SUPREME COURT OF QUEENSLAND

CITATION:	*Day v Grice* [2011] QCA 178
PARTIES:	**DAY, Stewart Rohan** (applicant/appellant) **v** **GRICE, Ian Colin** (respondent)
FILE NO/S:	CA No 1 of 2011 DC No 1925 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2011
JUDGES:	Margaret McMurdo P and Atkinson and Peter Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal granted;** **2. Appeal allowed;** **3. Set aside the orders of the District Court of 16 December 2010;** **4. Appeal to the District Court dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – WHEN NOT ALLOWED TO BE RAISED ON APPEAL – QUESTIONS NOT RAISED ON PLEADINGS OR IN ARGUMENT – GENERALLY – where the respondent was charged with exceeding the speed limit – where the speed of the respondent's vehicle was measured by a mobile radar device – where the respondent challenged the way the radar device was used, the stated ground being 'the officer has to prove the reading came from my vehicle' – where the respondent was convicted and fined in the Magistrates Court – where the respondent's appeal to the District Court was successful – whether the grounds relied upon by the respondent in the appeal to the District Court were available to him – whether the District Court Judge erred in allowing the appeal – whether leave to appeal should be granted TRAFFIC LAW – TRAFFIC REGULATION – SPEED-LIMITS – where the respondent was charged with exceeding the speed

limit – where the speed of the respondent's vehicle was measured by a mobile radar device – where the respondent challenged the way the radar device was used, the stated ground being 'the officer has to prove the reading came from my vehicle' – effect of statutory restriction on right to challenge accuracy of mobile radar device and certain other matters

District Court of Queensland Act 1967 (Qld), s 118
Justices Act 1886 (Qld), s 222, s 223
Transport Operations (Road Use Management) Act 1995 (Qld) (reprint 11C), s 112, s 124, s 124A

COUNSEL: D C Boyle, for the applicant/appellant
The respondent appeared on his own behalf

SOLICITORS: Director of Public Prosecutions (Queensland) for the applicant/appellant
The respondent appeared on his own behalf

[1] **MARGARET McMURDO P:** I agree with Peter Lyons J's reasons for granting the application for leave to appeal; allowing the appeal; setting aside the orders of the District Court; and instead dismissing the appeal to the District Court.

[2] **ATKINSON J:** I agree with the orders proposed by Peter Lyons J and with his Honour's reasons.

[3] **PETER LYONS J:** On 22 December 2009, a traffic infringement notice was issued to the respondent, alleging that he had travelled at a speed of 117 km per hour on a road for which the speed limit was 100 km per hour. The respondent elected to contest the matter, resulting in a hearing in the Magistrates Court. He was found guilty, and a fine was imposed. He appealed to the District Court, successfully. The applicant seeks leave to appeal against the decision of the District Court Judge.

[4] It is necessary to say something of the proceedings in the courts below.

Magistrates Court proceedings

[5] The Magistrates Court proceedings were commenced by way of complaint and summons, which alleged that the respondent was the driver of a motor vehicle and that he drove at a speed over the speed limit, the limit being 100 km per hour, on the Cunningham Highway at Maryvale, in the District of Warwick. The complaint contained averments, the averred matters not being in issue.

[6] It is apparent that before the hearing in the Magistrates Court, the respondent was given a Notice to Defend, which, amongst other things, informed him that he was entitled to collect a brief of evidence two weeks before the hearing; and that if he wished to challenge the accuracy of a radar device used to measure his speed, he was required to complete an attached form. The Notice to Defend was attached to the respondent's submissions filed in the District Court on 24 November 2010, as was a copy of part of the prosecution brief of evidence. The respondent completed a copy of the attached form, giving notice of his intention to challenge the way in

which the radar device was used, the stated ground being that, "the officer has to prove the reading came from my vehicle". The notice was dated 10 June 2010. The police prosecutor drew attention to this notice at the commencement of the prosecution in the Magistrates Court, and its contents were, apparently, known to the Magistrate. The prosecutor referred to s 124 of the *Transport Operations (Road Use Management) Act* 1995 (Qld) (*TORUM Act*), and noted that the respondent's notice had been served on the prosecution after the time specified in s 124, though he appeared to accept that the respondent could ask questions of the police officer about matters within the police officer's knowledge, relevant to the challenge.

[7] At the hearing in the Magistrates Court, the respondent pleaded not guilty to the charge.

[8] The only person to give evidence was Senior Constable Cremasco. He gave evidence that he was a Senior Constable of Police, attached to the Warwick Traffic Branch, and his duties had included traffic enforcement duties and speed detection for approximately 18 or 19 years.

[9] Senior Constable Cremasco gave evidence that on 22 December 2009, he was driving a marked police vehicle eastbound on the Cunningham Highway at Maryvale. The vehicle was equipped with a mobile radar device (*radar device*). Senior Constable Cremasco testified that he had tested the radar device in accordance with Queensland Police Service (*QPS*) policy and the manufacturer's specifications before commencing duty that day, and the radar device was found to be working in a proper condition.

[10] Senior Constable Cremasco also gave evidence that he was an authorised operator of a radar device, and had been for a number of years. He produced certificates, which became exhibits, one being a certificate apparently signed by Senior Sergeant Day as officer in charge of the Warwick Police Station, to the effect that he had been delegated the powers, functions and duties of a Superintendent of Traffic by the Commissioner of the QPS, pursuant to s 4.10 of the *Police Service Administration Act* 1990 (Qld) (*PSA Act*), and certifying that the digital speedometer for the vehicle driven by Senior Constable Cremasco was tested at Warwick on 26 November 2009 and was found to produce accurate results at the time of testing (Exhibit 1). Another (Exhibit 2) was a certificate by Senior Sergeant Day, in the same capacity, that the radar speed detection device in the police vehicle was tested on 13 November 2009 in accordance with the appropriate Australian Standard, and was found to produce accurate results at the time of testing. A third, (Exhibit 3) was a certificate by Senior Constable Cremasco that the radar device was used by him at 9:45 am on 22 December 2009 in accordance with the appropriate Australian Standard. In addition, an instrument of delegation bearing what appears to be the signature of the Commissioner and dated 11 January 2008 was tendered (Exhibit 4). This document evidenced a delegation to any officer in charge of a police station of or above the rank of Sergeant to issue a certificate that a radar speed detection device has been tested and found to produce accurate results, pursuant to s 124(1)(pa) of the *TORUM Act*.

[11] Senior Constable Cremasco also produced a document dated 19 September 2006, which was a statement that he had attended a speed detection operator's course on 2 and 3 June 2006 and had received instruction in the use of the radar device. This document became Exhibit 5 (without objection).

[12] Senior Constable Cremasco then gave evidence that at 9:45 am on 22 December 2009 he observed a silver Mercedes sedan travelling towards him. He formed the opinion that this vehicle was travelling in excess of the 100 km per hour speed limit for the road. He activated the radar device, which showed a speed of 117 km per hour. It also showed a speed for the police vehicle of 93 km per hour, consistent with the speedometer reading of that vehicle. He gave evidence that he "tracked" the speed of the Mercedes for a number of seconds before he "locked" the speed of 117 km per hour on the device. He gave evidence that at that time there was no other vehicle in sight and travelling towards him. He activated the police vehicle's emergency lights. At that time, he saw a semi-trailer travelling (westbound) towards him. He performed a u-turn, intercepted the Mercedes vehicle, and had a conversation with the respondent.

[13] He also gave evidence that the radar device emits a sound called a Doppler tone when it detects a vehicle. He said that at the time of detecting and tracking the respondent's speed, there was only a single Doppler tone. That was consistent with his visual observation that no other vehicle was approaching. He also gave evidence that if more than one vehicle is in the radar beam, the Doppler tone will be different from the tone for a single vehicle, and more than one speed will be displayed. On this occasion, there was only ever a single Doppler tone, and only one target speed displayed on the radar device.

[14] Senior Constable Cremasco recorded his conversation with the respondent when he intercepted the vehicle. The recording was played, and a copy tendered at the Magistrate's Court trial. A transcript was made available at the hearing of this appeal, there being no suggestion that the transcript was not accurate. The recording included a statement by the Senior Constable to the respondent that "I checked your speed at 117 in a 100 zone", to which the respondent replied, "Was it that high, was it?" Senior Constable Cremasco then asked the respondent what speed he thought he was doing, to which the respondent replied "over 100 but I didn't think – I didn't think I was doing, I thought it was under one hundred and ten".

[15] Shortly afterwards the respondent referred to the semi-trailer travelling in the same direction. The Senior Constable asked the respondent how fast the semi-trailer was travelling, to which the respondent replied, "One hundred and five". The Senior Constable asked whether there was any need to pass, if the semi-trailer was "already doing the speed limit". The respondent's response included, "I know what you're saying".

[16] A little later, Senior Constable Cremasco asked the respondent, "Other than just going past that truck, there is no other reason for being exceeding [*sic*] the speed limit?" To which the respondent replied "No". Shortly after this, the Senior Constable informed the respondent that the speed was still "locked" on the radar display, if the respondent wished to see it, to which the respondent replied, "I think you're probably telling me the truth".

[17] In oral evidence, Senior Constable Cremasco confirmed the accuracy of the tape recording, and that it included the whole of his conversation with the respondent.

[18] In cross-examination, the respondent referred the Senior Constable to Exhibit 5 and asked him to identify where on that document the Senior Constable was identified

as an authorised operator of the radar device. The Senior Constable's response was, "[t]hey don't issue a certificate of attainment – of attendance, if you haven't successfully completed that training." After further questioning by the defendant, the Senior Constable confirmed that he was an authorised operator, and that he had successfully completed the training. He added, "The QPS does hold other computer records in relation to training that has been successfully completed".

[19] At the conclusion of the evidence, the respondent made a submission that he had no case to answer. His first ground was that Senior Constable Cremasco was "not certified to operate the device" because the certificate which had been tendered did not indicate that he had successfully completed the operator's course in June 2006. He next submitted that the prosecution had not proven that the reading on the radar device was linked to his vehicle. In support of that submission, he asserted that had he known the conversation was being recorded, he would have made reference to the other vehicles on the road, and queried the potential influence of the semi-trailer on the reading. He also commented on differences between Senior Constable Cremasco's evidence about where the events occurred, and the location for which the respondent contended.

[20] The no case submission was rejected. The Magistrate accepted that the Senior Constable was authorised to operate the radar device. Her Honour referred to the evidence from Senior Constable Cremasco linking the reading on the radar device to the respondent's vehicle. Beyond that, her Honour referred to the recording of the conversation between Senior Constable Cremasco and the respondent, and to the admissions contained in it, on a number of occasions to the effect that the respondent acknowledged travelling in excess of the speed limit of 100 km per hour.

[21] At that point the respondent was given the opportunity to call evidence, but did not do so. From the bar table, he asserted that he did not believe he was doing 117 km per hour.

[22] The Magistrate then gave her decision. She referred to the recorded conversation, and on that basis found that the complaint had been made out. She stated that it did not matter whether the respondent was travelling at 117 km per hour or not, the only issue being whether he was travelling at a speed in excess of 100 km per hour.

[23] The Magistrate then considered the question of penalty. At that point, her Honour held that it was likely that the respondent was travelling at 117 km per hour, based on the radar device. After inviting further submissions, her Honour recorded a conviction, and imposed a penalty.

Appeal to the District Court

[24] The respondent appealed to the District Court against his conviction. The appeal was brought under s 222 of the *Justices Act* 1886 (Qld) (*Justices Act*). The nature of the appeal is identified by s 223 of that Act, which is in the following terms:

> "**223 Appeal generally a rehearing on the evidence**
>
> (1) An appeal under section 222 is by way of rehearing on the evidence (*original evidence*) given in the proceeding before the justices.

> (2) However, the District Court may give leave to adduce fresh, additional or substituted evidence (*new evidence*) if the court is satisfied there are special grounds for giving leave.
>
> (3) If the court gives leave under subsection (2), the appeal is—
>
> (a) by way of rehearing on the original evidence; and
>
> (b) on the new evidence adduced."

[25] Of an appeal regulated by this provision, this Court has said:[1]

> "The appeal proceeded under s 223(1) on the evidence given in the Magistrates Court. On such an appeal the judge should afford respect to the decision of the magistrate and bear in mind any advantage the magistrate had in seeing and hearing the witnesses give evidence, but the judge is required to review the evidence, to weigh the conflicting evidence, and to draw his or her own conclusions: *Fox v Percy* (2003) 214 CLR 118 at [25]; *Rowe v Kemper* [2008] QCA 175 at [5]."[2]

[26] There were significant difficulties with a number of the grounds relied upon by the respondent in his appeal to the District Court. For example, one ground was that the Magistrate had relied on evidence given at the hearing, rather than on a document which was not in evidence. However, another ground was that Senior Constable Cremasco was not authorised to operate the radar device, because the certificate referred only to his attendance at the course, rather than to its successful completion. Absence of authorisation was relied upon as demonstrating a failure to comply with the relevant Australian Standard, notwithstanding the certificate which had been tendered. In argument, the respondent referred to a provision of what he described as the QPS regulations, the effect of which was said to be that an operator was required to undergo retraining within 36 months of initially obtaining a certificate. It is not necessary, in these proceedings, to attempt to identify other matters referred to by the respondent in support of his appeal.

[27] The applicant in the present proceedings, in written submissions in the District Court, drew attention to the limitations imposed by s 124 of the *TORUM Act* on any challenge which the respondent wished to make to the certificates relating to the accuracy of the radar device. The applicant also submitted that the authority of Senior Constable Cremasco to operate the radar device was established by his own evidence, together with the certificate which became Exhibit 5 in the Magistrates Court.

[28] The District Court Judge identified only two viable grounds of appeal. One was that the Magistrate had erred in admitting into evidence the conversation between the respondent and Senior Constable Cremasco. The other was that the prosecution had failed to tender a certificate showing that Senior Constable Cremasco was authorised to operate the radar device.

[29] His Honour considered that the Magistrate had lawfully admitted the evidence of the conversation with the respondent recorded by Senior Constable Cremasco. He

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1 In *Mbuzi v Torcetti* (2008) 50 MVR 451 at [17] per Fraser JA, with whom Keane JA (as his Honour then was) and Muir JA agreed.

2 See also *Stevenson v Yasso* [2006] 2 Qd R 150 at [36]; *Parsons v Raby* [2007] QCA 98 at [24]; *Eggmolesse v Bruce* [2009] 1 Qd R 324 at [29].

considered that that evidence "could amount to admissions the (respondent) was exceeding the speed limit". His Honour accepted that it was not necessary for the prosecution to prove that the respondent's speed was 117 km per hour, and that proof that the respondent had exceeded the speed limit was sufficient. Accordingly, he held that this ground of appeal did not succeed.

[30] The respondent's written submissions in the District Court had referred to clauses 6.3.5 and 6.9.2 of the document identified as the QPS regulations, which his Honour stated were apparently found in the Traffic Manual of the QPS. His Honour noted that these clauses contained "directions" from the Commissioner "necessary or convenient for the efficient and proper functioning of the police service pursuant to s 4.9" of the *PSA Act*. His Honour then set out some provisions of the Traffic Manual. Clause 6.9.2 contains a provision, under the heading "POLICY", to the effect that an officer in charge of a district or region is to ensure that officers who successfully undertake courses in the operation of speed detection devices are issued with appropriate authorisation; and the authorisation is said to lapse if the operator has not successfully completed the relevant reassessment course in the preceding 36 months. His Honour noted the respondent's submission that the certificate referred to a course undertaken more than 36 months before the date of the offence.

[31] His Honour then stated that he agreed with the respondent that Exhibit 5 was inadequate, as it did not state that Senior Constable Cremasco had successfully completed the course referred to. His Honour stated that the certificate appeared to be "out of date in accordance with the Traffic Manual". He held that, notwithstanding Senior Constable Cremasco's evidence that he was authorised to operate the radar device, the Magistrate could not have been satisfied beyond reasonable doubt that he was so authorised. This led his Honour to allow the appeal, to set aside the orders made by the Magistrate, and to find the respondent not guilty of the offence charged.

Contentions of the parties on application for leave to appeal

[32] The grounds identified in the application for leave to appeal to this Court are that the learned District Court Judge erred by giving insufficient weight to the admissions made by the respondent (no doubt a reference to the conversation recorded beside the Cunningham Highway on 22 December 2009); and that the learned District Court Judge erred in the application and interpretation of a provision of the Traffic Manual.

[33] The applicant's submissions referred to s 118(3) of the *District Court of Queensland Act* 1967 (Qld), under which this application is made. They referred to *Smith v Ash*,[3] where it was observed that the section "confers a general discretion on this Court to grant or refuse leave to appeal which is exercisable according to the nature of the case".[4] However, leave is usually granted only where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected. It was submitted that errors made by the learned District Court Judge have broad implications for the conduct of future

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3 [2010] QCA 112 at [50] per Fraser JA.

4 The statement was based on an earlier judgment, *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100 at [5], where all members of the court agreed with a similarly expressed statement.

prosecutions under the *TORUM Act*, and the method of proof to be used for those prosecutions.

[34] The applicant then submitted that, putting to one side the reading from the radar device, the evidence nevertheless established the offence.

[35] It was also submitted that s 112 of the *TORUM Act* required that a police officer using a radar device must comply with the appropriate Australian Standard; and that the learned District Court Judge erred by relying on a requirement of the Traffic Manual, rather than the Australian Standard (it appeared to be common ground that AS 2898.2 – 2003 was the relevant Standard). Further, it was submitted that no opportunity was given to deal with this issue at the summary hearing. It was also submitted that the provision of the Traffic Manual relied upon by his Honour was "policy". Moreover, Senior Constable Cremasco gave evidence he was authorised, and had successfully completed the training, which was accepted by the learned Magistrate. Further, Exhibit 4 was a certificate which was evidence of compliance with the Australian Standard, and a challenge to it was precluded by the absence of a notice under s 124(5) of the *TORUM Act.*

[36] The respondent represented himself on the application. His submissions generally demonstrated a failure to appreciate the true issues for consideration. Much that was submitted by the respondent does not require discussion, being assertion without content (at times interspersed with comments which appear calculated to arouse prejudice against the applicant and others associated with the enforcement of law in this State). In general terms it was apparent that the respondent supported the approach taken by the learned District Court Judge. The respondent submitted that Senior Constable Cremasco was not authorised to operate the radar device, and in support of that submitted that the Traffic Manual has the force of law. The respondent's written submissions included a request for this Court to consider the issue of an order under the *Vexatious Proceedings Act* 2005 (Qld), apparently on the ground that there is no substance in the applicant's proposed appeal.

[37] For the purpose of the hearing, Counsel for the applicant provided a copy of the QPS Traffic Manual. It became apparent that some of the provisions in that document were not consistent with provisions referred to by the learned District Court Judge in his reasons for judgment. This provoked a written response by the respondent, which he entitled "Formal Complaint", alleging that the document provided to the Court was fraudulent.

[38] Counsel for the applicant, pursuant to leave granted by the Court, has subsequently provided a correct copy of those parts of the Traffic Manual where some error had been found. An affidavit has been provided from a research officer with the QPS stating that in March 2011 she prepared a copy of the Traffic Manual for this application, and had understood that the document she prepared was current from 4 December 2009; and that it was due to an administrative error that some parts of the documents were from a later issue of the Traffic Manual.

[39] No basis has been established for any suggestion of fraudulent conduct in relation to the provision of a copy of extracts from the Traffic Manual to the Court. It should be noted that in the record of appeal, in the preparation of which the applicant's representatives are likely to have played a significant role, the reasons for judgment

of the learned District Court Judge correctly set out the provisions of the Traffic Manual as they stood on 22 December 2009.

[40] Before turning to the issues which arise on the appeal, it is necessary to note some provisions of the *TORUM Act.*

Relevant provisions of the *TORUM Act*

[41] Chapter 5 of the *TORUM Act* deals with road use generally. Part 7 of Chapter 5 deals with detection devices, and includes the following provision:

> "**112 Use of speed detection devices**
>
> When using a radar speed detection device or laser-based speed detection device, a police officer must comply with—
>
> (a) the appropriate Australian Standard for using the device, as in force from time to time; or
>
> (b) if there is no appropriate Australian Standard for using the device in force at the time of the use—the manufacturer's specifications for the device."

[42] Part 8 deals with proceedings and evidence. Section 124 includes the following:

> "**124 Facilitation of proof**
>
> (1) In any proceeding under or for the purpose of this Act, the following apply—
>
> …
>
> (p) a certificate purporting to be signed by the chief executive, the commissioner or a superintendent stating a stated stop watch, other watch or speedometer has been tested and found to produce accurate results at the time of testing is evidence the stop watch, other watch or speedometer was producing accurate results when so tested and for 6 months after the day of testing;
>
> (pa) a certificate purporting to be signed by the commissioner and stating a particular stated induction loop speed detection device, laser-based speed detection device, piezo strip speed detection device or radar speed detection device—
>
> (i) was tested at a stated time in accordance with—
>
> (A) the appropriate Australian Standard for testing the device, as in force on the day of testing; or
>
> (B) if there is no appropriate Australian Standard for testing the device in force on the day of testing—the manufacturer's specifications; and
>
> (ii) was found to produce accurate results at the time of testing;

is evidence that the device was producing accurate results when so tested and for 1 year after the day of testing;

(pb) a certificate purporting to be signed by a police officer stating a particular stated laser-based speed detection device or radar speed detection device was used by the officer at a stated time in accordance with—

(i) the appropriate Australian Standard for using the device, as in force on the day of use; or

(ii) if there is no appropriate Australian Standard for using the device in force on the day of use—the manufacturer's specifications;

is evidence of the matters stated;

(pc) a certificate purporting to be signed by the commissioner stating a specified vehicle speedometer accuracy indicator (commonly known as a chassis dynamometer) has been—

(i) tested at a stated time; and

(ii) found to produce accurate results at the time of testing;

is evidence the indicator was producing accurate results when so tested and for 6 months after the day of testing;

…"

[43] Subsections 124 (4) and (5) then limit the right of a defendant to challenge certain matters, as follows:

"(4) A defendant who intends to challenge—

(a) the accuracy of a speed detection device or vehicle speedometer accuracy indicator for which a certificate is given under subsection (1); or

(b) the time at, or way in, which the relevant device was used;

at the hearing and determination of a charge against the defendant under this Act must give written notice of the challenge to the prosecution.

(5) The notice must be in the approved form and must—

(a) be signed by the defendant; and

(b) state the grounds on which the defendant intends to rely to challenge a matter mentioned in subsection (4)(a) or (b); and

(c) be given at least 14 days before the day fixed for the hearing."

[44] However, s 124A provides, in a case where a person has given a written notice under s 124(4), that in certain circumstances, a person giving a notice might raise additional grounds. It includes the following:

> **"124A Additional ground of challenge not stated in written notice required under particular provisions**
>
> (1) This section applies to a hearing in relation to which a person has given a written notice under section 61E(2), 61F(5), 61G(4), 80(27), 118(4), 119(1) or 124(4).
>
> (2) The requirement mentioned in section 61E(3), 61F(6), 61G(5), 80(27)(c), 118(5), 119(2) or 124(5) to state in the written notice the grounds on which the person intends to challenge the evidence mentioned in that subsection does not prevent the person from raising a ground at the hearing to challenge the evidence if—
>
> (a) the person did not know the ground before the hearing; and
>
> (b) as far as the ground was able to be found out by the person—the person took all reasonable steps to find out the ground before the hearing.
>
> (3) If a person raises a ground at the hearing that was not stated in a written notice under section 61E(2), 61F(5), 61G(4), 80(27), 118(4), 119(1) or 124(4), the court may adjourn the hearing to the time, and on the terms as to costs, the court considers appropriate.
>
> …"

[45] The combined effect of s 124A(2), s 124(4) and s 124(5) is that a challenge of the kind identified in s 124(4) can only be raised by notice given in accordance with s 124, or in the circumstances identified in s 124A(2).

Evidence of speed from the radar device

[46] The reasons of the learned District Court Judge raised two matters relating to the training of Senior Constable Cremasco to use the radar device, namely, that Exhibit 5 did not state that Senior Constable Cremasco had successfully completed the course to which it refers; and that "it appears to be out of date in accordance with the Traffic Manual". The reasons also raise an issue relating to Senior Constable Cremasco's authority, namely, that Exhibit 5 does not state that Senior Constable Cremasco was authorised to operate the radar device. However, the reasons do not identify the process by which the learned District Court Judge reached, from these propositions, the conclusion that the appeal to the District Court should be allowed.

[47] The ultimate issue in the proceedings before the Magistrate was whether it was shown beyond reasonable doubt that the respondent had exceeded the speed limit. A subsidiary issue was whether the evidence from Senior Constable Cremasco of the reading from the radar device was evidence of the respondent's speed at the time of the alleged offence. That depended upon the acceptance of the evidence of Senior Constable Cremasco in relation to his use of the radar device on that occasion; and a conclusion about the reliability of the reading obtained from the radar device.

[48] On the latter issue, Exhibit 2 was a certificate signed by the applicant stating that the radar device was tested on 13 November 2009 in accordance with the appropriate Australian Standard for testing the device, and was found to produce accurate

results at the time of testing. Exhibit 4 was evidence of a delegation of the power of the Commissioner to issue a certificate under s 124(1)(pa) of the *TORUM Act.* It will also be recalled that Senior Constable Cremasco tested the device before commencing duty on 22 December 2009, and found it to be working properly. Moreover, the notice given by the respondent under s 124(4) and s 124(5) did not notify an intention to challenge the accuracy of the radar device. Accordingly, no basis has been identified for not accepting the accuracy of the reading of the device.

[49] The reasons of the learned District Court Judge do not attempt to identify the significance of the qualifications or authority of Senior Constable Cremasco to operate the radar device. The respondent has not identified any statutory provision which makes those matters relevant to the acceptance of evidence of the reading of the device, in relation to the speed of his vehicle. While s 112 might provide such a basis, the Court has not had the benefit of detailed submissions on this point, and it is ultimately unnecessary to determine whether it is correct.

[50] Section 112 requires a police officer using a radar device to comply with the appropriate Australian Standard for using the device. Exhibit 3 was a certificate from Senior Constable Cremasco that he used the radar device in accordance with the appropriate Australian Standard, at the time of the alleged offence. Section 124(1)(pb) makes that document evidence of the matters in it. There was, therefore, evidence that Senior Constable Cremasco complied with s 112.

[51] The respondent's submissions on the present application referred to particular provisions of the Australian Standard. Clause 2.1 of the Standard states that, for the purposes of law enforcement, the operator of a radar device is to be a person who is trained in accordance with Appendix A to the Standard, and who is authorised to use radar devices to measure the speed of objects. A note to Clause 2.1 identifies the authorising body as the body with responsibility for enforcing laws relating to speed at the location where the radar device is to be used.

[52] As noted by the learned District Court Judge, the Traffic Manual was issued by the Commissioner of the QPS under s 4.9 of the *PSA Act*. That section permits the Commissioner to cause to be issued general or particular written directions which the Commissioner considers necessary or convenient for the efficient and proper functioning of the police service. Provisions in the Traffic Manual appear under headings such as "POLICY", "PROCEDURE" and "ORDER". No provision of the Traffic Manual has been identified which explains the significance of these headings. Provisions relevant to the authorisation of an operator of a radar device appear under the heading "POLICY".

[53] Clause 6.5.4 of the Traffic Manual states that operators of a speed detection device are to hold a current operator's authorisation for the type of speed detection device being used; and (except when training) an officer who does not hold such an authorisation is not to operate such a device. The introduction to clause 6.9 includes a statement that authorised operators of speed detection devices are to undertake a competency reassessment course every three years to retain authorisation in the use of a speed detection device. Clause 6.9.2 provides that the Officer in Charge of the district or region in which an officer is stationed, is to ensure that officers who successfully undertake courses in the operation of speed detection devices are issued with appropriate authorisation; and that the authorisation of an operator of a speed detection device lapses if the operator has not used the relevant device within a

12 month period; or has not successfully completed the relevant reassessment course in the preceding 36 months. Clause 6.9.4 provides that on completion of the training course, the course facilitator is to ensure that successful course participants are issued with the appropriate authorisation to operate the specified speed detection device; and further that upon successful completion of a speed detection device course, appropriate authorisation is to be issued by "either [*sic*] the officer in charge of the region or district in which the officer is stationed."

[54] It would seem, therefore, that the case the respondent wished to advance was that the radar device had been used in contravention of s 112 of the *TORUM Act* because there had been a failure to comply with a requirement of the Australian Standard that the operator be authorised to use the device to measure the speed of objects; that Senior Constable Cremasco was not authorised, his authorisation having lapsed by virtue of Clause 6.9.2 of the Traffic Manual; and for that reason, either the reading from the radar device should not be accepted as reliable, or evidence of it should be regarded as inadmissible.

[55] The raising of such a ground would give rise to a series of legal issues, and at least one issue relating to the construction of the Traffic Manual. It would also give rise to at least one factual issue, namely, whether Senior Constable Cremasco had successfully completed a reassessment course in the 36 months preceding 22 December 2009. However, the case could only succeed on the basis that s 112, which requires a police officer using a radar device to comply with the Australian Standard, was not complied with. In the context of the relevant provisions of the TORUM Act, this is a challenge to the way in which the radar device was used. The respondent's notice, given to the prosecution shortly before the hearing in the Magistrates Court, did not raise this ground.

[56] Both in that Court, and on the appeal to the District Court, those representing the applicant maintained reliance on the provisions of s 124 under the *TORUM Act.* The respondent has not sought to establish that he could avoid those limitations by virtue of s 124A(2) of the *TORUM Act.* He has not sought to establish that he did not know the ground before the hearing in the Magistrates Court; nor that he took all reasonable steps to find it out before that hearing. Indeed, so far as can be seen from the material before this Court, there is reason to think that the respondent was aware, before the Magistrates Court hearing commenced, that the prosecution intended to rely on the certificate which became Exhibit 5 as demonstrating the authorisation of Senior Constable Cremasco to operate the radar device.

[57] In those circumstances, s 124 precluded the respondent's reliance on this ground. The certificate from Senior Constable Cremasco that he used the radar device in accordance with the appropriate Australian Standard could not be challenged in the proceedings.

[58] The availability of the ground relied upon by the respondent, and determined in his favour in the appeal to the District Court, was in issue in that appeal. It was not dealt with by the learned District Court Judge. Had his Honour adverted to this issue, it should have led him to dismiss the appeal to the District Court.

[59] In any event, the focus of the learned District Court Judge on the question of authorisation was misdirected. The basis for the respondent's conviction in the Magistrates Court was the evidence of his admissions of driving at a speed in excess

of the speed limit, not the evidence relating to the recording of the speed by the radar device.

The respondent's admissions

[60] No reason has been identified for departing from the conclusion of the learned Magistrate about the effect and the legal consequence of the evidence of the respondent's admissions. The reasoning of the learned District Court Judge does not take issue with the learned Magistrate's conclusion. The difficulty arises from the failure of the District Court Judge to carry out the task assigned to him by s 223 of the *Justices Act.* His Honour failed to appreciate the implications of his rejection of the first ground of appeal, namely, that there was evidence to support the conviction, regardless of his Honour's view about the other ground of appeal considered; and there was no identified reason for not giving effect to that evidence.

Disposition of the application for leave and of the appeal

[61] It will be apparent that errors have been identified in the reasoning of the District Court Judge. Fundamentally, there has been a failure to rehear the matter. In addition, there has been a failure to recognise and give effect to the provisions of s 124 and s 124A of the *TORUM Act*. These matters are sufficient to justify a grant of leave to appeal to this Court.

[62] The orders of the learned District Court Judge should be set aside. The evidence in the present case provides no basis for remitting the matter to the District Court for further determination. On the evidence, the learned Magistrate was correct to convict the respondent.

Conclusion

[63] I would propose the following orders:

(a) The application for leave to appeal to this Court be granted;
(b) The appeal to this Court be allowed;
(c) The orders of the District Court be set aside;
(d) The appeal to the District Court be dismissed.