[2019] QCA 19

COURT OF APPEAL

HOLMES CJ
PHILIPPIDES JA
McMURDO JA

CA No 92 of 2018
DC No 2984 of 2017

BRANCH, Brian David **Applicant**

v

COMMISSIONER OF POLICE **Respondent**

BRISBANE

WEDNESDAY, 13 FEBRUARY 2019

JUDGMENT

McMURDO JA: The applicant, Mr Branch, was charged with a traffic offence involving what is called unlawful edge filtering. The rider of a motorbike is edge filtering if the motorbike travels to the outside of the edge line of a road while passing one or more vehicles which are on that road.

Edge filtering is unlawful in any one of several circumstances, of which two were alleged in this case. One was that the speed limit was less than 90 kilometres per hour. The other was that the motorbike was travelling at more than 30 kilometres per hour.

The offence was alleged to have occurred one morning on the Centenary Highway at Jamboree Heights. The prosecution witness was a police motorcyclist, Senior Constable Kelly, who

followed Mr Branch for some length along the road and said that he saw Mr Branch riding to the left of the left lane at a speed of about 80 kilometres per hour and where the speed limit varied from 60 to 80 kilometres per hour.

Mr Branch gave evidence that he was riding his motorbike on the Centenary Highway but that at no point did he enter the edge of the road. The magistrate accepted the evidence of the police officer and rejected Mr Branch's evidence to the contrary. Mr Branch was convicted and fined $500.

Mr Branch appealed against that conviction to the District Court under s 222 of the *Justices Act* 1886 (Qld). He argued that the hearing before the magistrate had been unfair because he was provided with the brief of evidence only on the morning of the trial. He said that the policeman's evidence should not have been accepted because it was inconsistent with traffic data which he had obtained and a recording tendered at the trial.

He was permitted by the judge to tender new evidence which consisted of records of the Department of Transport and Main Roads as to the extent of traffic congestion and the speed limits which were current at various places along the Centenary Highway on the morning in question. His appeal to the District Court was dismissed. The judge found there had been no procedural unfairness because Mr Branch, who throughout has been without legal representation, chose to proceed on that day rather than accepting the magistrate's offer of an adjournment.

The judge said that the new evidence could not have undermined the police officer's evidence. The magistrate had found that the offence was committed in a location shown in photograph 3 of exhibit 1 in the hearing where the magistrate said the speed limit was 60 kilometres per hour. The data from the department showed that the speed limit was, indeed, 60 kilometres per hour, although the District Court judge said that the limit was 80 kilometres per hour. That was an error by the judge.

But, either way, the speed limit was less than 90 kilometres per hour and the edge filtering would have been unlawful regardless of the speed limit if, as was found, Mr Branch was riding at a speed of more than 30 kilometres per hour.

The judge noted that the magistrate's decision was on the basis of his findings of the credibility or otherwise of the two witnesses. Correctly, the judge observed that, although he was to conduct a rehearing of the case, he had to make proper allowance for the advantages of the magistrate in seeing and hearing the evidence as it was given, citing *Fox v Percy* (2003) 214 CLR 118 and *Devries v Australian National Railways Commission* (1993) 177 CLR 472. Having noted earlier in his judgment that: "this Court is required to conduct a real rehearing and reach its own conclusions.", his Honour upheld the magistrate's decision and dismissed the appeal.

Mr Branch applies for leave to appeal against that decision. His application is made under s 118(3) of the *District Court of Queensland Act* 1967 (Qld). The principles that apply to an application of this kind were summarised by Bowskill J with the agreement of the other members of the Court in *McDonald v Queensland Police Service* [2017] QCA 255 at [39]. Of those principles, in the present case the following are particularly relevant:

(1) Leave to appeal should not be given lightly, given that the applicant has already had the benefit of two judicial hearings.

(2) The mere fact that there has been some error is not ordinarily by itself sufficient to justify the granting of leave to appeal. Leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant.

(3) If leave is granted, the appeal is an appeal in the strict sense in which this Court has not engaged in a rehearing so that it is not for this court to substitute its own findings for those of the District Court judge, except if there is no evidence to support the finding or the finding is shown to be unreasonable in the sense described by Dixon J in *Hocking v Bell* (1945) 71 CLR 430 at 497 – 499.

The new evidence from the department indicated that the police officer was mistaken about his recollection of the speed limit at various points along the road, although his evidence as to the speed limit at the relevant location was accurate. That inaccuracy was not a substantial basis for the rejection of his evidence overall.

The police officer had a camera on his helmet, normally activated by the pressing of a switch on the helmet. The police officer testified that he had tried to do this at earlier stages whilst following Mr Branch but that the camera was not activated until a late stage when it recorded what the judge described as:

> "…the last part of the interaction between the police officer and the appellant."

The magistrate accepted that evidence. The activation of the camera captures the preceding two minutes and Mr Branch says that the film demonstrates that, during that period, the officer was not trying to activate his camera. But that does not prove that the officer was unreliable in relevant respects.

The magistrate said that there was no rational explanation of why the police officer would give the evidence that he did, other than that it was a clear recollection of what he observed. It must be said that it is not unknown for incorrect evidence to be given by police officers, as with other witnesses. But the magistrate explained his observation by saying there was nothing in this case to suggest that the officer was seeking to fabricate or exaggerate the facts or that he was mistaken. If the officer was mistaken in his recollection about when he first saw the edge filtering, the judge was not bound to reject the officer's evidence in its essential respects. Nor was the officer's evidence inconsistent with the evidence from the department about traffic congestion.

It may be difficult for Mr Branch, without the benefit of legal advice, to understand the limitations that apply in this Court to a case such as this. Those limitations are the result of sections 118 and 119 of the *District Court of Queensland Act* 1967 (Qld). An error by the District Court judge which is likely to have resulted in a substantial injustice to the applicant must be demonstrated. No error of that kind is demonstrated and, nor, more generally, does it appear that the judge did not conduct a rehearing of the case, as Mr Branch seems to suggest.

Further, if Mr Branch was granted leave to appeal, in this case, there is no basis upon which this Court could substitute its own factual findings for those of the magistrate and the judge. In my view, the application for leave to appeal must be refused.

HOLMES CJ: I agree.

PHILIPPIDES JA: I also agree.

HOLMES CJ: The application for leave to appeal is refused.