

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI-2022-404-000095
[2022] NZHC 1582**

BETWEEN

VIPUL GAMBHIR
Appellant

AND

NEW ZEALAND POLICE
Respondent

Hearing: 28 June 2022

Appearances: Justin Harder for the Appellant
Alexander Gee for the Respondent

Judgment: 5 July 2022

**JUDGMENT OF MOORE J
[Application for leave to bring a second appeal against conviction]**

This judgment was delivered by me on 5 July 2022 at 3:00 pm.

Registrar / Deputy Registrar

Date:

Introduction

[1] Vipul Gambhir disputed an infringement notice alleging that he had exceeded the applicable speed limit on a highway in Dome Valley. The dispute was heard before Justices of the Peace. The Justices found that the infringement was proved and fined Mr Gambhir \$170.

[2] Mr Gambhir paid the fine but nevertheless appealed to the District Court. On 16 February 2022, Judge E M Thomas dismissed the appeal.¹

[3] Mr Gambhir now seeks leave to bring a second appeal against conviction.

The infringement

[4] On Sunday, 13 December 2020, Mr Gambhir was driving on State Highway 1 in Dome Valley. Road workers had previously demarcated a stretch of the highway with signs displaying a temporary 50 kilometre per hour speed limit. The temporary speed limit was originally imposed as road works were being conducted.

[5] Constable Thow was on duty conducting speed enforcement in the area. His radar measured Mr Gambhir's vehicle travelling at 75 kilometres per hour. He pulled Mr Gambhir over. He then issued Mr Gambhir a fine of \$170 and 35 demerit points.

Hearing before Justices of the Peace

[6] Mr Gambhir disputed the infringement before the Justices. He accepted that Constable Thow recorded his car travelling at 75 kilometres per hour.

[7] Mr Gambhir's case was that the applicable speed limit varied depending upon whether the road works were attended or unattended. He cited an NZTA press release for the area which stated that the applicable speed limit was 70 kilometres per hour when the site was unattended. The limit reduced to 50 kilometres per hour when the site was attended. He gave evidence that on the day that he was issued the fine the 50 kilometres per hour speed limit sign was present, despite it being a Sunday and the

¹ *Gambhar v Police* [2022] NZDC 2522. The intituling of the judgment misspells Mr Gambhir's surname so is cited with that error.

site being unattended. His argument was that the speed limit was actually 70 kilometres per hour.

[8] While the Justices expressed some sympathy with Mr Gambhir's position, they noted that they were bound to apply the law. They found that, rightly or wrongly, the posted speed limit was 50 kilometres per hour and that was the speed limit Mr Gambhir was required to follow. The Justices concluded by commenting that:

“[7] As a side note, it is disappointing that roading contractors throughout New Zealand are very lax in the management of their safety plans. We all know of experiences when signs have been left up when they are not applicable, but unfortunately until somebody takes something against the contractors to do their jobs properly, we all suffer and we have a lot of sympathy for your position, unfortunately, it cannot be that way in law.”

Appeal to the District Court

[9] Mr Gambhir appealed to the District Court. He argued that the Justices failed to appreciate that the site was unattended and that the posted speed limit should have been 70 kilometres per hour. He produced a traffic management plan for the site which stated that this was the speed limit when the site was unattended.

[10] Judge Thomas considered that Mr Gambhir was unable to demonstrate that the Justices had misinterpreted the word “unattended”. The Judge explained:

“[4] ... ‘Unattended’ can mean many different things. It can mean that there are no works going on at the site. It can mean that there are no works going on that day on the site. It can mean that there are no works going on at that particular moment because everybody is having a coffee break. It could mean all sorts of things.”

[11] Although contractors confirmed that there may not have been anybody on site that day, the Judge considered that Mr Gambhir was unable to prove that “the site was unattended from a legal point of view”. In any event, the Judge found that there could be no miscarriage of justice because Mr Gambhir was driving at 75 kilometres per hour, which exceeded the 70 kilometre per hour speed limit he argued for. His appeal was dismissed without any further legal analysis.

Application for leave to bring a second appeal

[12] Mr Gambhir now applies for leave to bring a second appeal against conviction.² Leave must not be granted unless the appeal involves a matter of general or public importance, or that a miscarriage of justice may have occurred, or may occur unless the appeal is heard.³ The threshold for granting leave is high, particularly because not every error will carry with it a risk of a miscarriage of justice.⁴

Should leave to appeal be granted?

[13] Mr Harder, for Mr Gambhir, seeks leave to appeal on two bases. The first is that Mr Gambhir’s appeal involves a matter of general or public importance insofar as it concerns the meaning of “applicable speed limit” under the Land Transport Rule: Setting of Speed Limits 2017 (“the Rules”). He submits that the proper interpretation has broad implications for road safety. He further submits that allowing the appeal would signal to the relevant authorities the need for greater care when managing temporary speed limit signage.

[14] The second is that a miscarriage of justice has occurred because the Justices failed to determine whether the temporary speed limit was “right or wrong” and in doing so failed to determine whether an essential element of the offence was proved. Mr Harder submits that the burden of proof was wrongly shifted onto Mr Gambhir.

[15] The interpretation of the Rules is capable of qualifying as a question of law of general importance.⁵ Their general importance is reflected in their purpose, which includes giving effect to a nationally consistent and evidence-based approach to speed management and deciding which speed limit is safe and appropriate for roads.⁶ The Rules apply to every motorist who travels on roads in New Zealand. A decision clarifying the interpretation of the Rules will therefore have implications for the safety of all of those motorists.

² Criminal Procedure Act 2011, s 237(1).

³ Section 237(2).

⁴ *McAllister v R* [2014] NZCA 175 at [38]. See also *Larason v Police* [2021] NZCA 440 at [18].

⁵ *Larason v Police* [2021] NZCA 440 at [19].

⁶ Land Transport Rule: Setting of Speed Limits 2017, r 1.3.

[16] Such a decision will also have implications for road controlling authorities and contractors tasked with carrying out functions under the Rules. The Justices took notice of the common experience among New Zealanders encountering road work sites that are mismanaged by roading contractors. The essence of Mr Gambhir's case is that mismanagement of that kind has legal implications under the Rules. If he is correct, those implications would be of public importance and would no doubt be taken into account by the relevant authorities.

[17] I acknowledge that the Rules were superseded by a more recent iteration this year. In my view the wording of both iterations is sufficiently similar that the interpretation of the previous iteration will inform that of the most recent.

[18] For the Crown, the thrust of Mr Gee's opposition to the application is that even if a proposed appeal concerns a question of general importance, it must nevertheless raise a tenable argument.⁷ He submits that Mr Gambhir fails to raise a tenable argument that the posted speed limit was inoperative. It follows, in his submission, that Mr Gambhir cannot establish that there was miscarriage of justice.

[19] I am not satisfied that Mr Gambhir's argument should be discounted at this stage. The following facts appear to be accepted for the purpose of the argument:

- (a) that there was a 50 kilometre per hour speed limit sign installed on the relevant part of the highway in Dome Valley;
- (b) the sign related to road works being undertaken on that stretch of road;
and
- (c) the construction area was unattended at the relevant time, in the sense that there were no workers or others connected to the road works on duty or in the vicinity.

⁷ *Larason v Police* [2021] NZCA 440 at [19].

[20] This final point was seemingly contentious in the District Court, but clarified at the leave to appeal hearing. With the Crown's consent, Mr Harder produced an email in response to an Official Information Act 1982 request in which Waka Kotahi confirmed that there was no one working on the site on the relevant day,. This documentary record corroborates Mr Gambhir's evidence to the same effect. Although the facts will ultimately be a matter for the appellate Judge, it would be preferable for the parties to file an agreed statement of facts setting out what appears to be common ground relevant to the issues.

[21] The issue on appeal will be whether the Justices erred in their interpretation of the Rules by finding that the 50 kilometre per hour temporary speed limit was effective at the time Mr Gambhir infringed that limit. Whether that temporary speed limit was validly set and effective at the time of the alleged infringement is a question of law. The answer turns upon a reasonably complex exercise of interpreting the Rules. It also directly bears upon the risk of a miscarriage of justice.

[22] Neither the Justices nor the District Court Judge appears to have undertaken this interpretative exercise. The Justices accepted that it "could well have been the case that there was no work being carried out at the particular time" but relied upon the posted speed limit. The District Court found that Mr Gambhir failed to establish that the site was "unattended" in a legal sense. I make no criticism of either approach. Mr Gambhir was previously self-represented and is only represented by counsel in this Court. The inescapable conclusion is that this important question did not receive the attention and scrutiny it deserves.

[23] The consequence is that the arguments signalled by Mr Gambhir on this application concern a matter of public importance and have not yet been fully argued and determined. If Mr Gambhir is correct but leave is not granted, a miscarriage of justice will have occurred. It follows that a grant of leave is necessary to enable full argument.

Result

[24] The application for leave to bring a second appeal against conviction is granted.

Moore J

Solicitors:

Mr Harder, Auckland

Crown Solicitor, Auckland