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RE APPEAL OF WHITE

Special JurisdictionDistrict Court of New South Wales
: Shadbolt DCJ
28-29 April 1987

Vehicles and Traffic -- Traffic offences -- Exceeding speed limit -- Accuracy of speedometer challenged -- Whether proof of accuracy required -- National Measurement Act 1960 (Cth), s 10.

Vehicles and Traffic -- Traffic offences -- Exceeding speed limit -- Admissibility of evidence of estimate of speed by police officer.

Vehicles and Traffic -- Traffic offences -- Exceeding speed limit -- Defence of necessity -- What constitutes necessity -- Motor Traffic Act 1909.

Evidence -- Proof of particular matters -- Speed -- Measured by scientific instrument -- Speedometers -- Presumption of accuracy.

Criminal Law -- Liability -- Traffic offence -- Speeding -- Strict liability offence -- Defence of necessity -- What constitutes necessity -- Motor Traffic Act 1909.

The appellant was observed by police officers driving his motor vehicle in excess of the speed limit. The appellant was driving his gravely ill son to hospital. The appellant submitted that:

(1) there was no evidence that the speedometer that the police used was accurate or that it subscribed to the *National Measurement Act* 1960 (Cth), s 10;

(2) he had a defence of necessity.

On appeal against conviction,

Held: (1) The *National Measurement Act* 1960 (Cth), s 20, only operates where it becomes necessary to ascertain whether or not a measurement of a physical quantity has been measured in Australian legal units of measurement. (430B)

(2) Therefore, a court is not precluded from accepting the evidence of the reading of a speedometer unless the accuracy of that instrument is challenged in regard to its capacity to measure in accordance with the Australian legal units of measurement. (430C)

(3) Further, a court is not precluded from accepting estimates of speed by suitably qualified persons. (430C)

(4) In appropriate circumstances the defence of necessity is available as a defence to the commission of an offence under the *Motor Traffic Act* 1909; "necessity" embraces voluntariness, knowledge and intention to commit the act which constitutes the offence. (431E)

(5) Accordingly, where a speeding driver was only concerned to get his gravely ill son to hospital when there was a real danger and a real possibility of death and when the speeding was not so gross as to create another danger then the defence of necessity was available.

CASES CITED

The following cases are cited in the judgment:

(1987) 9 NSWLR 427 at 428

Bond v Hall [1938] SASR 59.
Buckoke v Greater London Council [1971] Ch 655.
Gorham v Brice (1902) 18 TLR 424.
Maher v Musson (1934) 52 CLR 100.
Nicholas v Penny [1950] 2 KB 466.
Plancq v Marks (1906) 94 LT 577.
R v Bourne [1939] 1 KB 687.
R v Dudley and Stephens (1884) 14 QBD 273.
R v Kitson (1955) 39 Cr App R 66.
R v Loughnan [1981] VR 443.
Sherras v De Rutzen [1895] 1 QB 918.
Southwark London Borough Council v Williams [1971] Ch 734.

No additional cases were cited in argument.

APPEAL

This was an appeal from a decision of a Stipendiary Magistrate, convicting on a charge of speeding.

The appellant in person.

M A A von Schulenburg, for the Crown.

29 April 1987

SHADBOLT DCJ. The appellant brings this appeal from a decision of Mr Simpson, Stipendiary Magistrate sitting at Parramatta Court of Petty Sessions convicting him of speeding.

The facts given by the prosecution witnesses are that on 19 June 1981 three police in an unmarked police car were going east towards the city along Victoria Road when, at the point where the Tarban Creek Bridge roadway diverges from the Gladesville Bridge roadway, they were overtaken by a white Alfetta driven by the appellant. Sergeant Christian, the observer in the police car estimated that the car was being driven well in excess of the 60 kilometres speed limit applicable in that area.

The appellant was followed and clocked at 88 kilometres per hour and subsequently stopped. Sergeant Christian approached him and he said: "I have checked the speed of your vehicle over the Gladesville Bridge at 88 kilometres per hour which is a 60 kilometres zone. Can I see your licence please?" After Sergeant Christian inspected the licence the appellant said: "I thought it was an eighty kilometres per hour zone."

There is no evidence before me that the speedometer was operating accurately but both Mr Christian and his colleague Senior Constable Hale are experienced police officers, experienced in highway patrol work and Constable Hale has attended a course where estimation of speed has been practised and he has gained some expertise in that area.

The appellant gave evidence that on that day he was carrying his sick son to his physician. His son, Robert White was suffering a florid asthmatic attack. He is a chronic asthmatic and on this occasion his lips were blue and his breathing was rapid, laboured and shallow. He was under the impression that the area had a speed limit of 80 kilometres per hour. He saw a metal sign

with"80" painted on it as he approached the bridge and subsequently he saw a 60 kilometres sign painted on the road.

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He remembered the conversation as follows: "Do you know that you are doing 85 in a 60 kilometres zone?" to which remark he replied: "I believe the speed limit is 80 kilometres per hour." He said that when he had last checked his speedometer he was doing 78 kilometres per hour.

I am satisfied on the evidence of the police officers of the following:

1. The officers' car was overtaken by the appellant's car being driven by the appellant;

2. At that stage both police officers were of the opinion that it was travelling in excess of 60 kilometres per hour;

3. That a speed limit of 60 kilometres per hour appertained to that length of roadway;

4. That the appellant was followed by the police officers;

5. His speed was indicated at 88 kilometres per hour by the speedometer of the police car;

6. It was estimated by Senior Constable Hale to be between 85 and 90 kilometres per hour; and

7. His reply was as the police recorded it.

I am satisfied on the evidence of the appellant and his witnesses.

1. That he was going not less than 78 kilometres per hour;

2. That he was carrying a sick passenger who whilst not then in extremis was certainly in a grave situation which could, without attention, have become life-threatening;

3. He was carrying this passenger to his treating physician; and

4. That he did not bring this to the attention of the police officers because of recollection of past events where enlisting the help of police had caused further delay.

The appellant has based his appeal on a variety of submissions. First, it is maintained that the area was an 80 kilometres per hour zone. In regard to this contention I am satisfied beyond reasonable doubt that it was not. The evidence of the two officers was consistent and in my view, their truthful recollection, and each corroborated the other.

Secondly, it is maintained that the evidence of the police officers as to their observation of the speedometer in their car ought not to be viewed as evidence against the appellant because:

(a) it was not tested for accuracy on that day; and

(b) there is no evidence that it subscribes to the *National Measurement Act* (Cth) as amended, s 10.

Thirdly, it is submitted that a defence of necessity has arisen which has not been negatived by the Crown.

The *National Measurement Act* 1960 (Cth), s 10, states:

> "When, for any legal purpose, it is necessary to ascertain whether a measurement of a physical quantity for which there are Australian legal units of measurement has been made or is being made in terms of those units, that fact shall be ascertained by means of, by reference to, by comparison with or by derivation from",

(and thereafter the section lists a number of appropriate and described standards)"and not in any other manner".

It is contended by the appellant that as the *Motor Traffic Act* 1909 requires proof of speed beyond that permitted by the Act and regulations and as speed is a combination of two quantities, namely distance and time

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expressed as kilometres per hour, each quantity must be shown to have been made in terms of the Australian legal unit by reference to an appropriate Australian primary or secondary standard or a State primary or secondary standard in accordance with s 10. Only by these means can the Crown prove its case and all other means are to be excluded.

The Crown must, according to Mr White's submissions, prove beyond reasonable doubt that this measurement of physical quantity has been made in terms of the Australian legal unit of measurement. Secondly, no other device for measurement, save those which can be demonstrated to subscribe

with s 10 may be used for this purpose.

In my view, the section only operates when it becomes *necessary* to ascertain whether or not a measurement of a physical quantity has been made in terms of those units, namely the Australian legal unit of measurement. Then and then only need it be ascertained by reference to comparison with or derivation from the appropriate standard.

It does not preclude the acceptance by the Court of evidence of the reading of the speedometer unless and until that reading is challenged by virtue of a challenge to the accuracy of the instrument in regard to its capacity to measure in accordance with the Australian measures. It certainly does not preclude estimates of speed given by a person suitably qualified.

In this case there has been no such challenge. On the other hand there is no evidence that in its operation, the speedometer did subscribe to s 10 generally or on that day.

Courts have been generally loath to be wearied in seeking proof of some absolute measure or requiring it in cases such as this. It is not possible for every child to check his wooden ruler with the standard metre in Canberra nor every grocer his scales with the standard gram. Most of us accept the ruler's accuracy and the weight of the grocer's scales.

In *Nicholas v Penny* [1950] 2 KB 466, Lord Chief Justice Goddard was not of the view that a speedometer needed to be tested before the evidence of its reading might be accepted. In coming to this conclusion he relied on the older authority namely *Gorham v Brice* (1902) 18 TLR 424 where Lord Chief Justice Alverstone questioned "what automobilists thought to gain by suggesting that there was no evidence as to speed, when, as in practically every case, they did not like the findings of Magistrates".

In *Plancq v Marks* (1906) 94 LT 577, evidence of a stop-watch reading was not challenged and conviction was confirmed and Lord Chief Justice Goddard went on to point out that at a prima facie level such readings could be accepted. If disputed, then the Justices must determine the issue by preferring one of the witnesses to another. In *Bond v Hall* [1938] SASR 59, the evidence of an untested speedometer was sufficient to found a conviction. Whilst these cases demonstrate a certain impatience in the Court with quibbles regarding the accuracy of speedometers none suggests that the reading of untested instruments raises more than a prima facie case. If, in England the final resolution of the issue must lie in the magistrate's preference of one witness over another, s 10 of the *National Measurement*

Act 1960 (Cth) might stand to resolve the issue here.

In this case, as I have pointed out, there is no such issue. The police officers observed 88 kilometres being recorded on their car's speedometer. One of them estimated 85 kilometres and the appellant can only say that before the

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measurement took place he was doing 78 kilometres per hour. The difference between a 40 per cent excess over the limit and a 30 per cent excess over the limit is not to the point. I am satisfied beyond reasonable doubt that he was exceeding the speed limit set for that part of the road at 60 kilometres per hour.

One further point remains. The appellant maintains that he was acting throughout to get his son to medical treatment as quickly as possible. Doctor Wilkins gave telling evidence of the need of his patient, Mr Robert White, to have proper and timely medical attention when Mr Robert White suffers an attack. He has been a chronic asthmatic all his life and Dr Wilkins maintained that it is a life-threatening condition. I accept all of his evidence.

The question now arises: does necessity act as a defence to the commission of an offence under the *Motor Traffic Act*?

Breaches of the *Motor Traffic Act* and regulations in regard to speeding are offences of strict liability. No specific state of mind needs to be proved nor is the absence of mens rea a defence.

In *Sherras v De Rutzen* [1895] 1 QB 918, it was said (at 921):

> "... There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

Speeding would have to be one of that class of acts which in the words of Wright J in *Sherras v De Rutzen* (at 922), "are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty".

Whilst in certain circumstances a *Maher v Musson* (1934) 52 CLR 100 defence may be available that is not so where a deliberate choice has been made. A defence of necessity must, by definition, embrace voluntariness, knowledge and intention to commit the act which constitutes the crime. If

honest and reasonable belief in circumstances which, if true, would be exculpatory is a defence to a crime of strict liability, I can see no reason why, in appropriate circumstances, a choice made to commit an offence of strict liability in order to avoid a greater evil would not also be a defence. Public policy has required a sparing use of the defence and certainly in murder it has never been sustained: see *R v Dudley and Stephens* (1884) 14 QBD 273. The balance in crimes of such gravity can never fall to the side of the killer. But as the offence becomes less serious, the balance more readily falls to the side of the one who commits such an offence. A possible death must far outweigh a minor infraction of the *Motor Traffic Act*.

The requirements of this defence are laid down in *R v Loughnan* [1981] VR 443 at 448. They are:

> "(a) the criminal act must have been done only in order to avoid certain consequences which would have inflicted irreparable harm upon the accused or upon others whom he was bound to protect;
> (b) the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril;
> (c) the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided."

R v Kitson (1955) 39 Cr App R 66 was a case instanced in *R v Loughnan* *(1987) 9 NSWLR 427 at 432* with approval as one where necessity might well have been successfully raised against a charge of driving under the influence of alcohol.

In *Buckoke v Greater London Council* [1971] Ch 655 Lord Denning MR was of the view that necessity was not available to a charge of commission of an offence of strict liability. He gave the example of the fire engine and the red light where the driver chose to rescue the man trapped and defy the traffic regulation (at 668). He came to the view that necessity would not be applicable in the circumstances. Nevertheless, he said: "Such a man should not be prosecuted. He should be congratulated." So, he added yet another case to the long list from *R v Dudley and Stephens* through *Kitson's* case to the case of *Southwark London Borough Council v Williams* [1971] Ch 734 at 744, where the defence has been viewed as a viable one but one to be denied whenever raised.

It would appear to be a defence in search of the perfect circumstances. They were, of course, to be found in *R v Bourne* [1939] 1 KB 687 and in my view they are to be found here. That the appellant did not tell the police officer of his plight has, in my view, been satisfactorily explained. It might

have caused further delay. I consider his only concern was to get his gravely ill son to hospital. I do not think that he concerned himself particularly with the speed. I do not think his breach was so gross as to create another danger together with the existing one. It was a choice to be made and he made it in order to avert, as he saw it, a real danger and a real possibility of death but I am not of the view that the public good and society's cohesion would be placed in such jeopardy by that choice, that the defence of necessity should not be available.

The Crown in my view failed to negate it and the appeal will be upheld. The formal orders I make is that the appeal is upheld and the conviction is quashed.

Appeal allowed

Solicitor for the Crown: Solicitor for Public Prosecutions.

M L BARR,
Barrister.