DISTRICT COURT OF QUEENSLAND

CITATION:	*Mizikovsky v The Commissioner of Police* [2020] QDC 79
PARTIES:	**MIZIKOVSKY, Lev** (Appellant) **v** **THE COMMISSIONER OF POLICE** (Respondent)
FILE NO:	3224 of 2019
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrate Court at Brisbane
DELIVERED ON:	13 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2020
JUDGE:	Rosengren DCJ
ORDER:	**The appeal is dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – JUSTICES ACT – WHETHER COMPLAINT STATUTE BARRED – where complaint must be made within one year – where appellant contends prosecution alleged a different offence by particularising the offending act outside the one year – whether respondent required to issue and serve a fresh notice to appear CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – JUSTICES ACT – MISTAKE OF FACT - where the appellant was convicted

and fined for failing to keep left of centre dividing line whilst approaching a left bend in the road – mistake of fact – whether a defence of honest and reasonable mistake was available on the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – JUSTICES ACT – WHETHER APPELLANT RODE OVER THE CENTRE DIVIDING LINE TO AVOID AN OBSTRUCTION - consideration of s 139(2) of the *Transport Operations (Road Use Management – Road Rules) Regulation* 2009 (Qld)

Criminal Code Act 1899 (Qld) s 24
Justices Act 1886 (Qld) pt 9 div 1, s 52, 52(1), s 47, s 83A, s 222, s 223, s 225
Police Powers and Responsibilities Act 2000 (Qld) s 386, s 387(1), s 387(2), s 388
Transport Operations (Road Use Management – Road Rules) Regulation 2009 (Qld) s 132(2), sch 5

Bode v Commissioner of Police [2018] QCA 186, cited
Director of Public Prosecutions v Kypri [2011] VSCA 257, distinguished
Flanagan v Remick [2001] VSC 507, distinguished
Fox v Percy [2003] HCA 22, applied
Lacey v Attorney-General of Queensland (2011) 242 CLR 573, cited
Mizikovsky v Queensland Police Service [2018] QDC 249, cited
Robinson Helicopter Company Inc v McDermott (2016) 90 ALJR 679, cited
R v Logan [2012] QCA 210, applied
R v Makary [2018] QCA 257, cited
R v Saffron (1988) 17 NSWLR 395, applied
R v Surman 85 A Crim R 361, distinguished
R v Quagliata [2019] QCA 45, applied
Teelow v Commissioner of Police [2009] QCA 84, cited

COUNSEL: T Ryan for the appellant
J O'Brien for the respondent

SOLICITORS: Anderson Fredericks Turner for the appellant
The Office of the Director of Public Prosecutions for the respondent

[1] This is an appeal under s 222 of the *Justices Act* 1886 (Qld) ('the Justices Act') from a decision of a magistrate in the Brisbane Magistrates Court on 16 August 2019. It followed a summary hearing for failing to keep left of a dividing line of a road pursuant to s 132(2) of the *Transport Operations (Road Use Management – Road Rules) Regulation* 2009 (Qld) ('the Regulations').

[2] The matter had previously proceeded to a hearing and summary conviction in the Pine Rivers Magistrates Court before a different magistrate in March 2018. This earlier conviction was set aside on appeal to this court on 25 October 2018.[1]

[3] The rehearing was over three days, being 11 March, 28 May and 30 July 2019. The witnesses who gave evidence were Sgt Sweeney, David McEvoy, Leigh Willis, John Wikman and Snr Sgt Murphy. The appellant did not give evidence. The magistrate reserved her decision and delivered it on 16 August 2019. The appellant was convicted of the offence and fined $219. I have read the transcript of the summary hearing and have seen the exhibits.

[4] This appeal is against conviction only. The three grounds are as follows:

(i) A conviction for the charge as now particularised cannot be sustained by application of s 52 of the Justices Act;

(ii) The prosecution did not exclude beyond reasonable doubt the operation of s 24 of the *Criminal Code Act* 1899 (Qld) ('Criminal Code');

(iii) In the alternative to the application of s 24 of the Criminal Code, the prosecution did not exclude beyond reasonable doubt the operation of s 139(2) of the Road Rules.

Nature of s 222 appeals

[5] The appeal is brought under Part 9 Division 1 of the Justices Act. Section 222 of the Justices Act provides that a defendant aggrieved by an order made by a justice in a summary way on a complaint for an offence, may appeal within one month after the date of the order to a District Court judge.

[6] Section 223 of the Justices Act provides that the appeal is by way of rehearing on the evidence given in the proceeding before the magistrate. On a rehearing, subject to the powers to admit fresh evidence, the court conducts a rehearing on the record of the hearing in the Magistrates Court to determine whether the conviction is the result of some legal, factual or discretionary error.[2] Whilst this does not involve a rehearing of the evidence of witnesses, the court has the power to draw inferences from primary facts, including facts not disputed and findings of fact.[3]

[7] In *Fox v Percy*[4] Gleeson CJ, Gummow and Kirby JJ said at [25]:

> "Appellate courts are not excused from the task of 'weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect'."

[8] McMurdo JA confirmed in *Bode v Commissioner of Police*[5], that the task of an appellate court conducting a rehearing is as described by the High Court in *Robinson Helicopter Company Inc v McDermott,* which is as follows:

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[1] *Mizikovsky v Queensland Police Service* [2018] QDC 249.
[2] *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573.
[3] *Teelow v Commissioner of Police* [2009] QCA 84 at [3]–[4].
[4] [2003] HCA 22.
[5] [2018] QCA 186.

> "A court of appeal conducting an appeal by way of rehearing is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings."[6]

[9] Pursuant to s 225 of the Justices Act, the appellate court can confirm, set aside or vary an order or make any other order considered just.

Background

[10] Shortly prior to 1pm on Sunday 4 December 2016, the appellant and his partner were each riding motorcycles in a southerly direction along Mt Nebo Road, towards Brisbane. Sgt Sweeney first observed them when he was on a motorcycle stationary at the intersection of Mt Nebo Road and Darcy Kelly Road. He followed the two motorcycles and activated a camera which was affixed to his helmet.

[11] Sgt Sweeney observed the appellant's motorcycle to travel across the dividing line onto the incorrect side of the road as it was heading into a left bend in the road. Sgt Sweeney explained in evidence that it was not safe to intercept the appellant at this time. He subsequently observed the appellant's motorcycle travel across the dividing line on two further occasions when negotiating right bends in the road before finding a safe location to intercept him.

[12] The relevant section of Mt Nebo Road is two lanes divided by a continuous straight line with one lane designated for traffic travelling in a southerly direction towards Brisbane (as the appellant was) and the other lane designated for traffic travelling in the opposite northerly direction. The speed limit was 60 kilometres per hour. There was a red warning sign which stated '*winding road*', '*slippery when wet*', '*next 12km*', '*REDUCE SPEED*'.

[13] The camera footage was tendered at the summary hearing and viewed by the magistrate on multiple occasions. At the hearing of the appeal I also viewed the part of the camera footage which depicted the appellant's motorcycle crossing over the dividing line onto the incorrect side of the road when approaching the left bend. It could clearly be seen on the incorrect side of the road at this point.

[14] When Sgt Sweeny intercepted the appellant, he had a conversation with the appellant that was also recorded. Relevantly, there was the following exchange between Sgt Sweeney and the appellant:

> *SGT SWEENEY: The reason I stopped you though, I just followed you and twice you've gone on the incorrect side of the white line when you're making a right - going around a right bend. Any reason at all why you'd be on the incorrect side of a solid white unbroken line? ---*
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> *APPELLANT: Why would I?*

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[6] (2016) 90 ALJR 679, 686–687.

> *SGT SWEENEY; I don't know, you're the one riding the bike. Did you have any life threatening emergency requiring you to drive in that manner?---*
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> *APPELLANT; I don't think I was, it's a big bike, it's quite possible.*

[15] The appellant was subsequently issued with an infringement notice which stated the offence as '*fail to keep left of centre dividing line'*. It is said to have occurred at 12.58pm on 4 December 2016.[7] The appellant elected for the matter to be dealt with by a court.

[16] A notice to appear dated 6 March 2017 was issued to the appellant in which he was notified that he was required to attend court in relation to the following offence:

> [RULE] 132(2) KEEPING TO THE LEFT OF THE DIVIDING LINE
>
> That on the 4th day of December 2016 at Mount Nebo in the Pine Rivers Division of the Caboolture Magistrates Court District in the State of Queensland one Lev Mizikovsky being the driver of a vehicle namely a motorbike on a road namely Mount Nebo Road Mount Nebo the said road with a dividing line failed to drive to the left of the dividing line on the said road and it is averred that the said motorbike is a vehicle as defined in section 15 of the Transport Operations (Road Use Management – Road Rules) Regulation 2009 and it is averred that the said Mount Nebo Road Mount Nebo is a road as defined in schedule 4 of the Transport Operations (Road Use Management) Act 1995 and it is averred that on the said 4th day of December 2016 the said dividing line is an official traffic sign as defined in schedule 4 of the Transport Operations (Road Use Management) Act 1995.

[17] On 5 May 2017, the appellant first appeared in the Pine Rivers Magistrates Court. By this time he had been provided with a copy of the QP9 police report that summarised the appellant's offending in the following way:

> *"As the motorcycles were travelling east, the first motorcycle was observed on two separate occasions to cross the right of the centre dividing line."*[8]

[18] In late May 2017 the camera footage was disclosed to the appellant.

[19] On 5 December 2017 Sgt Sweeney provided a witness statement. This was 12 months and one day after the subject offending. In paragraph 7 of the statement he said:

> *"...shortly after they had passed the intersection with the Goat Track I observed the first of these two motorbikes to be on the incorrect side (right) of the single continuous dividing line by approximately thirty centimetres... From my observation this was a controlled, intentional manoeuvre by the rider to navigate the left bend as the motorbike was to right of the centre dividing line for a period of 2 seconds…".*[9]

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[7] Exhibit 9.
[8] T 1–78.
[9] Exhibit 14.

[20] Sgt Sweeney provided a further statement dated 20 February 2019 in which paragraph 7 of his initial statement referred to in the abovementioned paragraph was repeated.[10]

[21] At the commencement of the summary hearing on 11 March 2019, the particulars of the offence were tendered as an exhibit. The particulars were that the offending occurred immediately before the appellant headed into the left bend in the road.[11]

[22] Since the subject offending, a 20 km/hr advisory sign has been installed in advance of the subject left bend in the road and the 60km/hr speed limit has been replaced with a 40 km/hr speed limit. Mr Wickman explained that the reduction in the speed limit was at the request of local residents who had complained that people were speeding in the vicinity of the Mt Nebo township.

Whether complaint statute barred

The appellant's submissions

[23] The following is a summary of the appellant's contentions:

(i) The magistrate's reasons reveal a failure to appreciate that proof that the motorcycle crossed the dividing line on right bends in the road constituted an entirely separate and distinct offence from the offence constituted by crossing the dividing line in the approach to a left bend in the road.

(ii) The magistrate reasoned that the complaint is valid because all the essential elements of the only possible offence are alleged in the ticket, notice to appear and bench charge sheet. However, more than one offence was potentially committed and the offence alleged in the infringement notice and the notice to appear was a different offence to the offence alleged at the summary hearing.

(iii) The particulars of the alleged act that were provided by the prosecution from 4 December 2016 onward were the only means by which the act alleged to constitute the offence could be known to the appellant. Prior to 5 December 2017 those particulars were that the offence involved crossing the dividing line when approaching right bends in the road. After Sgt Sweeney's statement was disclosed on 5 December 2017, the appellant became aware that the respondent was alleging an entirely different offence, involving the appellant's motorcycle crossing the dividing line when approaching a left bend in Mt Nebo Road. This amounted to the substitution of a different offence outside the limitation period.

(iv) The learned magistrate also erred in finding that:

(a) Sgt Sweeney mistakenly referred to the right bends in Mt Nebo Road rather than the left bend when he spoke with the appellant at the scene; and

(b) The QP9 details were not decisive in establishing that a ticket was issued for a different infringement than the one particularised at the summary hearing.

The respondent's submissions

[24] The respondent contends that the true nature of the offence was apparent on the face of the charge, being that the appellant crossed the dividing line. The act of crossing the dividing line when approaching the left bend in the road is a particular of that offence.

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[10] T 1–75.

[11] Exhibit 1.

Further, any change as to the particular location on Mt Nebo Road where the offence occurred is a particular and not a new and discrete offence outside the limitation period.

Consideration

[25] For the reasons that follow, in my view the appellant has raised no matter which would suggest any error by the magistrate in her determination that the summary hearing of the complaint was not statute barred pursuant to s 52(1) of the Justices Act.

[26] This section provides that in the case of a simple offence, unless some other time is limited for the making of a complaint by the law relating to a particular case, the complaint must be made within one year from the time when the matter of complaint arose. There is no dispute that the one year 'limitation period' applies here. Pursuant to s 47 of the Justices Act, the description of the offence in the words of the Regulations, or in similar words, shall be sufficient in law.

[27] Section 388 of the *Police Powers and Responsibilities Act* 2000 (Qld) ('PPR Act') provides that a statement in a notice to appear of the substance of an offence that is alleged to have been committed is taken to be a complaint under the Justices Act. The said statement need only provide general particulars of the offence, for example the type of offence and when and where it is alleged to have been committed.[12] This does not detract from the responsibility to provide proper particulars in the course of the prosecution.[13] I agree with the magistrate that the particulars required in this case related to the particular section on Mt Nebo Road where the offence was alleged to have been committed.

[28] In this case s 132(2) of the Regulations creates the offence. It was the offence that is charged in the notice to appear which describes the offence in the words of the Regulations. It further details that it is alleged to have occurred on 4 December 2017 on Mt Nebo Road at Mt Nebo. The notice to appear is dated 6 March 2017. There is no dispute that the appellant received this well within the one year limitation period. I agree with the magistrate's observation that the notice to appear includes such essentials to make it a valid institution of proceedings.

[29] The notice to appear is so drawn that it does not make clear the precise location on Mt Nebo Road where the offence occurred. There is more than one set of facts that are equally capable of supporting the complaint. It was the evidence of Sgt Sweeney that the appellant's motorcycle crossed over the dividing line onto the incorrect side of Mt Nebo Road on three separate occasions. The first of these occurred when the appellant was approaching a left bend in the road. The subsequent two other occasions occurred when he was approaching right bends in the road.

[30] Given that there was more than one act capable of supporting the complaint, the appellant was of course entitled to be appraised of the particular act alleged as the foundation of the charge. Any want of particularity is covered by s 387(1) of the PPR

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[12] PPR Act s 386.
[13] PPR Act s 387(2).

Act which requires the prosecution to provide proper particulars in the course of the prosecution of the offence. In the context of a criminal case, the purpose of particulars is to give a defendant sufficient indication of the precise case which is the basis for the charge preferred against them before they are required to plead to the charge. A defendant should have sufficient particulars to prepare his defence so that appropriate objections can be taken and so that appropriate forensic decisions can be made.[14]

[31] It is not contended by the appellant that there was a failure on the part of the prosecution to meet the requirements of ss 386 and/or 388 of the PPR Act and to provide a lawful complaint. The real grievance is that on the basis of Sgt Sweeney's conversation with the appellant at the scene and the contents of the QP9, the particulars that had been provided to him within the one year from when the matter of complaint arose, were that the act that the prosecution proposed to prove and that was the subject of the complaint, was the act of crossing the dividing line when approaching the two right bends in the road. This is in circumstances where the particulars relied on by the prosecution at trial, were the act of crossing the dividing line when approaching the left bend in the road.

[32] There are a few observations to be made about this. First, the conversation with Sgt Sweeney at the scene did not amount to the provision of particulars, in circumstances where it occurred not only prior to the appellant being served with the notice to appear, but it was also prior to him even being issued with the infringement notice. Second, the QP9 does not refer to the two acts of crossing the dividing line as relating to the occasions when the appellant was approaching two right bends in the road. The magistrate was correct in observing this. Third, the camera footage disclosed to the appellant in May 2017 clearly showed the appellant crossing over the dividing line when approaching a left bend. Fourth, given the above, within five months of the alleged offending, there was at least some confusion as to the particular act the subject of the complaint. There is no reason why the appellant could not have requested clarification on this. If the respondent had been unwilling for any reason to provide such particulars, an application could have then been made under s 83A of the Justices Act. Fifth, even if Sgt Sweeney's conversation with the appellant at the scene could be said to have amounted to the provision of particulars (which I am not persuaded it was), there is no reason in law why those particulars could not have been withdrawn and new particulars furnished before he was required to plead to the charge.

[33] For the reasons outlined above, I agree with the magistrate. I am not persuaded by the appellant's submission that the prosecution have alleged a different offence by particularising for the purposes of the summary hearing, the offending act of crossing over the dividing line approaching the left bend in the road.

[34] I also reject the appellant's contention that the provision of these particulars necessitated the respondent issuing and serving a fresh notice to appear as contended for in his written submissions. Amending particulars or the provision of new particulars is not the initiation of a new complaint. It is a step taken in the original complaint proceedings and the time limit specified in s 52 of the Justices Act does not apply.

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[14] *R v Saffron* (1988) 17 NSWLR 395; *R v Logan* [2012] QCA 210; *R v Quagliata* [2019] QCA 45.

[35] It is worth observing that the appellant clearly required the particulars to know the precise case that formed the basis of the charge. He needed to be appraised of this so that he could plead to the charge and prepare his defence. The precise case that was the subject of the hearing involved the appellant's motorcycle crossing the dividing line as it approached the left bend in the road. It is not in contention that the appellant knew this by 5 December 2017. The fact that this is one year and one day after the subject offence occurred is irrelevant. What is relevant is that he knew of this well in advance of the commencement of the summary hearing, more than 15 months later. Indeed the particulars were tendered as exhibit 1 at the summary hearing. If they had taken him by surprise or for any other reason deprived him of a proper opportunity to prepare his defence, he would have been entitled to have applied for an adjournment of the hearing. The appellant was represented by counsel and an adjournment was not sought. I understand the reason for this is that the appellant did not require one.

[36] Counsel for the appellant has relied on *R v Surman*[15], *Flanagan v Remick*[16] and *Director of Public Prosecutions v Kypri*[17]. In my view, each of these authorities is distinguishable.

[37] In *R v Surman* the appellant was convicted of driving with the prescribed concentration of alcohol in his blood, in circumstances where he had originally been charged with attempting to put a motor vehicle into motion while having a prescribed concentration of alcohol in his blood. The prosecution had applied for and been permitted to amend the complaint at the beginning of the hearing. As explained above, there was no requirement to amend the complaint in the present case. There has been no amendment involving the charging of a different offence.

[38] In *Flanagan v Remick* a charge and summons were issued alleging two offences against repealed subordinate legislation. The issue was whether the charge was a nullity for failing to comply with statutory requirements. This cased is clearly factually distinguishable from the present case.

[39] In *Director of Public Prosecutions v Kypri* the appellant was charged with an offence under s 55 of the *Road Safety Act* 1986 (Vic). A question arose as to whether the charge was improperly drawn in that it failed to identify the subsection under which the requirement was made for the respondent to accompany the informant. There are different requirements under s 55. Nettle JA observed the following at [16]:

> "A charge is to be interpreted in the way in which a reasonable defendant would understand it, giving reasonable consideration to the words of the charge in their context.[18] If, therefore, the contents of the charge and the summons are sufficient when read as a whole to bring home to a reasonable defendant the essential elements of the offence alleged, the charge will not be invalid. Failure to name the sub-section would be a breach of s 27 of the *Magistrates' Court Act 1989*.[19] But that would be the sort of breach which could be rectified by amendment. It would not affect the essential validity

[15] 85 A Crim R 361.
[16] [2001] VSC 507.
[17] [2011] VSCA 257.
[18] *DPP Reference (No 2 of 2001)* (2001) 4 VR 55, [40].
[19] *McMahon v DPP* (Unreported, Supreme Court of Victoria, Court of Appeal, Brooking, Charles and Callaway JJA, 10 June 1995) 4.

> of the charge or, necessarily, the validity of any conviction obtained on it.[20] Where, however, as here, the charge and summons do not allege sufficient facts to enable a reasonable defendant to determine *ex facie* the sub-section of s 55 under which the requirement is alleged to have been uttered, the charge is defective because it fails to convey the nature of the offence alleged."

[40] In the present case, there was nothing about the notice to appear that called into question the validity of the complaint. It contained the type of offence and when and where it was alleged to have been committed in accordance with the requirements of s 386 of the PPR Act. It identified the applicable legislative provision, namely s 132(2) of the Regulations. It did not fail to allege an essential element of the offence. There was no attempt by the prosecution at any time to formulate a new and different charge. Contrary to the submission of the appellant, there was nothing about the way the case was prosecuted that amounted to an improper avoidance of the time period provided for in s 52 of the Justices Act.

[41] Given my findings above, it is not necessary to determine whether the learned magistrate erred in accepting Sgt Sweeney's evidence in cross examination to the effect that he mistakenly referred to the right bends in Mt Nebo Road rather than the left bend when he spoke with the appellant at the scene. If such a determination was required, I do not accept the submission by the appellant in this regard. The magistrate had the benefit of seeing and hearing Sgt Sweeney give evidence. Upon my review of the record and giving appropriate weight to the magistrate's findings, it was clearly open to the magistrate to accept his evidence on this point.

[42] The appellant further contends that the magistrate made an error in her understanding that the prosecution's particularised case at trial was that the appellant's motorcycle twice crossed the dividing line. It is accepted that the magistrate makes mention in her reasons to the motorcycle crossing the dividing line twice. Later on in her reasons she refers to 'the acts constituting the offence'.[21] I am not persuaded however, that the magistrate held such a mistaken understanding of the particulars of the prosecution case. The abovementioned jurisdictional issue was raised by counsel for the appellant as a preliminary issue at the summary hearing. The magistrate's ruling on this preliminary issue clearly demonstrates that she was cognisant that she was required to determine whether a single offence occurred when the appellant was approaching a left bend in the road.[22] The particulars which were tendered as exhibit 1 clearly refer to this single incident. In addition a review of the transcript of the summary hearing confirms that it is was conducted on the basis of this single incident.

[43] Therefore, there is no error shown by the learned magistrate in her determination that she had jurisdiction to hear the summary trial.

Mistake of fact

The appellant's submissions

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[20] Ibid; *Heddich v Dike* (Unreported, Supreme Court of Victoria, Gobbo J, 24 March 1981) 9; *DPP v Ross* (Unreported, Supreme Court of Victoria, Beach J, 7 January 1993) 4.
[21] Magistrate's decision and reasons at [5] and [42].
[22] T 1–18, ln 17–19.

[44] The appellant is critical of the magistrate for not having made express reference to s 24 of the Criminal Code. It is also asserted that the magistrate did not apply the correct test as to the reasonableness of the appellant's belief, namely whether there were reasonable grounds upon which the appellant's honest belief could be said to have been held.

[45] According to the appellant the evidence squarely raises his belief that the motorcycle had not crossed over the dividing line. It is said this can be found in his conversation with Sgt Sweeney at the scene. Further, it is contended that Sgt Murphy's evidence supports the conclusion that such a belief was reasonable. This was evidence to the effect that on approach to a corner such as the left bend that the appellant was approaching, it is reasonable to expect that the focus of the rider of a motorcycle would be on the curve ahead, not on the road surface immediately beneath the motorcycle. The other piece of evidence is the manner of the appellant having driven his motorcycle close to the dividing line as shown in the camera footage. It was contended that a consideration of all of this evidence led to a conclusion that the prosecution could not establish beyond reasonable doubt that the appellant did not act under an honest and reasonable belief.

The respondent's submissions

[46] The respondent contends that the evidence led in the prosecution case was capable of establishing that even if the appellant held an honest, but mistaken belief that he had not crossed the dividing line, that it was not a reasonable belief.

Consideration

[47] It is true that the magistrate did not specifically refer to s 24 of the Criminal Code. However, it is clear from her reasons that she appreciated that the appellant was contending that the evidence raised for consideration was whether an excuse under s 24 of the Criminal Code applied to the facts of the case. She was aware of the legal considerations that apply to this defence and she applied them.

[48] The magistrate clearly understood the prosecution bore the onus of proof in proving beyond reasonable doubt that the appellant did not act under an honest and reasonable belief that he was on the correct side of the road. She was also mindful that the burden of proof was to the standard of beyond reasonable doubt.

[49] The defendant did not give evidence. The magistrate appreciated that this was not fatal to the defence and that such a belief might be inferred from other evidence in the case.[23] She correctly referred to the fact that part of the appellant's case was that the prosecution had not excluded that the appellant honestly and reasonably, albeit wrongly believed that he had not crossed over the dividing line. The magistrate referred to an honest belief involving the subjective state of mind of a person and appreciated it is a belief that needs to be genuinely held by the person. She referred to a reasonable belief involving an objective question of fact. It is apparent from her determination of whether the appellant's belief was reasonable, that she considered his particular circumstances.

[50] In my view, the magistrate was correct in concluding that the prosecution had discharged its onus in proving that there no evidence that the appellant held the belief

[23] *R v Makary* [2018] QCA 257.

that he was on the correct side of the road. The fact to which the appellant points, namely his conversation with Sgt Sweeney at the scene is incapable of giving rise to any inference that he held a belief that he had not crossed the dividing line when approaching the left bend in the road. The question Sgt Sweeney posed related to two unrelated occasions when the appellant crossed over the dividing line when approaching right bends in the road. I reject the appellant's submissions that his response to this question ought to be interpreted as him conveying to Sgt Sweeney that he had remained on the correct side of the road at all times when riding along Mt Nebo Road. Even if it could be interpreted in this way, in my view it does not advance the appellant's appeal in any material way. His response was not that he had turned his mind to it and held an actual belief about the positioning of his motorcycle on the road around the times his motorcycle crossed over the dividing line. Rather, he effectively said that if he had that it must have been inadvertent because he had a '*big bike*'.

[51] In short, I agree with the magistrate that the appellant's response was of no probative value. The magistrate was also entitled to determine that there was an *'insufficient evidentiary basis for inferring that the defendant thought about where he was on the roadway in relation to the dividing line at the time or place [of the] alleged breach or, if he did [that he] actually believed that he was to the left of it'.*[24] In arriving at this conclusion I am mindful that the evidence relevant to this defence should be analysed in a way that is most favourable to the appellant.

[52] Even if it were arguable that there was sufficient evidence that precluded the prosecution excluding beyond reasonable doubt that the appellant had an honest belief that he had not crossed the dividing line, the magistrate rejected as she was entitled to do, the appellant's contention that the prosecution had not excluded that there were reasonable grounds for such an honest but mistaken belief. Her reasons for this are detailed at paragraphs [38] to [41] of the decision. This included the fact that the motorcycle was on the incorrect side of the road by approximately 30 centimetres and over a distance of some 12 metres. It also included the fact that the appellant did not claim at the scene that the absence of a slower speed sign had any relevant bearing on his matter of driving and there was no other evidence from which this could rationally be inferred. Those paragraphs demonstrate that her reasons were not limited to only two matters, as submitted by the appellant. Further, I do not accept the appellant's submission that the magistrate's findings in this regard were against the weight of the evidence. The magistrate had the benefit of seeing and hearing the evidence of the various witnesses and reviewing the relevant footage. I have read all of the relevant material and viewed the camera footage. I consider it was open to the magistrate to make these findings.

[53] In short, it was reasonably open for the magistrate to have concluded that the prosecution had discharged its onus in relation to this defence. This ground of appeal has not been made out.

Section 139(2) of the Regulations

[24] Magistrate's decision and reasons at [37].

[54] The alternative defence case raised by the appellant is the exception provided for pursuant to s 139(2) of the Regulations. This section provides that a driver may drive over a dividing line to avoid an obstruction if three preconditions are met, namely:

(i) The driver has a clear view of any approaching traffic;
(ii) It is necessary and reasonable, in all the circumstances for the driver to cross the dividing line to avoid the obstruction; and
(iii) The driver can do safely.

[55] An "obstruction" for the purposes of s 139(2) is defined in the dictionary to the Regulations (Schedule 5) to include a 'traffic hazard', which is not defined and is to be given its ordinary natural meaning. The Macquarie Concise Dictionary defines the word "hazard" to mean "a risk, exposure to danger or harm; cause of such a risk; essential source of harm, injury or difficulty".

[56] The appellant contends in his written submissions that the "traffic hazard" that confronted the appellant was the sharpness of the impending left hand bend, without adequate prior warning in the form of an advisory sign, as he approached the bend within the speed limit. It is submitted that this combination of factors led to his motorcycle taking a line marginally to the right of the dividing line. This is in circumstances where a road safety audit had been conducted of Mt Nebo Road prior to the subject incident identifying the need for an advisory sign. Such a sign for 20 km/hr was positioned to the side of the road on the approach to the subject left bend in the road after the subject incident. This of course needs to be considered in the context that prior to the incident there was a red warning sign advising road users to reduce their speed.

[57] It is of note that the defendant did not mention any such hazard or obstruction to Sgt Sweeney at the scene and did not give evidence to this effect. Even if it could be said that the circumstances mentioned in the paragraph above constituted a traffic hazard (which I very much doubt), in my view it is ultimately unnecessary for this determination to be made. This is because even if it was, the appellant did not give evidence and there is no other evidence that he had a clear view of approaching traffic or that it was safe to cross the dividing line. The appellant's argument on this defence was rejected by the magistrate as she was entitled to do.

Order

[58] It is ordered that the appeal against conviction is dismissed.