[2016] QCA 29

COURT OF APPEAL

MARGARET McMURDO P
FRASER JA
DAUBNEY J

CA No 180 of 2015
DC No 312 of 2012

THE QUEEN

v

AL SHAKARJI, Mustafa **Applicant**

BRISBANE

TUESDAY, 16 FEBRUARY 2016

JUDGMENT

THE PRESIDENT: Justice Daubney will deliver his reasons first.

DAUBNEY J: On the 4th of September 2012, after a two day summary trial in the Magistrates Court at Townsville, the applicant was convicted of speeding, namely, exceeding the speed limit of 60 kilometres per hour by travelling at 88 kilometres per hour on the ring road at Townsville, on 14 March 2012. He was fined $500 and ordered to pay costs.

The applicant successfully appealed to the District Court pursuant to s 222 of the *Justices Act* 1886 and on 21 December 2012 that Court allowed the appeal, set aside the conviction and sentence and no retrial was ordered. The present respondent then sought leave to appeal that

decision to this Court. On 25 October 2013, this Court granted leave to appeal, allowed the appeal, set aside the orders of the District Court and remitted the matter to the District Court for determination (see *Commissioner of Police v Al Shakarji* [2013] QCA 319).

On 16 July 2015, following a hearing on 29 May 2015, it was ordered in the District Court that the applicant's appeal against the Magistrates Court orders be dismissed (see *Al Shakarji v Commissioner of Police* [2015] QDC 176).

The applicant has now applied under s 118(3) of the *District Court of Queensland Act* 1967 for leave to appeal against that latest District Court judgment.

Section 118(3) relevantly provides to the effect that a party dissatisfied with a judgment in the District Court's original or appellate jurisdiction "…may appeal to the Court of Appeal with the leave of that Court."

Whilst it is clear that this section confers a general discretion on this Court which is exercisable according to the nature of the case (*Smith v Ash* (2010) 200 A Crim R 115 per Fraser JA at [50]), it is equally well established that such leave:

> "…is usually only granted where an appeal is necessary to correct a substantial injustice to the applicant, or there is a reasonable argument that there is an error which should be corrected." (*Commissioner of Police v Al Shakarji* [2013] QCA 319 per Morrison JA at [4]).

Moreover, as this would be an appeal from a decision of the District Court in its appellate jurisdiction, it would be a "strict appeal" limited to errors of law rather than an appeal by way of rehearing (ibid, per North J at [75] and *Gobus v Queensland Police Service* [2013] QCA 172 per Fraser JA at [5]).

The evidence which incriminated the applicant was derived from a radar device fitted in a police vehicle. The learned primary judge summarised at paragraphs [16] to [20] of his judgment the relevant evidence given in the Magistrates Court trial by the police officer who was operating the device. In that evidence, the police officer described his experience in the use of the device, the location of the device in the vehicle, and his testing of the device on the

day in question. He described his observation of the vehicle driven by the applicant, of his activation of the radar device including ensuring that he was receiving a clear audible Doppler tone which indicated that the device was targeting only one vehicle, the measurement of the applicant's speed at 88 kilometres per hour, his apprehension of the applicant and the issuing of a traffic infringement notice.

The present application for leave stated the following grounds:

> "(1) The initial finding of guilt was unsafe and unsatisfactory in that the Court at first instance accepted and relied upon evidence, which has now been shown to be false and misleading.
>
> (2) On appeal, the Honourable Judge Shanahan DCJ erred in law in accepting that the officer had complied with the Australian standards when the device was not fitted in accordance to the Australian Standards. Exhibit no 1 in the rehearing clearly shows the device fitted to the steering column. Exhibit no 2, Magistrate Transcript pg 23 shows the prosecution relying on the device being bolted to a dashboard of another vehicle which is in accordance with the Australian Standards. Exhibit 1 clearly indicates the device in the subject vehicle was not fitted in accordance with AS 2898.2.2.3.3, thereby rendering Ex 8 the certificate the device was used invalid.
>
> (3) The Honourable Judge Shanahan DCJ erred by accepting the evidence of the deeming certificate Exhibit 10 as a valid certificate. This certificate was not valid, as the device for which the certificate was issued was not fitted in accordance with AS 2898.2-2003-2.3.3."

The grounds were developed in the applicant's written submissions and in his courteous oral argument before this Court. The gist of the applicant's arguments before this Court rely on an assertion that there was a finding of fact below that the radar device in question was mounted on the steering column of a police car rather than on the dashboard and a consequential assertion that the mounting of the radar device on the steering column contravened the relevant Australian standard.

The applicant, who represented himself, assisted this Court in oral argument by identifying the two matters on which he relies as errors by the learned primary judge, namely, the judge's acceptance of the evidence of the police officer and the judge's acceptance of the radar device compliance certificate. For the reasons which follow, I am not persuaded by the applicant's arguments.

The true position relating to the state of the evidence concerning the position of the radar device in the police vehicle was described by the learned primary judge as follows in paragraph [59] of his reasons for judgment:

> "Of more substance is the conflicting evidence as to the positioning of the radar device in the police vehicle. Constable Donnelly gave evidence that the radar device sat on the dashboard with an antenna on the right-hand side of the dashboard (T1-23). A photo was tendered showing the positioning of a black box device on the dashboard (Exhibit 2). This was not the actual police vehicle, which had been disposed of in the interim. Constable Donnelly's evidence was that that was where it was on all cars (T1-23). However, the digital recordings of the actual car (Exhibits 7 and 17) plainly show that the black box device is attached the top of the steering column in Constable Donnelly's car. The antenna device can be seen to the right hand side of the dashboard. Again, this issue was not brought to the attention of the learned magistrate or further explored on the trial. It is worth noting that the certificate (Exhibit 10) proved that the device was fitted according to Australian standards."

The learned primary judge then went on to say, at paragraph [61], that these anomalies in the police officer's evidence caused the learned primary judge some concern but:

> "They were not explored on the trial and no mention of them was made to the learned magistrate in submissions. There may well be explanations for them."

The learned primary judge then went on to refer to the police officer's evidence as "clear and concise" and "consistent throughout". It was noted that the magistrate had no hesitation in accepting the police officer's evidence and in rejecting the evidence of the applicant. The learned primary judge further expressly found that the anomalies in the evidence of the police officer did not persuade his Honour that the police officer was not a witness of credit.

Importantly, at paragraph [65] of his judgment, the learned primary judge said:

> "As noted by the Court of Appeal, the issue in the trial was a straightforward one: whether on all the evidence it was proved beyond reasonable doubt that Constable Donnelly had correctly targeted the appellant's car. In my view, the evidence did establish that."

In short, it is clear that no such finding of fact as now underpins the submissions sought to be advanced by the applicant was in fact made. It is not for this Court now to embark on a fact finding exercise.

Moreover, it is abundantly clear that the argument now sought to be advanced by the applicant has not been pursued as a matter of law in the Courts below. In final argument before the learned primary judge, the anomaly in the evidence concerning the position of the radar device in the police vehicle was expressly relied on by the applicant for the purposes of seeking to impugn the credit of the police officer (see applicant's written submissions at AR 267).

In any event, insofar as the question of compliance with the Australian Standards had previously been raised, it is clear from the previous judgment of this Court that this argument was abandoned long ago. Morrison JA observed in that judgment at paragraph [38] and following:

> "Properly understood, the manner of operation, or whether the operation was in accordance with standards either in the form of the Police Manual or the Australian Standards, had ceased to be an issue. On two distinct occasions the respondent told the magistrate that it was no longer his case that the handling or management of the device was inappropriate, but rather that the police officer had targeted the wrong vehicle.
>
> That being the case, the question of whether the operation of the device was in accordance with the Police Manual or the Australian Standards is irrelevant."

In all of those circumstances, it is quite clear that the case now sought to be advanced by the applicant does not involve agitation of an error of law which would render it appropriate to grant leave to appeal. On the contrary, the applicant seeks, by a sidewind, to re-agitate an argument which he abandoned long ago.

Accordingly, I would refuse the application for leave to appeal.

THE PRESIDENT: I agree.

FRASER JA: I agree.

THE PRESIDENT: The order is the application for leave to appeal is refused. Adjourn the court.