19/98

SUPREME COURT OF VICTORIA

KNOWLES v HARITOS and ANOR

Hampel J

30 March, 29 April 1998

PROCEDURE – ORDER FOR DEMONSTRATION BY POLICE INFORMANT OF SPEED MEASURING DEVICE AT SCENE – WHETHER SUCH ORDER CONDUCIVE TO THE EFFECTIVE DETERMINATION OF THE PROCEEDING – WHETHER SUCH ORDER BEYOND POWER: *MAGISTRATES' COURT ACT* 1989, S136.

At a mention hearing of a charge of speeding, the magistrate made an order that the police informant and the defendant's expert witness visit the scene for the police officer to demonstrate how the speed measuring device was used to check the defendant's speed and how the police officer was positioned. Also, that the speed measuring device used on the particular occasion be available for testing. Upon appeal—

HELD: Orders quashed.
The magistrate had no power to make the orders. The orders were outside the process of the hearing of a contested charge. They were wide, oppressive and not in the interests of justice and did not fall within the orders permitted by s136 of the *Magistrates' Court Act* 1989 for the conduct of the proceedings.

HAMPEL J: [1] By an Originating Motion, the plaintiff, Jeffrey Brian Knowles, a police officer, seeks an order in the nature of certiorari quashing or setting aside an order made by the Magistrates' Court at Broadmeadows on 23 June 1997. The circumstances which led to the making of the order are not in issue and can be simply outlined. On 20 August 1996 the Plaintiff intercepted the first Defendant, Christos Haritos, driving a motor car in the vicinity of the intersection of the Calder Highway and Oakbank Road. The driver's speed was assessed by a hand held Kustom Falcon radar device at 148 kilometres per hour in a 100 kilometre per hour speed zone. The driver was asked his reasons for speeding and invited to inspect the radar reading. He replied, "No, I believe you. Can't you do something? I need my licence for work. I own a business." The Plaintiff issued a penalty notice and following an objection to the notice a summons was issued returnable on 15 April 1997 at Broadmeadows Magistrates' Court. The hearing was adjourned and, eventually, on 2 June 1997 the driver's solicitors wrote requesting further particulars of the charge. These particulars sought details of the position of the vehicles when the driver was observed and checked and whether the Plaintiff was seated or standing when he observed and checked the vehicle when using the radar device. There was also a request for the testing of the radar device from the location from which it was operated and for testing records of the radar.

Particulars were provided by a letter of 12 June as follows: -

> "The informant Constable Knowles was stationary, seated in a police vehicle close to the intersection of the Calder Highway with Oakbank Road when he first observed, and when he checked the speed of your client's vehicle. He was on the northern side of the highway limiting himself to checking vehicles travelling east along the Calder Highway. The informant was approximately 400 metres from your client's vehicle when he checked its speed which he did for a distance of approximately 300 metres the radar showing a constant reading of 148 kilometres per hour. The use of the radar by the informant complies with 509 of the regulations."

[2] I need not refer to further particulars provided in relation to the radar because that is no longer an issue in this proceeding. The solicitors for the driver complained that the particulars were inadequate and ultimately the matter was raised before the Magistrate at a mention. Counsel for the driver made an application for further and better particulars and there was some discussion about the provision of the same radar gun which had been used by the plaintiff. The defence called an expert, Mr Leigh-Jones, who suggested that he would like to go to the site and would be happy to have the police officer demonstrate where he was and how he used the radar

gun, even if it were done with a different gun. The Magistrate suggested that the police officer could take the expert to the site and give a demonstration. The prosecutor objected to this course but finally asked what the officer would be required to do. The Magistrate said, "Once he's at the site he can do what he wants where he wants. He should show Mr Leigh-Jones how he was seated and which way he pointed the gun. If the prosecution can find the gun in question then O.K." Over the prosecutor's further objections the Magistrate made an order as follows:–

> "That before the next mention date the informant and Dr Leigh-Jones meet at a mutually convenient time at the site where the informant states he checked the speed of the defendant's vehicle and for the informant to demonstrate to the best of his recollection how the device was used to check the defendant's speed including how the informant was positioned. This exercise should take no longer than five minutes. The prosecutor undertakes to use his best endeavours to ensure that the speed-measuring device, the subject of these proceedings, will be available for testing by the informant at the time mutually agreed as between him and Dr Leigh-Jones."

The Magistrate made further orders about the records and testing history of the radar device which was used to assess the driver's speed. It was submitted on behalf of the plaintiff that the Magistrate erred in law in making the order for a number of reasons. Some of them were that the order is vague and oppressive, it is beyond power as it orders activities outside the court-room, that it would be ineffective because there would have to be evidence about what **[3]** occurred at the demonstration in case of a dispute, that it would have no forensic benefit as it would not be a demonstration in the presence of the court and that it was contrary to the practice and procedure of a court hearing a summary prosecution in an adversary system. It was further submitted that although the court had power to regulate its own procedure and could give directions pursuant to s136 of the *Magistrates' Court Act* for the conduct of the proceedings which it thinks conducive to its "effective, complete, prompt and economical determination", the order made by the Magistrate was outside those powers and not conducive to a proper determination of the issues between the parties. It was also argued that the proper procedure, if the Magistrate thought that the particulars given were not sufficient, was to hold a view and perhaps even a demonstration in the presence of the court. Alternatively, the questions about which further particulars were sought could have been the subject of evidence and cross-examination as part of the hearing of the Information.

I agree with those submissions and find that the Magistrate had no power to make the orders he did. Such orders are outside the process of the hearing of a contested Information. They are wide, oppressive and not in the interests of justice when ordered to be done not as part of the hearing by way of a view and/or evidence. Such orders do not fall within the orders permitted by s136 of the *Magistrates' Court Act* for the conduct of the proceedings. Rather they are orders for investigation and demonstration outside the proceedings. Although I can understand that the Magistrate was attempting to provide a practical solution, in my opinion, his method and the orders made to achieve that practical result were outside the adversary process and beyond power. They cannot be allowed to stand. I therefore make the orders sought in the Summons on the Originating Motion and quash the order of the Magistrates' Court.

APPEARANCES: For the plaintiff (police informant): Mr R Lopez, counsel. Victorian Government Solicitor. For the Defendant: Mr P Marzella, counsel. Klooger Forbes, solicitors.
