36/13; [2013] VSC 490

SUPREME COURT OF VICTORIA

CHALLIS v WILLIAMS

Williams J

29 August 2013

MOTOR TRAFFIC – EXCESSIVE SPEEDING CHARGE – CONVICTION FOR BREACH OF BY EXCEEDING SPEED LIMIT BY 45 KILOMETRES PER HOUR OR MORE – EVIDENCE BY PRELIMINARY BRIEF – USE OF LASER SPEED DETECTOR – NO EVIDENCE OF TESTING OF DEVICE WITHIN PREVIOUS 12 MONTHS – SUFFICIENCY OF EVIDENCE – WHETHER CONVICTION SHOULD BE QUASHED: *CRIMINAL PROCEDURE ACT* 2009, S84; *ROAD SAFETY RULES* 2009, R20.

HELD: Appeal allowed and conviction quashed.
1. The evidence relied on by the prosecution would have been admissible if there had also been proof that the device been tested and sealed in the prescribed manner under r45 of the *Road Safety (General) Regulations* 2009, that is, within 12 months prior to its use.

2. The preliminary brief contained only a certificate to the effect that the device had been tested and sealed in accordance with the Regulations on 11 July 2012, one month after the date of the alleged offence on 15 June 2012.

3. In the circumstances the Magistrate could not have been satisfied beyond reasonable doubt that the appellant was travelling 45 kilometres per hour over the applicable 80 kilometres per hour speed limit on the Maroondah Highway at the point at which he was intercepted. The use of the summary procedure in the absence of the defendant did not entitle the prosecution to obtain a conviction without proper proof of the elements of the charge.
***Hannon v Norman* [2006] VSC 228; (2006) 45 MVR 520, applied.**

WILLIAMS J:
1. On 21 February 2013, the appellant was convicted at the Magistrates' Court at Ringwood of a charge of exceeding the speed limit by 45 kilometres per hour or more under r20 of the *Road Safety Road Rules* 2009. He was fined $500 and his driving licence was suspended for a period of 12 months from 21 February 2013.

2. The charge was heard at an *ex parte* hearing under s80 of the *Criminal Procedure Act* 2009. It is common ground that the preliminary brief had been served on the appellant in accordance with s342 of the *Criminal Procedure Act*. The prosecution relied upon the material in the preliminary brief.

3. It is also common ground that the prosecution relied upon inadmissible evidence of speed determined by a laser measuring device. The prosecution would have been able to rely upon admissible evidence of speed indicated by such a device under s79 of the *Road Safety Act* 1986 which provides:

> **79 Evidence of speed**
> (1) If in any criminal proceedings the speed at which a motor vehicle or trailer travelled on any occasion is relevant, evidence of the speed of the motor vehicle or trailer as indicated or determined on that occasion by a prescribed road safety camera or prescribed speed detector when tested, sealed and used in the prescribed manner is, without prejudice to any other mode of proof and in the absence of evidence to the contrary, proof of the speed of the motor vehicle or trailer on that occasion.

4. The evidence would have been admissible if there had also been proof that the device been tested and sealed in the prescribed manner under r45 of the *Road Safety (General) Regulations* 2009 ('the Regulations'), that is, within 12 months prior to its use. Regulation 45 is in these terms:

> **Use of laser devices**
> A laser device is used in the prescribed manner for the purposes of s79 of the Act if—

> (a) whenever the operator connects the laser device to a source of electricity, the operator ensures that all elements of the speed display are illuminated; and
>
> (b) the operator activates the device with the device aimed in the direction of a motor vehicle within the operator's field of vision and observes the reading displayed on the digital speed display; and
>
> (c) the device has been tested in accordance with regulation 42 within 12 months before the occasion of its use; and
>
> (d) the device has been sealed in accordance with regulation 43 at the time that it was last tested.

5. The preliminary brief contained only a certificate to the effect that the device had been tested and sealed in accordance with the Regulations on 11 July 2012, one month after the date of the alleged offence on 15 June 2012. That was not brought to the learned Magistrate's attention.

6. It is frankly conceded by Senior Counsel for the respondent that there was insufficient evidence to sustain the conviction, in the absence of admissible evidence of speed measured by a device which had been tested and sealed in that prescribed manner. I note in that regard that the preliminary brief foreshadowed evidence from Sergeant Mark Squires to the effect that he estimated the appellant's vehicle's speed to be between 130 and 140 kilometres per hour, before checking it using the laser speed detector, which indicated a speed of 133 kilometres per hour at a certain point. There was also foreshadowed evidence from Leading Senior Constable Paul Doevelaar that he observed the appellant travelling very fast.

7. There was also a record of admissions by the appellant, who denied that he had travelled at 133 kilometres per hour as alleged but might be taken to have admitted driving at a lesser speed, up to 20 kilometres per hour over the 80 kilometres per hour speed limit. He is recorded as saying this:

> I wouldn't have been doing that speed is the only thing I've got to say about that.

The following exchange also occurred between the appellant and Leading Senior Constable Bieser:

> LSC Bieser said, 'Okay, how fast do you say that you were travelling when you overtook this vehicle?'
> He said, 'I might have got to a 100 or ... it's possible, it's possible because I wanted to get past as quick as I could. It's not a great road but it was safe at the time to do so. It's possible I was over 80.'
> LSC Bieser said, 'Did you look at your speedo while you were doing this?'
> He said, 'No I didn't.'
> LSC Bieser said, 'So you really don't have any idea what speed you were doing?'
> He said, 'But I know a 133. I don't believe I was doing that speed.'
> LSC Bieser said, 'Is that your vehicle on the left hand side of the page?'
> He said, 'Yes it is.'
> LSC Bieser said, 'You can actually see your face in the rear view mirror?'
> He said, 'Nice. I was driving, I'm not denying it.'

8. In the circumstances, as is common ground, the learned Magistrate could not have been satisfied beyond reasonable doubt that the appellant was indeed travelling 45 kilometres per hour over the applicable 80 kilometres per hour speed limit on the Maroondah Highway at the point at which he was intercepted. As Gillard J held in *Hannon v Norman*,[1] the use of the summary procedure in the absence of the defendant does not entitle the prosecution to obtain a conviction without proper proof of the elements of the charge.[2]

9. It has been pointed out by the respondent that I have the option of remitting the matter for further hearing in the Magistrates' Court in light of evidence by an affidavit filed today of Ms Stavroula Aridas, a senior solicitor of the Office of Public Prosecutions, to the effect that the device had in fact been sealed on 14 July 2011: that is, within a year before its use on 15 June 2012.

10. I am not persuaded to remit the matter. I see no reason why the prosecution should be allowed a second chance to gather evidence to prosecute the appellant whose conviction has been quashed on the grounds of the insufficiency of the evidence

11. The appeal should be allowed and the conviction quashed.

[1] [2006] VSC 228; (2006) 45 MVR 520.
[2] Ibid [21].

APPEARANCES: For the appellant Challis: Mr S Hardy, counsel. The Law Offices of Barry Fried, solicitors. For the respondent Williams: Mr P Rose SC, counsel. Stavroula Aridas, Solicitor for Public Prosecutions.
