28/98

SUPREME COURT OF VICTORIA

FOSKETT v BURGESS and ANOR

Harper J

2, 3 July 1998 — (1998) 102 A Crim R 448

PROCEDURE – SPEEDING CHARGE – PROPOSAL TO CALL EXPERT EVIDENCE – DEFENDANT REQUIRED TO SERVE ON THE INFORMANT A STATEMENT OF EXPERT WITNESS – LETTER SENT TO INFORMANT OF PROPOSAL TO CALL EXPERT AS TO OPERATION OF RADAR DEVICES AND RELEVANT STANDARDS – WHETHER LETTER CONSTITUTED A STATEMENT – WHETHER LETTER MET THE STATUTORY REQUIREMENTS: *MAGISTRATES' COURT ACT* 1989, Sched 2 Cl1A subcl(8).

Prior to the hearing of a charge of excessive speed, the defendant's solicitor wrote to the informant to give notice that at the hearing of the charge it was proposed to call an expert witness to "adduce evidence as to the required method of operation of radar devices and the characteristics of radar waves" and also evidence "regarding the operation and implication of" the relevant standards. When the matter came on for hearing the prosecutor objected to the expert giving evidence. The magistrate ruled that the letter constituted a "statement" within the meaning of the sub-clause. Upon an originating motion—

HELD: Injunctive relief granted. The defendant is restrained from calling any expert evidence unless he serves on the informant a document which contains the substance of the evidence intended to be called from the expert witness or a notice that although the defendant intends to call the witness, the witness is not in a position to make such a statement.
1. By virtue of sub-cl (8) of cl 1A of Schedule 2 of the *Magistrates' Court Act* 1989 a defendant must serve on the informant a copy of the statement of any expert witness whom the defendant intends to call to give evidence at the hearing.

2. The letter sent to the informant did not meet the requirements of subcl (8). It gave neither the informant nor the court any indication of the case which it was intended to put through the expert witness. Any evidence given by the witness would necessarily have been evidence of which no notice whatsoever had been given to the informant. The letter met none of the objectives which sub-cl (8) was designed to advance. Accordingly, the magistrate was in error in ruling that the letter constituted a statement within sub-cl (8).

HARPER J: [1] On 14 March 1997 Senior Constable Alan Foskett was on duty in the vicinity of Jarklin, a small town on the Loddon Valley Highway, about halfway between Bendigo and Kerang. According to him, at 3.10pm that day, the first defendant, Roderick Burgess, was detected driving south. The speed of Mr Burgess' car was checked by use of a Kustom Falcon model radar speed measuring device, which is one of the radar devices prescribed for the purposes of ss74 and 79 of the *Road Safety Act* 1986: see Regulation 506 of Statutory Rule 28 of 1988 [the *Road Safety (Procedures) Regulations* of that year]. The device used by Mr Foskett indicated that Mr Burgess was travelling at 135 kilometres per hour, although the speed limit on that section of the highway was, as the prosecution alleges, 100 kilometres per hour. Mr Burgess' car was intercepted. After a conversation during which, according to Mr Foskett, Mr Burgess sought not to deny but to explain the speed at which he was travelling. Mr Foskett issued Penalty Notice N427695. The effect of that notice is that if the notice stands, Mr Burgess will face a fine of $220 and suspension of his licence for one month.

Mr Burgess does not accept the police case. He instructed his solicitors accordingly. Arrangements were thereafter made for his being represented at the Magistrates' Court at Kerang for a "contest mention" on 11 December 1997. This was followed by a direction that the case be fixed for a contested hearing on 4 February 1998 at that court. **[2]** In these circumstances, it was open to the informant to serve on Mr Burgess a brief of evidence as described in s37 of the *Magistrates' Court Act* 1989. If this is done, clause 1A of Schedule 2 of the Act (which is concerned with summary criminal hearings) does not apply. But in this case, it was not done. Accordingly, clause 1A is applicable.

That clause includes subclause (8), which is in the following form:

> "(8) The defendant must serve on the informant at least seven days before the mention date (or, if the statement is not then in existence, as soon as possible after it comes into existence) a copy of the statement of any expert witness whom the defendant intends to call to give evidence at the hearing."

Why this subclause should not apply if a brief of evidence is served pursuant to s37 is a mystery. It is a matter which, like a number of other very strange examples of draftsmanship in the subclause itself, requires the attention of legislature. What is plain, however, is that the subclause was inserted so as to give the informant appropriate notice of expert evidence to be called on behalf of the defendant, and so as to assist in the smooth running of contested summary criminal hearings in cases where experts are to be called. For reasons to which I shall return, this conclusion is one which necessarily follows from the nature of the provision (that is subclause (8)) itself. It is also consistent with the intention of parliament, as expressed by the minister when making the Second Reading Speech in the debate on the *Magistrates' Court* ***[3]*** *(Amendment) Bill* on 28 April 1994. *[His Honour then referred to statements made during the debate and continued]...* **[5]** It can fairly be said that at least this aspect of the bill received bipartisan support.

The logic behind subclause (8) is obvious. Section 79 of the *Road Safety Act* not only permits evidence of the speed of a vehicle to be given by reference to a reading taken from a prescribed speed measuring device, such as the Kustom Falcon radar device, but also provides that such evidence will, in the absence of evidence to the contrary, constitute proof of that speed. There is a caveat, however, to the effect that the device must be tested, sealed and used in the prescribed manner. Evidence of the proper testing and sealing may, by s83 of the Act, be given by a certificate in the prescribed form if the certificate is signed, or purports to have been signed, by a person authorised to do so. Again, the certificate will, in the absence of evidence to the contrary, constitute proof of the facts stated in it. In these circumstances, the informant would not in the usual case contemplate calling expert evidence to establish what otherwise would be necessary to put before the court. The case for the informant would be straightforward - an obviously desirable outcome if traffic cases are not to clog the lists of already busy courts.

At the same time, enabling informants to present **[6]** straightforward proofs of traffic offences should not be allowed to prevent defendants from putting a case which, if accepted, would avoid conviction – and the suspension of a driver's licence which might follow with, in the individual case, very severe consequences. In these, as in other criminal matters, defendants are entitled not only to put forward a positive case in support of a conclusion of innocence, but also to require the informant to prove guilt beyond reasonable doubt. The legislature has recognised this need for balance by providing for the reception of what is described in each of ss79 and 83 of the *Road Safety Act* as "evidence to the contrary". But these entirely appropriate provisions must somehow, if proper effect is to be given to them, be assimilated into what must remain as the standard format for the hearing of a criminal charge: that is, that the prosecution call all its evidence before the defence is required to respond. But how can the prosecution meet or attempt to meet "evidence to the contrary" if it has no idea what that evidence might be? One means would be to anticipate all such evidence by meeting it in advance. Given, however, that such an approach would necessarily defeat the entire legislative scheme for dealing efficiently with road traffic offences, requiring the prosecution to call anticipatory evidence is not a solution that is open. Nor is it the solution which parliament has chosen. That solution is to require the defence to give advance notice of any expert evidence which the defence intends to call; hence subparagraph (8) of clause 1A of Schedule 2 of the *Magistrates' Court Act*.

[7] I have been urged on behalf of Mr Burgess to give this subclause a restrictive operation. It should be construed narrowly, it is submitted, because it constitutes an infringement of the hallowed right to silence, and a restriction on the equally hallowed privilege against self-incrimination. I do not accept the correctness of these submissions, while of course accepting the hallowed nature of both the right to silence and the privilege against self-incrimination. It seems to me that subclause (8) may be seen as part of a scheme to prevent the prosecution from having an almost automatic right to reopen its case in a contested hearing, with the consequential and additional loss of time and money which the necessary adjournments would entail. Thus it can be said that the interests of defendants as well as those of informants would be best served if subclause (8) were interpreted so as to require, if not that the entirety of a witness statement (as these are used in, for example, the Commercial List of this court) be served on the informant in respect of each expert witness whom the defendant intends to call to give evidence, then at least that the

informant receive a document containing the substance of such evidence. In this context, I refer again to the passages that I have quoted from the speeches on the *Magistrates' Court (Amendment) Bill* as set out in Hansard; and I refer in particular to the reference by the member for Gippsland South to Order 44 of the Rules of the Supreme Court. It seems to me entirely consistent with the propositions there put by members on both sides of the House that **[8]** subclause (8) be given the reading which enables it to serve its purpose. The reading contended for by the first defendant would not, in my opinion, enhance but rather defeat that aim.

In my opinion, no document such as to conform with the requirement of subclause (8) was served on Mr Foskett. Rather, on 2 February 1998, the solicitors for the first defendant forwarded by fax addressed to the police prosecution, the following letter:

> "Refer Magistrates' Court 4 February 1998. Our client R. Burgess.
>
> We now wish to give notice that at the hearing of this matter we propose to call Professor P.N. Joubert. We shall forward a copy of Professor Joubert's curriculum vitae to you tomorrow. It is proposed to call Professor Joubert to adduce evidence as to the required method of operation of radar devices and the characteristics of radar waves. It is also proposed to adduce evidence from Professor Joubert regarding the operation and implications of [the relevant] standards."

The effect of this letter was to give notice to the informant that Professor Joubert would be called to give evidence at the hearing at Kerang on 4 February 1998. The letter did not give notice of what may have been Mr Burgess' real intention: namely to call Professor Joubert only if the evidence led by or adduced in cross-examination of the informant or his witnesses (if any) enabled Professor Joubert to detect some flaw in what would otherwise have been the informant's statutorily-sanctioned proofs. The police prosecution read the letter as one would expect: that is, that the defendant intended to call Professor Joubert as a witness, he already being in a position to give opinion evidence upon which the **[9]** defendant intended to rely. When at the outset of the hearing on 4 February Mr Meehan, counsel for Mr Burgess, informed the prosecutor that he intended to call Professor Joubert to give expert evidence on behalf of his client, the Prosecutor submitted that this should not be allowed (or, in other words, that His Worship should rule as inadmissible the evidence proposed to be given by the Professor) because:

> "[The] defence had not complied with the provisions of paragraph (8) of clause1A of schedule 2 of the *Magistrates' Court Act* ("the Act") insofar as (a), no statement had been received from the solicitors for the first defendant in accordance with the provisions; (b), the letter [dated 2 February 1998] herein does not constitute a statement within the meaning of the Act; (c),notification of the intention to rely upon or call an expert was received only two days before the hearing contrary to the Act."

These submissions of the Prosecutor did not find favour with His Worship. On the contrary, the Magistrate ruled that the letter constituted a "statement" within the meaning of that expression in the subclause. The Prosecutor then sought and was granted an adjournment: but on the basis that the Chief Commissioner pay the first defendant's costs fixed at $2,450.

In my opinion, the letter of 2 February did not meet the requirements of subclause (8). It gave neither the informant nor the court any indication of the case which it was intended to put through the witness on behalf of the first defendant. Any evidence given by Professor Joubert which might have assisted His Worship in coming to a conclusion as to whether the informant had proved his case to the required standard, would **[10]** necessarily have been evidence of which no notice whatsoever had been given to the informant. In short, the letter met none of the objectives which subclause (8) was designed to advance. Were I to hold that it did comply with that provision, the way would be open for extensive abuse by defendants of measures which are directed not at providing them with an illegitimate advantage, but at promoting the proper management of litigation.

It was submitted on behalf of Mr Burgess that he did all that in the circumstances he could have done. Not having been in a position to obtain relevant particulars about the informant's case (or, more probably, about concessions which might be obtained from the informant under cross-examination) and not being independently in a position to provide Professor Joubert with meaningful instructions, Mr Burgess at least told the informant that he intended to use the services of an expert.

This submission confronts the problem that it is based on a premise which was concealed from the informant. It has as its starting point the proposition that Mr Burgess was (and is) unable to furnish Professor Joubert with any information upon which the Professor might base an opinion which in turn might assist the first defendant to defend his charge. Of course, as I have said, it is proper for someone in Mr Burgess' position to require the prosecution to prove the case against the defendant beyond reasonable doubt. Of course Mr Burgess is entitled for this purpose to call in aid whatever doubt expert evidence might properly **[11]** throw on the Prosecutor's case. But if this is to be done only on the basis of material extracted from prosecution witnesses during the course of their evidence, then it is misleading to speak of proposals to call the expert "to adduce evidence on the required method of operation of radar devices", and so on.

For these reasons, it seems to me that by writing the letter of 2 February, the first defendant's solicitors in fact put the informant in a more disadvantageous position than would have been the case had no notice been given of the intention to call Professor Joubert. Had no notice been given, and had the first defendant sought to call Professor Joubert after the prosecution case had concluded, then it would have been open to the first defendant to submit to His Worship that in the circumstances he had done all that was open to him to comply with subclause (8). That subclause, it will be remembered, specifically adverts to the possibility that "the statement" might not be available at the time envisaged by that provision. In those circumstances, subclause (8) requires that the statement be served on the informant as soon as possible after it comes into existence. If in the particular circumstances it cannot come into existence until after the end of the Crown case, then it is in my opinion open to a defendant to submit to the court that in the circumstances all that is possible to have been done in compliance with the provision has been done, and whatever consequential orders are appropriate in those circumstances (including an adjournment to allow the prosecution to call, or at least obtain instructions **[12]** concerning the benefits of calling, rebuttal evidence) should accordingly be made; possibly without penalty to the defendant although questions of costs might have to be considered in the light of subsequent events.

That was not the course which was followed in this case. It is in my opinion a direct result of the course adopted by the first defendant that the prosecution felt obliged to seek the adjournment which His Worship granted. It follows from these reasons, however, that in making his order in relation to costs, His Worship compounded the mistake which was made when His Worship accepted the letter of 2 February as a document which was served in compliance with the requirements of subclause (8). In both these findings His Worship was, it seems to me, mistaken. It was submitted on Mr Burgess' behalf that the informant had been given two days' notice of the intention to call Professor Joubert. Accordingly, the prosecution had ample time within which to consider its position and avoid the necessity for attendance at Kerang on 4 February by notifying the first defendant of its wish for an adjournment. By this means, the costs of such adjournment might have been avoided. It is therefore appropriate that those costs should be borne by the prosecution.

This submission is, in my opinion, devoid of merit. No adjournment could have improved, otherwise than marginally, the position of the prosecution. It is true that the informant might have used the additional time to secure the attendance of an expert to give evidence "as to the required method of operation of **[13]** radar devices and the characteristics of radar waves"; even, perhaps, evidence "regarding the operation and implications of" the relevant standards. It is quite likely, however, that these are not matters of scientific controversy. It is also quite likely, therefore, that Professor Joubert's evidence on these matters would not conflict with that called by the prosecution - a possibility that highlights the inadequacy of the letter of 2 February as an indication of the evidence (if any) which Professor Joubert might at some time give in an attempt to advance the case for the defence. The inadequacy of that correspondence is also highlighted by the fact that, apart from giving the (possibly non-controversial) evidence that falls under the headings of the letter of 2 February, any expert for the Crown would necessarily have been left guessing about the substance of the evidence which Professor Joubert might subsequently give.

Suppose the informant had done that which it is now submitted on Mr Burgess' behalf he should have done. An adjournment having been arranged, the prosecution would doubtless on the adjourned date have called its expert, and all the other evidence which it was then in a position to call. The informant would then have closed his case; and the first defendant would have begun

his. If Professor Joubert had heard anything in the course of listening to the prosecution case which, in his opinion, threw doubt upon a material part of that case, he would have been called. The prosecution would then have heard for the first time what it was about the case against Mr Burgess which he really wanted **[14]** challenge. The prosecution might or might not have had an answer to that challenge. If the former, a further adjournment might have been necessary to enable the informant to consider his position and, if necessary, reopen his case. At the very least, any challenge put up by Professor Joubert which in the opinion of the informant was without substance would have necessitated a reopening of the prosecution case, with all the procedural disadvantages which would have been occasioned by such a step.

In my opinion, the informant therefore acted appropriately in not seeking an adjournment after his receipt of the letter of 2 February. He was, on the information contained in that letter, in no position to make an informed decision about the conduct of his case. More importantly, he was entitled to regard the letter as in no way meeting the requirements of sub-cl(8). He was accordingly entitled to expect that the magistrate would disregard that letter for any of the purposes of Schedule 2 of the Act. The prosecution case could then have been presented on 2 February. If Professor Joubert was called and gave evidence which the informant reasonably wished to meet by calling other expert evidence, an adjournment could then have been granted for that purpose - with, one might expect, costs being reserved. If it subsequently appeared that the prosecution was able to dispel any reasonable doubt that Professor Joubert might have originally raised, then doubtless the costs of the adjournment would be met by the defendant. The fact that, on this hypothesis, Mr Burgess was not before the original hearing able to **[15]** furnish the informant with a statement pursuant to sub-cl (8) could hardly, one would think, be used as a basis for any other order – he having taken the risk that something in the prosecution case might prove useful to his expert.

If, on the other hand, Professor Joubert (or another expert) revealed a flaw in the prosecution case which precluded a verdict of guilty, then the magistrate would have to consider whether in all the circumstances the costs of the adjournment should by borne by the informant. I stress, however, that these observations about costs are intended to be a helpful guide, not a binding prescription. In the end, the issue is for the magistrate to determine in the exercise of a judicial discretion. It now falls to me to do what, if anything, is properly open to me to correct the difficulties with which each party is now confronted. *[After considering this question, his Honour continued]* ... **[18]** I will order as follows:

> 1. That the first defendant be restrained
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> (a) from calling any expert witness to give evidence on his behalf in any proceeding arising directly out of a charge that he did, on Friday 14 March 1997, at Jarklin in the State of Victoria, commit a traffic offence in the nature of an offence involving driving at excessive speed, unless not less than seven days before calling that evidence the first defendant either serves on the informant a copy of the statement of that witness (as that expression is used in subclause (8) of clause 1A of schedule 2 of the *Magistrates' Court Act* 1989) or gives the informant written notice **[19** that although the first defendant intends to call the witness, the witness is not in a position to make such a statement;
> (b) from enforcing the order for costs made by the Magistrates' Court at Kerang on 4 February 1998.
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> 2. That the second defendant be restrained from hearing or further hearing any proceeding described in part 1 of this order, save in accordance with these reasons for judgment.

I will ensure that under the heading "Other Matters" which precedes the orders I have just pronounced, the following will appear on the order as authenticated:

> "Compliance with part l(a) of the orders made below will be effective if, within the time permitted, the first defendant serves on the informant either a document which, in the opinion of the second defendant, contains the substance of the evidence intended to be called from the expert witness to which that part refers, or a notice as therein described."

It is possible that difficulties will arise in giving full effect to this judgment and to the orders made pursuant to it. I will accordingly reserve to all parties liberty to apply. *[His Honour then made an order for costs.]*

APPEARANCES: For the plaintiff: Mr R Gipp, counsel. Victorian Government Solicitor. For the first defendant: Mr G Meehan, counsel. Dunhill Madden Butler, solicitors.