SUPREME COURT OF QUEENSLAND

CITATION:	*Eggmolesse v Bruce* [2008] QCA 393
PARTIES:	**DAVID EGGMOLESSE** (applicant/appellant) **v** **KYLIE DONNA BRUCE** (respondent)
FILE NO/S:	CA No 1 of 2008 DC No 11194 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s118 DCA (Criminal)
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	9 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2008
JUDGES:	McMurdo P, Fraser JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal granted.** **2. Appeal allowed.** **3. The order of the District Court dismissing the appeal and ordering Mr Eggmolesse to pay the sum of $900 for costs is set aside.** **4. Instead, it is ordered that the appeal to the District Court be allowed and the order of the magistrate at Beenleigh on 15 December 2006, convicting Mr Eggmolesse, fining him and disqualifying him from driving for nine months, is set aside. Instead a verdict of not guilty is entered.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – DRIVING OFFENCES – OTHER MATTERS – the applicant, who was a mechanic, took a can of petrol to a vacant lot where his sister was waiting with a car which had stopped – applicant poured petrol into car's tank and adjusted battery with bonnet up to try and make the car operational – applicant put hand in through car window to attempt to turn key to start engine but there was no key in the ignition – applicant returned to front of car and shut bonnet – police apprehended applicant – applicant under the influence of

alcohol – police arrested applicant and charged him with being in charge of a vehicle whilst under the influence of liquor – magistrate accepted applicant's evidence including that it was his intention not to drive the car – common ground on appeal that applicant "in charge" of the vehicle – defence in s 79(6) *Transport Operations (Road Use Management) Act* 1995 (Qld) not raised before magistrate or District Court judge on appeal – whether the car was a "motor vehicle" under that Act – whether the applicant had the benefit of the defence in s 79(6) of that Act

Transport Operations (Road Use Management) Act 1995 (Qld), s 79(1)(c), s 79(6), s 124(1)(t)

Bartlett v Harrison; ex parte Bartlett [1975] Qd R 325, followed
Davies v Dorfler; ex parte Davies [1988] 2 Qd R 490, followed
Floyd v Bush [1953] 1 All ER 265, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, followed
Hart v Rankin [1979] WAR 144, cited
Lawrence v Howlett [1952] 2 All ER 74, cited
Mbuzi v Torcetti (2008) 50 MVR 451; [2008] QCA 231, followed
Newberry v Simmonds [1961] 2 QB 345, cited
Rowe v Kemper [2008] QCA 175, followed
Smart v Allan & Anor [1963] 1 QB 291, cited
Wynne v Campbell; ex parte Campbell [1966] QWN 7, cited

COUNSEL: D C Shepherd for the applicant/appellant
G J Cummings for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The applicant, David Brian Eggmolesse, pleaded not guilty in the Magistrates Court at Beenleigh to a charge against s 79(1)(c) *Transport Operations (Road Use Management) Act* 1995 (Qld) ("the Act") that on the 11 September 2005, at Loganholme, whilst under the influence of liquor or a drug, he was in charge of a motor vehicle elsewhere than on a road. On 15 December 2006, the magistrate found him guilty after a trial, convicted and fined him $720 and disqualified him from driving for nine months. He appealed to the District Court under s 222 *Justices Act* 1886 (Qld) against his conviction, contending that the evidence did not establish he was in charge of the motor vehicle. The District Court judge dismissed his appeal and ordered him to pay $900 costs. The judge agreed with the magistrate's conclusion that Mr Eggmolesse was in charge of the motor vehicle because of the facilitation of proof provision in s 124(1)(t) of the Act. He now seeks leave to appeal from the District Court decision under s 118 *District Court of Queensland Act* 1967 (Qld). These are my reasons for granting the application for leave to appeal and allowing the appeal.

[2] Mr D C Shepherd, who appears for Mr Eggmolesse in this application, does not now contend that the magistrate erred in finding that Mr Eggmolesse was in charge of the motor vehicle. No doubt that is because of the evidentiary provision contained in s 124(1)(t) which relevantly provides:

> "any person who … uses or attempts to use … the same shall be presumed to be the person in charge thereof whether the person is or is not the real person in charge, and it is immaterial that by reason of circumstances not known to such person it is impossible to … use the same."

[3] The presumption of fact, that by using or attempting to use the motor vehicle a person is in charge of it, which flows from s 124(1)(t) is, however, capable of rebuttal by other evidence: *Wynne v Campbell, Ex parte Campbell*.[1] But as Mr Shepherd is no longer submitting that Mr Eggmolesse was not in charge of the motor vehicle, and the issue was not argued before this Court, it is unnecessary to consider that aspect further.

[4] The proposed amended grounds of appeal are instead that the judge should have allowed the appeal for two reasons. The first is that the vehicle was not a motor vehicle as defined in the Act. The second is that, because Mr Eggmolesse had satisfied the requirements of s 79(6) of the Act, he ought not to have been convicted. Neither of these contentions was raised in the Magistrates Court or on appeal to the District Court.

The evidence

[5] The relevant evidence before the magistrate came from three prosecution witnesses, police officers Bruce, Hallam and Tracy, and from two defence witnesses, Mr Eggmolesse and his sister, Ms Norma Eggmolesse.

[6] Police officer Bruce's evidence included the following. She and police officer Hallam attended a vacant lot where they saw Mr Eggmolesse at the front of an unregistered blue Holden Commodore. He went to the driver's side, sat in the front seat, started the engine and turned it off. He got out and returned to the front. The police officers administered a roadside breath test to Mr Eggmolesse and then detained him. Another officer administered a further test at the police station. A certificate subsequently issued which recorded that his blood alcohol concentration level was 0.15. In cross-examination, police officer Bruce conceded that Mr Eggmolesse may not have started the car engine and may merely have tried to do so.

[7] Police officer Hallam in his evidence maintained that Mr Eggmolesse leant into the Commodore and actually started it.

[8] Police officer Tracy gave evidence that when he approached the vacant lot, he saw Mr Eggmolesse, who was working at the front of the Commodore, walk to the driver's side and get in it. He said that Mr Eggmolesse tried to start the car; the engine turned over but did not start.

[9] Mr Eggmolesse gave the following evidence. His sister, Norma, phoned him and asked him to bring some petrol to the vacant lot as the car in which she was a

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1 [1966] QWN 7.

passenger had stopped. He did not intend to drive any vehicle that day. He walked to the Commodore carrying the petrol, rather than driving there from his home, because he did not have a licence and he was drunk. When he arrived, she was at the car and its bonnet was open. He was a mechanic. He put some petrol into the car and went to the driver's side. He leant in the window intending to see if the car would start but there was no key in the ignition. He could not turn over the engine, let alone start the car, because the key was missing. He returned to the front of the vehicle to close the bonnet when the police arrived. He was not so drunk that he did not know what he was doing. Before the police arrived, he had also worked on the Commodore's disconnected battery. He explained that he had replaced it with another battery which was on the ground in front of the Commodore. He had no intention of driving the Commodore and once he realised there was no key in the ignition, he left the driver's side and shut the bonnet.

[10] Ms Eggmolesse said that she had been drinking "heaps" at Fitzy's Tavern and asked a stranger for a lift to the other side of Nujuloo Road. She travelled with the stranger in his Commodore. After a while, the car engine cut out and the Commodore stopped in the spare allotment where the police officers later found it. She thought it had run out of petrol and walked away to phone home for assistance. She understood the driver would wait for her at the Commodore. She spoke to her brother and asked him to bring petrol. By the time she returned, the stranger had gone. She continued drinking beer while she waited for her brother. When he arrived he put petrol in the Commodore. The bonnet was open. Shortly afterwards the police arrived. In cross-examination, she said her brother was sitting in the front on the driver's side. She could not recall her brother trying to start the Commodore.

[11] The magistrate accepted Mr Eggmolesse's version of events where it differed on relevant matters from the prosecution witnesses and found his evidence "credible on the whole". Her Honour noted that, although Mr Eggmolesse was affected by alcohol, his evidence was frank and clear. The magistrate found that he leaned into the car to see if it would start but did not start it as there was no key in the ignition.

Was the car a "motor vehicle" under the Act?

[12] Mr Shepherd submits that the evidence, at its highest for the prosecution, was that the Commodore had broken down; it was unknown if it was in working order when Mr Eggmolesse reached into it hoping to start it. Mr Shepherd contends that the evidence did not prove that the Commodore was a vehicle propelled by a motor; it did not establish beyond reasonable doubt that it was a motor vehicle as that term is defined in the Act. He argues that the definitions in the Act of "vehicle" and "motor vehicle" mean that, to convict Mr Eggmolesse, the prosecution must prove that the Commodore was a vehicle at least capable of being operated by being propelled by a motor, even if the motor was temporarily stationary or not running. The evidence, he submits, was sufficient to rebut what would otherwise flow from the averment that the Commodore was a motor vehicle.

[13] The relevant provisions of the Act are as follows. Section 79(1)(c) provides that:

> "Any person who whilst under the influence of liquor or a drug –
>
> …
>
> (c) is in charge of a motor vehicle …
>
> is guilty of an offence … ."

[14] The term "motor vehicle" is relevantly defined in Schedule 4 of the Act as meaning "a vehicle propelled by a motor that forms part of the vehicle …".

[15] The fact that the Commodore was a "motor vehicle" was averred in the charge against Mr Eggmolesse so that, under s 124(1)(r)(ii) of the Act, the averment was evidence that it was a motor vehicle as defined in the Act and, in the absence of rebutting evidence,[2] established that the car was a motor vehicle.

[16] The term "vehicle" is defined in Schedule 4 of the Act as including "any type of transport that moves on wheels …".

[17] The question whether a non-operational motor vehicle is a motor vehicle as defined in the Act involves determinations of fact and assessments of matters of degree: see, for example, the various approaches taken in differing circumstances in *Lawrence v Howlett*;[3] *Floyd v Bush*;[4] *Newberry v Simmonds*;[5] *Smart v Allan & Anor*[6] and *Hart v Rankin*.[7]

[18] The contention that the evidence did not demonstrate that the car was a vehicle propelled by a motor and so was not a motor vehicle under the Act was taken neither at trial nor on appeal to the District Court. The issue was not explored and the magistrate was not asked to make findings of fact upon it. The evidence is unclear whether the Commodore was working when Mr Eggmolesse was in charge of it or, if not, how easily it may have been fixed. As a result, there was no evidence before the magistrate, the District Court judge on appeal or this Court to rebut the evidence flowing from the averment that the car was a motor vehicle under the Act. As a result, the prosecution established this element of the charge at trial beyond reasonable doubt. This proposed ground of appeal has no prospects of success.

Section 79(6) of the Act

[19] Section 79(6) of the Act relevantly provides:

> "Where upon the hearing of a complaint of an offence against subsection (1)(c) … in respect of a motor vehicle the court is satisfied beyond reasonable doubt by evidence on oath that at the material time –
>
> (a) the defendant –
>
> (i) by occupying a compartment of the motor vehicle in respect of which the offence is charged other than the compartment containing the driving seat of that motor vehicle; or
>
> (ii) not being in that motor vehicle, by some action;

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2 *Wynne v Campbell, Ex parte Campbell* [1966] QWN 7.
3 [1952] 2 All ER 74 (Lord Goddard CJ, Devlin and Gorman JJ).
4 [1953] 1 All ER 265 (Lord Goddard CJ, Croom-Johnson and Pearson JJ).
5 [1961] 2 QB 345 (Lord Parker CJ, Winn and Widgery JJ).
6 [1963] 1 QB 291 (Lord Parker CJ, Gorman and Salmon JJ).
7 [1979] WAR 144 at 146 (Burt CJ).

had manifested an intention of refraining from driving that motor vehicle whilst the defendant was under the influence of liquor or a drug … ; and

(b) the defendant –
(i) was not under the influence of liquor or a drug to such an extent; …

as to be incapable of understanding what the defendant was doing or as to be incapable of forming the intention referred to in paragraph (a); and

(c) the motor vehicle in respect of which the offence is charged was parked in such a manner as not to constitute a source of danger to other persons or other traffic; and

(d) the defendant had not previously been convicted of an offence under subsection (1), (2), (2A), (2B), (2D) or (2J) within a period of 1 year prior to the date in respect of which the defendant is charged;

the court shall not convict the defendant of the offence charged."

[20] The phrase "in a vehicle" includes "on a vehicle".[8]

[21] Mr Shepherd contends that on the evidence, the magistrate and the District Court judge on appeal, should have concluded that all the matters referred to in s 79(6)(a) to (d) inclusive were established beyond reasonable doubt and so should have refused to convict Mr Eggmolesse of the offence against s 79(1)(c).

[22] Neither the magistrate nor the District Court judge on appeal was asked to direct their mind to s 79(6). That does not, however, necessarily absolve a court from its obligation to consider the exculpatory provisions of s 79(6) where they are raised on the evidence.

[23] For present purposes, the expression "material time" in the opening paragraph of s 79(6) refers to the time Mr Eggmolesse was in charge of the motor vehicle: *Bartlett v Harrison, ex parte Bartlett*[9] and *Davies v Dorfler, ex parte Davies*.[10] As noted earlier, it is no longer in issue that Mr Eggmolesse was in charge of the Commodore. On the unchallenged findings of the magistrate, his use or attempted use of the Commodore commenced at least when he checked if it was operational for someone else to drive, by putting his hand in the driver's side window to try to start it; his use of it continued as he withdrew his arm, returned to the front and closed the bonnet after realising there was no key. He remained technically in charge of the vehicle throughout that period. The expression "material time" encompasses this whole time period during which Mr Eggmolesse technically used or attempted to use the car, and so was in charge of it by way of s 124(1)(t).

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8 Sch 4, Dictionary.
9 [1975] Qd R 325 at 327.
10 [1988] 2 Qd R 490.

[24] But is Mr Eggmolesse able to establish either of the issues referred to in s 79(6)(a)(i) and (ii)? His use or attempted use of the Commodore did not bring him within s 79(6)(a)(i). He can only avail himself of s 79(6)(a)(ii) if, when he used or attempted to use the Commodore, he manifested his intention of refraining from driving it whilst under the influence of liquor by some action. Section s 79(6)(a)(ii) is not available to him if, whilst he was in charge of the Commodore, he was "in" it. Whilst the dictionary in the schedule to the Act extends the meaning of "in a vehicle" to "on a vehicle" the word "in" is not otherwise defined. It has its ordinary meaning: "expressing inclusion or position within limits of space … (*in Darwin; in bed; in the rain*)",[11] and "inclusion within space or limits, a whole, … : *in the city; in the army; dressed in white; …*".[12]

[25] Giving the word "in" its ordinary meaning, Mr Eggmolesse is not precluded from reliance on s 79(6)(a)(ii) simply because he put his arm through the driver's side window. For a defendant to be "in" a motor vehicle, the defendant must be substantially within the space or limits of the motor vehicle itself. Mr Eggmolesse is not precluded from relying on s 79(6)(a)(ii) by the fact that his hand or arm was in the motor vehicle during the period he was technically in charge of it. In removing his hand from the Commodore, walking to the front of it and shutting the bonnet, he manifested by his actions his clear intention of refraining from driving the Commodore while he was under the influence of liquor. The evidence given at trial on oath and accepted by the magistrate established beyond reasonable doubt that Mr Eggmolesse, not being "in" the Commodore, by his actions manifested an intention of refraining from driving it whilst he was under the influence of liquor. The matters in issue in s 79(6)(a)(ii) were established beyond reasonable doubt.

[26] The magistrate found that, notwithstanding that Mr Eggmolesse was affected by alcohol at the time of the incident, he was able to give frank and clear evidence about it. The sworn evidence at trial uncontroversially established beyond reasonable doubt that, for the purposes of s 79(6)(b), Mr Eggmolesse was not under the influence of liquor to the extent that, at the material time, he was incapable either of understanding what he was doing or of forming an intention to refrain from driving whilst under the influence of liquor.

[27] It was also uncontroversial that the Commodore was located, at the material time, on a vacant allotment off the roadway and so did not constitute a source of danger to people or traffic. The issue referred to in s 79(6)(c) was established by evidence on oath beyond reasonable doubt.

[28] Mr Eggmolesse's traffic and criminal history was not before the magistrate prior to her finding him guilty of the offence against s 79(1)(c). She was however informed of his traffic history before she formally convicted and sentenced him. Her Honour noted that his traffic history demonstrated that he had not committed any offences since 2002. From this point in the proceedings, it was apparent that Mr Eggmolesse had not previously been convicted of the offences referred to in s 79(6)(d) within a period of one year prior to the date of the offence. The respondent does not now contend to the contrary. The issue referred to in s 79(6)(d) was, at least from the time of the sentencing submissions, established beyond reasonable doubt.

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11 The Australian Concise Oxford Dictionary, 2nd ed, 1992.

12 The Macquarie Dictionary, Federation Edition, 2001.

[29] It follows from this discussion that, on the appeal to the District Court, all the matters referred to in s 79(6)(a) to (d) inclusive were established on the material before the judge beyond reasonable doubt. The learned judge was required to review the evidence before the magistrate and to draw his own conclusion: *Fox v Percy*[13] and *Mbuzi v Torcetti*.[14] Had the judge been asked to do so, his Honour should have determined that, in the unusual circumstances of this case, s 79(6) required that Mr Eggmolesse's appeal against conviction should be allowed, his conviction quashed and a verdict of not guilty entered. The judge cannot fairly be criticised for not taking this course when that was neither a ground of appeal before him nor an issue before the magistrate at trial. But the matter has now been brought to this Court's attention. To refuse leave to appeal would allow the wrongful conviction to stand and would give rise to a significant miscarriage of justice. It follows that the interests of justice support the granting of leave to appeal, the setting aside of the conviction and the directing of a not guilty verdict.

[30] I propose the following orders:

1. Application for leave to appeal granted.
2. Appeal allowed.
3. The order of the District Court dismissing the appeal and ordering Mr Eggmolesse to pay the sum of $900 for costs is set aside.
4. Instead, it is ordered that the appeal to the District Court be allowed and the order of the magistrate at Beenleigh on 15 December 2006, convicting Mr Eggmolesse, fining him and disqualifying him from driving for nine months, is set aside. Instead a verdict of not guilty is entered.

[31] **FRASER JA:** I have had the advantage of reading McMurdo P's reasons in draft. I agree with her Honour's reasons for the conclusion that the prosecution established beyond reasonable doubt that the car of which the applicant was alleged to have been in charge was a "motor vehicle" within the meaning of that defined term as it is used in s 79(1)(c) of the *Transport Operations (Road Use Management) Act* 1995 (Qld).

[32] The other ground of the proposed appeal is whether s 79(6) of that Act in this case obliged the magistrate to refrain from convicting the applicant.

[33] That proposed ground assumes the correctness of the magistrate's conclusion that the applicant was proved to be in charge of the car at the relevant time. Notwithstanding s 124(1)(t) of the Act, on the magistrate's findings of fact and the applicant's accepted evidence there seems to me to be a substantial question whether it was open to conclude beyond reasonable doubt that the applicant was "in charge" of the car.

[34] However, as McMurdo P points out in paragraph [3] of her Honour's reasons the issue whether the applicant was correctly found to be "in charge" was not argued in this application. Accordingly I do not express any view upon that question. It is sufficient for the disposition of this application to assume that the applicant was "in charge" of the car at the relevant time. Upon that assumption I agree with McMurdo P's reasons for concluding that s 79(6) obliged the magistrate to refrain from convicting the applicant.

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13 (2003) 214 CLR 118; [2003] HCA 22 at 126-7 [25].

14 (2008) 50 MVR 451; [2008] QCA 231 at [17], [19]; see also *Rowe v Kemper* [2008] QCA 175 at [5].

[35] I agree with the orders proposed by McMurdo P.

[36] **McMEEKIN J:** I have had the advantage of reading the reasons for judgment of the President. I agree with the orders that she proposes for the reasons that she has given.