30/01; [2001] VSC 459

SUPREME COURT OF VICTORIA

KURZBOCK v HALLETT

Ashley J

23 November, 3 December 2001 — (2001) 126 A Crim R 125

PROCEDURE – RE-OPENING PROSECUTION CASE – DEFENDANT CHARGED WITH SPEEDING – INFORMANT'S WRITTEN STATEMENT TENDERED BY CONSENT – NO EVIDENCE GIVEN THAT SIGNS COMPLIED WITH ROAD RULES OR A DESCRIPTION OF SUCH SIGNS – NO EVIDENCE GIVEN BY DEFENDANT NOR WITNESS CALLED – APPLICATION BY PROSECUTOR TO RE-OPEN CASE – GRANTED BY MAGISTRATE – FURTHER EVIDENCE GIVEN TO REMEDY DEFECT – DEFENDANT CONVICTED – WHETHER MAGISTRATE'S DISCRETION MISCARRIED.

K. was charged with an offence of driving a motor vehicle at a speed over the limit as indicated by the speed limit signs. Before the police informant commenced his evidence, defence counsel indicated he had no objection to the informant's written statement being tendered in evidence. At the close of the prosecution case, defence counsel called no evidence from K. or any witness but submitted that the informant had not given evidence that the speed limit signs complied with Road Rule 21 nor a description of such signs. The prosecutor applied to re-open his case. In granting the application the magistrate stated that in view of the manner in which the informant had been invited to adopt his statement rather than give evidence in the normal manner sufficient grounds existed for the Court to exercise its discretion. K. was subsequently convicted. Upon appeal—

HELD: Appeal dismissed.

1 Leave to re-open should only be granted in very special or exceptional circumstances. There is a general prohibition with permissive exceptions. Very special or exceptional circumstances will not be constituted if the occasion for calling the further evidence ought reasonably to have been foreseen.

***R v Chin* [1985] HCA 35; (1985) 157 CLR 671; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495, applied.**

2. In the present case, the events were unusual. The prosecution had been told before the hearing that strict proofs would be required but then after a contest about the admissibility of the certificate in relation to the speed detection device, defence counsel had invited use of the informant's statement. This conveyed the impression — whether intentionally or otherwise — that so much of the statement as was ultimately relied upon with respect to the speed limit signs was not in issue. It was open to the magistrate to conclude that in the circumstances of the hearing, the foreseeability that proof of the design and content of the speed limit signs was required had disappeared.

ASHLEY J:

The Appeal

1. This is an appeal brought under s92 of the *Magistrates' Court Act* 1989 from a final order made by the Magistrates' Court at Ringwood on 13 July 2001. By that order the appellant was fined $500.00 plus costs and his right to drive was suspended for a period of four months.

2. The question of law raised by this appeal, according to a Master's order made 2 August 2001, is whether the learned magistrate erred in allowing the prosecutor, after the defence had closed its case, to re-open the prosecution case to lead evidence as to the description of speed limit signs and as to whether the signs complied with the road rules.

3. The question thus framed does not clearly illuminate the true issue, which is whether the learned magistrate's exercise of a judicial discretion to permit the re-opening of the prosecution case is shown to have miscarried on an application of the principles which apply with respect to a challenge to the exercise of such a discretion.

The Course of the Proceeding in the Magistrates' Court

4. To understand the issue thus arising something must be said of the circumstances of the case.

5. The appellant, Johann Kurzbock, was charged that

> "at Bayswater on 4 January 2001, being the driver of a vehicle on a length of roadway namely the Mountain Highway, [he] did drive at a speed over the speed limit being 70 kph as indicated by the speed limit signs."

6. The charge and summons identified the law under which the appellant was charged as "Road Rule 20".

7. The matter came on before the Magistrates' Court on 13 July 2001. The appellant was represented by counsel.

8. Prior to the hearing, on two occasions, counsel had informed the prosecutor that the prosecution would be put to strict proof of its case, the fact and the law. At least on one occasion the prosecutor was told, also, that the defendant was not calling an expert.

9. The transcript of the proceeding shows that when the respondent, as informant, was first called, challenge was raised to the tender of a certificate which purported to show that the laser speed detection device used by him had been tested and sealed as required by s79 of the *Road Safety Act* 1986. Proof of that matter was necessary in order that the reading made by the device constitute proof, in the absence of contrary evidence, of the speed of the appellant's vehicle at the relevant time.

10. That objection was eventually rejected. So also was a submission that the certificate was faulty because, although it referred to testing conducted before the date of the alleged offence, it bore a date subsequent to the date of the alleged offence.

11. Following that skirmish the respondent was recalled. Before he could be asked a full question counsel for the appellant said this:

> "... sorry to interrupt my learned friend your worship but just to save your worship a lot of writing and a lot of speaking by the Informant I have no objection if the Informant simply wishes to tender his statement which I have received under the prehearing disclosure rules and speak to the accuracy of that on his oath. If that suits the Prosecution."

That course was adopted, although the statement there referred to seems never to have been formally received as an exhibit. Before me, in any event, there was no argument against the proposition that the statement became part of the evidence in the case.

12. I should set out two parts only of the statement:

> "I said, 'Your speed has been checked at 125 km/h in a 70 km/h speed zone. Do you have a reason for exceeding 70 km/h.' He said, 'I work for a caryard, this is a caryard car, I am not used to it.'"

and

> "Mountain Highway, Bayswater is a length of road defined by 70 signs at the beginning and 60 signs at the end. There are no signs permitting any higher speed."

That part of the respondent's statement was not amplified by any further evidence in chief. In cross-examination there was this incidental reference to the applicable speed limit:

> "... the defendant was actually the fastest motor car that I have ever seen along that stretch of road. I regularly get them, it's a 70 zone I regularly get them in the 90s to 100s..."

13. At the close of the prosecution case counsel for the appellant said this:

> "As the prosecution has closed its case, I open the defence case by making a no-case submission. Your Worship I have instructions not to call evidence. I close the defence case. I wish to make submissions of law."

14. Counsel then made two submissions. The first of them was that the certificate which had

been admitted related to a laser device other than the one which the respondent gave evidence of using. The second of them was that it was an indispensable part of the prosecution case that evidence be given that the speed limit signs "were signs as provided for under the Road Rules". The informant "must say that the 70 kilometre per hour signs... complied with Road Rule 21 and he must also give a description".

15. Counsel conceded that acceptance of the first submission would not necessarily result in the prosecution failing. That was evidently so. The informant had given evidence of estimating the speed of the vehicle; and his evidence was open to a conclusion, notwithstanding substantial cross-examination, that the speed of the appellant's vehicle was, if not 125 kph, then not much short of that.

16. The second alleged defect in the prosecution proofs, counsel submitted, was inevitably fatal.

17. The prosecutor did not concede that either defect was present; but he applied to re-open in the event that the magistrate was of a contrary opinion.

18. Counsel for the appellant opposed the prosecution's application that, if necessary, the prosecution be permitted to re-open its case. This is what he submitted:

> "On 9 July I received mobile telephone call from the learned Prosecutor. The gist, I'm just looking at a file note, I said the Prosecution would be put to the strict proof of its case, the fact and law but the Defendant's not calling an expert – that's a summary of the conversation. This morning before Your Worship convened your Court, I again mentioned to the Prosecution it would be put to the strict proof of its case."

The prosecutor, in reply, made this point:

> "... the Defence decided well before today that they were not calling expert evidence in relation to this matter, so its not a situation where they have been put to any difficulties inconvenience or unfairness in relation to the preparation of their case."

19. The learned magistrate accepted counsel's first submission. But in the end he was satisfied that the prosecution had proved that the appellant had driven at a speed which exceeded 70 kph by a speed of 40 kms an hour or more. He was not satisfied that the speed of the vehicle had exceeded the speed of 70 kph by 50 kms an hour or more.

20. His Worship accepted counsel's submission that the prosecution had been required to prove that the 70 kms per hour sign(s) complied with Road Rule 21, this necessitating a description of such sign(s). Then his Worship had to decide whether the charge should be dismissed or whether the prosecution should be permitted to re-open its case. In that connection the learned Magistrate said this:

> "I must say that in ordinary circumstances that I would not be persuaded to exercise the discretion of the Court and re-open the matter. However, given the way the matter proceeded the invitation to adopt a statement, the invitation to tender it to the Court rather than have the Informant to give his evidence in the normal manner seems to me sufficient grounds for the Court to exercise its discretion. And I propose to do so."

That was the exercise of discretion which is the subject of the present appeal.

21. Thereafter the informant was recalled. He gave evidence the consequence of which was that the supposed defect in the prosecution case was remedied. That led on, in due course, to the appellant being convicted and penalised.

Matters not arising on the Appeal; and Common Ground

22. It is no part of this appeal whether the learned magistrate's conclusion that there was a defect in proofs concerning the speed limit sign(s) was correct. I need offer and do offer no opinion about that matter.

23. It follows from what I have just said that, if the exercise of discretion is successfully attacked, the only possible result is that the appeal should be allowed and the conviction set aside. Mr Just, for the respondent, did not suggest to the contrary.

24. I should next refer to the bases upon which the exercise of a judicial discretion may be successfully challenged. They are set out in cases such as *House v R*[1]; *Australian Coal and Shale Employees' Federation v Commonwealth*[2]; *McKenna v McKenna*[3]; and *Norbis v Norbis*[4]. In short, there is a strong presumption in favour of the correctness of the decision. To succeed in a challenge it must be shown that the judge or magistrate acted on a wrong principle, took account of some extraneous consideration or irrelevant matter, failed to take a relevant consideration into account, or mistook the facts; or that the decision was unreasonable or plainly unjust as would imply a failure to properly exercise the discretion. Failure to take account of a relevant consideration refers to a consideration which must properly have been brought to account.

25. Before me, the principles thus stated were not controversial.

26. That takes me to the circumstances in which, on the authorities, the prosecution may be given leave to re-open its case. It was contended for the appellant and accepted by the respondent that leave should only be granted in very special or exceptional circumstances. There is a general prohibition with permissive exceptions. See *Shaw v R*[5]; *Killick v R*[6]; *Lawrence v R*[7]; and *R v Chin*[8].

Competing Submissions

27. Counsel for the appellant relied particularly upon the propositions that (1) generally speaking, very special or exceptional circumstances will not be constituted if the occasion for calling the further evidence ought reasonably to have been foreseen[9]; and (2) such circumstances do not include instances which would have been covered if the prosecution case had been fully and strictly proved[10]. In the present case, he submitted, those considerations meant that the discretion must have been exercised against the prosecution. He emphasised that his invitation to the prosecutor to make use of the informant's statement had not shut the door on the prosecutor eliciting further evidence from the respondent pertaining to the speed limit signs. He further submitted that a pertinent question was whether the defence would be irretrievably prejudiced by granting the prosecution leave to re-open its case. That went to showing that there would be unfairness to the appellant in the event that leave to re-open was granted. Here there was irretrievable prejudice. Had the informant given necessary evidence concerning the speed limit signs in his initial evidence, the defence case could have been differently presented.

28. Counsel for the respondent conceded the accuracy of the first of the propositions to which I referred a moment ago. But he submitted[11] that warning has been given against the adoption of a rigid formula concerning the circumstances in which re-opening will be permissible. He further submitted that the application of the first proposition, and of the underlying rationale of fairness, need to be considered in the factual milieu of the particular case. Here the events were unusual: the prosecution had been told before the hearing that strict proofs would be required. But then, after a vigorous contest as to the admissibility of the certificate, counsel for the appellant had invited use of the informant's statement, this conveying the impression – whether intentionally or otherwise – that so much of the statement as was ultimately relied upon by counsel for the appellant with respect to the speed limit signs was not in issue. Although it ought reasonably to have been foreseen at the outset that proof of the design and content of the speed limit signs was required, that foreseeability disappeared – or at least it was open to the learned magistrate to so conclude – in the circumstances of the hearing as it developed. The learned magistrate's expressed reason for permitting the prosecution to re-open its case reflected conclusions to that effect.

29. Counsel for the respondent further submitted that there was no unfairness in this case as should have told against the grant of leave to re-open. It had been the forensic decision of counsel for the appellant not to raise the matter by way of a no-case submission.[12] The re-opening had deprived the appellant of the opportunity of calling evidence upon the matter. But that had been the consequence of the forensic decision.

30. Counsel for the respondent made two additional submissions. He contended, first, that

the further evidence called in this matter was essentially of a formal kind that does not admit of denial, and which had been overlooked by the prosecution.[13] He did not suggest that the learned magistrate had approached the matter in this way, but submitted that it provided an alternative basis supporting the decision.

31. Second, he submitted that if the decision was not comprehended by a class of exception thus far recognised, it was nonetheless supportable as a fresh exception to the general rule, the classes of exception not being closed.

Resolution of the Appeal

32. In my opinion the appellant has not shown that the learned magistrate's discretion miscarried. His Worship evidently and correctly recognised that exceptional circumstances were required before he should permit re-opening. In substance he decided that the course of the hearing which led to the occasion for calling the evidence was not such as should reasonably have been foreseen – whatever might have been the position before the hearing commenced. That was the application, in particular circumstances, of a recognised exception to the general prohibition against re-opening. Individual cases have stretched the conception of what should reasonably be foreseen very far[14]. Something may be reasonably foreseen, it has been said, although it is unexpected[15]. Even so, it is the particular circumstances of the individual case which must be considered. More than that, this court is called upon to consider the exercise of a judicial discretion in those particular circumstances.

33. Further, his Worship said nothing about fairness. It is very unlikely that he did not consider it, for it provides a rationale for the very special circumstances test. But assume that he gave it no discrete consideration. Even so, I consider that it assists the appellant not at all. In my opinion there was much to commend the pertinent submission of counsel for the respondent. Moreover, the submissions made by counsel for the appellant to the learned Magistrate as to prejudice focussed upon particular considerations; and in that connection should reasonably have been regarded as entirely unconvincing.

34. So, counsel did not suggest that in other circumstances he would have called evidence concerning the signs. He did submit that "it (*sic*) could instruct my solicitor to call an expert in the laser device". But, as he told the Magistrate, he had earlier informed the prosecutor that the appellant was not calling an expert.[16] He also submitted to the Magistrate, referring (as he claimed) to the appellant, that he could have called the appellant to give evidence. But about what? He did not suggest to the magistrate that such evidence would have related to the speed limit signs. Before me, he made it clear that the signs would not have been a topic addressed by the foreshadowed evidence; but rather the speed of the vehicle. That evidence could have been adduced regardless of the state of the evidence concerning the signs. But it was not. Having regard to the attacks made on the laser gun evidence, one of which ultimately proved to be successful, there was good reason why the appellant would have been kept away from the witness box. The learned magistrate was entitled to treat the submission that, had the presumed necessary evidence been adduced from the respondent concerning the speed limit signs, the appellant might have given evidence, as fanciful. Indeed, I do not think he could sensibly have done otherwise.

35. It is unnecessary, in the circumstances, to make anything but passing mention of the further submissions advanced for the respondent. I say nothing as to whether the exercise of a judicial discretion could be supported, in a s92 appeal, by recourse to a consideration which (let it be assumed) was not in fact brought to account by the decision-maker. That said, there was, I think, substance to the submission of counsel for the respondent that the evidence not called was relevant to an essentially formal proof.

Order

36. The appeal must be dismissed with costs. It will follow that the stay the subject of paragraph 8 of the Master's orders made 2 August 2001 is at an end.

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[1] [1936] HCA 40; (1936) 55 CLR 449 at 505 per Dixon, Evatt and McTiernan JJ.
[2] [1953] HCA 25; (1953) 94 CLR 621 at 627 per Kitto J.
[3] [1984] VicRp 58; (1984) VR 665 at 672.
[4] [1986] HCA 17; (1986) 161 CLR 513 at 517-518; [1986] FLC 91-712; 65 ALR 12; (1986) 60 ALJR 335; (1986) 10 Fam LR 819 per Mason and Deane JJ.

[5] [1952] HCA 18; (1952) 85 CLR 365; [1952] ALR 257.
[6] [1981] HCA 63; (1981) 147 CLR 565; 37 ALR 407; 56 ALJR 35.
[7] (1981) 38 ALR 1.
[8] [1985] HCA 35; (1985) 157 CLR 671; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495.
[9] Citing Gibbs CJ and Wilson J in *Chin* at 676-677.
[10] Citing Dawson J, Mason J agreeing, in *Chin* at 684-685.
[11] Citing Dixon, McTiernan, Webb and Kitto JJ in *Shaw* at 379-380.
[12] Had it then been raised the prospect of the prosecution being permitted to re-open its case was probably greater: see *Hewitt v Harms* (1989) 10 MVR 63 at 66 and *Binting v Wilson* (Ormiston J, judgment 19 December 1989, unreported at [10]), cases cited for the appellant.
[13] He cited, as examples of that type of case, *Hansford v McMillan* [1976] VicRp 80; [1976] VR 743, *Kennett v Holt* [1974] VicRp 79; [1974] VR 644 and *Webb v Rooney* [1895] VicLawRp 75; (1895) 21 VLR 355.
[14] See, for example, *Killick* and *Lawrence*.
[15] *Shaw* was such a case.
[16] I add, though the Magistrate was not so informed, that counsel told me that no expert was on hand at the Magistrates' Court on 13 July.

APPEARANCES: For the Appellant Kurzbock: Mr W Walsh-Buckley, counsel. Kenna Croxford & Co, solicitors. For the Respondent Hallett: Mr D Just, counsel. Solicitor for Public Prosecutions.
