16/97

SUPREME COURT OF VICTORIA

GAFFEE v JOHNSON and ANOR

Smith J

6, 14 November, 23 December 1996 — (1996) 90 A Crim R 157

PROCEDURE – TRAFFIC OFFENCE – SPEEDING – PRE-TRIAL DISCLOSURE – REQUEST FOR DETAILS AS TO MODIFICATION OF SPEED MEASURING DEVICE – REQUEST DENIED – ORDER BY COURT FOR DISCLOSURE – WHETHER OPEN TO COURT TO MAKE ORDER: *ROAD SAFETY ACT* 1986 SS83, 95(1): *ROAD SAFETY (PROCEDURES) REGULATIONS* 1988, RR506, 507; *MAGISTRATES' COURT ACT* 1989, S136.

J. was charged with speeding. Prior to the mention date, J. sought from the prosecution details of the modifications or alterations between the US model of the speed measuring device and the model used by the Victoria Police. The request was denied. Upon application, a magistrate ordered that the prosecution provide to J. documentation to explain detail or describe any modification made to the device which were not already known. Upon application by originating motion to quash the order—

HELD: Application dismissed.
1. The inherent power of a court is to be exercised to achieve justice according to law in the particular case and extends, in the absence of any other power, to requiring an informant to produce documents.

2. In the present case, the relevant legislation and regulations, while drafted to facilitate proof of the speed of the driver, also leaves to the driver the right to challenge the alleged speed. The legislation envisages that it is open to a defendant to challenge the accuracy of the result recorded and one way in which this can be done is to lead evidence about the margin of error in any equipment or by pointing out some deficiency in the device which may have been overlooked by the authorities prescribing it. It would not be contrary to the intention of the statutory scheme for a magistrate to have power to require that documentary information be made available to a defendant for the purpose of that defendant's defence.

3. Accordingly, it would have been contrary to the interests of justice for the prosecuting authority to withhold relevant documentary information concerning relevant aspects of the radar device, its testing, sealing and its use.
***Glare v Bolster* (1993) 18 MVR 53, distinguished.**

SMITH J: *[After setting out the facts, the order made by the magistrate and the grounds relied upon in support of the order sought, His Honour continued]...* **[8]** I turn to the submissions made in this proceeding. Counsel for the plaintiff submitted that the order made was made without jurisdiction or power and that that error was revealed on the face of the record. In the course of his submissions, and after referring to authorities which touch on the inherent jurisdiction of the Magistrates Court, such as *Nguyen v Magistrates Court of Victoria* [1994] VicRp 5; [1994] 1 VR 88 and *Stefanovski v Murphy* [1996] VicRp 78; [1996] 2 VR 442, counsel submitted that the order made undermined the scheme of the *Road Safety Act* 1986 and regulations made under it to facilitate the proof of the speed of drivers charged with speeding offences. Counsel for the plaintiff referred first to legislation and regulations in support of a submission that they demonstrate an intention to facilitate the proof of the speed of a vehicle and proceedings brought to prosecute a driver for breach of speed limits. He referred to s79 *Road Safety Act* 1986 which has the effect that in a case such as that involving Mr Johnson, evidence of the speed of the motor vehicle indicated or determined by a prescribed speed measuring device was "without prejudice to any other mode of proof and in the absence of evidence to the contrary, proof of the speed of the motor vehicle on that occasion" where it was indicated or determined by a **[9]** "prescribed speed measuring device when tested, sealed and used in the prescribed manner".

Reference was also made to s83 of that Act which stated that a certificate

> "in the prescribed form to the effect that any device referred to in s79 ... has been tested or sealed in the prescribed manner, signed or purporting to be signed by a person authorised to do so by the regulations is, without prejudice to any other mode of proof and in the absence of evidence to the contrary, proof that the device has been so tested or sealed".

My attention was also drawn to s95(1) which empowered the Governor in Council to make regulations for or with respect to any matter or thing required or permitted by the Act to be prescribed. The following regulations are referred to by the plaintiff:

> (a) By regulation 506 of the *Road Safety (Procedures) Regulations* 1988, the radar device described as "Kustom KR-10SP" was listed as a prescribed speed measuring device for the purpose of s79 of the Act.
>
> (b) The prescribed manner of testing the radar devices is set out in regulation 507 of the *Road Safety (Procedures) Regulations* 1988. In particular regulation 507(1) provides:
>
> "(1) The test of the radar device must be such as will ascertain with respect to the speed computing components of the radar device that—
> (a) the circuit is in accordance with the manufacturer's circuit design, including any modification to that design approved by the manufacturer or the testing officer; and
>
> (b) the radar device is in a satisfactory electrical condition and, in particular, that any maintenance which has been carried **[10]** out has been carried out satisfactorily."

In light of these provisions counsel submitted that the order was made without power because it was contrary to the statutory scheme. I am not persuaded by the plaintiff's argument. It seems to me, that the legislation and regulations while drafted to facilitate proof of the speed of the driver also leaves to the driver the right to challenge the alleged speed. It would not be contrary to the intention of the statutory scheme for a magistrate to have the power to require documentary information to be made available to a defendant for the purpose of that defendant's defence. The plaintiff also places reliance on the reasons for decision of Beach J in the matter of *Glare v Bolster* (1993) 18 MVR 53. In that case his Honour was considering an originating motion to quash a magistrate's decision refusing to set aside summonses served on the Chief Commissioner of Police, the Assistant Commissioner of Police and a company, seeking documents relating to an automatic detection device. The principal ground for allowing the application and quashing the summonses was that on proper analysis it was not shown that it was "on the cards" that production of the documents would materially assist the defence and his Honour relied on *Alister v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97; and *R v Saleam* (1989) 16 NSWLR 14; 39 A Crim R 406 to support that conclusion. He also held that the summonses constituted a fishing expedition. Particularly, relevant to this proceeding, however, is the following passage (at p65) on which the plaintiff relies in this case:

> "The clear inference to be drawn from the legislative provision to which I have referred is **[11]** that the legislature is satisfied that photographic detection devices including the Gatsometer MRC System are reliable, so much so that in the absence of evidence adduced by a defendant to the contrary evidence of the speed of a motor vehicle as indicated or determined by such a device is proof of the speed of the motor vehicle on that occasion. It is unthinkable that the legislature would approve of such a device if that was not the situation. Indeed it would constitute a gross failure on the part of the prosecution to fulfil its duty to disclose to the defence material evidence of which it is aware and which might be of assistance to the defence, if it withheld from the defence evidence that the particular speed detection device used to measure the speed of the defendant's motor vehicle on the occasion in question was defective or that speed detection devices of the type in question were generally defective or unreliable. It may be entirely proper in the circumstances of a particular case for a defendant to challenge the reliability of a device which measured the speed of his motor vehicle. It is another thing to attempt to challenge the reliability speed detection devices generally or in this instance, Gatsometer MRC System devices generally. If there are those who have reason to believe that Gatsometer MRC System devices are generally unreliable, they are in truth saying that they should never have received the approval of the legislature or that the legislature should withdraw its approval from them. They should therefore address their representations to the appropriate authority... "

Counsel for the plaintiff submits that his Honour's analysis is applicable to the present case and that what was being sought and permitted by his Worship was an attempt to challenge generally the reliability of the speed detection device by making the orders that he made. His Honour's remarks were *dicta* and made as a parting observation in the reasons for judgment. The principal ground relied upon by his Honour went to the merits **[12]** of the application. The

present application does not challenge the merits of the decision. As to his Honour's comments, they proceed on the assumption that the legislature has approved the device in question. Whatever may be the case with the Gatsometer MRC system under the Act, it cannot, in my view, with respect, be said that the legislature itself has approved the Kustom KR-10SP. The legislature delegated to the executive the task of prescribing radar devices and delegated to the executive the task of prescribing reliable testing procedures. The legislation also envisaged that it will be open to a defendant to challenge the accuracy of the result recorded and one way in which this can be done is to lead evidence about the margin of error in any equipment or by pointing out some deficiency in the device which may have been overlooked by the authorities in prescribing it. I am not persuaded, therefore, that his Honour's dicta assist me in this matter.

Before me, counsel for Mr Johnson has submitted that in addition to the inherent power of the Magistrates' Court relied upon below, his Worship had power pursuant to s136 *Magistrates Court Act* 1989. It provides as follows:

> "136. The Court may, except where otherwise provided by this or any other Act, at any stage of a proceeding, give any direction for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination."

For the plaintiff it is submitted that this was an ancillary power given to the Magistrates Court and did not extend the inherent jurisdiction of the court. Whether s136 extends the inherent power or not is an interesting question but does not have to be determined. The question to be determined, so far **[13]** as s136 is concerned, is whether it gives power to make orders of the kind given in this case. The other basis relied upon to support his Worship's power or jurisdiction is Schedule 2 of the *Magistrates' Court Act* 1989. It is unnecessary to consider this basis in light of the conclusions I have come to on the other bases. Dealing first with the question of inherent jurisdiction, the defendant relies upon *Nguyen v Magistrates Court of Victoria* (above) and *Margaritis v Collins* (McDonald J, unreported, 3.8.1989). He also refers to the remarks of Tadgell J (as he then was) in *Stefanovski* (above, at 443) that:

> "It is an obvious and elementary necessity of our legal system that those presiding in courts of law should have full authority to exercise procedural control. Without a proper and effective exercise of the authority the system would be unworkable. The power to control procedure exists for the benefit alike of courts, litigants and the community as a whole; and it is of course exercisable with the object of achieving justice according to law. The exercise of procedural control will therefore be neither capricious nor haphazard, but will be undertaken in a spirit of co-operation by all those for whose benefit it is exercisable."

See also *Mooney v James* [1949] VicLawRp 6; [1949] VLR 22, 27-28; [1948] 2 ALR 369. Neither counsel has been able to refer me to any authority directly in point. It is clear, however, from the discussion in *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (in particular, at 48, 66; (1993) 65 A Crim R 466 that significant changes have occurred over the years in the approach to pre-trial disclosure of the Crown case in criminal proceedings. Brooking J (as he then was) stated at VR p48:

> "But it cannot now be denied that the court in its criminal jurisdiction has inherent power to order the prosecutor to produce to the defence for **[14]** inspection documents or things in the possession of the prosecutor where the interests of justice require it. The interests of justice are not confined to those of the accused. In determining whether the interests of justice require production, the judge may in a given case properly considers matters like delay and expense where numerous documents, not of any real importance, are in question. ..."

The inherent power (or implied power) which a court possesses, including a Magistrates Court, is concerned with adjectival law which includes pre-trial procedures and I do not have any difficulty with the proposition that the inherent power of the court would extend in the absence of any other power to requiring the informant to produce documents. That power is to be exercised to achieve justice according to law in the particular case. Thus, it seems to me that the Magistrates' Court had inherent power to make the order in question. It seems to me that the same consequence flows for the plaintiff in relation to the second basis advanced - s136 of the Act. The plaintiff does not submit that there is provision in this or any other Act to the contrary of s136. The power that is given by the legislation is to make orders which the court considers conducive to the "effective, complete, prompt and economical determination" of the particular

proceeding. It seems to me that that power extends to a power to give a direction to an informant to supply documents.

Ultimately, we are concerned with the due administration of justice in the criminal justice system. In prosecutions of the kind considered below, the legislature has given the prosecution significant assistance in proving its case and, as a result, a substantial forensic advantage. In **[15]** the vast majority of cases the defendant will not contest the result of the radar test. In those cases where a defendant wishes to contest the result, however, it would, in my view, be contrary to the interests of justice for the prosecuting authority to withhold relevant documentary information concerning relevant aspects of the radar device, its testing, sealing and its use if that is sought by the accused. If it reveals nothing to detract from the evidence of the device's reading, no harm is done from the prosecution's point of view. If it reveals facts which do so detract, then the accused is entitled to know. To permit the withholding of such information would be to allow a situation to exist where, in most cases, the *prima facie* proof intended by Parliament would become conclusive. That was not Parliament's intention and the courts should not permit such a situation to exist without the plainest statutory direction.

For the above reasons I have come to the conclusion that the plaintiff's application should fail.

APPEARANCES: For the plaintiff: Mr GJC Silbert, counsel. Solicitor: Mr RC Beazley, Victorian Government Solicitor. For the first defendant: Mr P Marzella, Counsel. Solicitors: Russell Kennedy.
