05/09; [2009] VSC 37

SUPREME COURT OF VICTORIA

DUNCAN v DEMIR

Kyrou J

2-3, 13 February 2009 — (2009) 52 MVR 90

PRACTICE AND PROCEDURE – MOTOR TRAFFIC – SPEEDING CHARGE – CHARGE LAID BY NOMINAL INFORMANT – ADDRESS OF VICTORIAN TAXI DIRECTORATE GIVEN ON SUMMONS – AT CONCLUSION OF HEARING OF CHARGE SUBMISSION MADE THAT INFORMANT NOT AUTHORISED TO LAY CHARGE – AUTHORITY TO PROSECUTE OFFENCES OF SPEEDING – WHETHER COMMON LAW RIGHT OF A MEMBER OF THE PUBLIC TO PROSECUTE ABROGATED – WHETHER S30(1) OF THE *MAGISTRATES' COURT ACT* 1989 PROVIDES AUTHORITY TO PROSECUTE – PRESUMPTION OF REGULARITY – WHETHER MAGISTRATE SHOULD HAVE GRANTED PROSECUTION AN OPPORTUNITY TO REOPEN ITS CASE AND PROVE THE AUTHORITY OF THE INFORMANT – FINDING BY MAGISTRATE THAT INFORMANT WAS NOT AUTHORISED TO BRING PROSECUTION – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, S77(2): *MAGISTRATES' COURT ACT* 1989, S30(1).

HELD: Appeal allowed. Remitted to the Magistrate for hearing and determination according to law.

1. At common law, any member of the public may bring a prosecution for an offence if the breach of the law charged is of a public nature and not of purely local interest ("common law right") unless that right is abrogated by an Act either by express words or by necessary intendment. The provisions of the *Road Safety Act* 1986 ('Act') are laws of a public nature and not of a purely local interest. Accordingly, if the common law right has not been abrogated by s77 of the Act and the informant was not authorised under s77, he could have continued the prosecution in his capacity as a member of the public even though he initiated it purportedly in a capacity under s77.

2. The features of s77 of the Act, the nature of speeding offences under the Act and the regulations made under the Act, and the nature of the Act itself are sufficient to indicate a clear Parliamentary intention to abrogate the common law right of a member of the public to bring a prosecution in respect of such offences. It is not necessary to decide whether the common law right is abrogated in respect of other offences under the Act or the regulations.

3. Section 30(1)(b) of the *Magistrates' Court Act* 1989 refers to persons who may issue a summons to answer a charge. The reference to a public official acting in the performance of his or her duty in issuing a summons does so on the basis that the official's authority to do so is under the common law or a statutory provision other than s30(1) itself. Accordingly, s30(1) did not authorise the informant to prosecute the defendant in the present case.

4. As neither the contents of the summons nor any documentary or oral evidence before the Magistrate enabled an inference to be drawn that the informant was an employee of the Department of Infrastructure the presumption of regularity did not apply to establish that the informant was authorised to prosecute the defendant.

5. If a party contests the issue of a summons, it must appear under protest and state the objection at the time so that if it has any substance, it can be debated and resolved as a preliminary issue. If there is any substance in the point, defence counsel should raise it at the outset. It is not appropriate to appear under protest without stating the basis of the objection. When defendant's counsel stated that the defendant was no longer appearing under protest, the informant was entitled to proceed with the prosecution on the basis that there was no challenge to his authority to bring the prosecution. Accordingly, the defendant failed to comply with the principle that challenge should have been made to the authority to bring the prosecution and the Magistrate erred in law in stating that there was no requirement on the defendant to raise the issue of the informant's authority prior to the close of the prosecution case.

6. A court has a discretion to permit a prosecutor to reopen the prosecution case after the close of that case to enable evidence to be presented to establish a procedural matter and, in very special or exceptional circumstances, to establish an element of the offence. In this case, the Magistrate regarded the informant's authority to prosecute as an element of the offence with which the defendant was charged. It is clear from the authorities that the Magistrate erred in law in treating the informant's authority to prosecute as an element of the offence.

7. Having regard to the circumstances, it was open to the Magistrate to permit the prosecution to reopen its case to present evidence of the informant's authority to prosecute. Accordingly, the Magistrate was in error in ruling that there was no power to allow the prosecution to reopen its case.

KYROU J:

Introduction and summary

1. This is an appeal under s92(1) of the *Magistrates' Court Act* 1989 (Vic) ("MC Act") by the appellant, Scott Duncan, from a final decision of the Magistrates' Court at Melbourne to dismiss a charge brought against the respondent, Osman Demir, by Mr Duncan as informant. The charge alleged that on 9 May 2007, Mr Demir's vehicle travelled at a speed of 51 kilometres per hour in a 40 kilometres per hour school safety zone in Flemington Road, North Melbourne. Mr Demir's vehicle is a luxury chauffeur-driven hire car.

2. The Magistrate dismissed the charge after the close of the prosecution case on the basis that the prosecution failed to present evidence to establish that Mr Duncan was authorised to bring the prosecution under s77 of the *Road Safety Act* 1986 (Vic) ("RS Act").

3. In the appeal, Mr Duncan claims that the Magistrate's decision is vitiated by several errors of law, including failure to apply the presumption of regularity, failure to consider alternative sources of Mr Duncan's authority to prosecute and precluding the exercise of the Magistrate's discretion to permit the prosecution to reopen its case to establish Mr Duncan's authority to prosecute.

4. It was common ground before me that the only provision of s77 of the RS Act that could possibly apply to Mr Duncan is s77(2)(c) which provides that "any employee in the Department of Infrastructure who is authorised in writing to do so either generally or in any particular case by the Secretary to the Department of Infrastructure" may prosecute for any offence against the RS Act or the regulations made under that Act.

5. For the reasons set out in this judgment, I have decided that the Magistrate erred in law in allowing Mr Demir to object to Mr Duncan's alleged lack of authority to bring the prosecution after the close of the prosecution case, without giving Mr Duncan the opportunity to apply to reopen his case to establish his authority to prosecute.

Facts

6. By a "Charge and Summons" issued on 12 November 2007 ("Summons"), Mr Demir was charged with an offence under r20 of the Road Rules – Victoria, namely driving at a speed of 51 kilometres per hour in a 40 kilometres per hour zone. In the Summons, next to the heading "Informant" appeared the words "Scott DUNCAN (Nominal Informant)" and next to the heading "Agency and Address" appeared the words "Victorian Taxi Directorate, Level 6, 14-20 Blackwood Street, Nth Melbourne 3051, Ph 9320 4317, Agency Ref: P032-07". The Summons was signed by the informant on 8 November 2007. The Summons made no reference to any employment relationship between Mr Duncan and the Victorian Taxi Directorate ("VTD") and did not refer at all to the Department of Infrastructure, which is now known as the Department of Transport ("DOI").

7. The Summons was heard by the Magistrate on 3 July 2008. At that hearing, Mr Hardy of counsel announced his appearance on behalf of Mr Demir and Mr Davies announced that he appeared "to prosecute on behalf of the Department of Transport". Mr Hardy informed the Magistrate at the outset that he had two issues that he wanted to bring to the Magistrate's attention. The first issue was whether Mr Demir was validly served with a true copy of the original Summons. Mr Hardy did not identify the second issue at this point of the hearing. However, the following exchange took place with the Magistrate:

> MR HARDY: I did have two things. I don't think the other one is worth pursuing, your Honour. I have had a good look at it and I think that it is – even if I could convince you of my argument I don't think the Supreme Court would agree with me so I won't pursue it, your Honour.
> HER HONOUR: Well, if the Supreme Court is not going to agree with you then I certainly won't. I know that. All right. Look, I will stand this down. As I say I will see what efforts can be made to locate the original file and I will also have a look at section 34 of the *Magistrates' Court Act* and then I will

> come back in and I will tell you what I have achieved, if anything, and then you can make whatever submissions each, if you want to make any, about because I take it if we can't locate the file you are still appearing under protest.
> MR HARDY: Yes.

8. After a short adjournment, the first issue raised by Mr Hardy was resolved once the Court's file was located. The following exchange then took place:

> MR HARDY: And I am now satisfied that that is a – the same as the document that was served on my client.
> HER HONOUR: Yes.
> MR HARDY: In all material respects at least.
> HER HONOUR: Well, it appears to be the original. It has the signature appearing in pen and not a copy of it and it has the date stamp as having been received as well. All right. Well, then what is to happen in those circumstances? You no longer appear under protest, I take it?
> MR HARDY: Well, that's right, your Honour.

9. Following this exchange, Mr Davies presented the prosecution case. Phillip Rattle and Peter Hannah gave evidence for the prosecution.

10. Mr Rattle said that on 9 May 2007, he was a "Transport Safety Officer for the Victorian Taxi Directorate". His evidence was that on the morning of that day, he pointed a laser device at Mr Demir's vehicle in a 40 kilometres per hour zone and the device recorded Mr Demir's vehicle's speed at 53 kilometres per hour. He said that he requested his colleague, Mr Hannah, to indicate to Mr Demir to pull over to the side of the road. He said that he spoke to Mr Demir who told him that his vehicle had been travelling at 45-50 kilometres per hour and also that he was not speeding.

11. Mr Hannah said that he was employed as an "authorised officer for the Victorian Taxi Directorate". He said that he indicated to Mr Demir to pull over to the side of the road, that he spoke to Mr Demir and that Mr Demir said that his vehicle was travelling at 45-50 kilometres per hour and also that he was not speeding.

12. Neither Mr Rattle nor Mr Hannah gave evidence about Mr Duncan. Accordingly, there was no evidence before the Magistrate that Mr Duncan was an employee in DOI.

13. Mr Demir gave evidence after Mr Hannah. His evidence was to the effect that he was aware that officers of the VTD were monitoring the speed of motorists along Flemington Road on the morning of 9 May 2007, that he was aware of the 40 kilometres per hour speed limit in the school safety zone, that he set his cruise control at 39 kilometres per hour as he approached the school safety zone, that he did not tell either Mr Rattle or Mr Hannah that his vehicle was travelling at 45-50 kilometres per hour, that he answered "I wasn't speeding" in response to their questions as to why he was speeding, that he said to Mr Hannah "I don't know what you guys were pointing the [radar device] at" and that he opted to have the matter dealt with in Court.

14. At the conclusion of the evidence for both parties, Mr Hardy submitted that there was insufficient evidence that the laser device was used in a prescribed manner for the purposes of s79 of the RS Act and r309 of the *Road Safety (General) Regulations* 1999 (Vic). Mr Hardy then submitted that only a person authorised under s77 of the RS Act could bring the prosecution and that, as there was no evidence that Mr Duncan fell within any of the categories of authorised persons in s77 of the RS Act, the prosecution was unlawful. In response to a question from the Magistrate as to whether this was a point that is usually taken, Mr Hardy answered that he had seen it taken successfully before and that sometimes he will raise it as a preliminary point.

15. The following exchange then took place:

> HER HONOUR: So this effectively is a no case submission that you are making? Tantamount to a no case submission which you could have made even before your client gave evidence.
> MR HARDY: I have got essentially three points. Regulation 309, section 77 and my client's merits.
> HER HONOUR: I understand. Although section 77 really comes first does it not?
> MR HARDY: Well, yes, in a logical analysis it does.
> HER HONOUR: Yes. And depending on how I rule in relation to that I then need to or not need to

proceed with the other matters. I understand. All right. Mr Davies, I think I am following. There are the three submissions that are made but the first submission, I think, that needs to be dealt with because it is tantamount to a no case submission is section 77 of the *Road Safety Act* which, as I understand it, sets out the prosecuting bodies or the bodies who have the power to prosecute and we obviously all know about the police force and then there are these other ones and it may be that the Victorian Taxi Directorate falls into one of those other ones but Mr Hardy's point is that there has been no evidence of that by you, by anyone, to say that they are in fact an authorised or have the power to in fact prosecute in that they fall into one of these categories. The absence of that evidence, and if I was satisfied as to – if I were not satisfied that there was evidence before me that enabled them to fall into one of these categories and therefore have the power there is effectively no case to answer.
MR DAVIES: I hear what your Honour is saying.
HER HONOUR: It is not what I am saying. I think I am just not very eloquently summarising what Mr Hardy was saying.
MR DAVIES: Yes. I wouldn't say not very eloquently but I obtain my power to appear before you under section 229 of the Transport Act, as does Mr Duncan with his powers, and I am also authorised under section 77(2) to bring proceedings by the director of the Department of Infrastructure, as it was then known; it is now the Department of Transport, as is Mr Duncan, Scott Duncan, but to actually prove that in court at this present time once my case is closed.
HER HONOUR: You can't.
MR DAVIES: I am in your hands.
HER HONOUR: My hands unfortunately.
MR DAVIES: Well, or the lap of the Gods, your Honour.
HER HONOUR: I think the court's hands are tied. It is - - -
MR DAVIES: Unfortunately – sorry, your Honour.
HER HONOUR: Sorry. No, go on. You wanted to say something else.
MR DAVIES: Just in relation to how this matter has proceeded it appears to me that identity, well, according to the notes of the previous prosecutor identity will not be an issue.
HER HONOUR: That's identification, as I gather, of the defendant.
MR DAVIES: That's correct. Sorry, your Honour. There is no indication - - -
HER HONOUR: But this has never been raised previously. I accept that, and it is – well, is that right? It has not been raised previously?
MR HARDY: It is always my practice to concede identity and nothing else .
HER HONOUR: No, no. I am talking about this particular issue that you have raised, section 77. That has not been raised previously.
MR HARDY: It hasn't.
HER HONOUR: And I accept there is no requirement for you to raise it.

16. There then followed discussion about the roles of the VTD and DOI and whether the Summons itself was evidence that enabled Mr Duncan's authority under s77(2)(c) of the RS Act to be established. Mr Davies said that had the issue of authority to prosecute been the subject of evidence, "there would have been evidence given that the agency fell under section 77(2)(c) of the *Road Safety Act*". Before ruling on the matter, the Magistrate asked Mr Davies whether he wanted to say anything else. Mr Davies said that he did not. The Magistrate then made the following ruling:

> Mr Hardy, on behalf of the defendant has submitted to me, amongst other things, that there is no case to answer, effectively no case to answer, because there has been no evidence before me upon which I can be satisfied that the informant or nominal informant, Scott Duncan, is a person authorised to bring such prosecutions pursuant to section 77. The evidence that I have heard has, of course, focussed primarily on the events as they were alleged to have transpired on the morning of 9 May 2007 and there has, of course, been complete silence or nothing offered by way of authorising the – or qualifying the informant, if I can use that word "qualifying" in a very loose sense as a person authorised pursuant to section 77 to bring such a prosecution. In the absence of that evidence and somewhat reluctantly I am going to accede to the submission that has been made by Mr Hardy. That is that effectively there is no case to answer as it is not – I am not satisfied on the evidence that there has been a proper prosecution brought pursuant to the *Road Safety Act* in as much as section 77 does not appear to have been the subject of any evidence upon which I can conclude that Scott Duncan is a person authorised to bring such a prosecution. Calling the case as dismissed.

17. The Magistrate made the following order on 3 July 2008:

Dismissed.MERITS OF THE CASE
Special Conditions:
NO CASE TO ANSWER. PROSECUTION HAVE FAILED TO [SATISFY] COURT THAT THE INFORMANT IS A PERSON WITH POWER TO BRING SUCH PROSECUTION PURSUANT TO S.77 ROAD SAFETY

ACT. S DUNCAN (Informant) ordered to pay costs in the amount of $2500.00
Stay to 30/9/2008

18. Mr Duncan's amended notice of appeal raises the following questions of law:

> (1) On the proper construction of section 77 of the *Road Safety Act* 1986 (the Act), whether in order to find a charge on summons under the Regulations to the Act proven,
> (a) the informant must be authorised under section 77 of the Act;
> (b) the presumption of regularity can operate to establish that an informant is authorised to issue the summons;
> (c) in the circumstances of the case below the presumption of regularity operated to establish that the informant was authorised to issue the summons.
>
> (2) Whether the Magistrate should have allowed the prosecution to reopen his case in order to prove the informant's authority to issue the summons.

19. The issues raised in the appeal by Mr Duncan's grounds of appeal as elaborated upon in his submissions to this Court, are:

> (a) whether the Magistrate erred in law in deciding that the informant in a prosecution for an offence pursuant to r20 of the *Road Rules – Victoria* ("r20 offence") must be a person authorised under s77 of the RS Act;
>
> (b) whether the Magistrate erred in law in finding that in order for a r20 offence to be proved, there must be evidence of the informant's authority to prosecute under s77 of the RS Act;
>
> (c) whether the Magistrate erred in law in failing to conclude, by an application of the presumption of regularity together with the evidence before the Magistrate, that Mr Duncan was authorised to bring the prosecution under s77 of the RS Act;
>
> (d) whether the Magistrate erred in law in not permitting the prosecution to reopen the prosecution case to present evidence that Mr Duncan was authorised to bring the prosecution.

Authority to prosecute

20. The first issue that I need to decide is whether only the persons referred to in s77 of the RS Act may bring a prosecution for an offence under that Act or the regulations made under that Act.

Common law right of members of the public to prosecute public offences

21. At common law, any member of the public may bring a prosecution for an offence if the breach of the law charged is of a public nature and not of purely local interest ("common law right") unless that right is abrogated by an Act either by express words or by necessary intendment.[1] It was common ground before me that the provisions of the RS Act with which this case is concerned are laws of a public nature and not of a purely local interest. Accordingly, if the common law right has not been abrogated by s77 of the RS Act and Mr Duncan was not authorised under s77, he could have continued the prosecution in his capacity as a member of the public even though he initiated it purportedly in a capacity under s77.[2]

22. The following principles are relevant to the question whether s77 of the RS Act has abrogated the common law right:

> (a) the common law right is an important and very valuable public right which will not be held to be abrogated by a statute unless a contrary intention appears clearly from the statute;[3]
>
> (b) the fact that a statute contains a list of persons authorised to bring a prosecution does not necessarily indicate that Parliament intends to abrogate the common law right;[4]
>
> (c) the fact that a statute requires individuals to be authorised, including where the authorisation must be in writing, by a Minister, the head of a department or some other body before being empowered to bring a prosecution may, but will not necessarily, indicate that Parliament intends to abrogate the common law right;[5]
>
> (d) the context within which a statutory provision that identifies the persons who are authorised to bring a prosecution under that statute appears may indicate that Parliament intends that only those persons may bring a prosecution under that statute.[6]

23. Ms Hanscombe, who appeared with Ms McKenzie for Mr Duncan, informed me that she was aware of only one case where this Court had held that a statute had abrogated the common law right, namely *Davis v Grocon Ltd.*[7]

24. *Davis* dealt with s48 of the *Occupational Health and Safety Act* 1985 (Vic) ("OH&S Act") which provided that proceedings for an offence against that Act could be brought by the Minister or an inspector, that no proceedings could be brought by an inspector without the authority in writing of the Minister and that the Minister had to issue guidelines to inspectors with respect to the prosecution of offences. Section 49 of that Act also provided that if a prosecution was not brought within six months after the occurrence of something which in the opinion of a person constituted an offence against the Act, that person could make a written request to the Minister to bring a prosecution and the Minister was obliged to respond to that request within three months after the request indicating whether a prosecution had been or would be brought or giving reasons why a prosecution would not be brought. If the Minister indicated that a prosecution would not be brought, then the person who made the request could require the Minister to refer the matter to the Director of Public Prosecutions ("DPP") who was then required to provide advice about whether a prosecution should be brought.

25. Hayne J said in *obiter* that ss48 and 49 of the OH&S Act taken together showed plainly that the legislature intended that prosecutions under that Act should be brought only by the Minister or by an inspector and that if any person might bring proceedings for an offence, there would be little or no reason for the statutory requirement for the issue of ministerial guidelines about the prosecution of offences or the elaborate provisions under s 49 for members of the public to inquire about the institution of proceedings.[8]

26. The earlier case of *United Transport Services Pty Ltd v Evans*[9] also dealt with ss48 and 49 of the OH&S Act. In that case, Southwell J referred to the fact that under s48(2), an inspector was precluded from bringing a prosecution unless the inspector was authorised by the Minister and said that it was "unlikely that Parliament intended to give a private citizen the right to prosecute without reference to the Minister, where an inspector could not do so".[10]

Section 77 of the RS Act

27. The authorities discussed above show that the precise wording of a statutory provision authorising persons to bring a prosecution and the context in which that provision appears are very important in deciding whether the common law right is abrogated.

28. In the case of the RS Act, it is a relevant matter that the Act is long and complex and deals with a variety of offences including, in particular, driving under the influence of alcohol or drugs, speeding and parking infringements. The sections dealing with speeding offences contain detailed provisions concerning proof of the offence by use of prescribed speed measuring devices which are tested, sealed and used in a prescribed manner by authorised persons. A member of the public would not be an authorised person for the purposes of the Act and ordinarily would not have access to a prescribed device. While these provisions deal with how a speeding offence can be proved rather than who can prosecute such an offence, they nevertheless suggest, at least, that the RS Act does not contemplate that members of the public will prosecute such offences.

29. Obviously, it is also relevant to consider s77 of the RS Act as a whole. The section provides:

> **77 Power to prosecute ...**
> (2) The following people may prosecute for any offence against this Act or the regulations—
> (a) any member of the police force;
> (ab) a protective services officer appointed under Part VIA of the Police Regulation Act 1958, if the offence occurs on land or premises that are, or are in the vicinity of—
> (i) a place of public importance that the officer has been directed to protect; or
> (ii) a place where there is present a person holding an official or public office, whom the officer has been directed to protect;
> (b) a municipal council or any member of staff of a municipal council who is authorised in writing to do so either generally or in any particular case by the municipal council;
> (c) any employee in the Department of Infrastructure who is authorised in writing to do so either generally or in any particular case by the Secretary to the Department of Infrastructure;
> (d) any officer of the [Roads] Corporation who is authorised in writing to do so either generally or in any particular case by the Corporation;

(da) the presiding officers of the Legislative Council and the Legislative Assembly, if the offence occurs on the Parliamentary reserve;
(db) a person authorised under section 229(1AA) of the *Transport Act* 1983 to bring a proceeding for a ticket offence (within the meaning of section 208 of that Act), if the offence against this Act or the regulations occurs on or in a park and ride facility;
(e) any officer who is authorised in writing to do so either generally or in any particular case by a public authority or other person prescribed for the purposes of this subsection, if the offence occurs on land or premises which are vested in, or under the control of, that public authority or person.
...
(3) If proceedings are taken by a member of the police force or an officer of the [Roads] Corporation or an employee in the Department of Infrastructure or a protective services officer the proceedings may be conducted before the court by any other member of the police force or officer of the [Roads] Corporation or employee in that Department or protective services officer, as the case requires.
(3A) If proceedings are taken by a person referred to in subsection (2)(db), the proceedings may be conducted before the court by any employee in the Department of Infrastructure.
(4) Proceedings for any offence which relates to the parking or leaving standing of a vehicle may be taken by any officer appointed either generally or in any particular case by a public authority or other person prescribed for the purposes of this subsection, if the offence occurs on land or premises which are vested in, or under the control of, that public authority or person.
(5) Any money that is recovered by way of fine for a prescribed offence must be paid into the Consolidated Fund, unless the charge is filed by an officer who is appointed by a public authority or by any other person who is prescribed for the purposes of this subsection, in which case the money that is recovered by way of fine must be paid into the prescribed fund in respect of that public authority or person.
(5A) Despite subsection (5), any money that is recovered by way of fine by a prosecutor authorised under subsection (2A) must be paid into the Consolidated Fund.
(6) If a parking infringement (other than a parking infringement involving a contravention of section 90E) or other offence prescribed for the purposes of section 3(1A) occurs on land which is part of the Parliamentary reserve, no prosecution may be taken in respect of it except on the written direction of a presiding officer authorising the prosecution either generally or in a particular case.
(7) In a prosecution for an offence in relation to a parking infringement (other than a parking infringement involving a contravention of section 90E) or other offence prescribed for the purposes of section 3(1A) occurring on the Parliamentary reserve, a certificate which purports to be signed by a presiding officer stating that a person is authorised to take proceedings in respect of that parking infringement or offence is evidence, and, in the absence of evidence to the contrary, is proof, that the person is so authorised.
(8) All courts must take judicial notice of the signature of a presiding officer on a certificate referred to in subsection (7).

30. What is different about s77 of the RS Act compared to the provisions of the statutes considered in the previous cases that I was referred to is that s77 contains a long list of categories of authorised persons, with each category (other than the police) containing preconditions on the power to prosecute (such as prior authorisation in writing from a particular body or person) and restrictions on the types of offences that can be prosecuted, including restrictions based on where the offence took place. For example, the presiding officers of the Legislative Council and the Legislative Assembly can only prosecute for an offence occurring on the Parliamentary reserve and an officer authorised by a public authority can only bring a prosecution if the offence occurs on land or premises vested in or under the control of that public authority. Section 77 also contains elaborate provisions about who is entitled to the fines imposed for various offences.

31. As in *Davis*,[11] if any person might bring proceedings for a speeding offence, there would be little or no reason for the elaborate provisions in s77 of the RS Act regarding the types of persons who are authorised to bring prosecutions for specific types of offences. Each category of authorised persons is drafted very carefully by reference to factors such as the nature of the offence and where the offence took place. In addition, in the case of speeding offences, the prescriptive nature of the provisions of the RS Act dealing with the offences renders it very difficult for a member of the public to detect and prove such an offence.

32. Ms Hanscombe submitted that *Davis*[12] is distinguishable from the present case because, unlike s77 of the RS Act, ss48 and 49 of the OH&S Act required the Minister to issue guidelines for the prosecution of offences and substituted for the common law right, a right to require the Minister to indicate whether the Minister would bring a prosecution and, if not, to refer the matter to the DPP for advice. I am not satisfied that the absence of these features in s77 of the RS Act means that s77 does not abrogate the common law right in respect of speeding offences. The features of

s77 referred to in paragraph 30 of this judgment, the nature of the speeding offences under the RS Act and the regulations made under the Act, and the nature of the Act itself (see paragraphs 28 and 31 of this judgment) are, in my opinion, sufficient to indicate a clear parliamentary intention to abrogate the common law right of a member of the public to bring a prosecution in respect of such offences. It is not necessary for me to decide whether the common law right is abrogated in respect of other offences under the Act or the regulations.

Section 30(1) of the MC Act

33. My conclusion that s77 of the RS Act excludes the common law right in respect of speeding offences under the Act or the regulations does not mean that a person authorised by another statutory provision cannot bring such a prosecution.

34. Ms Hanscombe submitted that s30(1) of the MC Act provided authority for Mr Duncan to prosecute Mr Demir. Section 30(1) of MC Act provides:

> 30 Prescribed persons may issue summons
> (1) Without limiting the power of a registrar in any way—
> (a) a member of the police force; or
>
> (b) a public official acting in the performance of his or her duty (whether the power to commence the proceeding is conferred on him or her by or under an Act or at common law)—
>
> may, after signing a charge-sheet, issue a summons to answer to the charge.

35. In argument, I indicated to Ms Hanscombe that it seemed to me that insofar as s30(1)(b) referred to a public official acting in the performance of his or her duty in issuing a summons, it did so on the basis that the public official's authority to do so was under the common law or a statutory provision other than s30(1) of the MC Act itself. Ms Hanscombe did not seriously press her submission that Mr Duncan was authorised by s30(1) of the MC Act to prosecute Mr Demir. In my opinion, s30(1) of the MC Act did not authorise Mr Duncan to prosecute Mr Demir.

36. Ms Hanscombe did not refer me to any other statutory provision authorising Mr Duncan to prosecute Mr Demir. Accordingly, unless Mr Duncan was authorised to prosecute Mr Demir under s77 of the RS Act, the prosecution was unauthorised.

Presumption of regularity

37. Mr Hanscombe submitted that the Summons, which described Mr Duncan as the informant and included contact details at the VTD, was sufficient to attract the presumption of regularity and that the effect of the presumption is that Mr Duncan is presumed to be authorised to bring the prosecution unless Mr Demir adduces evidence to rebut the presumption.

38. Ms Hanscombe relied on the decision of Gillard J in *Director of Public Prosecutions v Sher*,[13] which was affirmed by the Court of Appeal.[14] That case involved a prosecution brought by a member of the police force of the rank of senior constable who described himself in the summons as a "prescribed person". A prescribed person is a member of the police force who has served at least two years in the force. While there was evidence before the Court that the informant was a senior constable, there was no evidence that he had served in the police force for at least two years. Gillard J referred to the well-established presumption that public and official acts and duties have been regularly and properly performed and that persons acting as public officers or in public capacities have been regularly and properly appointed. He said: "This is a [rebuttable] presumption of law in that once the basic fact is established the conclusion as to the existence of the presumed fact must be drawn in the absence of evidence to the contrary".[15] His Honour said that the basic fact that was established in that case was that the summons was signed by a member of the police force of the rank of senior constable, who asserts in the summons that he is a prescribed person. He concluded that the Court was entitled to infer that the informant was a prescribed person.

39. Mr Kowalski, who appeared before me for Mr Demir, sought to distinguish Sher on the basis that in that case, the basic fact that the police officer was a prescribed person was established by the police officer describing himself in the summons as a prescribed person, and this enabled the Court to presume that he was regularly appointed as a police officer and that he was a prescribed person in the absence of evidence to the contrary. Mr Kowalski submitted that, in the present

case, the only assertion made by Mr Duncan in the Summons was that he was the informant. There was nothing in the Summons that established the basic fact required for the purposes of s77(2)(c) of the RS Act, namely that Mr Duncan was an employee in DOI.

40. I agree with Mr Kowalski's submission. While there was evidence before the Magistrate that Mr Rattle and Mr Hannah were employed by the VTD and a statement by Mr Davies that he was authorised to appear as prosecutor on behalf of DOI, there was no documentary or oral evidence that Mr Duncan was an employee in DOI or held himself out or acted as if he was such an employee. Further, there was no evidence of any title or office that Mr Duncan may have held and his connection with the VTD was not apparent from the Summons. If the Summons had described Mr Duncan as an employee in DOI, that basic fact would have enabled the Magistrate to infer that Mr Duncan's employment in DOI was regular and possibly that he was authorised by the Secretary of DOI to bring the prosecution. If these inferences could be drawn, the presumption of regularity would have applied and would have enabled the Magistrate to presume that Mr Duncan's authority under s77(2)(c) of the RS Act had been established in the absence of evidence by Mr Demir to rebut the presumption. However, neither the contents of the Summons nor any other documentary or oral evidence before the Magistrate enabled either inference to be drawn.

41. It follows that the presumption of regularity did not apply in this case to establish that Mr Duncan was authorised to prosecute Mr Demir under s77(2)(c) of the RS Act.

Procedure for objecting to authority to prosecute

42. The informant's authority to prosecute is not an element of the offence being prosecuted.[16] As long as a defendant does not object that an informant's authority has not been proved, the authorisation will be presumed in accordance with the presumption of regularity.[17] If objection is taken, the informant must prove the authorisation on the balance of probabilities in order to establish the validity of the prosecution.[18]

43. In *Sher*, Gillard J stated:[19]

> In my opinion the court was entitled to infer from [the summons] that the informant was a prescribed person and if the defendant wished to challenge that assertion then the defendant in my opinion should have raised the issue during the course of the hearing whilst evidence was being given ... The issue did not go to proof of any element in the charge ... but went to the question as to the procedural regularity of the issue of the summons.
>
> In my opinion if a party contests the issue of a summons, it must appear under protest and state the objection at the time so that if it has any substance, it can be debated and resolved as a preliminary issue. If there was any substance in the point, defence counsel should have raised it at the outset. It is not appropriate to appear under protest without stating the basis of the objection.

44. Ms Hanscombe submitted that, in accordance with the above principle, Mr Demir should have appeared under protest before the Magistrate and raised the issue of Mr Duncan's authority to prosecute as a preliminary issue. In this case, Mr Demir initially appeared under protest to raise two issues. The first issue, namely whether Mr Demir had been validly served with a true copy of the Summons, was resolved against Mr Demir. Mr Demir's counsel, Mr Hardy, did not identify the second issue. After the first issue was resolved, Mr Hardy informed the Magistrate that he was not pursuing the second issue and that Mr Demir was no longer appearing under protest. Ms Hanscombe submitted that, in these circumstances, Mr Duncan was entitled to proceed with the prosecution on the basis that there was no challenge to his authority to bring the prosecution. Ms Hanscombe submitted that, if the second issue that Mr Hardy raised without identifying and which he then abandoned, was in fact the issue of Mr Duncan's authority to prosecute, then this reinforced Mr Duncan's entitlement to proceed with the prosecution on the basis that there was no challenge to his authority to prosecute.

45. Mr Kowalski sought to qualify the principle referred to in paragraph 43 of this judgment, on the basis that the principle only applies in cases where there is evidence before the Court which enables it to infer that the prosecutor is authorised to bring the prosecution. I reject this submission. Although Gillard J in *Sher*[20] concluded that it was open on the facts of that case to infer that the informant was authorised, he did not say that the principle referred to in paragraph 43 of this judgment only applies to cases where the facts enable an inference to be drawn that the informant is authorised.

46. Accordingly, I find that Mr Demir failed to comply with the principle referred to in paragraph 43 of this judgment and that the Magistrate erred in law in stating that there was no requirement on Mr Demir to raise the issue of Mr Duncan's authority prior to the close of the prosecution case.

Magistrate's discretion to permit reopening of prosecution case

47. A court has a discretion to permit a prosecutor to reopen the prosecution case after the close of that case to enable evidence to be presented to establish a procedural matter and, in very special or exceptional circumstances, to establish an element of the offence.[21]

48. In this case, the extracts from the transcript quoted in paragraphs 15 and 16 of this judgment indicate that the Magistrate regarded the informant's authority to prosecute as an element of the offence with which Mr Demir was charged. As the Magistrate was not satisfied that Mr Duncan was authorised to prosecute Mr Demir, she acceded to Mr Demir's no case submission. It is clear from the authorities referred to in paragraph 42 of this judgment that the Magistrate erred in law in treating Mr Duncan's authority to prosecute as an element of the offence.

49. As Mr Demir had not raised the issue of Mr Duncan's authority to prosecute as a preliminary issue after appearing under protest, and sought to raise the issue after the close of the prosecution case, the appropriate course for the Magistrate to adopt was to give leave to Mr Duncan to reopen the prosecution case to present evidence of his authority to prosecute.

50. Mr Kowalski submitted that Mr Davies at no time made an application to reopen the prosecution case and therefore it was not up to the Magistrate to adopt this course on her own initiative. However, the exchange between Mr Davies and the Magistrate that is set out in paragraph 15 of this judgment, particularly the Magistrate's statement that the Court's hands are tied, indicates that the Magistrate was of the view that in the circumstances that had arisen, there was nothing the Court could do to enable Mr Duncan to establish he had authority to prosecute. This view of the Magistrate was erroneous in light of the authorities referred to in paragraph 47 of this judgment. Faced with a statement from the Magistrate to the effect that the Court could not give him an opportunity to rectify the absence of evidence of Mr Duncan's authority to prosecute, it is not surprising that Mr Davies did not make a formal application to reopen the prosecution case.

51. Accordingly, I find that the Magistrate, in effect, ruled that she did not have the power to permit the prosecution to reopen its case to present evidence of Mr Duncan's authority to prosecute and, in doing so, erred in law.

52. In my opinion, in the circumstances of this case, including the matters referred to in paragraph 44 of this judgment, it was open to the Magistrate to exercise her discretion to permit the prosecution to reopen its case.[22] Mr Kowalski conceded that, had Mr Davies made an application to reopen his case, it may have been open to the Magistrate to grant that application.

Decision on the questions of law raised in the notice of appeal

53. For the above reasons, I answer the questions of law in the amended notice of appeal (which are set out in paragraph 18 of this judgment) as follows:

1. (a) Yes in relation to a speeding offence unless the informant is authorised under another statutory provision; (b) Yes; (c) No; and
2. The Magistrate erred in law in denying the prosecution the opportunity to apply to reopen the prosecution case.

Proposed orders

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

(a) The appeal is allowed;

(b) The order of the Magistrates' Court at Melbourne dated 3 July 2008 in case number W03085900 is set aside; and

(c) Case number W03085900 is remitted to the Magistrates' Court at Melbourne to be reheard and determined according to law.

55. I will hear from the parties on the precise form of the orders, including the question of costs.

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[1] *Armstrong v Hammond* [1958] VicRp 77; [1958] VR 479, 480-1; [1958] ALR 940 ("*Armstrong*"); *Deveney*

v Sturt [1969] VicRp 20; [1969] VR 174, 176; (1968) 26 LGRA 210.
[2] *Morrison v Rodda* (1991) 74 LGRA 61 ("*Morrison*").
[3] *Armstrong* [1958] VicRp 77; [1958] VR 479, 481; [1958] ALR 940; *Lynch v Sloan* [1959] VicRp 85; [1959] VR 656, 658-9; [1959] ALR 1172 ("*Lynch*").
[4] *Armstrong* [1958] VicRp 77; [1958] VR 479, 481; [1958] ALR 940; *United Transport Services Pty Ltd v Evans* [1992] VicRp 14; [1992] 1 VR 240, 249-50 ("*United*").
[5] *United* [1992] VicRp 14; [1992] 1 VR 240, 249; *Morrison* (1991) 74 LGRA 61; *Lynch* [1959] VicRp 85; [1959] VR 656; [1959] ALR 1172; *Davis v Grocon Ltd* [1992] VicRp 92; [1992] 2 VR 661, 669-70; (1992) 47 IR 404 ("*Davis*").
[6] *Davis* [1992] VicRp 92; [1992] 2 VR 661, 669-70; (1992) 47 IR 404.
[7] [1992] VicRp 92; [1992] 2 VR 661, 669-70; (1992) 47 IR 404.
[8] *Davis* [1992] VicRp 92; [1992] 2 VR 661, 669-70; (1992) 47 IR 404.
[9] [1992] VicRp 14; [1992] 1 VR 240.
[10] [1992] VicRp 14; [1992] 1 VR 240, 249.
[11] [1992] VicRp 92; [1992] 2 VR 661, 669-70; (1992) 47 IR 404.
[12] [1992] VicRp 92; [1992] 2 VR 661, 669-70; (1992) 47 IR 404.
[13] [2000] VSC 268 ("*Sher*").
[14] *Sher v DPP* [2001] VSCA 110; (2001) 34 MVR 153; (2001) 120 A Crim R 585.
[15] [2000] VSC 268, [164].
[16] *AB Oxford Cold Storage Co Pty Ltd v Arnott* [2005] VSCA 111; (2005) 11 VR 298, [26]; (2005) 145 IR 61 ("*AB*"); *Sher* [2000] VSC 268, [160].
[17] *AB* [2005] VSCA 111; (2005) 11 VR 298, [26]; (2005) 145 IR 61.
[18] *AB* [2005] VSCA 111; (2005) 11 VR 298, [26]; (2005) 145 IR 61.
[19] [2000] VSC 268, [160]-[161].
[20] [2000] VSC 268.
[21] *R v Chin* [1985] HCA 35; (1985) 157 CLR 671, 676-7; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495; *Blair v County Court of Victoria* [2005] VSC 213, [27] ("*Blair*").
[22] *Blair* [2005] VSC 213, [27].

APPEARANCES: For the appellant Duncan: Ms K Hanscombe SC with Ms F McKenzie, counsel. Legal Division, Department of Transport. For the respondent Demir: Mr M Kowalski, counsel. Thexton Lawyers.
