IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

AP.96/96

BETWEEN: H

Appellant

A N D: **POLICE**

Respondent

Counsel: Appellant in person
P.J. Morgan for accused

Hearing and Judgment: 25 March 1997

JUDGMENT OF PENLINGTON J

Solicitors: Crown Solicitor, Hamilton

Originally this was an appeal against conviction and sentence. Ultimately there was no challenge to the sentence.

The appellant is a cattle buyer. He drives 70,000 kilometres per year. He was charged with exceeding the speed limit of 100 kilometres per hour on the afternoon of Sunday, 24 March at 4.41 pm at Taupiri.

The appellant appeared before two Justices of the Peace on 2 October at the District Court at Huntly. He represented himself. He pleaded not guilty. After a defended hearing, in which a Police Officer gave evidence for the prosecution and the appellant gave evidence for the defence, he was convicted and fined $160, together with Court costs.

The appellant now challenges the conviction.

As to the factual background, a Constable gave evidence that on the afternoon of Sunday, 24 March he was on duty in an unmarked Police vehicle on Gordonton Road near Taupiri. He was operating a Hawk microwave unit. He was certified in the use of the unit. He said in evidence that he spotted a Nissan motor car travelling in a southerly direction. He checked its speed at 126 km/h between Carey Road and Henry Road. He said it was the only vehicle in the beam. He immediately made a U-turn and pursued the Nissan motor car. The Constable said that he used his flashing

lights and siren to pull the Nissan into the side of the road. Ultimately he stopped the Nissan by Ballard Road.

The Constable identified the appellant as the driver. He had a discussion with the appellant. The latter said that he had been to a children's cricket match in Auckland and that his wife was seriously ill. The Constable deposed that he offered the appellant a view of the screen, but that the offer was declined. He further said that he would send the appellant a traffic infringement notice. A notice was later sent to the appellant.

The Constable deposed to carrying out a calibration test at the commencement of his shift at 3.00 pm of the day of the alleged offence. That test included tuning fork tests and zeroing tests. He said the unit was operating correctly. To this end he produced a photo-copy of his log book. As well he produced a certificate of accuracy of the unit which was dated 8 July 1995.

The appellant, in giving evidence, said that he was homeward bound to his wife with two children. She unfortunately suffers from Multiple Sclerosis. He said he had been umpiring at a children's cricket match. He conceded that he was late getting home and that he was anxious. He asserted that he had passed three cars which were travelling at about 75-80 km/h in a tight bunch. He conceded that it was a very busy road. He

claimed to be happy with his speed and added "I didn't think that I was speeding".

The appellant joined issue with the prosecution on a number of peripheral points. He contended that he was not offered a view of the screen. He claimed that the Constable had said that he would discuss the whole matter with his senior sergeant before deciding whether to issue an infringement notice. He also complained in his evidence that he had written to the police, without any response.

The Justices of the Peace held that the three essentials to a successful prosecution had been established. First that the appellant was the driver; secondly that he was driving in excess of the speed limit; and thirdly that he was in the location mentioned in the Information.

On an appeal such as this, the onus is on the appellant to show that the decision of the Judge was wrong. The appellant is required to satisfy this Court that in all the circumstances the Justices of the Peace were not warranted in entering a conviction, or at least that their minds should have been left in a state of reasonable doubt.

In this Court, any advantages which the Justices of the Peace may have had in seeing and hearing the witnesses must be borne in mind. See

Perkins v Police [1987] 2 CRNZ; ***Toomey v Police*** [1963] NZLR 699; and ***Page v Police*** [1964] NZLR 974.

The appellant conducted his own case on appeal. He raised a number of points.

First he contended that the Constable had said that there were no other cars on the road whereas there were at least three other cars on the road and that they would raise a reasonable doubt as to the identification of the appellant's car by the Constable.

I have carefully considered the evidence. It is plain that the Constable did not say that there were no other cars on the road. Rather, what he said was that there were no other vehicles in the view of the beam at the material time. The point now made on appeal was put by the appellant to the Constable in cross-examination. The Constable again affirmed that he checked the appellant's speed and that his vehicle was the only vehicle in the beam at the time. I note that when the appellant gave his evidence, he that there were other cars on the road and that he mentioned his passing manoeuvre of the three cars. I also note however that he did not at any time say in his own evidence that there was more than one car in the beam.

In my view, this point therefore fails.

Secondly, the appellant, as I have stated above, joined issue on the question of whether he was given the opportunity to check the screen. The Constable said that he had afforded the appellant that opportunity but that the appellant declined it. The appellant, on the other hand, said he was not given that opportunity.

At the most this was a challenge to the credibility of the Constable. Plainly the Justices of the Peace preferred the evidence of the Constable. While they did not refer to this point specifically, it is clear that they accepted the Constable's evidence. They saw and heard both the Constable and the appellant give evidence. They preferred the Constable. In any event, this point does not bear on whether the appellant exceeded the speed limit.

Thirdly, the appellant complained that the Constable did not issue him with a ticket on the spot. The appellant now submits that that was indicative of a doubt in the Constable's mind. That point, however, was not put by the appellant to the Constable in that way under cross-examination. The Constable quickly heard the explanation of the appellant and it seems that the matter was terminated at that point out of consideration for the appellant's situation. The ticket point does not, in any event, assist the appeal.

Fourthly, the appellant asserted in his evidence, and he repeated the point before me, that the Constable had said that he was going to refer the matter to a senior sergeant before there was going to be a prosecution. The Constable, on the other hand, indicated that the reference to the senior sergeant was in the context of the appellant writing in and explaining the alleged offence.

Once again, there was a conflict on this point. It does not affect the critical issue of whether the appellant exceeded the speed limit, but in any event, as I have said earlier, the Justices of the Peace must have preferred the evidence of the Constable to that of the appellant, having regard to the conclusions which they articulated.

Fifthly, the appellant complained that he had written and telephoned the police following the alleged offence and that he had not received any response.

The police may have been discourteous to the appellant, but whether or not they replied to his enquiries does not bear on the issue which I must consider.

Sixthly, the appellant asserted that he raised the possibility that the unit was not working satisfactorily. The point was put to the Constable. He

responded by stating: "With the tests that I did, it [that is the machine] was operating correctly that afternoon."

I have carefully considered the cross-examination on this point. In my view it did not raise a reasonable doubt. This case can be distinguished from the situation which confronted the Court in ***MOT v Hughes*** [1991] 3 NZLR 325.

Seventhly, and lastly, the appellant complained about not having the opportunity to addressing the Court on sentence. In the event he was given the opportunity but because of the way that the appeal was conducted, any question relating to sentence was no longer in issue.

In my view the appellant has failed to discharge the onus which is incumbent on him on this appeal. He has not satisfied me that the Justices of the Peace should have been left in a state of reasonable doubt. The critical factual issues before the Justices of the Peace were: was the appellant's car in the radar beam, and if so what was its speed? Both these questions were answered adversely against the appellant on the evidence. The Justices of the Peace were entitled to accept that evidence, and they did accept that evidence. They found that the appellant exceeded the speed limit as alleged.

I see no reason for disturbing these findings. I am not persuaded by any of the points raised by the appellant. Accordingly, the appeal is dismissed.

P.G.S. Penlington J