being called. The first charge alleges an offence under s 4(1)(ba) of the *Animals Protection Act* 1925. The elements of that offence are that the person

charged is the owner of an animal and that he failed to provide treatment for an injury to the animal. "Owner" is defined in s 3 to include a person having possession, custody, control or charge of an animal.

[10] The second charge alleges an offence under s 4(1)(a). It requires proof that the defendant was a person who ill-treated an animal. "Ill-treat" is defined in s 3 as including causing an animal unnecessary pain and suffering. The particulars given focus on this. The case was conducted on the basis that the appellant was a person who failed to provide treatment to the foal and who ill-treated it. It was not suggested that he was a party to someone else's omissions. There was some evidence that he was the "owner" for the purpose of the first charge. There was unchallenged evidence that the horse was confined in a paddock on land described as "Mr Paulger's property" and "the defendant's property". In the absence of anything to the contrary there was some evidence that he had possession, custody, control or charge of the animal, but the way the first charge was particularised meant that by the dates alleged in the complaint the forms of treatment had become futile.

[11] It is not an element of the second charge that the person charged was the owner of the animal. It would be necessary however to prove that the applicant caused unnecessary pain and suffering to the animal by failing to kill it humanely. There was no evidence that the horse was his as the evidence stood. There was evidence that it was on his property. It is problematical whether the evidence as it stood constituted a *prima facie* case against him.

[12] Section 4(2B) provides authorisation for the humane killing of an injured animal in the absence of other reasonable means of relieving its suffering, dependent on the owner's opinion as to the necessity to do so. However, it is not a factor in proving whether a particular person was responsible for ill-treatment of an animal by not humanely killing it.

[13] It was not inappropriate for the prosecutor to form a conclusion that if the amendment was disallowed he could not establish the offences as particularised. There was nothing to suggest that there was any evidence that he could have called from that point on which would have repaired the deficiencies in the cases. Furthermore, if the additional evidence related to a period outside the period charged it may well have been irrelevant and inadmissible.

[14] It should be noted that reference was made during the course of the hearing of the present application to s 17 of the *Animals Protection Act*. Section 17(1) is concerned with categories of persons who are deemed to be guilty of an offence. The first category, in s 17(1)(a), is the person who actually commits the offence. In the present case the particulars were expressed in such a way as to allege that the applicant was the person who failed to provide treatment to the foal or alternatively ill-treated it.

[15] Sections 17(1)(b) to (d) are concerned with more remote degrees of involvement. Section 17(1)(e) is concerned with an "owner, or a person having possession or custody or control of any animal in respect of which such offence (presumably an offence committed against the Act) has been committed". Having regard to the structure of the subsection it is concerned with extending liability to an owner or person with possession, custody or control of an animal if another person commits an offence with respect to it. If that were not correct there would be the odd consequence that if s 17(1)(a) were relied on the onus would be on the prosecution to prove the

offence beyond reasonable doubt. If s 17(1)(e) were relied on the person charged would have an onus on the balance of probabilities to prove reasonable precautions and absence of reason to suspect that an offence was being or would be committed. Further, a similar section to s 17(2) has been interpreted as having a meaning which allows it no application to the present case (*Scott v Mulhall* (1946) 64 WN (NSW) 15).

[16] Given the position following the refusal by the magistrate of the application to amend the charges, it was not a case where the complaint was dismissed because no evidence was offered and the charges therefore dismissed without determination on the merits. It was a case where evidence had been led, the content of which fell short of establishing the charges as particularised. Without amendment the prosecution's case could not be improved. Any additional evidence would not have advanced the prosecution case in that regard. Had the amendment been allowed there would have been a *prima facie* case in respect of the first charge at least. The decision not to call any further evidence was made for genuine reasons. It would have been futile to do so since it could not cure the deficiency and, as previously observed, the evidence may well have been irrelevant and therefore inadmissible as well.

[17] On the particular facts of the case it is not in my judgment inconsistent with *Schneider v Curtis* or *Owen v Cannavan* to hold that there was an order made on a complaint, the order dismissing it, and that it was an order disposing of it in the sense required to provide a foundation for appeal under s 222 of the *Justices Act*. The case cannot be characterised as one where the decision not to call additional evidence was essentially motivated by an intention to avoid the constraints of an accepted interpretation of s 222 to facilitate an attempt to challenge an interlocutory ruling. Since the refusal of the amendment "affected the final result" (*Gerlach v Clifton Bricks Pty Ltd* (2002) 76 ALJR 828) the correctness of the ruling could be brought into issue on an appeal to a District Court judge under s 222. The learned District Court judge had authority to hear the appeal.

[18] With respect to the form of the order made by the learned District Court judge, I agree with Holmes J's analysis. I also agree with the orders proposed by her.

[19] **HOLMES J:** The applicant seeks leave to appeal from a decision of a District Court judge allowing the respondent's appeal from a magistrate under s 222 of the *Justices Act* 1886. The learned judge set aside the magistrate's orders refusing amendment of charges contained in two complaints and dismissing the complaints. He adjourned the relevant complaints for hearing in the District Court at Maroochydore.

The summary hearing

[20] The prosecution in the Magistrates Court had been brought on two complaints which, by consent, were heard together. They charged, in the alternative, two offences under the *Animals Protection Act* 1925:

> "That between 3 March 2001 and 6 March 2001 at Kenilworth …(the Applicant), being the owner of a male foal, did fail to provide treatment for an injury, namely a compound fracture of the metacarpal bone of the front left leg, with which the said foal was afflicted, contrary to section 4(1)(ba) of the *Animals Protection Act* 1925 as amended contrary to the Acts in such case made and provided; and

> That between 3 March 2001 and 6 March 2001 at Kenilworth …(the Applicant) did ill-treat an animal, namely a male foal, contrary to section 4(1)(a) of the *Animals Protection Act* 1925 as amended contrary to the Acts in such case made and provided."

[21] Particulars were provided at the hearing as to the treatment which should have been provided in the case of the first charge, and the ill treatment in respect of the second charge, which was the failure to "euthanase" the foal. Counsel for the complainant (the respondent here) called two witnesses, an RSPCA inspector, Mr Lewis, and a veterinary surgeon, Mr Baker, both of whom gave evidence of having gone to the applicant's property on 6 March 2001, where they sedated and ultimately put down the foal in question. The animal was found on examination to have had a severe compound fracture of its leg with an associated infection. The bone ends were completely separated and there was, according to Mr Baker, only a small piece of skin holding the leg together. All the nerves and tendons had been severed, and an amateurish and ineffectual splint had been applied. Mr Baker gave his view as to what would have been appropriate treatment of the injury: cleaning of the wound with an antiseptic, daily administration of antibiotics, splinting or plating of the bones and provision of analgesics. None of those appeared to have occurred. Crucially, Mr Baker gave evidence that the injury was probably about two weeks old; that for at least a week the animal had been beyond treatment and that the severing of the nerves towards the end of the period of its injury would probably have meant that it was not in a great deal of pain. The latter view seems to have been a departure from his statement, in an earlier report quoted during argument, that at the time of examination the foal was suffering greatly.

[22] In light of that evidence counsel for the complainant sought amendment of the complaints to particularise the dates of the offences as between, in each case, 1 February 2001 and 6 March 2001. It is to be noted that there was no question of the amended charges being out of time; the hearing was in October 2001, within the 12 month time limit imposed by s 22(4) of the *Animals Protection Act*. The application was opposed. Counsel for the defendant pointed out that the prosecution had had all relevant material for some time, and the charges had, notwithstanding, been framed in respect of the limited period between 3 and 6 March. He also adverted to prejudice to the defendant, although no detail was given of that prejudice. The learned magistrate refused the application to amend, giving as his reasons that the complaints had been issued for a considerable time in circumstances in which the solicitors drafting them had access to all witnesses, and that the defence had approached the case on the basis of the dates set out in the complaints. Counsel for the complainant unsuccessfully sought an adjournment, and then sought to withdraw the complaints, again unsuccessfully. He then declined to adduce any further evidence, and the complaints were dismissed on the defendant's application.

The s 222 appeal

[23] On appeal the learned District Court judge held that s 48(c) of the *Justices Act* applied to the consideration of the application for amendment; that is, that there was "variance between [the] complaint … and the evidence adduced at the hearing in support thereof" so as to enliven a discretion to make the amendments. In the present case, where there was a clear public interest in the prosecution proceeding, no evidence of prejudice to the defendant, and, in any case, the possibility of granting an

adjournment if there were, the magistrate's discretion had miscarried. He made the orders referred to at par [19].

The appeal to this Court

[24] The appeal which the applicant seeks leave to bring involves four issues: firstly, whether an appeal under s 222 was available to the complainant; secondly, whether the learned judge could determine whether it was a proper case for amendment or variance when not all the evidence had been called; thirdly, whether he was entitled to set the matter down for hearing in the District Court; and fourthly, whether the magistrate's refusal of an amendment was in any event a proper exercise of discretion.

Was the s 222 appeal competent?

[25] The applicant argued that the learned District Court judge had no power to entertain the appeal under s 222 because the ruling refusing amendment, on which the appeal was in substance brought, was incidental. Section 222(1) confers the right of appeal in the following terms:

> "222.(1) When any person feels aggrieved as complainant, defendant, or otherwise by any order made by any justices or justice in a summary manner upon a complaint for an offence or breach of duty such person may appeal as hereinafter provided to a District Court judge."

[26] *Schneider v Curtis* [1] is authority for the proposition that no appeal lies under s 222 from a ruling made on an incidental application during the hearing of the complaint; the right of appeal is given only from "any order made … upon a complaint", and those words refer to an order "disposing of the complaint itself"[2]. There could be no appeal from the dismissal of the complaints, the applicant here contended, because no prima facie case had been made out; so that the dismissal was plainly correct. The respondent's manner of proceeding, by appealing the dismissal of the complaints in order to attack the refusal to amend, was, the applicant said, a circumvention of the law.

[27] Quite apart from the construction question addressed in *Schneider v Curtis*, there is much to be said on policy grounds for prohibiting the bringing of appeals under s 222 against interlocutory rulings. Such appeals may lead to fragmentation of the criminal process, may in the long run prove to have been pointless, and are capable of being misused to exhaust the resources of a less well-heeled opponent. But an appellant may in an appeal against a final judgment properly raise the issue of the correctness of an interlocutory order "which affected the final result": *Gerlach v Clifton Bricks Pty Ltd*[3]. Thus, an appeal from a ruling before any evidence had been put before the court on the *voir dire*[4] or called in the case might well be doomed to failure, because of the impossibility of saying whether it had affected the final result. On the other hand, it does not follow in a case such as the present that every piece of evidence available to

---

1 [1967] Qd R 300.

2 [1967] Qd R 300 at 305.

3 (2002) 76 ALJR 828 at 829. See also *Pioneer Industries Pty Ltd v Baker* [1997] Qd R 514; *Ramton v Cassin* (1995) 38 NSWLR 88.

4 An appeal may lie although evidence essential to proof of the case has not actually been admitted because of an adverse ruling: see by way of example *Bunning v Cross* (1978) 141 CLR 54.

the prosecution must be called before it can be said that an interlocutory ruling has affected the outcome.

[28] Here, the respondent complainant was entitled to bring an appeal under s 222 from the dismissal of his complaints. Central to my conclusion in that regard is my view that the complainant had, at the time the complaints were dismissed, established on Mr Baker's evidence *prima facie* cases of failure to treat and the causing of unnecessary suffering. The evidence was that the animal was on 6 March in a paddock on the applicant's property, giving rise to an inference as to his possession or control of it sufficient to establish ownership[5]. What remained, had the charges been amended, was to establish the applicant's status in relation to the animal over the period as extended by amendment. Had the complainant sought while the charges remained unamended to adduce evidence of the applicant's involvement with the horse over the wider period, that evidence could properly have been objected to as irrelevant to the charges as framed; that is between 3 March 2001 and 6 March 2001. It was the magistrate's refusal to allow the cure by amendment of the deficiency as to particularisation of time, created by Mr Baker's evidence, which rendered that evidence irrelevant and inadmissible and resulted in there being no case to answer. (I am not entirely convinced, in fact, that the second of the complaints as particularised was not in any event made out, but that is beside the point for present purposes.) Dismissal was inevitable once the concession was made that no case had been established on the existing charges, and can properly be said to have resulted from the refusal to amend. The complainant was entitled to appeal on that basis.

Could amendment for variance be assessed without all the evidence?

[29] Secondly, the applicant argued, the learned District Court judge was not in a position to assess whether there was a variance between the complaints and the evidence adduced, because he had not heard all the evidence. Reliance was placed on the reference in s 48(c) to variance between the complaint and "the evidence adduced at the hearing"; on the statement from *Felix v Smerdon*[6] that: "A variance exists where an offence which is charged is established with some variation or difference in detail …"; and on the fact that in that case, in *Hayes v Wilson, ex parte Hayes*[7] and in *Fox v Chiu, ex parte Fox*[8], each of which involved an appeal or application against amendment allowed or disallowed, the prosecution had in each instance called all its evidence and closed its case. Had the complainant's case been completed, it was argued, there might not have been established a *prima facie* case; or there might have been such a discrepancy between the complaints and the evidence as to go beyond mere variance.

[30] Section 48 of the *Justices Act* provides, in relation to amendment for variance, as follows:

> "48 If at the hearing of a complaint, it appears to the justices that-
>
> …

---

5 Section 3 of the *Animals Protection Act* provides an extended definition of "owner" as including "any person for the time being having or being entitled to the possession or custody or control or charge of the animal."

6 (1944) 19 ALJ 30.

7 [1984] 2 Qd R 114.

8 [1978] Qd R 88.

(c) there is a variance between such complaint, summons or warrant and the evidence adduced at the hearing in support thereof;

then –

(d) if an objection is taken for any such defect or variance – the justices shall; or

(e) if no such objection is taken – the justices may;

make such order for the amendment of the complaint, summons or warrant as appears to them to be necessary or desirable in the interests of justice."

[31] I do not accept that the reference in s 48(c) to "the evidence adduced at the hearing" amounts to a requirement that all evidence be called before variance can be determined. To require that amendment wait until the end of the prosecution case, rather than proceed when the need becomes apparent, would produce absurd results. The prosecution would be bound to a case which it had already concluded it could not prove, and precluded from leading evidence reliant on amendment for its admissibility. Not surprisingly, there is authority to contrary effect[9], and it is, in my view, to be taken as established that an application for amendment may be made at any point prior to decision.

[32] If a ruling on amendment is made, the only issues on appeal can be whether it entailed any miscarriage of the magistrate's discretion, and, if so, whether it affected the final result below. If it were clear from other evidence or the lack of it that the prosecution case was hopeless, no doubt the appeal would not succeed; but that is a different question from whether amendment for variance has properly been allowed or disallowed. I do not think that the applicant's argument is assisted by the passage quoted from *Felix v Smerdon*, which does no more than identify an instance in which variance may be identified, or by the examples given of *Hayes v Wilson* and *Fox v Chiu*, which again are no more than particular instances of variance.

[33] The evidence of Mr Baker fitted the s 48(c) description of "evidence adduced in the case" at variance with the complaints. It plainly demonstrated the discrepancy between the complaints as particularised as to time and the actual timing of the alleged offences. If, as the applicant speculated, witnesses other than Mr Baker had not come up to proof, or a greater discrepancy between charges and evidence were demonstrated, it would have been a matter for the magistrate's assessment at the end of the day as to whether the charges as amended were made out. It certainly was not, in my view, necessary that all witnesses available to the prosecution be called before a decision could be made, either at first instance or on appeal, as to whether there was such variance as to warrant amendment; that circumstance had already been demonstrated by Mr Baker's evidence.

Was the amendment correctly refused at first instance?

[34] But the applicant submitted that the magistrate's decision to refuse the amendment was in fact correct. The time period alleged was material as affecting both what

---

9 *Mitchell v Myers* (1955) 57 WALR 49 cited with approval in *Hayes v Wilson, ex parte Hayes*[1984] 2 Qd R 114.

amounted to appropriate treatment and the applicant's stated knowledge of the foal's condition. It was argued that the offence which the complainant sought to prove was essentially different, and that reliance by the complainant on the decision in *Hayes v Wilson; ex parte Hayes*[10] was misplaced because that decision concerned a cognate offence. Finally, it was said that the applicant was prejudiced by the proposed amendment because the cross-examination of witnesses had been conducted on the basis of the charges and particulars provided.

[35] It seems to me that the argument that the proposed amendments to the complaints would result in the charging of different offences is without substance. There is authority for the proposition that where there is a time limit for prosecution the allegation of time may be essential to the information: see *Hackwill v Kay*[11]. But in that case, the offence as originally alleged was out of time for prosecution, and it was held that the attempt to amend the date to one within time, on evidence that a like offence had been committed at the later date, went beyond amendment for mere variance from the original complaint. *Felix v Smerdon* cannot assist the applicant on this point; there it was made clear that the terms of the regulation breached made time an essential element of the offence. And although "a variation in date and place may so grossly misrepresent the position as to charge in effect a different offence altogether" (*Parmeter v Proctor*[12]) I do not think that this was such a case. Here, the essentials of the offences charged in the respective complaints remained the same. The broadening of the period over which the offences were alleged did no more than reflect a variance within the meaning of s 48(c).

[36] Any prejudice to the applicant could be cured by recalling the witnesses to enable further cross-examination, and it was clear that the prosecution was willing and able to produce both the witnesses who had already given evidence for that purpose. Had there been any other element of prejudice arising from the late amendment of the charges, an adjournment might have been appropriate. But in all the circumstances, the learned District Court judge plainly was correct when he concluded that the magistrate's exercise of discretion had miscarried.

Was the further hearing of the matter correctly adjourned to the District Court?

[37] Finally, it is said that the learned District Court judge erred in adjourning the case for hearing in the District Court, because he had no power to do so. Essentially, this argument turned on the view to be taken of the learned judge's orders. Had he concluded the hearing of the appeal so as to be *functus officio*, and then set down the matters for separate hearing in the District Court, or had he merely adjourned the hearing of the appeal proposing to permit the calling of additional evidence at the further hearing?

[38] His Honour concluded his judgment as follows:

> "The appeal will be allowed. The orders of the Magistrate refusing the amendment sought, dismissing the complaints and for costs, are set aside. The question of what order for costs should be made for the hearing in the Magistrates Court to the time of the dismissal of the charges is reserved. The amendments sought are made. The further

---

10 [1984] 2 Qd R 114.

11 [1960] VR 632.

12 (1948) 66 WN (NSW) 48.

hearing of the matters in the District Court is adjourned to a date to be fixed in the District Court sitting at Maroochydore. At the resumed hearing the evidence already given will be evidence at the resumed hearing. Both parties have leave to adduce further evidence both by evidence-in-chief and cross-examination including from witnesses who have already given evidence and from such further witnesses as they wish to call. The complaints are adjourned to the criminal callover list in the District Court at Maroochydore with priority to be allocated trial dates."

[39] The powers of a District Court judge on the hearing of an appeal under s 222 of the *Justices Act* are to be found in the following sections:

> "223. (1) An appeal under section 222 is by way of rehearing on the evidence ("original evidence") given in the proceeding before the justices.
>
> (2) However, the District Court may give leave to adduce fresh, additional or substituted evidence ("new evidence") if the court is satisfied there are special grounds for giving leave.
>
> (3) If the court gives leave under subsection (2), the appeal is –
>
> (a) by way of rehearing on the original evidence; and
>
> (b) on the new evidence adduced.
>
> 224. The judge may at any time adjourn the hearing of the appeal for such time and upon such terms and conditions as the judge may think fit.
>
> …
>
> 225. Upon the hearing of any appeal the judge may by the judge's order confirm, quash, set aside, vary, increase or reduce the conviction order sentence or adjudication appealed against or make such other order in the matter as the judge may think just and may by such order exercise any power which the justices might have exercised and such order shall have the like effect and may be enforced in the like manner as if it had been made by justices."

[40] In *R v His Honour Judge Dodds and Stipendiary Magistrate at Emerald; ex parte Smith and Graham*[13] it was held that a District Court judge could not remit a matter the subject of a successful s 222 appeal for further hearing, but had a responsibility to dispose of it, and power under ss 223 and 225 of the *Justices Act* to do so. Here his Honour did make the statement, "The appeal will be allowed"; but that was, in my view, no more than an acknowledgement that the appellant there had succeeded in his arguments. The inference from his Honour's references to the "resumed hearing" is that he intended, in fact, to adjourn the appeal to be continued by rehearing, with leave to adduce additional evidence. The orders made were, in my view, an

---

13 [1990] 2 Qd R 80.

appropriate exercise of the learned judge's powers under ss 223, 224 and 225, in order to conclude the matter as he was required to do.

[41] In light of the decision in *Ex parte Smith and Graham* it is clear that there was no alternative available to the learned judge of remitting the matter to the Magistrates Court, whether differently constituted or not. Thus, in order finally to dispose of it, it was necessary that it be resolved in the District Court. While this matter would appear capable of relatively quick disposition, plainly enough that will not always be the case. The question is whether the District Court ought in such cases be obliged to add to its list matters intended for summary disposition in the Magistrates Court. It seems to me that it would be desirable if there were legislative change to enlarge the powers of District Court judges under s 225, so as to permit (but not require) the remitting of such matters to the Magistrates Court for further hearing.

[42] I would give leave to appeal, dismiss the appeal and order that the appellant pay the respondent's costs of the appeal and the application for leave to appeal.