

# SUPREME COURT OF QUEENSLAND

CITATION: *Maybir v Bone* [2005] QCA 344

PARTIES: **CALEB ALEXANDER MAYBIR**  
(appellant/applicant)  
v  
**SERGEANT MERVYN KENNETH BONE (QLD  
POLICE)**  
(respondent/respondent)

FILE NO/S: CA No 128 of 2005  
DC No 63 of 2004

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Beenleigh

DELIVERED ON: 23 September 2005

DELIVERED AT: Brisbane

HEARING DATE: 19 September 2005

JUDGES: Jerrard and Keane JJA and Cullinane J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **Application for extension of time within which to appeal  
dismissed**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND  
INQUIRY AFTER CONVICTION – APPEAL AND NEW  
TRIAL – PRACTICE: AFTER CRIMINAL APPEAL  
LEGISLATION – MISCELLANEOUS MATTERS –  
QUEENSLAND – PROCEDURE – EXTENSION OF TIME,  
NOTICE OF APPEAL AND ABANDONMENT – applicant  
convicted of speeding after summary trial in Magistrates  
Court – applicant was travelling at 73 kph in a 60 kph zone –  
applicant asserted that the speed limit sign was obscured by  
foliage – applicant admitted in cross-examination that he had  
previously known of the 60 kph sign in that position despite  
alleged obscurity – appeal against conviction to the District  
Court dismissed – whether applicant had any prospects of  
success on appeal so as to justify a grant of extension of time

*Traffic Regulation 1962 (Qld), s 210*  
*Transport Operations (Road Use Management) Act 1995*  
(Qld), Ch 5, Pt 7, Pt 8  
*Transport Operations (Road Use Management – Road Rules)*  
*Regulation 1999 (Qld), s 20, s 21, s 25, s 315, s 316, s 322,*

## Sch 6

COUNSEL: Applicant appeared on his own behalf  
M R Byrne for the respondent

SOLICITORS: Applicant appeared on his own behalf  
Director of Public Prosecutions (Queensland) for the  
respondent

- [1] **JERRARD JA:** Mr Maybir has applied for an extension of time within which to apply under s 118(3) of the *District Court of Queensland Act 1967* (Qld) for leave to appeal against a judgment of the District Court given on 4 October 2004. That judgment dismissed an appeal by Mr Maybir from a conviction after a summary trial in the Brisbane Magistrates Court on a charge of speeding. That conviction was on a charge alleging that on 14 June 2003 at Morningside he drove a motor vehicle at a speed over the speed limit, namely 60 kph, applying to the driver for a length of road, namely Lytton Road, Morningside where Mr Maybir was driving. Various other formal matters were alleged, irrelevant to this application; Mr Maybir was fined \$150 and ordered to pay \$65.60 costs of court, in default of three days imprisonment, and allowed five months to pay. His appeal against that conviction was dismissed, and the learned District Court judge ordered that each party bear their own costs of that appeal.

#### The prosecution case

- [2] The prosecution evidence before the Magistrate was given by way of certificates and photographs, which were collectively made exhibit 1 in those proceedings. Mr Maybir did not challenge the accuracy of those before the Magistrate. Those various documents were made admissible by virtue of provisions of Part 8 of Chapter 5 of the *Transport Operations (Road Use Management) Act 1995* (Qld) (“the TORUM”), read with the provisions of s 210 of the *Traffic Regulation 1962* (Qld). Those documents relevantly established that at 6.27 am on that winter morning – the prosecution photographs demonstrate that it was still pretty dark – the taxi Mr Maybir was driving was recorded travelling at 73 kph on part of Lytton Road at Morningside. Mr Maybir’s defence to the charge before the Magistrate did not involve any denial that he was the driver of the taxi, or that he was actually travelling at 73 kph, or that the applicable speed limit was 60 kph. His defence was that he believed the speed limit applicable to that section of road was 70 kph, which he was admittedly exceeding in truth by 3 kph; and he contended that a sign which he acknowledged was present at all relevant times, and which informed that the speed limit was 60 kph, was obstructed from view by vegetation until a driver had passed it. His vehicle had travelled past that sign some moments before it was recorded travelling at 70 kph. The prosecution response to his case appeared to concede that the prior stretch of roadway along which he had been travelling, before the 60 kph sign, was marked for 70 kph as the permitted speed.

#### The defence case

- [3] Mr Maybir produced four photographs during his evidence in chief before the Magistrate, for the purpose of showing that the sign was obscured from view by some shrubs on the footpath, on the passenger side of a vehicle approaching from Mr Maybir’s direction. Unfortunately for him those photographs did not show that the sign was even partially obscured from the viewpoint of a driver travelling in the

direction in which Mr Maybir was travelling on that morning on 14 June 2003. That is because one photograph was taken from the footpath, and shows that a pedestrian walking towards the sign would have an obscured view at one point, but that says nothing about a driver's viewpoint; another photograph was taken from behind a parked taxi, in turn parked behind another vehicle, and shows that a person standing or parked on the roadway in that position would have that person's view of that sign obscured by the foliage; the third photograph was taken on a different spot on the road showing a different sign; and the fourth was taken by a vehicle proceeding in the opposite direction to that in which Mr Maybir was travelling, and demonstrates only that a driver looking back over her or his right hand shoulder would not have the sign obscured. Thus, even if the sign was obscured from an approaching driver's view by vegetation, that fact was not established by those photographs. They do suggest that a driver's view *might* be obscured until the driver was close to the sign, but certainly not that the sign would not be visible in sufficient time to allow a car travelling at 70 kph to slow down to 60 kph.

- [4] Mr Maybir's evidence ran into another snag before the Magistrate. This was that under cross examination, he admitted that, as a taxi driver with 17 years experience, he had driven passed that 60 kph sign on "many, many occasions",<sup>1</sup> and agreed that he knew of the 60 kph sign in that position. What he said was "That 60K, okay, I've seen it, but it's always been hidden;"<sup>2</sup> and also that he had seen it on those "many, many" occasions "After we've gone past it".

### **The Magistrate's rulings<sup>3</sup>**

- [5] The learned Magistrate treated Mr Maybir as having argued a defence of mistake of fact, based on Mr Maybir's statement on oath that he had believed that the applicable speed limit was 70 kph, a belief apparently based on the fact that the sign had been obscured, the speed limit in the preceding stretch of road was 70 kph; and the difficulty in remembering the applicable limit from one stretch of roadway to another.<sup>4</sup> The Magistrate found that the photographs Mr Maybir produced to the court did not show the view of the sign that would have been available to Mr Maybir when driving his vehicle on 14 June 2003, and the Magistrate also found that Mr Maybir did not hold an honest belief that the speed limit was in fact 70 kph and not 60 kph. The Magistrate held that Mr Maybir may have believed the speed "may have been 70, it may have been 60, but he held no positive belief that it was in fact 70". In so finding the Magistrate referred to the evidence that Mr Maybir was aware of the sign, and observed that he had found Mr Maybir to be very unimpressive as a witness to his actual belief of the actual speed limit. When so remarking, the Magistrate referred to Mr Maybir's experience as a taxi driver, and also referred to Mr Maybir's evidence of his knowledge of the existence of the sign at the time. The Magistrate also held that even if he accepted that Mr Maybir did hold an honest belief that the applicable limit was 70 kph, that in the circumstances it was not reasonable; the Magistrate referred to the absence of any evidence that Mr

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<sup>1</sup> At AR 15

<sup>2</sup> At AR 15

<sup>3</sup> Reproduced at AR 19-25

<sup>4</sup> That approach may have been generous to Mr Maybir, in view of the decision in *Ostrowski v Palmer* (2004) 206 ALR 422 at [16] and [90]; but the respondent has not challenged the proposition that a defence of mistake of fact was available if, due to obstruction of the sign, Mr Maybir was led to believe the applicable limit was still 70 kph

Maybir had checked the speed shown on the face of the sign which Mr Maybir acknowledged he knew to be there.

### **The District Court ruling<sup>5</sup>**

- [6] The learned District Court judge hearing the appeal noted that there was no significant challenge to the accuracy of the measurement by the speed camera of Mr Maybir's speed of 73 kph, and that the focus of the appeal was on Mr Maybir's belief that the prevailing or applicable limit was 70 kph, and the reasonableness of that belief. The learned judge referred to the Magistrate's findings quoted herein, and to the difficulty of overturning such findings based on an observation of Mr Maybir in the witness box. The learned judge agreed with the Magistrate's view that the photographs produced by Mr Maybir did not demonstrate what view an approaching driver would have had of the relevant sign, and the judge concluded that there appeared no reason to overturn the findings by the Magistrate based on the evidence, which findings all appeared reasonably open to the Magistrate to make.

### **The appeal to this Court**

- [7] Mr Maybir has not shown any error in the reasoning of the learned District Court judge who heard the appeal from the Magistrate. Mr Maybir failed on the facts on the defence he wanted to raise, and the Magistrate was entitled to make that ruling, and the learned District Court judge was right in upholding it. Mr Maybir's first intended ground of appeal to this Court, one complaining that the speed sign was fully obscured in relation to where his vehicle had been on the road, is not supported by evidence accepted by the Magistrate. The Magistrate did not expressly reject Mr Maybir's own evidence the sign was obstructed; Mr Maybir has now sought to lead more photographic evidence on this application to show that that was the case. But those new photographs do not establish that, and whether or not the sign was obstructed until a vehicle was close to it, Mr Maybir knew of its location, and what it showed.
- [8] His next ground of appeal, that the speed camera unit was not placed within a reasonable distance of where the 60 kph speed sign was visible, is a new point, not raised before either the Magistrate or District Court judge. It is not supported by any evidence, and the obligation not to exceed 60 kph applies from when an oncoming vehicle reaches the 60 kph sign. Leave relying on that ground should be refused.

### **No "Speed Camera in Use" sign**

- [9] The third ground relied on in this appeal is that no "speed camera in use" sign was being used by the police officers operating the speed camera at the time Mr Maybir was photographed by that camera, and that accordingly the accuracy of the calibration of the camera "has to be questionable".<sup>6</sup> There is nothing in the evidence that suggests that the accuracy of the calibration of the camera depends upon whether or not a sign has been placed facing oncoming drivers and advising that a speed camera is being used in the area.

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<sup>5</sup> Reproduced at AR 60-65

<sup>6</sup> Grounds of appeal at AR 99

- [10] The presence or absence of such a sign was a matter that was important to Mr Maybir in his evidence given before the Magistrate, and he swore that he had deliberately driven back along Lytton Road that morning after becoming aware that he had been photographed by a speed camera, and had particularly taken note that there was no sign advising drivers proceeding along Lytton Road in the direction that he had been, that there was a speed camera in use. Mr Maybir was apparently confident that it was unlawful to operate such a camera without such a sign.
- [11] There is nothing in the *Traffic Regulation* 1962 (Qld), in Part 22 dealing with camera detected offences, requiring that police officers have any such signage visible, and likewise there is nothing in the provisions of Chapter 5 Part 7 of the TORUM, dealing with detection devices, that requires the use of any such sign; and likewise nothing in the provisions of the *Transport Operations (Road Use Management – Road Rules) Regulation* 1999 (Qld) (“the Regulation”) requiring that any such sign be used. Displaying one may serve the beneficial purpose of causing traffic to slow down, but displaying or not displaying such a sign is irrelevant to the lawfulness of using a speed camera or the admissibility of the results of using one.

### **Effect of an obscured sign**

- [12] If the evidence had established that the 60 kph sign was obscured from an oncoming driver’s view as Mr Maybir said it was, but as his photographs did not demonstrate, it would not necessarily follow that Mr Maybir was entitled to travel at either 70 kph or 73 kph, as a matter of law. That is because s 25 of the Regulation may have the effect of applying the “default” speed limit when a sign, otherwise applicable, is obscured.<sup>7</sup> The default speed limit in a built up area is 50 kph. However, if in fact the sign was obscured – and if Mr Maybir did not actually know of its presence, obscured or not, as in truth he did – then that might arguably provide a defence of honest and reasonable mistake. One issue would then be whether that was a mistake of fact or a mistake of law; the Magistrate was prepared to assume in Mr Maybir’s favour that it was a mistake of fact.
- [13] Considering solely the situation where a sign is obscured by foliage from the view of approaching drivers, s 20 of the Regulation provides that a driver must not drive at a speed over the speed limit applying to the driver for the length of road where the driver is driving. Section 21 provides that the speed limit applying to a driver for a length of road to which a speed limit sign applies is the number of kilometres per hour indicated by the number on the sign. The definition in Schedule 6 of the Regulation defines traffic control device, and the definition includes a traffic sign. Part 20 of the Regulation deals with traffic control devices and traffic related items; s 315 of the Regulation provides that a traffic control device has effect for the Regulation if the device is on a road, and if it complies substantially with the Regulation. Section 316 explains what is necessary for such a device to comply substantially with the Regulation. Section 322 provides that a traffic control device above or near a road is taken to be on a road; however the device or item is taken to be on the road only if it is clearly visible to road users to whom it is designed to apply.
- [14] Section 322, although applicable only to traffic devices above or near roads, and deeming them to be on the road and therefore ones having effect as provided by

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<sup>7</sup> It relevantly provides that if a speed limit sign does not apply to a length of road and the length of road is not in a speed limited area, the default speed limit applies

s 315, confirms that it is assumed and intended that traffic control devices be clearly visible, as Mr Maybir argues. After all, a speed limit made applicable by s 21 of the Regulations, being the number of kilometres per hour indicated by a number on the sign, cannot be “indicated” to an oncoming driver unless the sign with the number on it is clearly visible. But being right on the law does not help Mr Maybir where he failed on the facts; the Magistrate held that Mr Maybir was not operating under any relevant mistake, because of his actual knowledge of the existence of that sign, and because of what it showed. The District Court judge did not err any way in upholding the decision of the Magistrate.

[15] Accordingly, I consider that Mr Maybir has no prospects for success were he granted leave to appeal, and that his application for an extension of time within which to appeal should be dismissed.

[16] **KEANE JA:** I have had the advantage of reading the reasons of Jerrard JA. I respectfully agree with his Honour's reasons and with the orders which he proposes.

[17] **CULLINANE J:** In this matter I agree, for the reasons given by Jerrard JA, that the application for an extension of time should be refused.