02/13; [2012] VSC 637

SUPREME COURT OF VICTORIA

FOSTER v HARRIS

Williams J

21 August, 21 December 2012

MOTOR TRAFFIC – EXCESSIVE SPEED – SPEEDING IN A SCHOOL ZONE – CHARGE FAILED TO SPECIFY THE TIME WHEN THE SPEED ZONE APPLIED TO DRIVERS OR WHEN THE ALLEGED OFFENCE OCCURRED – CHALLENGE TO VALIDITY OF CHARGE – COMPLIANCE WITH ROAD RULES – ESSENTIAL FACTUAL INGREDIENTS OF OFFENCE TO BE INCLUDED IN CHARGE – WHETHER ALLEGED FACTS DETERMINING APPLICABILITY OF SPEED-LIMIT WERE ESSENTIAL FACTUAL INGREDIENTS OF OFFENCE TO BE INCLUDED IN CHARGE – EVIDENCE – CERTIFICATION OF TESTING AND SEALING OF SPEED DETECTOR – CERTIFICATE IN PRESCRIBED FORM – QUALIFICATION OF SIGNATORY AS 'TESTING OFFICER' NOT INCLUDED IN CERTIFICATE – CHARGE FOUND PROVED – WHETHER MAGISTRATE ERRED IN ACCEPTING CERTIFICATE AS PROOF THAT SPEED DETECTOR HAD BEEN TESTED AND SEALED AND FINDING CHARGE PROVED: *ROAD SAFETY ROAD RULES* 2009, R20; *ROAD SAFETY ACT* 1986, S83; *ROAD SAFETY (GENERAL) REGULATIONS* 2009, SCHED 3.

F. was charged with being the driver of a motor vehicle in a school zone at a speed over the limit applying to that zone. The charge did not specify the time when the speed zone applied to drivers or the time when the alleged offence occurred or that it occurred on a declared school day. The Certificate in relation to the speed measuring device was said not to have been signed by a person authorised to do so under the *Road Safety Act* 1986 ('Act'). The Magistrate found the charge proved. Upon appeal—

HELD: Appeal dismissed.

1. It had been established that the two essential ingredients of the charged offence to be included in the charge were the alleged facts that the vehicle was driven by F. and that she drove it over the speed-limit applicable to her on that particular section of the street. It was not necessary to include in the charge express reference to the factual basis on which the applicable speed-limit was to be determined, such as that she was driving on a declared school day or during the period referred to on the school zone sign. Such matters, and other relevant requirements of the *Road Safety Road Rules* might have been the subject of requests of particulars of the alleged applicability of the 40 km per hour speed-limit to F.

***Ciorra v Cole* [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547; and**
***DPP v Kirtley* [2012] VSC 78, applied.**

2. There was no uncertainty as to the offence charged nor was the offence created by r20 of the *Road Safety Road Rules* 2009 ambulatory in nature. Accordingly, the Magistrate was not in error in finding the charge proved.

3. The certificate tendered to the Court was in the prescribed form and was signed and there was no ambiguity in the reference to Regulation 5 in the context of the certificate replete with references to the Regulations.

4. In relation to the argument that the description of T.M. Mulcare as a testing officer was conclusory as it did not state the basis for that description and did not indicate which paragraph of the definition of 'testing officer' in reg 5 of the Regulations applied, the certificate was in the prescribed form and the prescribed form did not include a reference to the signatory's qualification as a testing officer. Nevertheless, the description of T.M. Mulcare in the certificate established that (in the language of s83 of the Act) it was one 'purporting to be signed by a person authorised to do so by the Regulations', namely, a 'testing officer'.

5. Accordingly, the Magistrate was correct to accept the certificate as valid and as constituting proof of the requisite testing and sealing of the speed detector, in the absence of evidence to the contrary, as s83 permitted her to do.

WILLIAMS J:

The appeal

1. On 25 November 2011, the appellant was found guilty in the Magistrates' Court at Myrtleford of contravening r20 of the *Road Safety Road Rules* 2009 ('the Rules'). She was fined $448 and

her licences under the *Road Safety Act* 1986 were suspended for six months, without conviction. She appeals against those orders and seeks the dismissal of the charge and an award of costs in her favour.

The charge

2. The charge was stated in these terms in the Charge-Sheet and Summons filed on 6 September 2011:

> The accused at Myrtleford at 9.9.10, being the driver of a vehicle on a length of road, named Prince St, in a school zone, to which a school zone sign indicating 40 kilometres per hour applied, did drive over the speed-limit applying to the driver for the length of road where the driver is driving, between O'Donnell Ave and William Street. Detected Speed 80 kph. Alleged Speed 78 kph.

Rule 20

3. Rule 20 was relevantly in these terms:

> **Obeying the speed-limit**
> (1) A driver must not drive at a speed over the speed-limit applying to the driver for the length of road where the driver is driving.
>
> In the case of drivers of heavy vehicles exceeding the speed-limit by less than 35 km per hour, 20 penalty units.
>
> In the case of drivers of vehicles other than heavy vehicles exceeding the speed-limit by 45 km per hour or more, 20 penalty units.
>
> In the case of drivers of vehicles other than heavy vehicles exceeding the speed-limit by 35 km per hour or more but less than 45 km per hour, 15 penalty units.
>
> In the case of drivers of vehicles other than heavy vehicles exceeding the speed-limit by less than 35 km per hour, 10 penalty units. ...
>
> **Notes**
> 1 The Road Rules about speed-limits are as follows—
> • rule 21—speed-limit where a *speed-limit sign* applies;
>
> • rule 22—speed-limit in a speed-limited area;
>
> • rule 24—speed-limit in a shared zone;
>
> • rule 25—speed-limit elsewhere.
> 2. ***Road*** includes a road related area—see rule 11(2).
>
> 3. ***Length***, of road, includes a marked lane, a part of a marked lane, or another part of a length of road—see the definition in the dictionary.
>
> 4. Part 20, Division 2 deals with the way in which a traffic sign applies to a length of road. Part 20, Division 3 deals with the way in which the traffic sign applies to drivers driving on the length of road.
>
> 5. *Heavy* ***vehicle*** and ***GCM*** are defined in the Act.

Questions of law in the appeal

4. The appellant argues that the Magistrate made errors of law which vitiated her decision. After their amendment by leave, the questions of law in the appeal are stated as follows:

> 1. Did the learned Magistrate err in law in holding that the charge laid against the appellant properly alleged an offence when it failed to specify the time when the speed zone applied to drivers or the time when the alleged offence occurred or that occurred or that the alleged offence occurred on a declared school day?
>
> 2. Did the learned Magistrate err in law in finding that the laser speed measuring device had been tested and sealed within 12 months of the date of the offence when the 'Certificate under s83' which was tendered into evidence did not purport to be signed by a person authorised to do so under s83 *Road Safety Act* 1986?

Grounds of appeal

5. The grounds of appeal in the notice of appeal first set out the charge against the appellant and then continue as follows:

> 2. The evidence before the Magistrate was that the Respondent used a prescribed laser speed measuring device to measure the speed of the appellant's motor vehicle at 80kmh. The Respondent gave evidence that on school days a speed zone of 40kmh applied between the hours of 8:00AM and 9:30AM to the length of road the appellant was driving on, and that outside those hours the road was 60kmh zone.
>
> 3. The Respondent tendered photographs of the 40kmh speed-limit signs which showed that they applied between the hours of 8:00AM and 9:30AM and between 2:30PM and 4:00PM on school days only.
>
> 4. The Respondent tendered into evidence a Schedule 3 certificate being a certificate of testing and sealing of the speed measuring device. The certificate was signed by "*T. M. Mulcare, Testing officer in accordance with Regulation 5*".
>
> 5. At the close of evidence, counsel for the appellant submitted that the charge was defective because if a 40kmh speed-limit applies at restricted times on school days only then it is insufficient for the charge to allege a date of offence only. The charge needs to allege that the act of driving occurred at a relevant time on a school day.
>
> 6. Counsel for the Appellant also submitted that the Schedule 3 certificate was deficient in that it was impossible to determine whether it was signed by a person who was authorized to do so pursuant to regulation 5 *Road Safety (General) Regulations* 2009. The signatory, T. M. Mulcare, did not purport to be any of the categories of people authorised to sign such certificates.
>
> 7. The learned Magistrate held that the charge was properly worded, that there was no need for the charge to allege any elements as to time, and that it was sufficient for the charge to allege a speed-limit without stating the times it applied or the time the act of driving is alleged to have occurred.
>
> 8. The learned Magistrate further held that the Schedule 3 certificate complied with the legislation and was admissible as evidence of testing and sealing within 12 months of the date of offence.

Discussion and conclusions: Question 1

6. The appellant argues that, because the alleged offence under r20 could not be committed if her act of driving did not occur during the relevant period of time on a declared school day, when the speed-limit of 40km per hour applied, the charge did not contain all the necessary elements of the offence. She contends that, where time is a material matter, it needs to be alleged in the charge, as does the material fact that the date of the alleged offence was a declared school day. She maintains that the charge was defective.

***Criminal Procedure Act* 2009**

7. As the respondent points out, the statutory requirements in relation to the statement of a charge were to be found in the first schedule to the *Criminal Procedure Act* 2009 which provided:

> **CHARGES ON A CHARGE-SHEET OR INDICTMENT**
>
> 1. **Statement of offence**
>
> A charge must—
>
> (a) state the offence that the accused is alleged to have committed; and
>
> (b) contain the particulars, in accordance with clause 2, that are necessary to give reasonable information as to the nature of the charge.
>
> 2. **Statement of particulars**
>
> (1) Subject to subclause (2), particulars of the offence charged must be set out in ordinary language and the use of technical terms is not necessary.
>
> (2) If a rule of law or a statute limits the particulars that are required to be given in a charge, nothing in this clause requires any more particulars than those required.
>
> 3. **Statutory offence**

(1) In this clause—
statutory offence means an offence created by an Act or subordinate instrument, or by a provision of an Act or subordinate instrument.

(2) For the purposes of clause 1(a), a statement of a statutory offence is sufficient if it—

(a) identifies the provision creating the offence; and

(b) describes the offence in the words of the provision creating it, or in similar words.

The common law

8. It was common ground that the common law applied to the determination of the issue raised by question 1.

9. In *Kirk v Industrial Relations Commission of New South Wales*[1], it was held that:

> The common law requires that a defendant is entitled to be told not only of the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge[2]. ... The common law requirement is that an information, or an application containing a statement of offences, "must at the least condescend to identifying the essential factual ingredients of the actual offence" [3]. These facts need not be as extensive as those which a defendant might obtain on an application for particulars [4].

10. As Charles JA (with whom Winneke P and Chernov JA agreed) stated in *Director of Public Prosecutions Reference No 2 of 2001*,[5] it is necessary to distinguish between those essential factual ingredients of the alleged offence, which must appear in a charge, and other facts which must be proved by the prosecution, to which it is not necessary to refer in the charge. There is no technical verbal formula which can be used to determine what those essential ingredients are.[6]

11. In *Ciorra v Cole*[7], Redlich J (as his Honour then was) reviewed a number of relevant authorities, including *DPP Reference No 2 of 2001*. In *Ciorra*, the appellant challenged the validity of a charge under r20 on the basis that it failed to specify essential ingredients of the alleged offence. The charge was in these terms:

> The defendant at McCrae on 6/4/2003 being the driver of a vehicle on a highway namely the Mornington Peninsula Freeway did exceed 100 kilometres per hour. Alleged speed was 145km/h.

The charge was said to be invalid for failing to state that the appellant had exceeded the speed-limit and for failing to specify the means by which that speed-limit was to be determined. These arguments failed.

12. Redlich J held that r20 was not ambulatory in nature, unlike its predecessor reg 1001(1) of the *Road Safety (Traffic) Regulations* 1988 which had created mutually exclusive offences by its sub-parts.[8] It was r20 which created the charged offence and not the provisions in the Rules which established the applicable speed-limit.[9] Importantly, his Honour also held that the essence of the r20 offence was that the driver had driven at a speed over the speed-limit which applied to that driver.

13. Redlich J distinguished between the legal elements of the offence, the essential factual ingredients which must be stated and particulars required for its proof and for the preparation of the defence.[10] His Honour concluded that the speed-limit exceeded was an essential factual ingredient of the offence under r20.[11] Despite the absence of express reference in the subject charge to the speed-limit signs determining the applicable speed-limit, on the only reasonable interpretation of the charge it did identify that speed-limit as 100 km per hour.[12] Redlich J held that the factual basis upon which the speed-limit was to be determined need not be set out in the charge as an essential ingredient for the identification of the offence under r20, even though it must be established by the prosecution.[13]

14. Another challenge to the validity of a charge under r20 was before the Court in *DPP v Kirtley*.[14] There, the charge referred to a speed-limit applicable to a length of road, rather than to the driver for that length of road. J Forrest J held that whether a charge contained the essential ingredients should be determined from the perspective of a reasonable person in the position of

the person charged.[15] His Honour considered that, in Mr Kirtley's case, it was 'patent that the essential ingredients of his driving of a vehicle over the prescribed speed limit were contained in the charge.'[16]

15. The appellant relies upon cases in which the date of the alleged offence was considered a matter to be included in an information where that information was required to be laid within a certain time after the alleged offence.[17] As the respondent points out, these decisions are distinguishable. Apart from anything else, the date of the alleged offence is included in the charge faced by the appellant.

16. The appellant also relies upon the Court's decision in *Woolworths (Victoria) Ltd v Fred Marsh*[18] in support of her argument that the charge was defective. There, Ormiston J (as his Honour then was) considered that the information under challenge did not conform with the section of the *Labour and Industry Act* 1958 which created the charged offence. His Honour also held that the offence in the relevant section was in 'general or ambulatory terms', being constituted by a failure or neglect to close a shop in accordance with a Part of the *Labour and Industry Act* which contained more than one requirement. Ormiston J found the information defective because it was 'ambiguous and arguably duplex and … certainly left the defendant to the information in a state of uncertainty as to the precise nature of the charge brought against it.'[19] The uncertainty manifest on the face of the information which prevented the defendant from identifying the charge was enough to invalidate it.[20]

17. The respondent reminds the Court of Charles JA's direction in *DPP Reference No 2 of 2001* that 'a charge should be interpreted in the manner a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context'.[21] His Honour also affirmed the necessity to strive to give a charge the meaning intended by the draftsman.[22]

18. It is clear from the statement of the charge before me that Ms Foster was alleged to have driven on 9 September 2010 in Prince Street, Myrtleford, at a speed greater than the speed-limit of 40 km per hour applicable to her, in contravention of r20. Unlike the situation in *Woolworths*, there is no uncertainty as to the offence charged. Nor is the offence created by r20 ambulatory in nature.

19. *Ciorra* and *Kirtley* establish that the two essential ingredients of the charged offence to be included in the charge are the alleged facts that the vehicle was driven by the appellant and that she drove it over the speed-limit applicable to her on that particular section of Prince Street. It was not necessary to include in the charge express reference to the factual basis on which the applicable speed-limit was to be determined, such as that she was driving on a declared school day or during the period referred to on the school zone sign. Such matters, and other relevant requirements of the Rules might have been the subject of requests of particulars of the alleged applicability of the 40 km per hour speed-limit to the appellant.[23]

20. Question 1 should be answered, 'no'.

Question 2

21. Under s79 of the *Road Safety Act* 1986, evidence of a measurement of speed obtained by use of a speed detector was admissible and, absent evidence to the contrary, could constitute proof of speed, provided that the speed detector had been tested and sealed within the previous twelve months.

22. The *Road Safety (General) Regulations* 2009 ('the Regulations') provided in regs 42 and 43 for speed detectors to be tested and sealed, respectively, by a 'testing officer'. A 'testing officer' was defined in reg 5 as follows:

> ***testing officer means—***
> (a) a technical officer or the head of a faculty, school or department of electrical engineering, communications engineering or electronics engineering at a post-secondary education provider within the meaning of the *Education and Training Reform Act* 2006; or
>
> (b) a person authorised in writing by the Chief Commissioner of Police or the Secretary of the Department of Justice; or

(c) a testing officer of a testing body accredited in the field of electrical testing by the National Association of Testing Authorities, Australia (NATA) ACN 004 379 748;

23. Section 83 of the *Road Safety Act* provided for proof of requisite testing or sealing by a certificate:

> **Evidence of testing and sealing**
> A certificate in the prescribed form to the effect that any prescribed speed detector or device referred to in section 79 or 82 has been tested or sealed in the prescribed manner, signed or purporting to be signed by a person authorised to do so by the regulations is, without prejudice to any other mode of proof and in the absence of evidence to the contrary, proof that the prescribed speed detector or device has been so tested or sealed.

24. Regulation 52 of the Regulations provided for the form of the certificate under s83 and authorised a testing officer to sign it:

> **Certificate as to testing and sealing road safety camera or speed detector**
> (1) For the purposes of section 83 of the Act, a certificate in relation to the testing and sealing of a road safety camera or a speed detector is in the prescribed form if it is in the form set out in Schedule 3.
>
> (2) A testing officer is authorised to sign a certificate referred to in subregulation (1).

25. The prescribed form for a s83 certificate in Schedule 3 to the Regulations was:

> **Certificate under Section 83**
> The *road safety camera/*speed detector/*portable weighing device/ (No.) was tested in accordance with the *Road Safety (General) Regulations* 2009 on [*date*].
>
> The test confirmed that the device was operating correctly in accordance with the requirements of those Regulations.
>
> The device has been properly sealed in accordance with those Regulations.
>
> Date:
> Signature of person issuing certificate:
> Name: [*print name*]
> * Strike out whichever is not applicable.

26. The appellant contends that the learned Magistrate erred in relying upon what purported to be a s83 certificate as evidence of the required testing and sealing of the speed detector used to measure her speed on 9 September 2010. The certificate was relevantly in this form:

> **ROAD SAFETY (GENERAL) REGULATIONS 2009**
> **S.R. NO.115/2009**
> **SCHEDULE 3**
> **Regulations 52, 65**
> **CERTIFICATE UNDER SECTION 83**
> The speed detector (No.PL150) was tested in accordance with the *Road Safety (General) Regulations 2009* on 14th July, 2010.
> The test confirmed that the device was operating correctly in accordance with the requirements of those Regulations.
> The device has been properly sealed in accordance with those Regulations.
> Date: (hand written) 14 July, 2010
> (Handwritten signature)
> T. M. MULCARE
> Testing Officer in accordance with Regulation 5.

27. The appellant concedes that the certificate signed by T. M. Mulcare was in the prescribed form and was signed. She argues, however that it should have contained a statement of the basis for T. M. Mulcare being properly described as a 'Testing officer in accordance with Regulation 5'. She maintains that the statement in the certificate that T. M. Mulcare was a testing officer was ambiguous and conclusory.

28. The appellant argues that the certificate was ambiguous because it did not identify the

Regulations. In my opinion, there is no ambiguity in the reference to Regulation 5 in the context of the certificate replete with references to the Regulations.

29. The appellant also contends that the description of T.M. Mulcare as a testing officer was conclusory, as it did not state the basis for that description. It did not indicate which paragraph of the definition of 'testing officer' in reg 5 of the Regulations applied. I am not persuaded by this argument. The certificate was in the prescribed form. The prescribed form did not include a reference to the signatory's qualification as a testing officer. Nevertheless, the description of T.M. Mulcare in the certificate establishes that (in the language of s83) it is one 'purporting to be signed by a person authorised to do so by the Regulations', namely, a 'testing officer'.

30. I agree with the respondent that the learned Magistrate was correct to accept the certificate as valid and as constituting proof of the requisite testing and sealing of the speed detector, in the absence of evidence to the contrary, as s83 permitted her to do.

31. Question 2 should also be answered, 'no'.

32. The appeal should be dismissed.

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[1] [2010] HCA 1; (2010) 239 CLR 531, 557 [26]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437, (French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ).
[2] *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 489 (Dixon J); [1938] ALR 104.
[3] *John L Pty Ltd v Attorney-General (NSW)* [1987] HCA 42; (1987) 163 CLR 508, 520; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228 (Mason CJ Deane and Dawson JJ).
[4] *De Romanis v Sibraa* [1977] 2 NSWLR 264 at 291-292, referred to in *John L Pty Ltd* [1987] HCA 42; (1987) 163 CLR 508, 520; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.
[5] [2001] VSCA 114; (2001) 4 VR 55, 54 [19]; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[6] *John L Pty Ltd v Attorney-General (NSW)* [1987] HCA 42; (1987) 163 CLR 508, 520; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228 (Mason CJ Deane and Dawson JJ).
[7] [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547 (*'Ciorra').*
[8] Ibid [78].
[9] See *DPP v Kirtley* [2012] VSC 78, [6] (J Forrest J).
[10] Citing *Preston & Gordon v Donohoe* [1906] HCA 43; (1906) 3 CLR 1089, 1096; 12 ALR 426 and *Taylor v Environment Protection Authority* [2000] NSWCCA 71; (2000) 50 NSWLR 48, 56-57; (2000) 113 LGERA 116 (Sperling J (Meagher JA and James J agreeing)).
[11] *Ciorra* [79].
[12] Ibid [72].
[13] *Ciorra* [81].
[14] [2012] VSC 78 (*'Kirtley').*
[15] Ibid [16].
[16] Ibid [26].
[17] *Hackwill v Kay* [1960] VicRp 98; [1960] VR 632; *R v Dossi* (1918) 13 Cr App R 158; (1918) 87 LJKB 1024; *Kerr v Hannon* [1992] VicRp 3; [1992] 1 VR 43.
[18] Unreported, Supreme Court of Victoria, Ormiston J, 12 June 1986 ('Woolworths').
[19] Ibid [10].
[20] Ibid.
[21] [2001] VSCA 114; (2001) 4 VR 55, 68 [40].; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[22] *Smith v Van Maanen* (1991) 14 MVR 365, 371 (Tadgell J).
[23] For examples of rules governing the applicability of the speed-limit to the appellant for the length of road, see rr21(1) and (3), 315, 316, 317A, 318(1) and 342 of the Rules.

APPEARANCES: For the appellant Foster: Mr S Hardy, counsel. Thexton Lawyers. For the respondent Harris: Mr C Ryan SC, counsel. Office of Public Prosecutions.
