SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of Police v Toomer* [2011] QCA 233
PARTIES:	**COMMISSIONER OF POLICE** (applicant) **v** **TOOMER, John Frederick** (respondent)
FILE NO/S:	CA No 45 of 2011 DC No 2146 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	13 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2011
JUDGES:	Muir JA, Margaret Wilson AJA and North J 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 made in the District Court on 17 February 2011.** **4. Dismiss the appeal to the District Court.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the respondent was convicted in the Magistrates Court of driving a motor vehicle over the speed limit of 60 kilometres per hour – where the respondent's appeal to the District Court was allowed and the conviction was set aside – where the applicant applies for leave to appeal against the District Court decision – where the applicant submits that the District Court judge erred in departing from the Magistrate's findings of fact – whether an error on the part of the Magistrate had been demonstrated – whether leave to appeal should be granted *District Court of Queensland Act* 1967 (Qld), s 118(3) *Abalos v Australian Postal Commission* (1990) 171 CLR 167; [1990] HCA 47, cited *Allesch v Maunz* (2000) 203 CLR 172; [2000] HCA 40, cited *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842; [1985] HCA 61, cited

Chambers v Jobling (1986) 7 NSWLR 1, cited
Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, considered
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, considered
Jones v Hyde (1989) 63 ALJR 319; [1989] HCA 20, cited
R v Coles, unreported, District Court of New South Wales, 15 February 2010, distinguished
Smith v Ash (2010) 200 A Crim R 115; [2010] QCA 112, considered
State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq) (1999) 73 ALJR 306; [1999] HCA 3, cited
SS Hontestroom v SS Sagaporack [1927] AC 37, cited
Toomer v Winston [2011] QDC 8, cited
Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd (1992) 27 NSWLR 326, cited
Voulis v Kozary (1975) 180 CLR 177; [1975] HCA 44, cited

COUNSEL: P B Rashleigh for the applicant
The respondent appeared on his own behalf

SOLICITORS: Queensland Police Service Solicitor for the applicant
The respondent appeared on his own behalf

[1] **MUIR JA: Introduction** The respondent was convicted on 8 July 2011 after a trial in the Magistrates Court of driving a motor vehicle on 1 May 2009 at a speed over the speed limit of 60 kilometres per hour. The respondent appealed against the decision to the District Court. On 17 February 2011, the appeal was allowed and the conviction was set aside. The applicant applies for leave to appeal against that decision pursuant to s 118(3) of the *District Court of Queensland Act* 1967.

[2] Fraser JA in *Smith v Ash*[1] discussed principles relevant to the exercise of the Court's discretion under s 118(3) as follows:

> In *ACI Operations Pty Ltd v Bawden* McPherson JA said that the criteria in the previous form of s 118 of the *District Court of Queensland Act* 1967 (Qld) of an important point of law or question of general public importance 'remains a sufficient, but not a necessary, prerequisite to a grant of leave to appeal' under the present enactment. In other cases it has been said that leave will usually be 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 is to be emphasised though that, whilst the Court exercises the discretion on a principled basis and those tests provide very useful guidance, s 118(3) confers a general discretion on this Court to grant or refuse leave to appeal which is exercisable according to the nature of the case." (citations omitted)

[3] The applicant argues that leave to appeal should be granted on grounds that:

(a) the District Court Judge erred in departing from the Magistrate's findings of fact in circumstances in which no error had been demonstrated and, in so

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1 [2010] QCA 112 at [50].

doing, failed to take into account the advantage held by the Magistrate in seeing the witnesses give evidence;

(b) the overturning of the Magistrate's decision gives rise to concern on the part of the Queensland Police Service that:
   (i) any speeding infringement could be challenged on the basis that the subject vehicle was in the vicinity of other traffic;
   (ii) the District Court decision may be regarded as authority for the proposition that the distances involved in this case undermine the reliability of a laser device;
   (iii) the fact that a laser does not "identify" the vehicle and relies on the skills of an operator may undermine the reliability of using the laser device as an effective tool in managing speeding offences; and
   (iv) infringements which are based on the laser device can be overturned readily without any appropriate factual foundation.

The evidence before the Magistrate

[4] Senior Constable Brindell gave evidence to the following effect. He had been a police officer since 1974 and was qualified in the use of speed detection devices, including laser speed detection devices, which he had operated since 1999. He was on duty on 1 May 2009, positioned on the western side of a road known as the Deagon Deviation, approximately 20 metres from the traffic lights at the northern end of the Deviation, using his tripod mounted laser device to detect speeding vehicles. The weather was fine. A random breath test vehicle was nearby but no random breath testing was in progress.

[5] The device has a trigger and a stock like that of a rifle and is held in the same way. It has a non-magnifying scope on top through which the operator sights the target. At about 2.03 pm, the officer noticed a white car which appeared to him to be exceeding the 60 kilometre per hour speed limit as it was gaining on vehicles some distance ahead of it which appeared to him to be travelling at about 60 kilometres an hour. There was "a fair gap" between the white car and the vehicles in front of it and there were no vehicles immediately behind it. He directed the device's laser beam onto the number plate on the front of the car and it recorded 84 kilometres per hour. A couple of seconds later, he repeated the exercise and 81 kilometres per hour and a distance of 345.1 metres were recorded.

[6] He was able to keep the respondent's vehicle under observation because the road was at a slight angle and he was standing approximately five or six metres away from the side of the road. He was assisted by there being "a big gap in front of [the respondent's vehicle] and no traffic behind [it]". After the second use of the device, the respondent's vehicle slowed in the left lane and then moved to the right lane. When he was targeting the respondent's vehicle, no other vehicles passed it. If they had he would have targeted them rather than the respondent's vehicle.

[7] Keeping the car under observation throughout, the officer walked on to the road and indicated to the driver to stop.

Transcript of the conversation between Senior Constable Brindell and the respondent

[8] The Magistrate also had before him a transcript of a recording made by Officer Brindell at the time he pulled over the respondent's vehicle. Asked if he knew what speed he was doing "catching up to those other vehicles ahead?", the respondent replied, "I was slowing down with the rest of the traffic". The Officer

responded, "That was then but before that you weren't. You slowed to 81. See the distance of the bottom here." The officer was requesting that the respondent look at the laser device display. He pointed out that the speed was 81 and the distance 345.1 metres from where he was standing. He said, "And that's the second time I checked your speed. And that's the slower speed." He asked three times whether the respondent had "any reason to be exceeding the speed limit?" On the third occasion the respondent answered, "I was travelling. Are you sure you got the right vehicle?" The officer asked whether the respondent "was watching [his] speedo at all" and the respondent replied that he wasn't. He said he was slowing down with the rest of the traffic.

This exchange occurred:

> "Q21. And did you slow down in the two times I checked your speed. It only slowed to 81.
>
> A. I was. I pulled over, there was a car overtaking me on the right hand side.
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> Q22. I don't know what happened out of sight. But in the 80 sorry 60 zone you doing, you slowing to 81 in that distance from where I was then you came all the way up behind the other traffic and then moved to the right hand lane where I stopped you here in the turn lane."[2]

[9] After the respondent's vehicle had moved to a safer location, the respondent asked, "How do you know it was me? Because I was, I was with the traffic on the left." The officer responded that he had been a police officer for 35 years, he had been using a laser since 1999 and could tell "when a vehicle was doing more than the speed limit just by looking at them." He said he estimated the respondent's speed in excess of 75 kilometres per hour and that he checked his speed with the laser twice. He said that the respondent:

> "went from 84 to 81, catching up to the other vehicles that were ahead of [him]. And then [he] slowed and stayed behind them. Until just back there when [he] moved to the right hand lane."[3]

[10] The respondent asked if Officer Brindell saw him move over "to let the other faster car come past me on the right hand side?" The officer said that he checked his speed "in the 60" and that he didn't know what happened eight or nine hundred metres back. The respondent said, "No, this was at this point", to which the officer replied, "I was looking at more than one vehicle. Except when I was targeting your vehicle." He said that he had targeted the respondent's vehicle twice and that regardless of what else was happening he checked the respondent's speed twice. The respondent asserted that he pulled over to the left because a faster car came past him. The officer responded, "That may have happened but I only saw you in the left hand lane." The respondent said that he was with "the rest of the vehicles" which were "all in close proximity". The officer responded:

> "Q46. I checked your speed twice. So regardless of any other traffic. Doesn't matter if everyone around you is speeding. Your still doing the 84 and the 81 when I checked you twice. There's no exemption cause people around you are doing the same speed."[4]

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2 Transcript of conversation between Officer Brindell and the respondent on 1 May 2009, p 4.

3 Transcript of conversation between Officer Brindell and the respondent on 1 May 2009, p 6.

4 Transcript of conversation between Officer Brindell and the respondent on 1 May 2009, p 7.

[11] The respondent again asked if the officer was sure he had "got that thing pointed at the right vehicle". The officer offered to let the respondent try the device to "see how easy it is". He said it had a range of a kilometre but that he was not using it at that range and that "there's a gap ahead of you. I'm aiming at your vehicle. The number plate … I've hit it twice." He made the point that the respondent was not watching his speedo so that he did not know what speed he was doing. He said:

> "Q63. Definitely the vehicle I was aiming at twice. Observation continuous. Right up until its slowed in the left hand lane behind the other traffic. Stayed there for a few seconds and then moved to the right hand lane. Cause the left hand lane was stopped completely and there's a big gap in the right hand lane."[5]

The officer recorded that the northbound traffic was light.

The respondent's evidence

[12] The respondent's evidence was to the following effect. Prior to entering the 60 kilometre per hour zone, or at the point of entering it, he was travelling in the right hand lane in front of a white sedan and a UDL van. The white sedan was tailgating him so he pulled over to the left and the sedan and the UDL van passed.

[13] The respondent was then in queue of cars slowing down for the traffic lights at the start of the bridge at the northern end of the deviation. He pulled over to the right lane and noticed a police officer who stopped his vehicle. He said that "[t]here was a lot happening. There was heavy traffic and a random breath test unit." He said he was doing the same speed as the other traffic.

The Magistrate's reasons

[14] The Magistrate found the respondent to be an honest witness who had been mistaken in his recollection. He accepted the evidence of Officer Brindell in preference to that of the respondent and distinguished a New South Wales District Court decision relied on by the respondent: *R v Coles*[6]. He referred to the officer's experience and that he had made "a mental calculation" that the respondent was speeding. He concluded that more than sufficient time existed for the officer to take his readings, that no other vehicle interfered with their accuracy and that the officer kept "an eye on the [respondent's] vehicle all the way until he intercepted it." He found the prosecution case proven beyond reasonable doubt.

The reasons of the District Court Judge

[15] The Judge discussed the evidence of Officer Brindell, the evidence of the respondent and the decision in *Coles*. After noting that the Magistrate had distinguished *Coles* on the basis that the appellant in that case had a speed limiting device fitted to his vehicle which fixed a speed of either 80 or 100 kilometres per hour (which was less than the alleged speed of 117 kilometres an hour) and that in the present case the respondent did not know his speed, his Honour said:

> "[26] Even so, both in the *Coles* case and the present case there was a substantial distance between the police officer operating the laser and the approaching vehicle. Further there was the possibility of other vehicles in the vicinity of the 'target' vehicle. I accept Senior Constable Brindell said

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5 Transcript of conversation between Officer Brindell and the respondent on 1 May 2009, p 9.

6 District Court of New South Wales 15 February 2010 unreported.

there was no traffic behind the appellant's vehicle and a fair gap in front of it. However, the appellant whom the learned magistrate accepted at all times had given honest evidence said two vehicles at one stage had been behind him and then went past him.

[27] In my opinion the substantial distance involved between the laser held by the police officer and the appellant's vehicle and the presence of other vehicles made it possible Senior Constable Brindell locked onto another vehicle. The learned magistrate noted the laser was an aim reliant device. In my opinion this makes it possible a mistake occurred in the present matter. I say that despite Senior Constable Brindell stating he had no doubt he targeted the appellant's vehicle.

[28] In the circumstances in my opinion the learned magistrate ought to have had a reasonable doubt that the appellant's vehicle had exceeded the speed limit and ought to have dismissed the charge."[7]

[16] His Honour then found the respondent's evidence to be reliable. He said:

"[30] As far as ground of appeal number 3 is concerned, the learned magistrate did accept the appellant at all times had given honest evidence. However, he did not accept the appellant's evidence was sufficiently reliable for him to say that a doubt existed as to the evidence given by Senior Constable Brindell.

[31] In my opinion there was nothing unreliable about the appellant's evidence. He may not have known what speed his car was travelling at. However, that does not make his evidence unreliable. Even so there is no dispute the distance between Senior Constable Brindell and the appellant's vehicle was 345.1 metres when he says he locked onto the appellant's vehicle. Further, even Senior Constable Brindell said there were other vehicles on the road, even though he said there was a gap between those vehicles and the appellant's vehicle."[8]

[17] Ground five casts doubt upon the ability of the officer to keep the respondent's vehicle in sight "while he crossed a busy 2 lane highway to stop [the respondent] in the right-hand lane …" In that regard, his Honour said:

"In my opinion there was nothing unreliable about the appellant's evidence. He may not have known what speed his car was travelling at. However, that does not make his evidence unreliable. Even so there is no dispute the distance between Senior Constable Brindell and the appellant's vehicle was 345.1 metres when he says he locked onto the appellant's vehicle. Further, even Senior Constable Brindell said there were other vehicles on the road, even though he said there was a gap between those vehicles and the appellant's vehicle."[9]

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7 Reasons at [26]-[28].

8 Reasons [30]-[31].

9 Reasons [39].

[18] The Judge implicitly rejected ground six which was:

> "Did not take into account in his summary the errors in the police evidence and the spin put on the diagrams i.e. eliminating the bend in the road and getting the distances wrong".[10]

[19] Grounds seven and eight were:

> "His Honour said the policemen had good eyesight in his summation despite the fact that the policemen (sic) wore glasses as (sic) was in his sixties;
>
> His Honour did not take into account the obstacles between the policeman and [the respondent's] vehicle, consisting of crash barriers and several road signs."[11]

[20] The Judge did not deal with these grounds as such, observing in respect of ground seven that in his opinion "a mistake may have occurred" and in respect of ground eight that he had already expressed the opinion that the Magistrate "could not be satisfied beyond reasonable doubt the [respondent] exceeded the speed limit."

Consideration

[21] In *Fox v Percy*,[12] Gleeson CJ, Gummow and Kirby JJ, discussing the circumstances in which an appellate court should interfere with a trial judge's findings of fact, said:

> "… the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.[13]
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> … In some, quite rare, cases, although the facts fall short of being 'incontrovertible', an appellate conclusion may be reached that the decision at trial is 'glaringly improbable'[14] or 'contrary to compelling inferences' in the case[15]. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must 'not shrink from giving effect to' its own conclusion."

After referring to the nature of an appeal by way of re-hearing, their Honours said:

> The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to

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10 AR 110.

11 AR 110.

12 (2003) 214 CLR 118 at 128.

13 Eg, *Voulis v Kozary* (1975) 180 CLR 177; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306; 160 ALR 599; cf *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 349-351.

14 *Brunskill v Sovereign Marine & General Insurance Co Pty Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

15 *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.

> 'give the judgment which in its opinion ought to have been given in the first instance'. On the other, it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole."

[22] In *Devries v Australian National Railways Commission*[16] Brennan, Gaudron and McHugh JJ said:

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact.[17] If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage'[18] or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'."[19]

Gleeson CJ, Gummow and Kirby JJ, in their reasons in *Fox v Percy*, referred to *Devries* as one of three cases in which the High Court had reiterated:[20]

> "its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not."

[23] Their Honours observed that those three decisions "were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges". In my respectful opinion, the Judge erred by failing to have regard to the above principles. His Honour, in referring to the powers of an appellate court on an appeal by way of re-hearing,[21] noted that the Court could substitute its own decision based on the facts and law "as they stand at the date of the decision of appeal." That is no doubt correct,[22] but first, error must be shown and "due allowances" must be made "for the advantages available to the trial judge".[23]

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16 (1993) 177 CLR 472 at 479.

17 See *Brunskill* (1985) ALJR 842; 62 ALR 53; *Jones v Hyde* (1989) 63 ALJR 349; 84 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

18 *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47.

19 *Brunskill* (1985) 59 ALJR at 844; 62 ALR at 57.

20 (2003) 214 CLR 118 at 127.

21 *Toomer v Winston* [2011] QDC 8 at [14].

22 *Allesch v Maunz* (2000) 203 CLR 172 at 180, 181.

23 *Fox v Percy* supra at 128.

[24] The Magistrate saw and heard both witnesses give their evidence-in-chief and be cross-examined. He found both witnesses honest but preferred the evidence of the police officer over that of the respondent. The Judge's explanation for reversing the findings on credibility, with respect, was not persuasive. Honesty in a witness is not to be confused with accuracy. The Judge reasoned that "the substantial distance" between the device and the respondent's vehicle and the presence of other vehicles made it possible that the officer had "locked on to another vehicle". From this, it was reasoned that it was "possible a mistake occurred". It is undoubtedly correct that a mistake was "possible" but the question which needed to be decided was whether the prosecution had failed to prove its case beyond reasonable doubt.

[25] The officer's evidence was clear, precise and unshaken in cross-examination. He explained how the respondent's vehicle came to his attention, how he trained the device on it and registered two readings in excess of the speed limit. He explained how he kept the target vehicle in sight until he motioned it to the roadside and how, when he targeted the vehicle which, in his experienced appreciation, was travelling at at least 75 kilometres per hour, there was "a fair gap in front of it" and no traffic behind it. There was no suggestion in cross-examination that the officer might have had difficulty in targeting the respondent's vehicle at the distances in question. The officer was confident that he had targeted the correct vehicle. There was no reason for him not to be, if, as the Magistrate accepted, he had kept the vehicle in sight from when he took his readings until pulling it over.

[26] The officer was an experienced operator of the device. His evidence gained some support from the uncontested fact that the speed limit changed from 80 to 60 kilometres per hour some 800 metres from where the officer was standing and from his evidence that the speed of the vehicle dropped from 84 to 81 kilometres per hour in the short time between the two occasions on which he targeted the respondent's vehicle. He was able to describe how the respondent's car manoeuvred. At relevant times, he was performing a function in which he was skilled and he was concentrating on the target vehicle which had not been selected at random.

[27] The respondent, in the transcript of the verbal exchange between himself and the officer, mentioned only one "other faster car" passing him on his right hand side. He made no mention, as he subsequently did in the Magistrate's Court proceedings, of being tailgated, of also being passed by a van and of the colour of the car which was said to have passed him. He had not checked his speedometer. He gave no evidence of deliberately slowing on leaving the 80 kilometre per hour zone. His only evidence in relation to his speed was that he was "in the normal traffic following the normal speed".

[28] There was thus a reasonable basis for the Magistrate's findings and it may be thought that, even without resort to the advantages enjoyed by the Magistrate, the evidence favoured the officer's version of events over that of the respondent. Certainly, it could not be said that the Magistrate's findings were "glaringly improbable" or "contrary to compelling inferences". Nor, in my respectful opinion, could it be said that it was not open to the Magistrate to conclude that the prosecution had proved its case beyond reasonable doubt.

[29] The Judge appeared to give considerable weight to the decision in *Coles*. He erred in doing so. The central issue in *Coles* and in these proceedings before the Magistrate and then the Judge, was whether the laser device operator had taken

a reading in respect of a vehicle other than the alleged offender's. The Magistrate in each case had to determine that purely factual question on all of the relevant facts and circumstances before him or her. One matter which was of obvious relevance was the assessment of the reliability of the evidence given by the device operator and the alleged offender. A finding in that regard in *Coles* could hardly assist in the making of such a finding in this case.

[30] Another significant factual difference, as the Magistrate appreciated, was that the Judge in *Coles*, unsurprisingly, placed great weight on the appellant's evidence that he had a speed limiter fitted to his vehicle which made it impossible for the vehicle to travel at the speed recorded by the laser device. The respondent here does not have the benefit of any such evidence.

[31] Apart from these considerations, any attempt to decide a factual question in a proceeding by reference to the decision in another involving generally similar facts or circumstances is highly likely to be productive of error. The exercise does not involve the identification and application of any principle. Any attempt to identify the factual matters which led the other Tribunal to decide as it did with a view to determining the case at hand will normally be pointless, at best. Furthermore, any such approach creates the risk that the subject case will be decided, not on the basis of facts found in it, but, in part, by reference to findings of fact in the other case.

[32] The respondent sought to uphold the Judge's decision on the basis that the Judge had upheld the appeal on four separate grounds. He argued that even if the applicant could succeed on one ground it was improbable that he could succeed on all four grounds. Unfortunately, the common experience is that the more grounds relied on to support an appeal or claim, the more likely it is that none of the grounds have merit. It is also the case that surrounding a meritorious point with numerous unarguable ones will create a risk that the meritorious point will be overlooked or not given the attention it deserves. Unmeritorious points do not acquire merit through weight of numbers.

[33] I have already discussed the factual matters on which the respondent principally relied. He referred specifically to: the 345.1m distance between the officer and the point at which the 81 kilometre per hour speed was recorded; alleged absence of proof of the officer's marksmanship; significant obstructions bordering the roadway; the presence of nine other vehicles; a bend in the road and the difficulties facing the officer in keeping the targeted vehicle in sight at all times.

[34] These matters were raised with the Magistrate. The bend in the road point does not have substance. It was at the point where the device was situated and not along the line of sight. The officer did not accept that his line of sight was obstructed by anything when he took his readings. There was no evidence which compelled the Magistrate to find to the contrary. There is no substance in the arguments that the officer could not have kept the respondent's car in view. Even if the officer had to look away at times in preservation of his own safety, he would have been conscious of the position of the target car relative to other cars, particularly as all the cars were slowing preparatory to stopping. The respondent also asserts that the officer had poor eyesight. No such suggestion was put to him by the respondent.

[35] The grounds identified by the respondent as the ones found in his favour by the Judge were:

(a) Ground 2 (taken by the Judge to encompass the critical issue of whether the prosecution case had been proved beyond reasonable doubt);
(b) Ground 3 – the Magistrate did not give the same weight to the respondent's evidence as he gave to that of the officer, despite accepting the respondent's good character;
(c) Ground 5 – the Magistrate erred in accepting that the officer kept the target vehicle in sight at all times;
(d) Ground 7 – the Magistrate found that the officer had good eyesight despite his being in his 60s and wearing glasses.

[36] Ground 2 has been discussed at length.

[37] Ground 3 has been discussed also: the respondent, like the Judge, erroneously equated a finding of honesty with reliability. It was open to the Magistrate to prefer one witness' evidence over that of another and he did so.

[38] The Judge's finding in relation to ground 5 was merely that there was the possibility of a mistake.

[39] There was no finding in favour of the respondent on grounds 7 in relation to which the primary judge observed merely that a mistake may have occurred. That begs the question. Ground 8 has been addressed generally in these reasons.

Conclusion

[40] The matters relied on by the applicant in paragraph 3(b) hereof, in my opinion, do not give rise to any important point of law or question of general public importance. This case involved purely factual questions, the resolution of which cannot assist in the determination of any subsequent cases. Nevertheless, the applicant has shown that the Judge erred in law in a critical respect and it is desirable that leave to appeal be granted to provide a reminder of the principles an appellate court must apply in relation to findings of fact by the tribunal of first instance. I note that the Judge's errors of law were not induced by any conduct on the part of the respondent. He conducted himself in the District Court and before this Court in an exemplary way and there is no reason to doubt the Magistrate's findings as to his honesty.

[41] For those reasons, I would:
(a) Grant leave to appeal;
(b) Allow the appeal;
(c) Set aside the orders made in the District Court on 17 February 2011; and
(d) Dismiss the appeal to the District Court.

[42] **MARGARET WILSON AJA**: I agree with the orders proposed by Muir JA and with his Honour's reasons for judgment.

[43] **NORTH J:** I agree with the reasons for judgment of Muir JA and with the orders proposed by his Honour.