30/08; [2008] VSC 181

SUPREME COURT OF VICTORIA

DPP v JUCHNOWSKI

Kyrou J

26 May, 3 June 2008 — 185 A Crim R 66

MOTOR TRAFFIC – SPEEDING CHARGE – DRIVER DETECTED EXCEEDING THE SPEED LIMIT – INFRINGEMENT NOTICE GIVEN – ELECTION BY DRIVER TO HAVE MATTER HEARD IN COURT – CERTIFICATE PRODUCED AS TO THE PRESCRIBED DETECTION DEVICE AND PHOTOGRAPHS SHOWING DETAILS INCLUDING THE VEHICLE INVOLVED, THE SPEED LIMIT AND THE SPEED – DISMISSAL OF CHARGE BY MAGISTRATE ON THE GROUND THAT THE APPLICABLE SPEED LIMIT HAD NOT BEEN PROVED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS81(2), 83A.

1. The question to be determined in the present case was whether s81(2) of the *Road Safety Act* 1986 ('Act') meant that a certificate under s83A of the Act that stated the speed limit without also stating the basis upon which the speed limit was determined was sufficient to prove the speed limit.

2. Section 81(2) of the Act provides that "evidence of the speed limit at [the relevant] time and place as indicated or determined on that occasion by an image or message produced by a prescribed process when used in the prescribed manner is ... proof of the speed limit on that occasion". It is clear from these words that Parliament intended that the speed limit can be proved by the relevant image or message. Such evidence is not necessarily conclusive. However, in the absence of evidence to the contrary, it establishes the speed limit. That section operates according to its own terms. Where its requirements are satisfied, the speed limit shown on the image or message must be accepted as being sufficient proof of the speed limit in the absence of evidence to the contrary.

***Ciorra v Cole* [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547; *MC31/04*, distinguished.**

3. Accordingly, where a certificate pursuant to s83A of the Act was tendered in evidence which showed the speed limit on an image, a magistrate was in error in dismissing a charge of speeding on the ground that there was no evidence of the speed limit at the time and place of the alleged offence.

KYROU J:

Introduction and summary

1. This is an appeal under s92(1) of the *Magistrates' Court Act* 1989 (Vic) ("MC Act") from a final order made on 15 October 2007 by the Magistrates' Court at Melbourne, dismissing a speeding charge against the respondent, Maryla Juchnowski. The appellant is the Director of Public Prosecutions ("DPP"), who has brought the appeal on behalf of the police informant, Peter Dolheguy.

2. The learned Magistrate dismissed the charge on the ground that the basis upon which the applicable speed limit is to be determined is a fact which must be proved by the prosecution and that that fact had not been proved.

3. For the reasons set out in this judgment, I have concluded that the learned Magistrate erred in law and that the appeal should be allowed.

Facts

4. Ms Juchnowski was charged with a contravention of rule 20 of the *Victorian Road Rules*, which relevantly provides as follows: "A driver must not drive at a speed over the speed-limit applying to the driver for the length of road where the driver is driving". Rules 21 to 25 of the Road Rules set out the basis upon which the speed limit for a length of road is determined. For example, rule 21(1) provides that the speed limit applying for a length of road to which a speed limit sign applies is the number of kilometres per hour indicated by the number on the sign. Rule 22 deals with speed-limited areas, rule 23 deals with school zones, rule 24 deals with shared zones and rule 25 deals with default speed limits.

5. It is alleged that on 7 October 2006 at 3.58 pm, Ms Juchnowski was the driver of a vehicle travelling west on Flinders Street and that, at the intersection with William Street, she drove over the 50 kilometres per hour speed limit applicable to that length of road. The detected speed of the vehicle allegedly driven by Ms Juchnowski was 63 km/h, and the alleged speed was 61 km/h.

6. Ms Juchnowski was sent a traffic infringement notice in respect of the alleged exceeding of the speed limit. She elected to have the matter heard in court. On 21 February 2007, a charge and summons was issued and forwarded to her.

7. The charge was heard on 15 October 2007. A certificate pursuant to s83A of the *Road Safety Act* 1986 (Vic) ("RS Act") was tendered in evidence. The certificate stated the following:

> (a) On 07/10/2006 the REDFLEXred-speed HDX system was a prescribed detection device for the purposes of Section 66 of the *Road Safety Act* 1986 and was tested, sealed and used in the prescribed manner and produced the images produced in printed form in paragraph (c)
>
> (b) The printed images and messages, set out in paragraph (c) were produced by a process prescribed for the purposes of Sections 81(1) and 81(2) of the *Road Safety Act* 1986
>
> (c) Printed Images and Messages: ...

8. The certificate included two photographs in paragraph (c). The first photograph showed a vehicle at an intersection and the second photograph showed a close-up of a licence plate. The following text appeared at the bottom of each photograph: "At the Intersection of Flinders Street and William Street, Melbourne in lane 1 from the left carriageway for the vehicle direction of travel. 50 km/h Speed Limit on 07/10/2006 at 3:38:05pm Speed 63 km/h".

9. It is not disputed that Ms Juchnowski was the driver of the vehicle which appears in the photographs in the s83A certificate at the time that the photographs were taken.

10. The learned Magistrate did not deliver written reasons for his order dismissing the charge. The critical passage from the Magistrate's oral reasons, given at the conclusion of the hearing on 15 October 2007 and recorded in the transcript of that hearing, is as follows:[1]

> The interesting issue ... is whether the prosecution have an additional element of proof, and on first blush it would seem that the prosecution do not, just by looking at the nature of the charge before the Court, but in a decision of *Ciorra* ... and *Cole* [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547 a decision of Redlich J, there the Court was dealing with the same rule 20 that this Court was dealing with and there was slightly different issues there, as I understand it the issue being whether or not the prosecution was obliged to note in the charge the basis upon which the speed limit was determined and there his Honour ruled that it did not.
>
> He did say that the essence of an offence under Road Rule 20 is that a driver has driven at a speed over the speed limit; an essential factual ingredient of the offence is the speed limit which the driver is said to have exceeded. Now that is the case here where there is evidence of the speed limit which the defendant is said to have exceeded and the speed limit which applies to the driver will depend on which of Road Rules 21 to 25 will apply. That seems to be something that relates back to what the speed limit will actually be. However, at paragraph 80 his Honour goes on to say:
>
> *I do not accept the contention of the appellant that it was necessary that the charge specify that 100 kilometre per hour speed signs apply. The basis upon which the speed limit is to be determined need not be set out in the charge though it be a fact necessary to be proved by the prosecution it is not an essential ingredient for the purpose of identifying the offence.*
>
> It seems on that basis that what his Honour clearly is saying, that the basis upon which the speed limit is to be determined is a fact necessary to be proved by the prosecution and it is conceded here by the prosecution that it has not been determined – the basis upon which the speed limit has not been proved and accordingly if what his Honour said is correct, and I consider myself bound by what his Honour has said, then the charge will be dismissed.

11. The notice of appeal from the learned Magistrate's order is dated 14 November 2007 and lists the following questions of law upon which the appeal is brought:

> 1. Did the learned Magistrate err in dismissing the charge against the respondent because there was

no evidence of the speed limits at the time and place of the alleged offence?

2. Did the learned Magistrate err in ruling that the certificate tendered pursuant to Section 83A of the *Road Safety Act* and the *Road Safety (General) Regulations* 1999 did not contain sufficient evidence of the speed limit at the time and place of the alleged offence?

3. Did the learned Magistrate err in ruling that notwithstanding the contents of the certificate tendered pursuant to Section 83A of the *Road Safety Act* it was otherwise necessary to establish the means whereby the speed limits at the time and place of the alleged offence were to be determined?

Relevant statutory provisions

12. Section 66 of the RS Act provides as follows:

> **66 Certain prescribed offences to be operator onus offences**
> A prescribed offence that is detected by a prescribed detection device or by a prescribed process or the detection of which involves the use of a prescribed detection device is an operator onus offence for the purposes of Part 6AA.

13. Section 81 of the RS Act contains the heading "Certain matters indicated by speed cameras are sufficient evidence". Section 81(1) deals with evidence of the speed of a vehicle. Section 81(2) deals with evidence of a speed limit and provides as follows:

> If in proceedings for an offence to which section 66 applies the speed limit at the time and place at which a motor vehicle or trailer travelled on any occasion is relevant, evidence of the speed limit at that time and place as indicated or determined on that occasion by an image or message produced by a prescribed process when used in the prescribed manner is, without prejudice to any other mode of proof and in the absence of evidence to the contrary, proof of the speed limit on that occasion.

14. Section 83A(1) of the RS Act provides as follows:

> **83A Evidence relating to prescribed detection devices**
> (1) A certificate in the prescribed form purporting to be issued by an authorised person certifying—
> (a) that a prescribed detection device for the purposes of section 66 was tested, sealed or used in the prescribed manner; or
>
> (b) that an image or message described in the certificate was produced by a detection device prescribed for the purposes of section 66 or by a prescribed process; or
>
> (c) as to any other matter that appears in, or that can be determined from, the records kept in relation to the detection device or the prescribed process by the police force of Victoria—
> is admissible in evidence in any proceedings and, in the absence of evidence to the contrary, is proof of the matters stated in the certificate.

Appeal under s92(1) of the MC Act

15. A party to a criminal proceeding (other than a committal proceeding) in the Magistrates' Court may appeal to this Court on a question of law, from a final order of the Magistrates' Court in that proceeding.[2]

16. Where, as in the present case, an informant who is a member of the police force wishes to appeal, the appeal must be brought by the DPP on behalf of the informant.[3]

The issue and the parties' submissions

17. I was informed by the parties that there was no dispute on the facts. In particular, the respondent did not dispute that s66 of the RS Act applied to a contravention of rule 20 of the Road Rules and that the s83A certificate complied with all applicable requirements. It was common ground before me that the only issue to be determined in this appeal is whether s81(2) of the RS Act meant that a s83A certificate that stated the speed limit, without also stating the basis upon which the speed limit was determined, was sufficient to prove the speed limit.

18. In making the order that he did on 15 October 2007, the learned Magistrate referred to, and considered himself to be bound by, statements made by Redlich J (as his Honour then was) in *Ciorra v Cole*.[4] In particular, Redlich J commented (at paragraph 80): "The basis upon which the speed limit is to be determined need not be set out in the charge. Though it be a fact necessary

to be proved by the prosecution, it is not an essential ingredient for the purpose of identifying the offence".[5]

19. The learned Magistrate held that the basis upon which the speed limit was determined in relation to Ms Juchnowski's alleged offence on 7 October 2006 was not proved by the prosecution, as the s83A certificate, which was the only relevant evidence tendered by the prosecution, set out the speed limit but not the basis upon which it was determined.

20. Mr Gyorffy, who appeared before me for the DPP, accepted that Redlich J's comments at paragraph 80 in *Ciorra* are an accurate statement of the general principle that applies to the proof of speeding offences under rule 20 of the Road Rules. He agreed that it is generally not sufficient for a prosecution witness to give evidence of what speed limit applied, as that would be merely an expression of opinion or hearsay. The witness must also give evidence of how the speed limit was determined, by reference to the alternatives set out in rules 21 to 25. However, Mr Gyorffy submitted that the general principle in *Ciorra* does not apply to proceedings for an offence to which s66 of the RS Act applies where s81(2) is relied on as proof of a speed limit. He submitted that *Ciorra* did not deal with proof of a speed limit under s81(2) and is not relevant to that mode of proof. He submitted that the words of s81(2) are clear and that the effect of the provision is that evidence of a speed limit which meets the requirements of s81(2) is *prima facie* proof of that speed limit.

21. Mr Walsh-Buckley, who appeared before me for Ms Juchnowski, acknowledged that *Ciorra* does not expressly deal with s81(2) of the RS Act. Mr Walsh-Buckley conceded that, if a statutory provision dispensed with the need to prove the basis upon which a speed limit is to be determined, that provision would have effect and would override the general principle stated by Redlich J in *Ciorra*. However, Mr Walsh-Buckley submitted that s81(2) of the RS Act does not assist the DPP in avoiding the operation of the general principle set out in *Ciorra* because the provision does not go far enough. In his submission, s81(2) does not deal with the basis upon which the speed limit is to be determined and does not dispense with the common law requirement that the prosecution must prove that basis.

22. The parties were unable to refer me to any cases considering the meaning of ss81(2) or 83A of the RS Act.

Meaning of s81(2) of the RS Act

23. As the respondent relied heavily on *Ciorra*, it is necessary to consider the facts in that case and the reasons for decision. Mr Ciorra was charged with driving in excess of the speed limit. The charge stated that Mr Ciorra's driving was in breach of the *Road Safety (Traffic) Regulations* 1988 (Vic). Those regulations had been repealed before the date of the alleged offence. At the commencement of the hearing, the prosecution was permitted to amend the charge to refer to the relevant current regulations which had been allegedly contravened. The amended charge did not specify that 100 km/h speed limit signs applied in the relevant area. At the hearing of the amended charge, the informant gave oral evidence that he had observed Mr Ciorra travelling at approximately 145 km/h in an area where 100 km/h signs applied.

24. Mr Ciorra was convicted and subsequently appealed to the Supreme Court seeking to set aside the conviction on four grounds. The first ground was that the charge did not allege an offence known to the law as the regulations referred to in the charge no longer existed. The second ground was that the amended charge was defective because it did not expressly state that Mr Ciorra had exceeded the speed limit and did not set out the basis for determining the speed limit and therefore did not allege the essential elements of the offence. The third ground was that Mr Ciorra should not have been convicted where he had not been served with the amended charge. The fourth ground was that the Magistrate should not have amended the charge when it was a nullity.

25. Redlich J dealt carefully with all four questions. The only question that is relevant for the present appeal is the question of whether the amended charge was defective because it did not set out the basis for determining the speed limit. His Honour said:[6]

> There is a distinction between legal elements of the offence, essential factual ingredients and

> particulars required by the defendant to prepare his or her defence which bear upon the validity of the charge as expressed. I do not accept the contention of the appellant that it was necessary that the charge specify that 100 kilometre per hour speed limit signs applied. The basis upon which the speed limit is to be determined need not be set out in the charge. Though it be a fact necessary to be proved by the prosecution, it is not an essential ingredient for the purpose of identifying the offence. The submission that the charge was a nullity because of the absence of these words cannot be sustained.

26. Based on oral evidence that had been given by the informant about the speed limit and how it was determined, his Honour held that these matters had been proved. Ultimately, his Honour allowed the appeal on the basis that Mr Ciorra had not been served with the amended charge.

27. It is clear from the above discussion of *Ciorra* that Redlich J did not need to, and did not in fact, consider s81(2) of the RS Act and the sufficiency of a s83A certificate which sets out the speed limit but not the basis upon which the speed limit was determined. His Honour was dealing with proof of a speed limit by oral evidence and, in that context, stated that oral evidence of the speed limit on its own, without evidence of the basis upon which the speed limit was determined, was not sufficient. His Honour did not discuss statutory means of proof of a speed limit and his comments cannot have any bearing on the proper interpretation of s81(2).

28. Section 81(2) appears in Part 6 of the RS Act, which deals with offences and legal proceedings. It is one of a number of provisions in that Part whose purpose is to facilitate the proof of an essential element of an offence under the RS Act (which includes an offence under the Road Rules). Other such facilitative provisions in Part 6 of the RS Act include ss78, 78A, 79, 79A, 80, 80A, 81(1), 81(1A), 82, 83, 83A and 84 of that Act.

29. Section 81(2) provides that "evidence of the speed limit at [the relevant] time and place as indicated or determined on that occasion by an image or message produced by a prescribed process when used in the prescribed manner is … proof of the speed limit on that occasion". It is clear from these words that Parliament intended that the speed limit can be proved by the relevant image or message. Such evidence is not necessarily conclusive. However, in the absence of evidence to the contrary, it establishes the speed limit.

30. Section 81(2) provides that it does not affect any other mode of proof. Accordingly, the prosecution can choose to prove the speed limit by other means. If the mode of proof selected is oral evidence, then in accordance with *Ciorra*, the evidence must establish the speed limit and the basis upon which it was determined. However, the requirement that the basis upon which the speed limit is determined must be the subject of evidence where proof is provided through oral evidence, does not apply to proof under s81(2). That section operates according to its own terms. Where its requirements are satisfied, the speed limit shown on the image or message must be accepted as being sufficient proof of the speed limit in the absence of evidence to the contrary.

31. The structure of s81 of the RS Act, and its nature as a facilitative provision (as described above), strongly suggests a legislative intention that s81(2) provide a complete means of proving an applicable speed limit, without the need to prove the basis upon which the speed limit is determined. Section 81(1) of the RS Act provides a mechanism for proving the speed, while s81(2) provides a mechanism for proving the speed limit. Collectively, those sub-sections in s81 provide means by which two of the essential elements of the offence in rule 20 of the Road Rules can be proved. It would be odd if, despite the legislative intention that appears from this drafting, it were necessary for a prosecutor to additionally prove the basis upon which a speed limit was determined where s81(2) provides a *prima facie* means of proving the speed limit itself. In my opinion, on a proper construction of s81(2), this additional proof is not required.

32. In forming the views expressed above, I have had regard to the principle that, in interpreting a penal statute, "the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject".[7] This is not a case where, following the application of the ordinary rules of construction, there is any ambiguity or doubt about the meaning of s81(2) of the RS Act.

33. It follows from what I have said above that my answer to each of the three questions of law posed in the notice of appeal is "yes".

Proposed orders

34. Subject to any submissions from the parties, I propose to make the following orders:

(a) The appeal is allowed.

(b) The order of the Magistrates' Court dated 15 October 2007 in case number W00526520 is set aside.

(c) Case number W00526520 is remitted to the Magistrates' Court at Melbourne to be reheard and determined according to law.

35. I will hear the parties on costs.

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[1] Transcript of Proceedings, *Victoria Police v Juchnowski* (Magistrates' Court of Victoria, 15 October 2007) 50, 51.
[2] MC Act, s92(1).
[3] MC Act, s92(2).
[4] [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547 ("*Ciorra*").
[5] These comments appear at [81] of the version reported at (2004) MVR 547.
[6] *Ciorra* (2004) MVR 547, [81]; [2004] VSC 416, [80]; (2004) 150 A Crim R 189 (citation omitted).
[7] *Beckwith v R* [1976] HCA 55; (1976) 135 CLR 569, 576; (1976) 12 ALR 333; 51 ALJR 247; 28 ALT 39 (Gibbs J). This statement was endorsed by the High Court in *Deming No 456 Pty Ltd v Brisbane Unit Development Corp Pty Ltd* [1983] HCA 44; (1983) 155 CLR 129, 145; (1983) 50 ALR 1; 58 ALJR 1 and *Waugh v Kippen* [1986] HCA 12; (1986) 160 CLR 156, 164; (1986) 64 ALR 195; 60 ALJR 250; [1986] Aust Torts Reports 80-004.

APPEARANCES: For the appellant DPP (On behalf of Peter Dolheguy): Mr T Gyorffy, counsel. Solicitor for Public Prosecutions. For the respondent Juchnowski: Mr WJ Walsh-Buckley, counsel. Stephen Andrianakas & Associates, solicitors.
