32/93

SUPREME COURT OF VICTORIA

GAMSER v RHIND

Nathan J

8 September 1993 — (1993) 19 MVR 231

MOTOR TRAFFIC – SPEEDING – RADAR DEVICE – EXPERT EVIDENCE CALLED THAT DEVICE CAN GIVE INACCURATE READING – EXPERT EVIDENCE ACCEPTED – WHETHER COURT MAY READ DOWN AND FIND SPECIFIC READING.

After accepting evidence from an expert in electronics that a speed measuring device on the occasion used produced an inaccurate reading, the magistrate was in error in finding that the motor vehicle travelled at a certain speed.

NATHAN J: [1] This is an appeal from a Magistrate's decision. It must, in accordance with the principles, raise a question of law rather than disputation as to the facts. I can shortly recite the uncontested facts and the Magistrate's findings and the same will reveal that a question of law has arisen. The Magistrate's error has been one of law rather than of fact.

The appellant was a motor car driver who in the early hours of the morning was detected by a radar sensing device held by a policeman to have been travelling at a speed of 127 kph. At a contested hearing before the Magistrate, expert electronic evidence was given by a Dr Leigh-Jones, whose expertise and qualifications were not in question. He gave evidence of conducting similar tests with a similar radar device as that used by the police but, of course, on a separate day and occasion. More significantly, he gave evidence of the proximity of power lines which, he averred, rendered the taking of radar readings close by to be inaccurate or subject to wild fluctuation. He gave evidence that the various surges of power in the amount of current moving along the power lines could affect, by a phenomenon known as a "sideways effect", the accuracy of otherwise impeccable radar recording devices. His evidence was that at one such time he took a test, the device registered 74 kph when no vehicle at all was in sight and that on other tests, the device significantly under-recorded as well as over-recorded the speed of travelling vehicles.

The Magistrate in accepting the findings of Dr Leigh-Jones adopted a curious path of reasoning, and I **[2]** recite from the affidavit, as follows:

> "He, that is, Dr Leigh-Jones, conducted his own tests and he went to the site. He indicated he got several readings, which demonstrated to him that there was outside interference likely to interfere with the integrity of the device. He gave a number of instances of reading; one was an error from 91 to 74 kph. Alarmingly, one recorded a reading when there was no vehicle. There were two occasions of over-reading. He said the device was inherently accurate as a measuring device, but that he had no doubt that the currents in power lines can cause inaccurate readings."

The Magistrate then said,

> "Given the number of occasions it occurred (that is, interference being disclosed) I cannot be satisfied that the radar device was not in some way interfered with. There were two over-readings in the tests by Dr Leigh-Jones. They were in the vicinity of 6 to 9 kph. I find that the radar may have over-read by some 9 kph."

The Magistrate then imposed a penalty in accordance with the *Road Safety Act* which ascribed to the appellant's vehicle a speed 9 kilometres less than the 127 recorded, namely, 118 kph. Pursuant to the statute, this had the effect of attracting a four months period of licence suspension, whereas had his speed been 105 or less, the period of compulsory cancellation would have been one month.

The recitation of the Magistrate's findings indicate that he came to conclude, and

ascribed, an accurate reading to a device which he said was inherently inaccurate in these given circumstances. The paradox of that result reveals an error of law. One looks to the facts decided and their relative importance as to the conclusion arrived at as deciding whether or not the Magistrate could reasonably have arrived at such a conclusion. The tests conducted by Dr Leigh-Jones were upon a different occasion and time to that conducted by the policeman. More than that, the Magistrate had, on his **[3]** own material, accepted evidence of wildly fluctuating speed reading, including one which reported an over-estimation of 19 kph as well as accepting evidence that the device under-reported by a similar figure.

The finding, viz., "I find the radar may have over-read by some 9 kph" and then imposing a penalty as if it did, and the subject of the matter was certain. It is an error of law, to ascribe a penalty to given conduct which the Magistrate had concluded had not been accurately recorded. That is he could not on his own findings be sure of the excess speed in kph.

That being so, I am confronted with an exercise of discretion as to what should best be done. Justice should be expeditious. The appellant in this case admitted to the policeman on the occasion, and his counsel has before me, to speeding at a rate of 102 kph. Of that, on the basis of the admission, there can be no doubt. Therefore in my view it is appropriate to impose a penalty and supplant the penalty of the Magistrate on the basis of the admission. Given the inaccuracies of the speed measuring device accepted by the Magistrate, I should not fall into the same error as the Magistrate and should not conclude at what speed accurate to a kilometre/hour the appellant was travelling. Therefore, pursuant to the provisions of s92 of the *Magistrates' Court Act*, I shall quash the order as to penalty made below and impose the following:

> Order that any licence to drive, of the appellant, under the provisions of the *Road Safety Act* be suspended for a period of one month.

[4] I am informed from the Bar table, and it is not contested that the period of suspension has now expired and accordingly, I declare that the appellant be entitled to drive and have re-issued to him any licence permitting him to do so under the terms of the *Road Safety Act*. So far as the pecuniary penalty is concerned, I do not intend to intrude. It might be said that now having reduced the period of suspension, I should also reduce the monetary penalty. It is a trivial sum. I should not interfere and I shall order that the appellant be fined the sum of One Hundred and Seventy-five dollars.

APPEARANCES: For the appellant Gamser: Mr MJ O'Brien, counsel. MJ Gilbert & Co, solicitors. For the respondent Rhind: Mr D Just, counsel. John M Buckley, Solicitor to the DPP.
