31/12; [2012] VSC 369

SUPREME COURT OF VICTORIA

CONTRACT CONTROL SERVICES PTY LTD v BROWN

Kyrou J

3, 29 August 2012

MOTOR TRAFFIC – OVERLOADING – ESSENTIAL ELEMENTS OF OFFENCE – ACCUSED WAS THE CONSIGNOR OF GOODS ON A VEHICLE WHOSE MASS EXCEEDED ITS MASS LIMIT – CHARGE SPECIFIED ERRONEOUS MASS LIMIT AND ERRONEOUS STATUTORY PROVISION – APPLICATION BY INFORMANT FOR CHARGE TO BE AMENDED – MAGISTRATE MADE AMENDMENT OF CHARGE AFTER EXPIRATION OF 12 MONTH LIMITATION PERIOD – WHETHER MAGISTRATE IN ERROR – REASONABLE STEPS DEFENCE – MAGISTRATE REJECTED DEFENCE – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S50(1); *ROAD SAFETY ACT* 1986, SS171(2), 179.

CCS – a building company – engaged a Hire Co as a sub-contractor to remove waste from a building site. The Hire Co in turn engaged an excavation operator who operated a truck which was found to have exceeded its mass limits on several occasions. Charges were laid and they set out the alleged mass on the day of each offence and the percentage by which the mass exceeded 18.4 tonnes. CCS pleaded not guilty to the charges asserting that the mass limit was 22.7 tonnes and that the charges were defective because they did not specify a valid mass limit. CCS also submitted that it had a defence to the charges under s179(1) of the *Road Safety Act* 1986 ('Act'). The Magistrate ruled that the mass limit was not an essential element of the offences but a particular that was capable of amendment. The Magistrate also rejected CCS's defence under s179(1) of the Act that CCS did not know of the conduct that constituted the commission of the offence and that it had taken all reasonable steps to prevent that conduct from occurring. Upon appeal—

HELD: Appeal in relation to the amendment made and the findings and orders made by the Magistrate quashed. The Appeal in relation to the reasonable steps defence rejected.

1. The validity of a charge is to be determined according to the contents of the summons and charge. A charge will be defective if it does not include an essential element of the alleged offence, or if the alleged offence is not known to law. Whether an amendment of a defective charge should be permitted is a matter of fact and degree.

2. The mass limit applicable to a vehicle was an essential element of an offence under s171(2) of the Act. The essence of such an offence was that the mass of a vehicle exceeded the mass limit applicable to that vehicle. The offence involved a comparison between two values, namely, the mass of the vehicle and the mass limit. Both values were essential elements of the offence because the absence of one of them prevented performance of the comparison that was required by s171(2). They both formed the foundation of the charge. Specification of the mass of the vehicle alone could not have established the offence because of the absence of the statutory standard by reference to which the offence was established. Likewise, specification of the mass limit alone simply provided the statutory standard but did not contain a vital fact by which infringement of that standard could be established.

3. The Act did not specify a single mass limit but set out a scheme under which the mass limit may vary. It followed that, in order for a defendant to have a proper understanding of the nature of the alleged offence, the charge must set out the mass limit that was allegedly applicable.

4. Specification of the mass limit was a matter of substance rather than form. A person who was charged with an offence under s171(2) of the Act was entitled to know the facts constituting the alleged offence and to be able to check the accuracy of those facts and to assess the strength of the prosecution case. The omission of a lawful mass limit from the charge would deprive the accused of these basic rights. Without knowing the lawful mass limit, the accused would not be able to make an informed decision about whether to contest the charge or to plead guilty and rely on mitigating circumstances.

5. The lawful mass limit applicable to the vehicle was an essential element of the offence and its absence from the charges rendered them defective. The charges did not set out offences upon which CCS could have been convicted. At no time prior to the expiration of the 12 month limitation period did VicRoads provide to CCS particulars of the lawful mass limit. Accordingly, the power to amend the charges did not apply after the limitation period had expired.

6. It followed that the magistrate erred in ruling that the mass limit was a mere particular rather than an essential element of an offence under s171(2) of the Act and that it was permissible to amend the charges to specify the mass limit after the expiration of the limitation period. His Honour should have refused the amendment and dismissed the charges.

7. In relation to the reasonable steps defence, an offence under s171(2) of the Act was one of strict liability, subject to CCS establishing, on the civil standard of proof, a defence under s179. Section 179 placed the onus on CCS to satisfy the magistrate that it had taken all reasonable steps to prevent the offending conduct. CCS could have discharged this onus by reference to the non-exclusive factors set out in s179(2) of the Act.

8. It was for CCS, rather than VicRoads or the magistrate, to identify the steps upon which CCS sought to rely and to present evidence to satisfy the magistrate that they were all the reasonable steps that could have been taken to prevent the offending conduct and that it complied with industry standards.

9. CCS' complaint that the magistrate rejected its reasonable steps defence without identifying standards and guidelines misconceived the purpose and effect of s179 of the Act. Section 179 itself – including s179(2)(b)(v) and (c)(i) – provided some guidance on what constituted reasonable steps.

KYROU J:

Introduction and summary

1. The appellant, Contract Control Services Pty Ltd ('CCS') has appealed under s272(1) of the *Criminal Procedure Act* 2009 ('CP Act') against a magistrate's findings of guilt in respect of five charges of being a consignor of goods on a vehicle whose mass exceeded its mass limit, contrary to s171(2) of the Road Safety Act 1986 ('Act').[1]

2. CCS is a building company. It engaged Julius Plant Hire Co ('Julius') as a subcontractor to excavate and remove waste from a building site. Julius, in turn, engaged an excavation operator and Norman Thackrah, the owner and operator of a truck with registration number CFW 088 ('Vehicle').

3. The five charges were among a total of 12 charges filed against CCS on 30 June 2009 by the respondent, Wayne Brown, who acted as informant in his capacity as an officer of VicRoads. The charges alleged that the offences took place on five separate days in the period from 30 September 2008 until 3 October 2008. The charges relevantly alleged that on those days, CCS was the consignor of goods on the Vehicle and that the Vehicle had been 'used on a highway while the mass of the vehicle exceeded its mass limit of 18.4 tonnes being the limit specified by Regulation 401(1) of the *Road Safety (Vehicles) Regulations* 1999'. Each charge then set out the alleged mass on the day of the offence, the percentage by which that mass exceeded 18.4 tonnes and whether the alleged breach was a 'minor', 'substantial' or 'severe' risk breach. For example, the last paragraph of Charge 2 alleged '(Mass 23.86 tonnes) (29.67% excess) (Severe risk breach)'.

4. CCS did not dispute that each charge correctly specified the date of the alleged offence; the place of the alleged offence; the name of the driver and the registration number of the Vehicle; the mass of the Vehicle at the time of the alleged offence (such as 23.86 tonnes for Charge 2) and that CCS was the consignor. From May 2010, however, CCS disputed that the applicable mass limit was 18.4 tonnes and that the mass limit was set by the *Road Safety (Vehicles) Regulations* 1999 ('1999 Regulations'). CCS asserted that the mass limit was 22.7 tonnes in accordance with the manufacturer's compliance plate and that the charges were defective because they did not specify a valid mass limit.

5. VicRoads continued to insist that the charges correctly stated the mass limit as 18.4 tonnes and that the charges were not defective. On 14 July 2009, VicRoads served a brief of evidence on CCS containing an evidentiary certificate under s84 of the Act that identified a gross vehicle mass of 18.4 tonnes, based on the rating applicable to the Vehicle upon its registration in 1984. However, at the commencement of the hearing of the charges on 8 August 2011 – nearly three years after the commission of the alleged offences – VicRoads acknowledged that the 1999 Regulations did not specify a mass limit that was applicable to the Vehicle and that the mass limit was not 18.4 tonnes. VicRoads applied under s50(1) of the *Magistrates' Court Act* 1989 ('MC Act')[2] to amend each of the charges by:

(a) deleting the words 'of 18.4 tonnes being the limit specified by Regulation 401(1) of the *Road Safety (Vehicles) Regulations 1999*', the alleged mass excess percentage, and the category of breach;
(b) substituting '22.7 tonnes' as the alleged mass limit; and
(c) inserting a new statutory reference (s153(2)(a)(i) and para (a) of the definition of 'GVM' in s3 of the Act), excess percentage and category of breach.

6. VicRoads withdrew six of the 12 charges (charges 5, 6, 7, 9, 10 and 12) because the Vehicle mass alleged in those charges did not exceed 22.7 tonnes.

7. CCS opposed the amendment of the remaining six charges on the basis that it had the effect of altering an essential element of an offence under s171(2) of the Act outside the 12 month limitation period for bringing a charge for such an offence.

8. The magistrate ruled that the mass limit was not an essential element of the offence that was required to be specified in the charge, but rather a particular that was capable of amendment. [3] Accordingly, his Honour allowed the amendment.

9. The magistrate also rejected CCS' defence under s179(1) of the Act that CCS did not know of the conduct that constituted the commission of the offence and that it had taken all reasonable steps to prevent that conduct from occurring.[4]

10. The magistrate found CCS not guilty of charge 1 and guilty of charges 2, 3, 4, 8 and 11. Without recording a conviction, his Honour fined CCS a total of $1,000 and ordered it to pay VicRoads' costs.

11. CCS' appeal relies on two grounds. The first ground is that the magistrate erred in permitting the charges to be amended on the basis that the mass limit of the Vehicle was not an essential element of the charges. The second ground is that, in reaching his conclusion that CCS did not take reasonable steps to prevent the offending conduct from occurring, the magistrate:

(a) found that CCS ought to have taken particular steps in circumstances where those steps had not been particularised in any of the charges or put in cross-examination of CCS' witnesses;
(b) did not comply with the requirements of procedural fairness;
(c) did not hear evidence in relation to standards or guidelines for steps that should have been taken by a reasonable person in the position of CCS, namely a construction company, in relation to the charges; and
(d) misdirected himself about what reasonable steps might be and wrongly found that the steps taken by CCS were not reasonable in all the circumstances.

12. For the reasons that follow, I have concluded that the magistrate erred in finding that specification of the mass limit was not an essential element of an offence under s171(2) of the Act, but that his Honour did not err in rejecting CCS' defence under s179(1) of the Act.

Ground of appeal 1: Mass limit was an essential element of the offence
Statutory provisions relevant to Ground 1
***Road Safety Act* 1986**
13. Section 171(2) of the Act provides:

171 Liability of consignor
...
(2) A person is guilty of an offence if—
(a) a vehicle is in breach of a mass, dimension or load restraint limit or requirement; and
(b) the person is the consignor of any goods that are in or on the vehicle.

14. Section 3(1) of the Act provides that 'mass limit' has the meaning set out in s153. Section 153(1) states that the mass limit 'is a limit specified under this Act concerning the mass of ... a vehicle'. Section s153(2) states that, without limiting s153(1), the following are mass limits: a limit concerning the gross mass of a vehicle or the mass on a tyre, an axle, or an axle group of the vehicle (s153(2)(a)(i) and (ii)), a limit concerning axle spacing (s153(2)(b)) and limits set out on signs (s153(2)(c)).

15. Section 3(1) of the Act provides as follows:

> ***GVM*** (gross vehicle mass) of a vehicle means the maximum loaded mass of the vehicle—
> (a) as specified by the vehicle's manufacturer; or
> (b) as specified by [VicRoads] if –
> (i) the manufacturer has not specified a maximum loaded mass; or
> (ii) the manufacturer cannot be identified; or
> (iii) the vehicle has been modified to the extent that the manufacturer's specification is no longer appropriate.

16. An offence under s171(2) of the Act may be a minor risk breach (s153(3)), a substantial risk breach (s153(4)) or a severe risk breach (s153(5)). These categories are set by reference to the percentage by which the load exceeds the mass limit. For a corporation, the maximum fine for a severe risk breach is 600 penalty units (s178(1)(a)(i)(A)), for a substantial risk breach it is 300 penalty units (s178(1)(a)(ii)(A)); and for a minor risk breach it is 100 penalty units (s178(1)(a)(iii)(A)).

***Magistrates' Court Act* 1989**

17. Section 26(4) of the MC Act provided that, subject to an exception which is not presently relevant, a proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence was alleged to have been committed.

18. Section 27 of the MC Act outlined the content requirements for a charge as follows:

> 27 Descriptions in charge
> (1) A charge must describe the offence which the defendant is alleged to have committed and a description of an offence in the words of the Act or subordinate instrument creating it, or in similar words, is sufficient.
>
> (2) A charge must identify the provision of the Act or subordinate instrument (if any) that creates the offence which the defendant is alleged to have committed.

19. Section 50 of the MC Act empowered the Magistrates' Court to amend a charge. It provided:

> **50 Power to amend where there is a defect or error**
> (1) On the hearing of a proceeding the Court must not allow an objection to a charge, summons or warrant on account of any defect or error in it in substance or in form or for any variance between it and the evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error.
> (2) An order must not be set aside or quashed only because of a defect or error in form but the Court may amend the order to correct the defect or error.

Principles for establishing an essential element of an offence

20. The validity of a charge is to be determined according to the contents of the summons and charge.[5] A charge will be defective if it does not include an essential element of the alleged offence,[6] or if the alleged offence is not known to law.[7]

21. In *DPP v Kypri*,[8] Nettle JA (with whom Ashley and Tate JJA substantially agreed) set out the following principles for determining whether a particular allegation is an essential element of an offence:

> (a) A charge is to be interpreted in the way in which a reasonable defendant would understand it, giving reasonable consideration to the words of the charge in their context.[9]
>
> (b) If the contents of the charge and the summons are sufficient when read as a whole to bring home to a reasonable defendant the essential elements of the offence alleged, the charge will not be invalid.[10]
>
> (c) Failure to name the provision of the applicable statute would be a breach of s27 of the MC Act, but such a breach could be rectified by amendment. It would not affect the essential validity of the charge or, necessarily, the validity of any conviction obtained on it.[11]
>
> (d) However, where the charge and summons do not allege sufficient facts to enable a reasonable defendant to determine on their face the provision of the applicable statute under which the alleged offence was committed, the charge is defective because it fails to convey the nature of the offence alleged.[12]

22. His Honour also explained the principles for amendment of a charge that fails to disclose the essential elements of an offence as follows:

> [I]f a charge is defective for failing to aver an essential element of the offence alleged, but contains sufficient information to enable a reasonable defendant to determine the true nature of the offence alleged, it may be amended (even after expiration of the limitation period) in order to accord to what was always understood to be the true nature of the offence alleged. Until such a charge is so amended, however, it remains ineffective. Where, therefore, such a charge is not so amended until after expiration of the limitation period, it will not be until after the expiration of the limitation period that there exists an effective charge. So, therefore, where such an amendment is made after expiration of the limitation period it will defeat the limitation period. ... [S]uch an amendment is regarded as acceptable; for the reason that it is not unfair so to defeat the limitation period where the defendant has been made to understand the true nature of the offence alleged before the limitation period expired.
>
> Logically, the same reasoning applies to a charge which is defective in that it fails to aver an essential element of the offence (and does not otherwise disclose *ex facie* the true nature of the offence) if, before the expiration of the limitation period, the true nature of the offence alleged is otherwise conveyed in writing to the defendant; for example, by particulars, or letter or even provision of the police brief. In terms of what is just, there is no difference. In each case, the defendant is made to understand, before expiration of the limitation period, the true nature of the offence alleged and, in each case, the amendment does no more than make the charge accord to that understanding.
>
> Arguably, there are reasons of certainty and convenience to restrict the power of amendment to cases where the true nature of the offence is apparent from the face of the charge and summons. Otherwise, there may be disputes as to the particulars, letters, briefs of evidence and other written communications which are sent and received and thus as to the facts of which defendants have been apprised. But they do not strike me as sufficient reasons to decline to exercise the power of amendment in cases where the position is clear.[13]

23. It has long been accepted that, under s50 of the MC Act, a magistrate has power to amend of his or her own motion.[14] According to Nettle JA in *Kypri*, the imperative terms in which s50 is drafted suggest that there is a duty on the magistrate to amend a charge in an appropriate case, irrespective of whether a prosecutor applies to amend it.[15]

24. As a general rule, an amendment after the expiration of the limitation period which clarifies a charge is permissible and an amendment which goes further than that is not.[16] An amendment may be permitted out of time when, despite the amendment, the offence charged stays the same. [17] An amendment will not be allowed out of time if it would result in the formulation of a new and different charge, as this is treated as an impermissible attempt to avoid the limitation period.[18]

25. A charge that lacks an essential element of the alleged offence is defective and, at common law, may be described as a nullity. However, if the true nature of the offence is apparent from the face of the charge, and the defendant has not been misled or otherwise prejudiced by the omission, the charge may be amended under s50 of the MC Act to include the missing element,[19] even if the amendment is made out of time. This is because such an amendment does no more than clarify what is already apparent from the face of the charge.[20]

26. In *Kypri*, Nettle JA described the power to amend given by s50(1) of the MC Act as 'wide-ranging, covering any defect in a charge whether in substance or in form, as well as answering any objection to a variance between the charge and the evidence presented in the proceeding'.[21] His Honour continued:

> It exists to ensure that justice is not defeated by errors and omissions which are not productive of injustice. So, if the justice of the case is the criterion, why should it not be thought appropriate to allow such an amendment, so long as the true nature of the charge is able to be discerned before expiration of the limitation period – whether that be *ex facie* or from particulars given or by means of some other form of written communication?
>
> It is true that the validity of a charge must be judged on the basis only of what appears from the face of the charge and the summons. But that is so because the charge defines the issues and thus the evidence admissible in the litigation. It would make no sense to seek to support the validity of a charge on the basis of information otherwise disclosed to the defendant. It is different where the question is whether to allow an amendment. Then the issue is not whether the charge is in proper form – if it were in proper form there would be no need to amend it – but whether it is just to allow it to be put into proper form.[22]

27. Failure of a charge to identify the statutory provision that creates the alleged offence, as required by s27(2) of the MC Act, does not deprive the magistrate of jurisdiction to make amendments under s50 of that Act.[23] Where a charge suffers from this defect, the relevant question to ask is whether an amendment can cure the irregularity by clarifying the charge that had been laid, without injustice to the defendant.[24] Tate JA in *Kypri*[25] identified a number of reasons why an amendment to such a charge can be made while avoiding injustice:

> (a) Where there has never been any doubt about the criminal conduct with which the appellant was charged, such that the offence would remain the same notwithstanding the amendment. The approach of asking whether the offence charged is the same before and the amendment is difficult to apply where the problem lies in the uncertainty, or latent ambiguity, in the initial charge.[26]
>
> (b) Where the details of the charge, albeit defective, are nevertheless sufficient to disclose the nature of the offence alleged.[27]
>
> (c) Where there are errors in the identification of the relevant statutory provision, but those errors are obvious and the intended meaning is plain.[28]

28. Whether an amendment of a defective charge should be permitted is a matter of fact and degree. It may depend on matters such as the contents of a police brief and the timing of its disclosure.[29]

29. In relation to offences that involve conduct that departs from a legislatively prescribed limit or standard – such as exceeding a speed limit, a mass limit or a blood alcohol concentration level – there is no direct authority for the proposition that such a limit or standard must be specified in the charge as an essential element of the offence.

30. However, it is arguable from the decisions of this Court in *Ciorra v Cole*[30] and *DPP v Kirtley*[31] that the specification on the charge of both the relevant speed limit and the speed at which the driver was alleged to have been travelling in excess of that limit are essential elements of an offence of exceeding the speed limit.

31. In *Ciorra*, the appellant was charged with driving in excess of the speed limit. The charge stated that the appellant's alleged speed of 145 km/h 'exceed[ed] 100 kilometres per hour', in breach of the *Road Safety (Traffic) Regulations* 1988. Those regulations had been repealed before the date of the alleged offence. At the commencement of the hearing, which was within the limitation period, the informant was permitted to amend the charge to refer to the relevant current regulations which had been allegedly contravened, namely, r20 of the *Road Rules – Victoria* 1999 ('Road Rules'). 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 the appellant travelling at approximately 145 km/h in an area where 100 km/h signs applied.

32. On appeal to this Court, it was submitted that the amended charge was defective because it did not expressly state that the appellant had exceeded the speed limit and did not set out the basis for determining the speed limit, such that it did not allege the essential elements of the offence.[32]

33. The following statements and conclusions of Redlich J are relevant to the present case:

> Though the words 'the speed limit of' did not precede the words '100 kilometres per hour' that is the only reasonable meaning that could be given to the words used. The respondent further relies on the fact that the charge then specifies the speed at which the appellant is alleged to have travelled, namely 145 km/h. There is considerable force in the submission of the respondent that an allegation that an offence has been committed by driving in excess of a particular nominated speed implies that the nominated speed is the speed limit applicable. Interpreting the charge in the manner in which 'a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context' leaves no doubt as to what the draftsman intended.
> ...
>
> The essence of an offence under r20 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.* The speed limit which applies to the driver will depend upon which of rr21-25 apply. As the evidence

> disclosed that it was speed limit signs which determined the speed limit referable to the appellant's driving, it would have been preferable that the charge specified that 100 km/h speed limit signs applied. The defence would be entitled to particulars of such a matter if it was not referred to in the charge.
> ...
>
> 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 km/h 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. [33]

34. In *Kirtley*,[34] J Forrest J readily accepted the reasoning of Redlich J in *Ciorra* and found that it had direct application to the case at hand.[35] The respondent in Kirtley was charged with travelling in excess of the speed limit. The description of the charge was in the following terms: The defendant at Rupanyup on 15/06/09 being the driver of vehicle on the length named Wimmera Highway did drive at speed over the speed limit applying for the length of road to which a speed limit sign of 100km/h applied between Marnoo and Rupanyup. Detected speed 158km/h. Alleged speed 156km/h kph.

35. Before the magistrate, counsel for the respondent submitted that the charge was defective in that, by failing to stipulate the speed limit applicable to the driver in regard to that length of road, as required by r20 of the *Road Rules*, it did not disclose an offence under the law. The magistrate accepted the respondent's submission and dismissed the summons.

36. On appeal to this Court, J Forrest J held that the charge did disclose an offence and that the magistrate should have proceeded to determine it.[36] In reaching this conclusion, his Honour discussed the essential elements of an offence under r20 of the *Road Rules* as follows:

> In my opinion, the submission made on behalf of the Director – that the two essential ingredients to a charge under r20 are (a) the driving of a motor vehicle (b) in excess of the speed limit – should be accepted.
> ...
> It is clear from the Charge on its face that Mr Kirtley must have known that the offence involved:
> (a) his driving of a motor vehicle;
> (b) on 15 June 2009, on the Wimmera Highway, between Marnoo and Rupanyup, was driven at a speed over the speed limit, which was alleged to be 100 km/h;
> (c) an allegation by the informant that he drove at 156 km/h on that occasion; and
> (d) an alleged breach of r20 of the *Road Rules*.
>
> It is patent that the essential ingredients of his driving of a vehicle over the prescribed speed limit were contained in the charge and the other details set out in the charge informed him satisfactorily of the circumstances of the offence.
> ...
> In summary, the charge was good in law and the essential ingredients and the relevant facts and circumstances adequately set out. True it is that the reference to 100km/h being applicable to the road rather than the driver was unfortunate, but it cannot be doubted that Mr Kirtley was aware that he was being charged in relation to his driving of the motor vehicle, it being alleged that he exceeded the relevant speed limit of 100 km/h by driving at 56km/h in excess of the prescribed speed.[37]

Magistrate's decision: The mass limit was not an essential element of the offence

37. The magistrate ruled as follows on VicRoads' application to amend the charges:

> I do not accept the proposition that the charges do not disclose an offence. The nature of the offences are clear; that is, of exceeding allowed mass. The legislative provisions are clear. I do not accept that an essential ingredient of the offence, being the mass limit allowed, is required to be specified in the charge. The legislation does not specify, as such, a mass limit. Rather, the limit is to be ascertained by reference to the vehicle manufacturer's maximum load mass. The mass limit for a particular vehicle is not a variable.
>
> An accused has the necessary information to ascertain the mass limit for the vehicle involved. The vehicle in this case is specified in the charge. The present charge is quite different to a charge such as exceeds speed where the speed limit concerned with a charge is a variable and requires to be

> specified. The charges set out what the mass allegedly was as a particular. What the relationship of the allowed mass limit [is] to the actual mass is set out as a particular. That relationship as a percentage is wrong as it is based on the specified 18.4 tonnes.
>
> It is an arithmetic calculation to be calculated from the manufacturer's maximum load mass and the actual mass which could readily be carried out by the accused. This is a fit case for amendment of particulars and does not have the result of substituting new charges.[38]

Parties' submissions

38. It was common ground that the elements of an offence under s171(2) of the Act include that the defendant was the consignor of goods; that the goods were on a vehicle; and that the weight of the vehicle when loaded exceeded the mass limit applicable to the vehicle. However, the parties disagreed about whether specification of the mass limit, the statutory source of the mass limit and the category of breach were essential elements of the offence.

39. CCS submitted that the mass limit was an essential element of an offence under s171(2) of the Act; that when the charges were filed, they did not specify a valid mass limit and were therefore defective; that, as the 12 month limitation period had expired, an amendment to specify a valid mass limit amounted to the laying of new charges and was impermissible; that the magistrate had erred in law in granting the amendment; and that the magistrate should have dismissed the charges.

40. VicRoads submitted that the mass limit was not an essential element of an offence under s171(2), but a mere particular; that the parts of the charges that specified an erroneous mass limit were surplusage; and that the magistrate did not err in granting the amendment.

Conclusion on Ground 1

41. In my opinion, the mass limit applicable to a vehicle is an essential element of an offence under s171(2) of the Act. The essence of such an offence is that the mass of a vehicle exceeded the mass limit applicable to that vehicle. The offence involves a comparison between two values, namely, the mass of the vehicle and the mass limit. Both values are essential elements of the offence because the absence of one of them prevents performance of the comparison that is required by s171(2). They both form the 'foundation'[39] of the charge. Specification of the mass of the vehicle alone cannot establish the offence because of the absence of the statutory standard by reference to which the offence is established. Likewise, specification of the mass limit alone simply provides the statutory standard but does not contain a vital fact by which infringement of that standard can be established.

42. The Act does not specify a single mass limit but sets out a scheme under which the mass limit may vary. It follows that, in order for a defendant to have a proper understanding of the nature of the alleged offence, the charge must set out the mass limit that is allegedly applicable.

43. Specification of the mass limit is a matter of substance rather than form. A person who is charged with an offence under s171(2) of the Act is entitled to know the facts constituting the alleged offence and to be able to check the accuracy of those facts and to assess the strength of the prosecution case. The omission of a lawful mass limit from the charge would deprive the accused of these basic rights. Without knowing the lawful mass limit, the accused would not be able to make an informed decision about whether to contest the charge or to plead guilty and rely on mitigating circumstances.

44. These concerns are magnified by the fact that the Act prescribes variable penalties depending on whether a breach is a minor risk breach, a substantial risk breach or a severe risk breach. As these categories apply by reference to the percentage by which a vehicle's mass exceeds its mass limit, knowledge of the lawful mass limit is essential.

45. Consistently with *Ciorra*,[40] the statutory source of the mass limit was a fact necessary to be proved by VicRoads, but it was not an essential element for the purpose of identifying the offence. The categories of breach were relevant to sentencing but were not essential elements of the offence.

46. *Kypri* is distinguishable. By virtue of s49(1)(e) of the Act, a refusal to comply with a requirement under s55(1) constituted a separate offence to a refusal to comply with a requirement

under s55(2). Accordingly, a charge that referred to a refusal to comply with a requirement under s55 generally, rather than with a requirement under the applicable subsection of s55, was defective because it failed to identify the statutory provision whose alleged breach constituted the offence. By contrast, s171(2) creates a single offence and reference to it in a charge sufficiently identifies the statutory provision whose alleged breach constitutes an offence, even if the charge does not accurately (or at all) identify the statutory source of the mass limit.

47. In the present case, it is tempting to adopt the simplistic approach that, regardless of whether the mass limit was 18.4 tonnes or 22.7 tonnes, and regardless of whether that limit was ascertainable under the 1999 Regulations or in accordance with s153 of the Act, CCS knew from the outset that the offence with which it was charged was exceeding the mass limit and that it was guilty of that offence. That approach, however, is unsound. As VicRoads' subsequent withdrawal of six of the 12 original charges demonstrates, it was initially far from clear what constituted the offences and whether CCS was guilty of them. Also, in the light of VicRoads' persistence with a mass limit of 18.4 tonnes prior to the hearing before the magistrate, notwithstanding that CCS had demonstrated that such a limit had no legal basis, to permit VicRoads to amend the charges after the commencement of the hearing would be unjust to CCS.

48. The lawful mass limit applicable to the Vehicle was an essential element of the offence and its absence from the charges rendered them defective. The charges did not set out offences upon which CCS could have been convicted. At no time prior to the expiration of the 12 month limitation period did VicRoads provide to CCS particulars of the lawful mass limit. Accordingly, consistently with the principles set out at [22] above, the power to amend the charges under s50(1) of the MC Act did not apply after the limitation period had expired.

49. It follows that the magistrate erred in ruling that the mass limit is a mere particular rather than an essential element of an offence under s171(2) of the Act and that it was permissible to amend the charges to specify the mass limit after the expiration of the limitation period. His Honour should have refused the amendment and dismissed the charges.

Ground of appeal 2: Reasonable steps defence under s179 of the Act

50. Having regard to the conclusion at [49] above, I can deal with the four limbs of Ground 2 relatively briefly. The analysis that follows assumes that the charges were validly amended to specify the correct mass limit.

Relevant provisions of the *Road Safety Act* 1986

51. Section 171(6) of the Act provides that a person charged with an offence under s171 has the benefit of the reasonable steps defence. Section 179 of the Act provides:

> **179 Reasonable steps defence**
> (1) If a provision of this Part states that a person has the benefit of the ***reasonable steps defence*** for an offence, it is a defence to a charge for the offence if the person charged establishes that—
> (a) the person did not know, and could not reasonably be expected to have known, of the conduct that constituted the commission of the offence; and
> (b) either—
> (i) the person had taken all reasonable steps to prevent that conduct from occurring; or
> (ii) there were no steps that the person could reasonably be expected to have taken to prevent the conduct from occurring.
> (2) Without limiting subsection (1), in determining whether things done or omitted to be done by the person charged constitute reasonable steps, a court may have regard to—
> (a) the circumstances of the alleged offence, including (where relevant) the risk category to which any breach of a mass, dimension or load restraint limit or requirement involved in the relevant offence belongs; and
> (b) without limiting paragraph (a), the measures available and measures taken for any or all of the following—
> (i) to accurately and safely weigh or measure the vehicle or its load or to safely restrain the load in or on the vehicle;
> (ii) to provide and obtain sufficient and reliable evidence from which the weight or measurement of the vehicle or its load might be calculated;
> (iii) to manage, reduce or eliminate a potential offence arising from the location of the vehicle, or from the location of the load in or on the vehicle, or from the location of goods in the load;
> (iv) to manage, reduce or eliminate a potential offence arising from weather and climatic conditions, or from potential weather and climatic conditions, affecting or potentially affecting the weight or

measurement of the load;
(v) to exercise supervision or control over others involved in activities leading to the offence; and
(c) the measures available and measures taken for any or all of the following—
(i) to include compliance assurance conditions in relevant commercial arrangements with other responsible people;
(ii) to provide information, instruction, training and supervision to employees to enable compliance with relevant laws;
(iii) to maintain equipment and work systems to enable compliance with relevant laws;
(iv) to address and remedy similar compliance problems that may have occurred in the past; and
(d) whether the person charged had, either personally or through an agent or employee, custody or control of the vehicle, or of its load, or of any of the goods included or to be included in the load; and
(e) the personal expertise and experience that the person charged had, or ought to have had, or that an agent or employee of the person charged had, or ought to have had.
(3) If the person charged establishes that the person complied with all relevant standards and procedures under a registered industry code of practice, and with the spirit of the code, with respect to matters to which the offence relates, that is evidence that the person charged took reasonable steps to prevent the offence from occurring.
(4) Subsection (3) does not apply unless the person charged served notice of intention to establish the matters referred to in that subsection on the prosecution at least 28 working days before the day on which the matter is set down for hearing.

52. Section 191(1) of the Act renders void any contractual provision that purports to exclude, limit or modify the operation of pt 10 (ss149A to 191) of the Act.

Facts relevant to Ground 2

53. At the hearing before the magistrate, CCS relied on the reasonable steps defence in s179 of the Act. As CCS relied on s179(1)(b)(i) rather than s179(1)(b)(ii), the key issue was whether CCS 'had taken all reasonable steps to prevent [the offending] conduct from occurring'.[41]

54. Stefan Seketa, a director of CCS, and Andrew Whelan, CCS' site foreman, gave evidence in support of CCS' defence under s179(1)(b)(i). The evidence adduced on behalf of CCS included the following:

(a) CCS and its predecessor company had used Julius for 16 years to provide cartage services and there had not been a breach of the mass limit provisions of the Act in that period. CCS paid Julius on an hourly basis, rather than on a job basis, and thus Julius did not have an incentive to overload trucks.

(b) Julius, in turn, engaged Mr Thackrah, the owner and operator of the Vehicle who, over many years in the industry, had infringed the mass limit provisions of the Act on only one prior occasion. CCS had not previously worked with Mr Thackrah.

(c) Mr Whelan oversaw loading operations at the construction site. On one occasion, he noticed that the Vehicle was blowing smoke and he jokingly asked Mr Thackrah whether the Vehicle was overloaded. Mr Thackrah laughed off the suggestion and denied that the Vehicle was overloaded.

(d) CCS had an account with the local tip where the Vehicle's loads of waste from the construction site were weighed on a weigh bridge and then dumped.

Magistrate's decision on CCS' defence under s179 of the Act

55. The magistrate made the following findings in relation to CCS' defence under s179 of the Act:

In my view, the responsible officer of the defendant, Mr Seketa, had knowledge concerning the mass limits of vehicles and was in a position to have ensured there was establish[ed] appropriate information instruction and training for his site foreman concerning the weight limits of vehicles for which the defendant was responsible. Indeed, the defendant had responsibility to ensure work systems that enable compliance with the mass limits included here could have been, upon a site induction by the site foreman, ascertaining the gross vehicle mass of any vehicle carrying loads from the site to have made known the need to produce weighbridge dockets and to have ascertained inspection of the vehicle's compliance plate.

This would have the effect of placing truck operators immediately on notice of the importance of observing mass limits. ...

> ... appropriate instruction and training and work system of employees, of relevance here, the site foreman, would have enabled detection of the breach of the mass limit in respect of the first load. Thereafter appropriate supervision of the truck loading by reducing the volume of the load of material would have reduced the likelihood of further breach, and if nothing else, would have demonstrated measures taken by the company to establish a reasonable steps defence.
>
> Instead, no useful inquiry was made as to the weighbridge dockets. It had simply been left up to the truck operator. That is not good enough. The reasonable steps defence fails ...[42]

Limbs 1 and 2: Particularisation of reasonable steps and procedural fairness

56. Under cover of limbs 1 and 2 of Ground 2, CCS submitted that the magistrate erred in finding that CCS should have taken particular steps to prevent the offending conduct, in circumstances where particulars of those steps were not provided to CCS and its witnesses were not cross-examined on them. CCS also submitted that the magistrate did not comply with the requirements of procedural fairness.

57. In relation to the alleged inadequacy of the particulars, CCS relied upon *Kirk v Industrial Court of New South Wales*,[43] *Baiada Poultry Pty Ltd v R*[44] and *R v ACR Roofing Pty Ltd.*[45]

58. I do not accept CCS' submissions. An offence under s171(2) of the Act is one of strict liability, subject to CCS establishing, on the civil standard of proof, a defence under s179. Section 179 placed the onus on CCS to satisfy the magistrate that it had taken all reasonable steps to prevent the offending conduct. CCS could discharge this onus by reference to the non-exclusive factors set out in s179(2).

59. It was for CCS to identify the steps upon which it sought to rely and to present evidence to satisfy the magistrate that they were all the reasonable steps that could have been taken to prevent the offending conduct. There was no obligation on VicRoads or the magistrate to give CCS prior notice of any matter under s179, as the scope of the defence was a matter for CCS. The role of VicRoads was to cross-examine CCS' witnesses and to make submissions to the magistrate on whether the evidence adduced by CCS was sufficient to discharge its onus under s179.

60. The role of the magistrate in relation to CCS' defence under s179 was to determine whether CCS had discharged its onus of establishing that defence. The magistrate's key finding was that CCS had left compliance with the mass limit entirely up to the operator of the Vehicle and had neither supervised nor made adequate inquiries of the operator. That finding of fact resulted in the magistrate not being satisfied that CCS had taken 'all reasonable steps to prevent [the offending] conduct from occurring' within the meaning of s179(1)(b)(i). It was a finding that was open to the magistrate on the evidence.

61. There is no substance in CCS' submission that its failure to take particular steps was not put to its witnesses in cross-examination. VicRoads cross-examined CCS' witnesses about the steps that CCS had taken and the steps that it had not taken, which assisted in persuading the magistrate that CCS had not established that it had taken 'all reasonable steps to prevent [the offending] conduct from occurring' within the meaning of s179(1)(b)(i).

62. In cross-examination, Mr Seketa agreed that CCS 'didn't have anything in place or any program to monitor the possibility of excess mass non-compliance' and that compliance with the Act was the responsibility of Julius rather than of CCS. He said that CCS relied on Julius to comply with mass limits. A director of Julius, Peter Heatherton, gave evidence to the effect that, under Julius' contract with CCS, it was CCS' responsibility to comply with all applicable laws and that, because Julius hired equipment 'all over the metropolitan area', it had 'no idea of what the piece of equipment is doing'. In cross-examination, Mr Whelan said that he did not supervise the loading of the Vehicle, that Mr Thackrah and the excavator operator 'supervise[d] themselves loading the truck', and that loading and overloading issues were 'their call'. Both Mr Seketa and Mr Whelan agreed that they had not made inquiries of the tip where the Vehicle's loads were weighed before being dumped, to audit excess mass.

63. It is clear from the evidence summarised at [62] above that CCS did not make any inquiries of its own and that the only step upon which it relied as a 'reasonable step' was its engagement of Julius. The magistrate found that leaving compliance with mass limits up to 'the truck operator'

was 'not good enough'. In effect, his Honour found that CCS had not established any procedures for compliance with mass limits and that, far from taking all reasonable steps, CCS had taken no reasonable steps. As Julius, upon whom CCS purportedly relied for compliance with mass limits, disowned any responsibility for compliance with those limits, it was inevitable that the magistrate would reject CCS' reasonable steps defence.

64. CCS' reliance on *Baiada* and *ACR* is misconceived. Those cases dealt with offences under occupational health and safety legislation pursuant to which it was an offence for an employer to fail, 'so far as [was] reasonably practicable', to provide and maintain a safe working environment. [46] In other words, failure to take reasonably practicable steps was an element of the offence which the prosecution had to establish.

65. *Kirk* is also distinguishable. The applicable legislation in that case imposed a general duty on an employer to safeguard the safety of employees and created a defence that it was 'not reasonably practicable' to comply with the statutory provision, the breach of which constituted the offence. The High Court held that the legislation was breached where an employer failed to take a particular measure that should have been taken to obviate an identifiable safety risk and, accordingly, the prosecution had to identify the measures that should have been taken. The Court in *Kirk* held that a breach had not been established because no particular act or omission was identified as constituting the offence. In the present case, the alleged offence was committed by virtue of CCS' status as the consignor of goods on a truck whose mass exceeded its mass limit. The acts constituting the offence were set out in the charges and issues relating to reasonable steps were for CCS to identify and make out.

66. Accordingly, limbs 1 and 2 of Ground 2 are not established.

Limb 3: Absence of evidence about standards or guidelines for 'reasonable steps'

67. CCS submitted that the magistrate erred in concluding that CCS had not taken all reasonable steps to prevent the offending conduct from occurring without any evidence in relation to standards or guidelines for determining the steps that should have been taken by a reasonable construction company. CCS contended that, on the basis of the facts set out at [54] above, the magistrate should have found that CCS had satisfied the defence in s179 of the Act.

68. CCS' submissions are misguided. For the reasons already discussed, it was for CCS, rather than VicRoads or the magistrate, to identify the steps upon which CCS sought to rely and to present evidence to satisfy the magistrate that they were all the reasonable steps that could have been taken to prevent the offending conduct.

69. Under s179, where a defendant seeks to satisfy the reasonable steps defence by adducing evidence that it complied with industry standards, the onus is on the defendant to identify those standards, to satisfy the magistrate that the standards encompass all reasonable steps to prevent the offending conduct from occurring and to demonstrate that the defendant complied with the standards.[47] CCS' complaint that the magistrate rejected its reasonable steps defence without identifying standards and guidelines misconceives the purpose and effect of s179 of the Act. Section 179 itself – including s179(2)(b)(v) and (c)(i) – provides some guidance on what constitutes reasonable steps.

70. CCS also submitted that the magistrate's statement that CCS 'had responsibility to ensure work systems that enable compliance with mass limits' misstated the reasonable steps defence. There is no substance to this submission. Although the magistrate's oral reasons contained imprecise language, it is clear that what his Honour meant was that CCS was strictly liable unless it satisfied the reasonable steps defence.

71. It follows that limb 3 of Ground 2 must be rejected.

Limb 4: Erroneous finding about the reasonableness of CCS' steps

72. CCS submitted that the magistrate erred in finding that CCS had not taken all reasonable steps to prevent the offending conduct from occurring. It contended that the magistrate's decision was unreasonable in the *Wednesbury*[48] sense, that is, that it was so unreasonable that no reasonable magistrate could ever have arrived at that decision.

73. For the reasons that I have already discussed in relation to the other limbs of Ground 2, this submission has no merit. Limb 4 was nothing more than a misguided attempt to impugn the magistrate's findings of fact and the merits of his decision. It has no foundation either on the evidence or in law.

Proposed order

74. The findings of guilt and the sentencing orders in relation to the five charges will be quashed and the charges will be dismissed. I will hear from the parties on the precise form of the orders to be made by this Court and on the question of costs.

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[1] The version of the Act that applies to the present case is version 111, incorporating amendments as at 1 December 2008.
[2] The MC Act was amended by the CP Act with effect from 1 January 2010. Relevantly, ss26 and 27 were repealed and s50 was amended. The hearing of the present case proceeded on the basis that ss26, 27 and 50 as in force prior to 1 January 2010 applied to the charges against CCS.
[3] *Brown v Contract Control Services Pty Ltd* (Unreported, Magistrates' Court of Victoria, Magistrate Mealy, 9 August 2011) Transcript 39.
[4] *Brown v Contract Control Services Pty Ltd* (Unreported, Magistrates' Court of Victoria, Magistrate Mealy, 9 August 2011) Transcript 123.
[5] *DPP (Vic) v Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 573 [19] ('*Kypri*').
[6] *Kypri* (2011) 207 A Crim R 566, 574 [24].
[7] *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, 601; [1947] ALR 27; *Flanagan v Remick* [2001] VSC 507; (2001) 35 MVR 289; (2001) 127 A Crim R 534, 538-9 [21], 542 [32].
[8] [2011] VSCA 257; (2011) 207 A Crim R 566.
[9] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 572 [16].
[10] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 572 [16].
[11] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 572 [16].
[12] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 572 [16].
[13] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 578-9 [37]-[39] (citations omitted).
[14] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 580 [44], 583 [58].
[15] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 580 [43].
[16] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 574 [23].
[17] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 574 [23].
[18] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 574 [23].
[19] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 574 [24], 584 [68].
[20] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 574 [24], 584 [68].
[21] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 575 [27].
[22] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 575 [27]-[28] (citations omitted).
[23] *McMahon v DPP (Vic)* (Unreported, Court of Appeal, Supreme Court of Victoria, 20 June 1995) 4-5, 6.
[24] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 584 [68].
[25] [2011] VSCA 257; (2011) 207 A Crim R 566.
[26] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 584-5 [69].
[27] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 585 [70].
[28] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 586 [72].
[29] *Kypri* [2011] VSCA 257; (2011) 207 A Crim R 566, 590 [88].
[30] [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547 ('*Ciorra*').
[31] [2012] VSC 78 (9 March 2012) ('*Kirtley*').
[32] *Ciorra* [2004] VSC 416; (2004) 150 A Crim R 189, 206 [67]; (2004) 42 MVR 547.
[33] *Ciorra* [2004] VSC 416; (2004) 150 A Crim R 189, 207 [71], 209 [78], [80]; (2004) 42 MVR 547 (emphasis added; citations omitted).
[34] [2012] VSC 78 (9 March 2012).
[35] *Kirtley* [2012] VSC 78 (9 March 2012) [24].
[36] *Kirtley* [2012] VSC 78 (9 March 2012) [1]-[2].
[37] *Kirtley* [2012] VSC 78 (9 March 2012) [20], [25]-[26], [30] (citations omitted).
[38] *Brown v Contract Control Services Pty Ltd* (Unreported, Magistrates' Court of Victoria, Magistrate Mealy, 9 August 2011) Transcript 39.
[39] *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531, 557 [26]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437 ('*Kirk*').
[40] [2004] VSC 416; (2004) 150 A Crim R 189, 209 [80]. See above at [33].
[41] Although VicRoads did not concede that CCS had satisfied s179(1)(a) of the Act, its cross-examination focused on s179(1)(b)(i).
[42] *Brown v Contract Control Services Pty Ltd* (Unreported, Magistrates' Court of Victoria, Magistrate Mealy, 9 August 2011) Transcript 123.
[43] [2010] HCA 1; (2010) 239 CLR 531, 557 [26]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[44] [2012] HCA 14; (2012) 86 ALJR 459; (2012) 286 ALR 421 ('*Baiada*').

[45] [2004] VSCA 215; (2004) 11 VR 187; (2004) 142 IR 157 ('*ACR*').
[46] The legislation considered in *ACR* used the expression 'so far as is practicable'.
[47] Section 179(3) and (4) of the Act deals specifically with standards and procedures under a registered industry code of practice.
[48] See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635.

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