SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCI 2024 0067

ROSARIO PELLIGRA — Applicant

v

HAMISH GUTHRIE FORBES — Respondent

JUDGES:	NIALL, MACAULAY and T FORREST JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	2 August 2024
DATE OF JUDGMENT:	17 October 2024
MEDIUM NEUTRAL CITATION:	[2024] VSCA 242
JUDGMENT APPEALED FROM:	[2024] VSC 311 (Watson J)

CRIMINAL LAW – Appeal – Applicant found guilty of exceeding speed limit – Applicant appealed from magistrate's order to Trial Division of Supreme Court on question of law – Where not driving heavy vehicle an element of the offence – Whether error in conclusion that applicant was not driving a heavy vehicle – No basis to conclude by inferential reasoning or judicial notice applicant's car not a heavy vehicle – Whether evidence established applicable speed limit – Unnecessary to decide – Leave to appeal granted – Appeal allowed – Charge dismissed.

WORDS AND PHRASES – 'heavy vehicle' – 'gross vehicle mass' – 'maximum loaded mass'.

Evidence Act 2008, s 144; *Heavy Vehicle National Law Act 2012* (Qld), sch, ss 5, 6; *Road Safety Act 1986*, s 3; *Road Safety (Drivers) Regulations 2019*, regs 5, 6; *Road Safety Road Rules 2017*, rr 20–25.

Fox v Director of Public Prosecutions (2022) 297 A Crim R 25, discussed.

Counsel

Applicant:	Mr OP Holdenson KC
Respondent:	Mr J O'Connor

Solicitors

Applicant:	Oakley Thompson & Co

Respondent: Ms A Hogan, Solicitor for Public Prosecutions

NIALL JA
MACAULAY JA
T FORREST JA:

1 On 21 June 2023, a magistrate found the applicant guilty of the offence of exceeding a speed limit of 100 kilometres per hour contrary to r 20(2) of the *Road Safety Road Rules 2017*. The applicant appealed that decision to the Trial Division of this Court, contending that the magistrate erred in finding that the Mercedes sports utility vehicle ('SUV') driven by the applicant was 'other than a heavy vehicle' — that being an element of the offence — and in finding that his speed exceeded the applicable speed limit of 100 kilometres per hour.

2 On 13 June 2024, the judge dismissed the appeal, finding that it was not reasonably open to question and was common knowledge generally that a Mercedes SUV of the kind driven by the applicant was a vehicle that could be driven with a car licence and did not require any form of heavy vehicle licence. His Honour also concluded that there was unchallenged evidence before the magistrate establishing that a 100 kilometres per hour speed limit applied and that the relevant signs complied with the *Road Safety Road Rules*.

3 The applicant now seeks leave to appeal from that decision on two grounds:

> 1. The learned Trial Judge erred in finding that the learned Magistrate had not erred when the Magistrate held that an element of the pleaded *Road Safety Road Rules 2017* [r] 20(2) charge of, 'being the driver of a vehicle, other than a heavy vehicle…' had been proved beyond reasonable doubt in that he could take judicial notice that the appellant's vehicle was not a heavy vehicle.
>
> 2. The learned Trial Judge erred in finding that the learned Magistrate had not erred when the Magistrate held that an element of the pleaded *Road Safety Road Rules 2017* [r] 20(2) charge of, '…exceeding a speed-limit sign…' had been proven beyond a reasonable doubt notwithstanding there was insufficient evidence of a compliant 'speed-limit sign' within the meaning of the description and diagram of same contained in [r] 21.

4 For the reasons that follow, we would grant leave to appeal, allow the appeal, set aside the orders of the magistrate and the judge and, in their place, make an order dismissing the charge.

Background

5 On 8 December 2020, the applicant was driving a black Mercedes AMG GLE along the Western Highway, Green Lake. The respondent, Leading Senior Constable Forbes, detected the applicant's speed as 143 kilometres per hour in an area where the speed limit was 100 kilometres per hour.

6 The applicant was charged with an offence that, contrary to r 20(2) of the *Road Safety Road Rules*, he:

> … at Green Lake on 08/12/2020, being the driver of a vehicle[,] other than a heavy vehicle, on a length of road, namely, Western Highway between 284 kilometre post and 286 kilometre post, did drive at a speed which exceeded a speed-limit sign of 100 kilometres per hour, which applied to the accused for the length of road on which the accused was driving, by 35 kilometres per hour or more but by less than 45 kilometres per hour. Detected speed 143 km/h[.] Alleged speed 141 km/h[.]

7 On 21 June 2023, the applicant was found guilty of that offence.

Relevant legislation

8 As at the date of the alleged offence,[1] r 20 of the *Road Safety Road Rules* relevantly provided as follows:

> **Obeying the speed-limit**
>
> …
>
> (2) A driver of a vehicle other than a heavy vehicle must not drive at a speed which exceeds the speed-limit applying to the driver for the length of road where the driver is driving by 35 kilometres per hour or more but less than 45 kilometres per hour.
>
> Penalty: In the case of a natural person, 15 penalty units; In the case of a body corporate, 120 penalty units.
>
> …
>
> (5) For the purposes of this rule, a ***heavy vehicle*** includes a motor vehicle (other than a bus) that has a GCM greater than 4.5 tonnes.
>
> **Notes**
>
> …
>
> 5 ***Bus, GCM, heavy vehicle*** and ***motor vehicle*** are defined in the **Road Safety Act 1986**.

9 Rules 21 to 25 of the *Road Safety Road Rules* specify the speed limit in particular circumstances, namely where a speed-limit sign applies (r 21), in a speed-limited area (r 22), in a shared zone (r 24) and elsewhere (r 25).[2]

10 It was confirmed in *Fox v Director of Public Prosecutions* and not in dispute that the fact that the accused drove 'a vehicle other than a heavy vehicle' constitutes an

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1 Subsequent to the alleged commission of the offence, rule 20 was amended so that there is a singular offence that applies to drivers whether or not they are driving a heavy vehicle.

2 There is no rule 23.

element of the offence of breaching r 20(2).[3] It follows, and is again not disputed, that in order to make out the charge the prosecution had to prove beyond reasonable doubt that the vehicle driven by the applicant was not a heavy vehicle. That required attention to the interlocking provisions that defined 'heavy vehicle'.

11 Section 3(1) of the *Road Safety Act 1986* includes the following definitions:

> ***GCM*** (gross combination mass) of a motor vehicle means the greatest possible sum of the maximum loaded mass of the motor vehicle and of any vehicles that may lawfully be towed by it at one time—
>
> (a) as specified by the motor vehicle's manufacturer; or
>
> (b) as specified by the Secretary if—
>
> (i) the manufacturer has not specified the sum of the maximum loaded mass; or
>
> (ii) the manufacturer cannot be identified; or
>
> (iii) the vehicle has been modified to the extent that the manufacturer's specification is no longer appropriate;
>
> …
>
> ***GVM*** (gross vehicle mass) of a vehicle means the maximum loaded mass of the vehicle—
>
> (a) as specified by the vehicle's manufacturer; or
>
> (b) as specified by the Secretary if—
>
> (i) the manufacturer has not specified a maximum loaded mass; or
>
> (ii) the manufacturer cannot be identified; or
>
> (iii) the vehicle has been modified to the extent that the manufacturer's specification is no longer appropriate;
>
> …
>
> ***Heavy vehicle*** has the same meaning as in the Heavy Vehicle National Law (Victoria).

[3] (2022) 297 A Crim R 25, 54 [115] (Kennedy, Walker and Whelan JJA); [2022] VSCA 38; see also *Kokas v Stanojlovic* (2021) 289 A Crim R 223, 231–2 [48]–[59] (Kyrou, Emerton and Kennedy JJA); [2021] VSCA 119.

12 Section 6(1) of the *Heavy Vehicle National Law (Victoria)*[4] ('National Law') defines 'heavy vehicle' as follows:

> For the purposes of this Law, a vehicle is a ***heavy vehicle*** if it has a GVM or ATM of more than 4.5t.

13 Under s 5 of the National Law, 'ATM', 'GVM' and 'loaded mass' are all defined:

> ***ATM*** (aggregate trailer mass), of a heavy trailer, means the total maximum mass of the trailer, as stated by the manufacturer, together with its load and the mass imposed on the towing vehicle by the trailer when the towing vehicle and trailer are on a horizontal surface.
>
> …
>
> ***GVM*** (gross vehicle mass), of a vehicle, means the maximum loaded mass of the vehicle—
>
> (a) if the registration authority has specified the vehicle's maximum loaded mass—specified by the registration authority; or
>
> (b) otherwise—stated by the vehicle's manufacturer.
>
> …
>
> ***loaded mass***, of a vehicle, means the vehicle's mass together with the mass of the vehicle's load that is transmitted to the ground.

14 Regulation 5(1) of the *Road Safety (Drivers) Regulations 2019* defines 'car' as follows:

> ***car*** means a motor vehicle, other than a motor cycle, that—
>
> (a) has a GVM of not more than 4.5 tonnes; and
>
> (b) is constructed or equipped to seat not more than 12 adults (including the driver);
>
> **Note**
>
> ***GVM*** is defined in section 3 of the [*Road Safety Act*].

15 The licensing regime does not operate by reference to the term 'heavy vehicle' but rather by reference to categories of motor vehicles including 'car', 'light rigid vehicle', 'medium rigid vehicle', 'heavy rigid vehicle' and 'heavy combination vehicle', each of which is a defined term. Regulation 6 of the *Road Safety (Drivers) Regulations* defines a number of categories of motor vehicles for licensing purposes. So, for example, it provides for a 'car' licence relevant to cars (as defined) and a 'light

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4 Set out in the Schedule to the *Heavy Vehicle National Law Act 2012* (Qld) and applied as a law of Victoria by s 4 of the *Heavy Vehicle National Law Application Act 2013*.

rigid vehicle' licence which authorises driving a light rigid vehicle,[5] which is defined to mean 'a motor vehicle that has a GVM of more than 4.5 tonnes but not more than 8 tonnes; or seats more than 12 adults (including the driver) and has a GVM of not more than 8 tonnes'.[6]

16 It will be appreciated that s 3 of the *Road Safety Act* defines the GVM of a vehicle by reference in the first place to a specification by the vehicle's manufacturer. For that reason, a vehicle could, at least theoretically, be a car for the purposes of the licensing regime (because the manufacturer specified a GVM of 4.5 tonnes or less) but a heavy vehicle for the purposes of the National Law and, therefore, the offence provision because the registration authority specified a GVM of more than 4.5 tonnes.

17 Finally, s 144 of the *Evidence Act 2008* provides as follows:

> **Matters of common knowledge**
>
> (1) Proof is not required about knowledge that is not reasonably open to question and is—
>
> (a) common knowledge in the locality in which the proceeding is being held or generally; or
>
> (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
>
> (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
>
> (3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.
>
> (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

The evidence

18 Given the scope of the application for leave to appeal, it is unnecessary to rehearse the evidence before the magistrate other than to note the following.

19 The respondent gave the following evidence in relation to the applicable speed-limit signs in his examination-in-chief:

> COUNSEL: Thank you, Your Honour. All right, Mr Forbes. Now, you've described the stretch of road. What speed zone is that?---It's 100 kilometre per hour speed zone.

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5 *Road Safety (Drivers) Regulations*, reg 6(2).

6 Ibid reg 5(1) (definition of 'light rigid vehicle').

> COUNSEL: All right, and did you ---
>
> HIS HONOUR: I missed that answer. What was the answer?
>
> COUNSEL: (Indistinct words) answer. Can you say it again?---Ah, sorry. It's a 100 kilometre, ah, sign posted speed zone.
>
> COUNSEL: Okay. Do you know where the signposts are?---Um, there'll be a 100 kilometre signpost coming out of Dadswells Bridge, which is an 80 kilometre per hour zone.
>
> COUNSEL: Okay?---And there'll be one on the other side, yeah, coming out of Horsham.

20 The applicant tendered an expert report by Dr George Rechnitzer, an engineer, that was admitted into evidence. In his report, Dr Rechnitzer analysed the cruise control function of the applicant's vehicle to determine whether it could have led to the applicant's claimed unintentional increase in speed. Dr Rechnitzer included photographs of the applicant's vehicle as well as describing its dimensions and stating that its kerb weight was 2,438 kilograms. The report also described the model of the applicant's vehicle as an 'SUV'.

21 Dr Rechnitzer's report also reproduces the respondent's statement from the police brief, which includes the following passage in relation to the speed zone where the applicant's alleged offending was detected:

> Western Highway is a highway as defined by the Road Safety Act 1986. The speed zone where the radar was being used and accused speed was checked is 100 kilometres per hour. This zone is defined by the erection of a 100 kilometre per hour sign at the commencement and an 80 kilometre per hour sign at the end. The signs comply with Road Safety Road Rules 2019 [sic].

The magistrate's decision

22 The applicant contended before the magistrate that the prosecution had not proved beyond reasonable doubt that a Mercedes AMG GLE was other than a heavy vehicle and that it was not a matter of common knowledge that it was other than a heavy vehicle.

23 The magistrate held, relevantly:

> I am aware from my own experience that the accused's vehicle is other than a heavy vehicle. I infact [sic] have a category of heavy vehicle license. I am conscious however that the test is not my knowledge based on some 'special' knowledge that I might have. Whilst I am not sure that verification by means of the type of licence with which the vehicle can be driven is sufficient (as was submitted by the prosecution) I am satisfied that it is common knowledge that the vehicle driven by the defendant was not a heavy vehicle. I am satisfied that I can take judicial notice of the fact that the accused['s] vehicle was other than a heavy vehicle.

24 The magistrate regarded the evidence of the respondent in examination-in-chief as establishing that a 100 kilometre speed limit applied at the time of the offence.

The judge's reasons

Heavy vehicle

25 Section 144(1)(a) of the *Evidence Act* provides that proof is not required about knowledge that is not reasonably open to question and that is common knowledge in the locality in which the proceeding is being held or generally. The judge observed that that provision refers to common knowledge that is not reasonably open to question and does not require that all persons must be aware of the fact for it to be common knowledge.[7] Rather, the fact need only be sufficiently generally known that it gives rise to a presumption that it is something overwhelmingly understood and accepted within the community as true.[8]

26 After reviewing some relevant authorities, his Honour observed that the relevant legislative provisions do not define 'heavy vehicle' by reference to ordinary usage but rather by reference to the gross vehicle mass ('GVM'). Consequently, a finding that it was common knowledge that a Mercedes SUV was not a heavy vehicle according to ordinary usage would not suffice for proof of the offence.[9] Further, the judge was not satisfied that it was common knowledge that a vehicle with the kerb mass of the applicant's vehicle could not lawfully be loaded beyond 4.5 tonnes.[10]

27 However, his Honour was satisfied that it was not reasonably open to question and was common knowledge generally that a Mercedes SUV of the type driven by the applicant was a vehicle that could be driven with a car licence and did not require any form of heavy vehicle licence.[11] Further, pursuant to the *Road Safety (Drivers) Regulations*, a car driver licence on its own only permits a vehicle with a GVM of not more than 4.5 tonnes to be driven and any vehicle with a GVM of greater than 4.5 tonnes requires some form of heavy vehicle licence.[12] His Honour found that those facts combined support the inference that Mr Pelligra's vehicle was not a heavy vehicle.[13]

Speed limit sign

28 After reviewing relevant authorities, the judge observed that the magistrate was correct to regard the unchallenged evidence of the respondent as establishing that a 100 kilometre per hour speed limit applied. The evidence established that it was a sign posted speed sign, gave the location of the relevant signs and established the speed

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7 *Pelligra v Forbes* [2024] VSC 311, [19] ('Reasons').
8 Ibid [20].
9 Ibid [33].
10 Ibid [34].
11 Ibid [35].
12 Ibid [36].
13 Ibid [37].

limit on the signs. The judge did not consider that it was a necessary element for the prosecution to establish that the particular signs were under r 21 of the *Road Safety Road Rules*.[14] Rather, in the context of the respondent's evidence, it was open to the magistrate to infer that the references to the 100 kilometre signposts were references to physically-compliant signs. Even if the respondent's evidence were insufficient, the report of Dr Rechnitzer tendered by the applicant before the magistrate, which reproduced the relevant portion of the respondent's statement, confirmed that the signs complied with the *Road Safety Road Rules*.[15]

Ground 1: Submissions

29 The applicant contends that it was necessary for the prosecution to prove that the registration authority had specified a GVM of 4.5 tonnes or less or, alternatively, that the manufacturer had made a statement that the GVM was 4.5 tonnes or less. By contrast, it is wrong to determine whether the applicant's vehicle was other than a heavy vehicle by seeking to ascertain the weight of the vehicle and leading evidence of that measurement. The magistrate erred by failing to apply the statutory definition, which exhaustively defined the means by which a vehicle can be proved to be other than a heavy vehicle for the purpose of the offence provision.

30 Alternatively, even if the status of the applicant's vehicle is capable of proof by other means, the applicant submits that the magistrate was wrong to conclude that he could take judicial notice of the fact that the applicant's vehicle was not a heavy vehicle because the matters that determine whether the applicant's vehicle was a heavy vehicle are not matters of common knowledge. Further, given the complex and intricate nature of the regulatory scheme, it is not common knowledge that a heavy vehicle licence is not required to drive a vehicle of the kind driven by the applicant, so that an inference cannot be drawn based on that fact that the applicant's vehicle was other than a heavy vehicle.

31 The respondent concedes that there was no evidence as to the specification by the registration authority or manufacturer's statement as to the vehicle's GVM, but says that this is not conclusive as to whether the vehicle was other than a heavy vehicle. The definition of GVM in the National Law should not be interpreted as requiring a single method of proof of the classification of a vehicle as a heavy vehicle or otherwise. 'Maximum loaded mass', the core aspect of the definition of GVM, has a meaning independent of the registration authority's specification or manufacturer's statement. If the definition of GVM did require proof of such a specification or statement, the unlikely consequence would follow that an offence contrary to r 20(2) would not be able to be proved if neither the registration authority nor the vehicle's manufacturer had specified a figure for the vehicle's maximum loaded mass.

32 Alternatively, the respondent contends that, if the definition of GVM did require proof of an actual specification by a registration authority, then r 20(2) must be read as

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14 Ibid [50].
15 Ibid [51]–[52].

impliedly excluding that requirement for the purpose of the offence provision.[16] Not to do so would lead to absurd outcomes — for example, that an offence of speeding by 'driving' a bicycle could not be proved.

33 The respondent then submits that there are two main ways to prove that the vehicle driven by the applicant was other than a heavy vehicle. First, judicial notice can be taken that the vehicle could be driven with a car licence and did not require any form of heavy vehicle licence. Second, it may be inferred from the evidence of the vehicle's appearance and evidence of its kerb weight in Dr Rechnitzer's report that the vehicle's maximum loaded mass was less than 4.5 tonnes. As to the first step, the judge correctly applied the test for judicial notice. To the extent that the trial judge decided that the second approach was not available, the respondent contends by its notice of contention that the judge erred.

34 In response to the notice of contention, the applicant contends that evidence of the appearance, dimensions and kerb mass of the applicant's vehicle cannot support a finding beyond reasonable doubt that the applicant's vehicle was other than a heavy vehicle because those matters cannot support a finding as to the registration authority's specification or the manufacturer's statement.

Ground 1: Decision

35 The elements of the offence not being in doubt, the critical issue is whether the prosecution proved beyond reasonable doubt that the vehicle driven by the applicant was not a heavy vehicle. The starting point of the inquiry is to identify the fact or facts that were required to be proved in order to make out the relevant element. Having done that, it will be necessary to determine whether the prosecution proved those facts either by admissible evidence, judicial notice, inference or a combination thereof.

36 As an aside, it may be observed that both the magistrate and the judge found that the relevant facts were proved by means of judicial notice, although the process of reasoning differed between them. On an appeal on a question of law, it would be enough if the applicant established that the recourse to judicial notice was in error. However, in the event that this Court were persuaded that there was sufficient evidence on which the relevant element could be established, the best that the applicant could achieve would be an order setting aside the magistrate's orders and an order remitting the charge to the Magistrates' Court for hearing. For that reason, the applicant took on the additional burden of arguing that there was no evidence, including that which could be established by judicial notice, that could have proved that the vehicle was not a heavy vehicle and, therefore, he was entitled to a finding that he was not guilty of the charge and an order dismissing it.

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16 Citing *Kelly v The Queen* (2004) 218 CLR 216, 253 (McHugh J); [2004] HCA 12 in relation to the construction of definitions.

What needed to be proved?

37 In order to prove that the applicant's car was not a heavy vehicle, the prosecution had to prove that the car had a GVM of no more than 4.5 tonnes.

38 It is noted that each of the *Road Safety Act* and the National Law define 'GVM'. The two definitions appear to be deceptively similar although contain a difference, in that they reverse the order in which the relevant specification and statement appear. As the definition of 'heavy vehicle' in the *Road Safety Act* picks up the definition of 'heavy vehicle' in the National Law, which in turn refers to 'GVM', it is tolerably clear that the relevant definition of 'GVM' is that contained in the National Law.

39 In the event that the relevant registration authority has specified the vehicle's maximum loaded mass, the GVM is the amount so specified. It is only in the event that the registration authority has not specified a figure that recourse to the maximum loaded mass stated by the manufacture might be relevant.

40 The respondent submits that the specification by the registration authority or the statement by the manufacturer are only means of proof rather than the fact to be proved. The respondent submits that the GVM of a vehicle is its maximum loaded mass, which does not depend on there being a specification or statement. On that basis, the respondent submits that the GVM could be proved by other means. We do not accept that submission. It does not reflect the text of the provision, which expressly defines 'GVM' as meaning one or the other of the two figures identified. The definition of 'GVM' is exhaustive and the two potential alternative definitions define the universe of possibilities.

41 The 'loaded mass' of a vehicle is defined in s 5 of the National Law to mean 'the vehicle's mass together with the mass of the vehicle's load that is transmitted to the ground'. Empirically, the loaded mass for a given vehicle will depend on its fixed mass and the mass of any additional load that is placed on the vehicle. Its maximum loaded mass means some figure that represents an upper limit of its mass. That upper limit must be set in some way by some body by reference to some criteria. It is likely that the criteria will be informed by matters such as safety, efficiency and other functional considerations such as durability and the intended range of operating speeds of the vehicle.

42 Under the National Law, the GVM is determined in the first place by the registration authority or, in the absence of a specification by the registration authority, by the manufacturer. It is not possible to discern some objectively-derived GVM using the laws of physics and based on considerations of a safe working or driving load, discerned by reference to legislative purpose but divorced from an actual specification or statement. There is no means provided in the legislation for working out what the maximum loaded mass should be. Rather, the definition unmistakably requires the GVM to be determined either by reference to the registration authority's specification or the manufacturer's statement.

43 To treat the GVM as a vehicle's safe working load would also give rise to an absurd result. On the respondent's approach, a GVM would be 4.5 tonnes or less if the Court determined on the evidence before it that the safe maximum working load for the

applicant's car was 4.5 tonnes or less. How that finding might sit with an inconsistent specification or statement was not explained. If, as the respondent submits, the specification is merely to facilitate proof, then presumably a court might find based on the evidence before it that the safe working load is more or less than the specified mass. Yet there is no process in the National Law to enable a court to reconcile those two figures. A vehicle's GVM, and therefore compliance with the requirements of the National Law, would depend on a subsequent factual inquiry as to its objective safe working load. The respondent's submission would introduce uncertainty and imprecision, which would be the antithesis of an orderly regulatory regime.

44 The respondent says that to treat the specification or statement as the thing to be proved would produce anomalous results because some of the items that fall within the definition of 'vehicle', such as a horse or bicycle, would not be registered nor, in the case of a horse, will there be a manufacturer. In truth, there is no anomaly. If in fact a registration authority or manufacturer has not specified or stated a maximum loaded mass for a vehicle, including because the vehicle is not registered or manufactured, the vehicle will not have a GVM. It would also follow that it would not have a GVM of more than 4.5 tonnes and would therefore be 'a vehicle other than a heavy vehicle'. For that reason, the respondent's alternative submission that r 20(2) of the *Road Safety Road Rules* must be read as excluding the definition of GVM to avoid absurd outcomes must be rejected.

45 The first step in the respondent's principal argument that the relevant fact was the maximum loaded mass which did not require proof of a specification or statement must fail. The respondent submitted in the alternative that whether there is a specification or statement for the vehicle with a GVM of more than 4.5 tonnes could be proved inferentially.

How might the fact be proved?

46 Having identified the fact to be proved, the issue then becomes how it might be proved.

47 There are three obvious ways for the prosecution to prove that a vehicle is not a heavy vehicle:

(a) prove that the registration authority has specified a maximum loaded mass of 4.5 tonnes or less;

(b) prove that the registration authority has not specified a maximum loaded mass and prove that the vehicle's manufacturer has stated a maximum loaded mass of 4.5 tonnes or less; or

(c) prove that there is neither a specification nor a statement of the vehicle's maximum loaded mass.

48 Although it is very likely that the specification or statement will be in writing, the National Law does not prescribe any particular form in which the specification or statement might be made. If they are in writing, then the contents of the document could be proved by, among other means, producing an original document, producing a

document that is a copy or purports to be a copy of the original document or, if the document is not available, by adducing oral evidence from a person familiar with the contents of the document.[17]

49 The prosecution made no attempt to prove the fact in this way. There was no direct evidence as to whether or not the registration authority had specified a maximum loaded mass for a car of the kind driven by the applicant. The applicant submits that, in the absence of direct evidence of the relevant fact, the fact could not be proved and the prosecution was doomed to fail. We do not accept that submission.

50 Logically, depending on the evidence, it may be possible to infer that there is no reasonable possibility that either the registration authority or the manufacturer would have specified or stated a maximum loaded mass of more than 4.5 tonnes for a car of the kind driven by the applicant. That reasoning would not require direct proof of whether or not the registration authority had specified or the manufacturer had stated a maximum loaded mass. If the evidence permitted that inference to be drawn to the criminal standard then, in our view, it would be a permissible means of proof. It follows that we reject the applicant's submission that the only means of proof would be to produce the certificate or statement or some statutorily-facilitated mode of proof such as that contained in s 84(1) of the *Road Safety Act*.

51 Having said that, given the nature of the fact to be proved, which involves a regulatory or manufacturer's decision that is likely to be informed by a large number of variables including safety and regulatory purposes and, from the perspective of the manufacturer, commercial imperatives, it would be very difficult to prove the GVM by inference. It would be entirely imprudent for the prosecution to attempt do so, when direct modes of proof are available to it.

Did the prosecution prove that the applicant's car was not a heavy vehicle?

52 The respondent contends that either by a combination of judicial notice and inferential reasoning in the way used by the judge, or simply by a process of inferential reasoning alone, it was proved that the applicant's car was not a heavy vehicle.

53 We deal first with the method adopted by the magistrate, which we observe was not defended by the respondent. The magistrate said that it was common knowledge that the vehicle driven by the applicant was not a heavy vehicle. That reasoning can be rejected for two reasons. First, it does not appear that the magistrate was directing himself to the definition of 'heavy vehicle' contained in the relevant provisions. Second, whether the registration authority or the manufacturer has specified or stated a GVM is not a matter of common knowledge.

54 The judge did not adopt the reasoning of the magistrate. The judge noted the evidence that the kerb weight of the car was 2.438 tonnes.[18] From that, the judge inferred that, in order for it to be a heavy vehicle, the car would have to be capable of being loaded

17 *Evidence Act*, s 48.
18 Reasons, [34].

lawfully with more than 2.062 tonnes. The applicant submitted before the judge that the dimensions of the car might permit it to be loaded with more than that additional mass. Although the judge did not accept that reasoning, he said that, nonetheless, he was not satisfied that it was common knowledge that a vehicle with the kerb mass of the applicant's car could not lawfully be loaded beyond 4.5 tonnes.[19]

55 The judge approached the matter differently. He was prepared to find that, as a matter of common knowledge, a heavy vehicle licence is not required to drive an SUV generally or a Mercedes SUV in particular.[20] When combined with the licence regime that required any vehicle with a GVM of more than 4.5 tonnes to have 'some form of heavy vehicle licence',[21] the judge concluded that the applicant's car was not a heavy vehicle. We do not find that reasoning persuasive.

56 The judge's conclusion rests upon a syllogism, namely: a heavy vehicle is one that, to be driven, requires the driver to hold a heavy vehicle licence; a car of this type does not require the driver to hold a heavy vehicle licence; therefore, the car is not a heavy vehicle. It is accepted that one of the legal attributes of a heavy vehicle is that it requires a special licence to be driven.[22] The main problem with the reasoning is with the second step — that is, in proving that the driver of the car does not require a special licence.

57 The judge concluded that, as a matter of common knowledge, a car of this type, namely an SUV, does not require a special licence. In our opinion, the licencing requirements that attach to particular kinds of vehicles are not matters of common knowledge that are not reasonably open to question within the meaning of s 144(1) of the *Evidence Act*. That is so because the fact of which there is said to be common knowledge elides the practical understanding of how the law operates with the true legal position. Moreover, it relies upon a contestable inference. Rather than an assertion of direct common knowledge of a fact — such as that Christmas Day falls on 25 December — here, it is an assertion of common knowledge of a common practice (that SUVs are generally driven using a car licence) from which to infer that, as a matter of law, drivers of SUVs do not require a special licence.

58 Further, whether or not that understanding or knowledge is reasonably open to question depends on whether it is legally correct. In turn, that would require establishing the correct legal position. In this case, that would require proving that the vehicle is not a heavy vehicle. The vice also flows from treating people's common understanding of the law as establishing the state of the law in the context of a criminal prosecution, where the standard of proof attracting to elements of the offence is beyond reasonable doubt.

59 There is a further factual complication not considered by the judge. As already observed, there may be a difference between a vehicle's status for licencing purposes

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19 Ibid.
20 Ibid [35], [37].
21 Ibid [36].
22 *Road Safety (Drivers) Regulations*, reg 7.

and for the purposes of the offence provision. This arises because of the different order in which the specification and statement appear in the definitions of 'GVM' under the *Road Safety Act* and the National Law. So, a vehicle might be a car for licencing purposes but a heavy vehicle for the purposes of the offence provision. It follows that the syllogism underpinning the judge's analysis that a heavy vehicle for the purposes of the offence provision will require a special licence is not necessarily correct and, we might add, not a matter of common knowledge.

60 The third potential mode of reasoning is that advanced by the respondent by way of the notice of contention. By a process of inferential reasoning applied to a number of primary facts, it is said that the trier of fact could comfortably be satisfied to the criminal standard that a figure of more than 4.5 tonnes would not have been specified or stated by the registration authority or the manufacturer respectively. The respondent sought to apply this mode of proof in the first instance on the basis that the fact to be proved was a safe working load and, secondly, on the assumption it did not succeed in that argument, that the initial fact to be proved was whether there was a specification or statement by the registration authority or manufacturer. As we have rejected the first argument, it is only necessary to determine the alternative argument.

61 The facts are as follows. The vehicle is a five-door vehicle with a kerb weight of 2.438 tonnes. Its purpose is for use as a passenger vehicle. The photographs of the vehicle in Dr Rechnitzer's report reveal space for five passengers including the driver and a modest boot area consistent with the overall dimensions of the car and having regard to its purpose. Body-worn camera footage taken by the police officer who imposed the speeding fine on the applicant was also in evidence. In drawing inferences as to the maximum loaded mass of the vehicle, it is also possible to take into account the regulatory purposes of the *Road Safety Act* and the National Law.

62 In our opinion, there is an insufficient factual foundation to prove beyond reasonable doubt by inference that any specification or statement of the GVM of the applicant's car would have been no more than 4.5 tonnes. It is likely that, if there was a specification or statement, it would have been less than that, but any firmer conclusion would entail impermissible speculation or guesswork based on unstated and unproved assumptions. It requires assumptions regarding how the registration authority might or might not have viewed the appropriate maximum loaded mass. Attempting to infer how a specialist regulatory agency might have approached the question of whether to specify a maximum loaded mass and, if so, what that mass might be is an entirely inadequate basis to make a finding beyond reasonable doubt as to the GVM of the applicant's car or whether it exceeded 4.5 tonnes.

63 In conclusion, the prosecution made no attempt to prove by direct evidence that the applicant's car was not a heavy vehicle and, although not impermissible in principle, the evidence did not sustain an inference beyond reasonable doubt that the car was not a heavy vehicle. Since proof that the car was 'other than a heavy vehicle' was an element of the offence, this conclusion means that the charge was not proved.

Ground 2: Submissions

64 The applicant submits that the respondent did not give or produce evidence that a 100 kilometre per hour limit existed by reason of a speed limit sign for the purposes of r 21 of the *Road Safety Road Rules*. If the respondent says that there was a 100 kilometre per hour sign on the road on which the alleged offence occurred, the prosecution must also prove that it was a speed limit sign for the purposes of r 21, and not some other type of speed limit sign, especially since that is what is pleaded in the charge. Further, it was impermissible for the judge to refer to Dr Rechnitzer's report as evidence of the relevant signs being compliant with the *Road Safety Road Rules* because that was not the basis on which the prosecution put its case before the magistrate. Doing so also denied procedural fairness to the applicant. In any event, all Dr Rechnitzer was doing in the relevant section of his report was setting out the evidence in support of the allegations and he made no statement that the information was true and correct.

65 The respondent contends that, as the trial judge found, the magistrate was correct to have accepted the unchallenged evidence of the respondent that there were 100 kilometre signposts on the stretch of road where the offence occurred. The magistrate was entitled to infer that, when the respondent described the 100 kilometre sign posts, he was referring to the presence of physically-compliant signs. Further, the trial judge was correct to conclude that, in any event, the relevant portions of the respondent's statement, which were reproduced in the report of Dr Rechnitzer, established that the signs complied with the *Road Safety Road Rules*.

Ground 2: Decision

66 It is strictly unnecessary to determine this ground. Had it been necessary to do so, we would have rejected it for the reasons given by the respondent.

Conclusion

67 We would grant leave to appeal and allow the appeal. The orders of the judge and the magistrate should be set aside. Given that there is no evidence capable of sustaining the charge, an order dismissing the charge should be made in their place.