SUPREME COURT OF QUEENSLAND

CITATION:	*Schulz v Johnstone* [2011] QSC 221
PARTIES:	**IAN SCHULZ** (applicant) **v** **PAUL JOHNSTONE** (first respondent)
FILE NO/S:	SC No 11602 of 2010
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Delivered ex tempore 21 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2011
JUDGE:	Atkinson J
ORDER:	**The application is by consent dismissed with no order as to costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – GENERALLY – where the applicant was charged with driving a vehicle in excess of the speed limit – where the matter was listed for summary hearing in the Magistrates Court – where the applicant objected to the Magistrate receiving into evidence an electronically recorded conversation and submitted it would be in breach of the "Judges' Rules" – whether the Magistrate erred in his ruling and in the exercise of his discretion – whether the application for judicial review of the Magistrate's decision should be allowed *Judicial Review Act 1991* (Qld), s 12 , s 43 *Justices Act 1886* (Qld), s 222 *Police Powers and Responsibilities Act 2000* (Qld), s 10 *Transport Operations (Road Use Management - Road Rules) Regulation 2009* (Qld), s 20 *Van der Meer v The Queen* [1988] HCA 56, cited
COUNSEL:	M N Thomas for the applicant C E Scott for the first respondent

J Rolls for the proposed second respondent

SOLICITORS: Caxton Legal Centre for the applicant
Crown Law for the first respondent
Queensland Police Service for the proposed second respondent

HER HONOUR: This matter came on for hearing before me today, and during the course of the hearing when it became apparent that the whole application was misconceived, the applicant sought leave to have the matter dismissed. The proposed second respondent concurred with that and did not seek any order as to costs. I shall give reasons why the dismissal of the application was entirely appropriate in the circumstances. In doing so I will rely heavily on the submissions made before me, particularly those by counsel for the second respondent, which I have found most useful.

The applicant filed an application to review a decision of the first respondent, who is a Magistrate, made on 16 February 2010, pursuant to section 43 of the *Judicial Review Act 1991* (Qld). The applicant also filed an application seeking to join the Commissioner of Police as a party and that an application the Commissioner of Police indemnify the applicant in relation to any costs properly incurred on the review application.

The first respondent, the Magistrate, appeared by an officer of Crown Law and quite properly sought leave to withdraw on the basis that the Magistrate would abide the order of the Court. The proposed second respondent appeared and made submissions, and I should formally make the second respondent a party to these proceedings. The second respondent, the Commissioner of Police, applied to strike out the applications for costs and for judicial review.

The applicant was a person who had been charged by way of complaint and summons with a breach of section 20 of the *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld), often referred to as "TORUM".

The charge arose out of events which occurred on 13 August 2008. That night a police officer, who was stationed at the Caboolture Traffic Branch, was working in an unmarked police car conducting observations at an intersection in Burpengary. He saw two motor vehicles accelerate, and pursued those vehicles. He followed them for a relatively short time along Nolan Drive where he observed that they both appeared to be accelerating "very heavily".

He was able to record, as he followed the vehicles, that he was travelling at a speed of 140 kilometres per hour, that he maintained this speed for about 250 metres and did not close the gap with the target vehicles. One of those vehicles was allegedly driven by the applicant.

The matter was initially listed for summary hearing at the Caboolture Magistrates Court on 8 December 2009. It was unable to be heard on that day and was adjourned with priority to 16 February 2010 when it came on before the first respondent. The transcript of that hearing is before me; although it is hardly necessary on an application like this for me to refer to the whole of the evidence.

The police officer, who had made the observations of what he alleged was the applicant driving a vehicle in excess of the speed limit, gave evidence. An objection was taken to the Magistrate's receiving evidence of a conversation that the traffic police officer had with the applicant, which was electronically recorded.

I should here interpolate that electronic taping of conversations by police officers is not to be discouraged. It is entirely appropriate for police officers to be very cautious about having conversations in situations such as that without tape recording them. The effect of not tape recording such conversations is to lead to disputes about what was said. If a conversation is electronically recorded and there is no malfunction in the tape, it has the very fortunate effect that both the police officers and the members of the public who speak to police officers are protected by the certain knowledge that any Court that hears that conversation will know precisely and accurately what was said during the electronically recorded conversation.

On this occasion an objection was taken to the Magistrate's receipt of the tape recording of words that were said. That, of course, is not an inappropriate course. If a person who has been accused, even of speeding, wishes to take an objection to the receipt of such evidence, he or she may of course do so.

The submissions made by a Mr MacAdam, who appeared for the applicant, seemed to suggest that the conversation could not

be admitted because it was in breach of what he referred to as the "Judges' Rules". He did not apparently hand up a copy of the Judges' Rules to the Magistrate. The police officer who appeared referred to Australian decisions, which are the appropriate source of the common law in Australia, and the *Police Powers and Responsibilities Act 2000* (Qld).

I should of course say that the *Police Powers and Responsibilities Act* is a very comprehensive piece of legislation setting out in comprehensive and clear form the law that applies to the conduct of police officers. Additionally, under section 10 of that Act, the common law discretion to exclude evidence in the exercise of judicial discretion is preserved.

The Magistrate proceeded, as is appropriate, to make a ruling on the objection. The ruling on the objection was, first of all, that the Judges' Rules did not apply. That ruling was undoubtedly correct. As Chief Justice Mason said in *Van der Meer v The Queen* [1988] HCA 56 at paragraph [16], "It has been repeatedly stated that the Judges' Rules do not have the force of law in Australia."

Those rules were developed in the early 20th century by the judges of the King's Bench in England for good reason, to regulate the matters those judges sitting in criminal trials would consider in the exercise of the discretion whether or not to allow evidence given by police officers of interviews with suspected persons, and long before the capacity to

electronically tape such conversations was the reality that it is today.

Since 1912 the law in this area has developed, both in terms of the common law of Australia as articulated by the High Court and courts of appeal, and also by such comprehensive regimes as the *Police Powers and Responsibilities Act*.

The Magistrate made a ruling about the applicability of the Judges' Rules to the proceedings before him which was undoubtedly correct. He then went on to consider the exercise of his discretion as to whether to allow the conversation recorded on the field tape to be given in evidence. In doing so he considered the fairness discretion. He set out the law as he understood it to be, which appears to be a correct statement of the law, and ruled that, "What could be more fairer than for the Court to have a contemporaneous account of the recording received in evidence," and he then formally allowed the reception of the tape into evidence.

Notwithstanding that ruling, it appears that counsel for the applicant continued to agitate the question of the relevance of the Judges' Rules. Perhaps counsel was unaware of the High Court authority on the matter.

The matter was taken on appeal to the District Court where it was struck out on the basis that it was premature and remitted by that Court for it to continue in the Magistrates Court. Notwithstanding that, Mr MacAdam continued to argue before the

Magistrate it appears in an attempt to reopen the point decided against his client, and then threatened to bring a judicial review of the Magistrate's decision. That is some background to the way in which the matter appeared in this Court.

Section 12 of the *Judicial Review Act* provides that an application for a statutory order of review may be dismissed if adequate provision is made by a law other than the *Judicial Review Act* under which the applicant is entitled to seek a review of the matter by the court or another court. Section 13 provides that an application must be dismissed if the court is satisfied, having regard to the interests of justice, that it should do so in these circumstances. This is clearly such a case.

The question of admissibility of evidence is peculiarly a matter before the judge or magistrate hearing the trial. If the person who is accused is convicted in the Magistrates Court, that person may appeal to a single judge of the District Court under section 222 of the *Justices Act 1886* (Qld). In the course of such an appeal, if an informed view were taken that some piece of evidence was incorrectly admitted into evidence, that could no doubt be a ground of appeal. There is, therefore, an adequate alternative way to seek a review of the question of the admissibility of evidence, and that would be the entirely appropriate way of dealing with this matter if, as does not presently appear to

be the case, there were any grounds for doubting the correctness of the Magistrate's ruling.

Because there does not appear to be any basis for doubting the correctness of the procedure adopted by the Magistrate, I am also of the view that no reasonable basis for the application is disclosed. Given the length of time between the question of the traffic offence of speeding and this matter being determined, it is close to being an abuse of the process of the court.

In my view this matter is on many levels entirely misconceived and the applicant was no doubt very wise after being given sensible legal advice by those who now appear for him, and I mention they were not the persons who appeared for him in the Magistrates Court, to ask for leave to withdraw his application. The application is by consent dismissed with no order as to costs.
