SUPREME COURT OF QUEENSLAND

CITATION:	*Crossman v Commissioner of Police* [2016] QCA 75
PARTIES:	**CROSSMAN, Ian Norman** (applicant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	CA No 279 of 2015 DC No 85 of 2015 DC No 93 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Cairns – [2015] QDC 265
DELIVERED ON:	1 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	17 March 2016
JUDGES:	Margaret McMurdo P and Gotterson JA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where the applicant was detected exceeding the speed limit at Cairns on two separate occasions – where the applicant gave the requisite notice of intention to challenge the operation or condition of the detection devices used in both instances – where summary trials in the Magistrates Court proceeded and concluded with decisions being made on 20 March 2015 and 30 April 2015 respectively, convicting the applicant of both speeding offences – where the applicant appealed the decisions made to the District Court at Cairns – where the appeals were heard together – where the District Court granted leave and dismissed both appeals – where the applicant applied for leave to appeal to the Court of Appeal – where the applicant submits there are inconsistencies in the evidence presented by the prosecution in both Magistrate Court trials – where the applicant submits the evidence presented should not have been afforded any weight and therefore cannot establish the alleged offences – whether the applicant can demonstrate a substantial injustice which requires correction, or that the decision below is infected by an error of law

	Transport Operations (Road Use Management) Act 1995 (Qld), s 112, s 120
	R v Al Shakarji [2016] QCA 29, cited
COUNSEL:	The applicant appeared on his own behalf M T Whitbread for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Gotterson JA's reasons for refusing this application for leave to appeal.

[2] **GOTTERSON JA:** The applicant, Ian Norman Crossman, has applied for leave pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) to appeal to this Court against the decision of a judge of the District Court at Cairns given on 29 October 2015.[1] In the proceeding before him, the learned primary judge extended time for the applicant to appeal pursuant to s 222 of the *Justices Act* 1886 (Qld) against decisions given in two separate matters in the Magistrates Court at Cairns on 20 March 2015 and 30 April 2015 respectively. His Honour ordered that each appeal be dismissed.

[3] By the decision given on 20 March 2015, the applicant was found guilty of a speeding offence. The particulars of the offence alleged were that on 10 July 2014, the applicant exceeded the speed limit of 60 kilometres per hour on the Captain Cook Highway at Cairns North. The applicant had been detected driving at 70 kph by a TruCAM device operated by Senior Constable Z Kendjelic, an authorised operator. The device was hand-held. At the time, Senior Constable Kendjelic was standing on a median strip in that part of the highway also known as Sheridan Street.

[4] Senior Constable Kendjelic gave evidence at the hearing in the Magistrates Court. The other witness in the prosecution case was Mr R I James, a senior electronics technical officer employed at the radio and electronic section in the Calibration Laboratory in Brisbane. He gave evidence that the particular TruCAM device had been calibrated on 9 January 2014 and, upon testing in January 2015, was found to be still producing results within the manufacturer's specifications. The applicant, who represented himself at the trial, gave evidence. In his evidence and his cross-examination of the prosecution witnesses, he sought to impugn the integrity of the evidence of him speeding captured by the device.

[5] According to the applicant, the operator had been "panning", that is to say, moving the TruCAM device in a sweeping motion, when he recorded the applicant's speed. As a result, the image captured by the device of his vehicle, and the calculation of its speed based on the image, were both unreliable. Notwithstanding doubt that the applicant's Notice of Intention to Challenge had raised panning as an issue, the learned magistrate accepted Mr James' evidence that if panning had occurred, an error message would have been displayed. Senior Constable Kendjelic gave evidence that no error display was observed by him. The magistrate held that this evidence was fatal to the applicant's assertions.[2]

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1 Application for Leave to Appeal filed 17 November 2015: AB394-396.
2 AB60 ll4-15.

[6] The decision given on 30 April 2015 by a different magistrate also found the applicant guilty of a separate speeding offence. The particulars alleged were that on 1 May 2013, the applicant exceeded the speed limit of 60 kph on Sheridan Street, Cairns. He had been detected driving at 73 kph, again by a TruCAM device. On this occasion, the device was operated by Senior Constable R W Belcher, an authorised operator, who gave evidence. Evidence was also given by Ms Z Evans, the supervisor of the image management unit of the Queensland Police Service and Mr S Irvine, a technical officer with the Calibration Laboratory.

[7] The applicant also represented himself at this trial and gave evidence. He said tests carried out by him and others showed that he could not have attained the detected speed from a standing start over a distance of 84 metres. He canvassed with witnesses his theory that a comparison of the photograph of his vehicle taken by the TruCAM and tendered in evidence with the corresponding infringement notice photograph that had been sent to him, showed that the reticles were of different sizes. That difference, he suggested, arose because the former must have been altered by someone in the image management unit. Relying on evidence led in the prosecution case with respect to reticle size, and evidence to the effect that no data is added after the event to the digital file associated with an image, the magistrate rejected the applicant's suggestion.

The proceedings before and the decision of, the learned primary judge

[8] The appeals from the decisions given on 20 March 2015 and 30 April 2015 were Appeal No 85/15 and Appeal No 93/15 respectively in the District Court of Cairns. They were heard together on 21 September 2015 on the records below. No further oral testimony was given. His Honour allowed the applicant to adduce into evidence some further documentary material. He expressed his doubt that the additional material would have any influence on the result, in the absence of supporting expert evidence. He proposed to accord it "appropriate weight".[3]

[9] In his reasons, his Honour considered and rejected an attempt by the applicant to characterise a TruCAM device as a "laser device merely attached to a camera". Relying on that characterisation, the applicant had contended that s 112 of the *Transport Operations (Road Use Management) Act* 1995 (Qld) ("TORUM Act") applied to a TruCAM as a laser-based speed detection device, such as would require compliance with the Australian Standard, AS4619-1, in the use of the device. His Honour observed that a TruCAM device was prescribed by regulation to be a photographic detection device.[4] It was not a laser-based speed detection device to which s 112 applied.[5] He then observed:

> "[37] Compliance or non-compliance with the Australian Standard is not to the point. Instead, the focus should be upon the competent use of the *LTI 20-20 TruCAM* device, and whether some sub-standard operation caused a malfunction, supporting the appellant's challenge to the accuracy, image or markings made by the device. This requires probative evidence, which casts doubt on the prosecution case. The provision denies the appellant of the comfort of merely relying upon the relevant Australian Standard."[6]

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3 At [14].
4 At [28].
5 At [34], [36].
6 AB366-367.

[10] The learned primary judge set out the evidentiary provisions in s 120(2), (2A) and (4) of the TORUM Act which facilitated proof of the accuracy of speed camera images, the notation of date, speed, time, location and speed limit, and compliance with the operation and testing requirements for the speed camera the subject of the proceedings before him.

[11] Turning to Appeal No 93/15, the learned primary judge noted that the applicant had renewed an argument before him based upon a comparison of reticles. His Honour described the argument in these terms:

> "[44] The appellant argued that the images depicted the icons with different diameter sizes. He equated the reticle size with the operating beam width of the device. He argued that the device did not accord with the Australian Standard, and this was unexplained by the witnesses. He submitted that the inconsistency between the two images meant - '*There is no doubt that the device had undergone some catastrophic trauma of some sort and as a result was giving wildly inaccurate readings'*."[7]

[12] It was an argument that the learned primary judge was not prepared to accept for the following reasons:

> "[45] Neither TORUM nor the regulation prescribe that the icon is or represents the actual band width of the laser beam. In my view, by virtue of s 120(2)(c) and (4) the depiction of the reticle icon in the image, is at best, a graphical representation of the aim or focal point of the device. It is not a depiction of the actual laser beam or its width as the appellant argues.
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> [46] The certificate (Photographic Detection Device – test) dated 26 June 2014 constituted evidence that the device was tested at 14.50 on 18 October 2012 in accordance with the specification of the devices manufacturer and any further requirements about calibration testing prescribed under regulation, and was found to be producing accurate results at the time of testing.
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> [47] Although the device was not further tested before the date of the offence on 1 May 2013, by virtue of s 120(2A) of TORUM the certified evidence was probative for 1 year after the date of testing, which included the date of the offence.
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> [48] As to the appellant's bare assertion that '*the device had undergone some catastrophic trauma,*' s 120(6) of TORUM provided that:
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> '*Evidence of the condition of the photographic detection device is not required unless evidence that the device was not in proper condition has been given*.'
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> [49] There was no credible evidence adduced to support the appellant's bare assertion, and therefore, s 120(6) relieved the prosecution of counteracting the assertion."[8]

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7 AB368.
8 *Ibid.*

[13] His Honour observed that he was required to make his own assessment of both the sufficiency and quality of the evidence.[9] In undertaking that task, he made the following observations and reached the following conclusion:

> "[57] The officer who operated the device gave evidence. The appellant asserted that his evidence was somehow '*compromised*' by the later departmental characterisation of the detection site reference of 821001, which included the area but expanded along the eastern coast of Queensland which comprised some 37 sites as at 17 September 2014. The officer gave clear and specific testimony of his location at the time of detection. The appellant was also critical of the officer's *'extraordinary recall'* in the absence of the physical evidence, and also the absence of other witnesses to testify about imaging processing. Of course, the certificates constituted such evidence. Further, I see no merit in the appellant's comparison of the testimony of the operating officer and prosecution correspondence about the testing of the laser beam and the reticle in the images. The latter was not a witness at the trial, and did not contradict the oral testimony in any event.
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> [58] The appellant also gave evidence describing his conduct at the time of the alleged offence. However, he did not discredit the certified evidence including the data block of information contained in the image.
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> [59] There is no meritorious reason to depart from the findings of the magistrate based on the testimony and documentary evidence. To the extent that the appellant asserted competing inferences, the trial magistrate properly drew on the corroborated certified evidence consistent with guilt, and in my view no other reasonable inference was open.
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> [60] There was a logical and rational connection between the facts found and the trial magistrate's deductions and conclusions. His verdict was reasonable, supported by the evidence and according to law. I must therefore dismiss the appeal against conviction in Appeal 93/15."[10]

[14] With regard to appeal No 85/15, the applicant renewed his argument with respect to panning. His Honour dealt with the argument in the following way:

> "[65] The appellant submitted before me that the operating police officer gave evidence that he uses *'panning'* regularly as an operation tool as long as the devices internal alert system does not activate. In my view the appellant misconceives the evidence. In answer to the appellant's questions, the officer gave evidence to the effect that he would first identify the target vehicle with the naked eye, then aim the device on the moving target's number plate, and then pull the trigger when the device indicates its set. He also testified that he would check the clarity of the image, which the device will automatically capture, on an SD card.

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9 At [56]; AB370.
10 AB370.

> When asked specifically about *'panning'* the officer explained the device's capabilities within limits. The witnesses elaborated in re-examination that an image would be distorted or blurred with excessive movement. Whilst the officer conceded that the image was '*a little blurry*' he explained that the '*vehicle is moving and … that's normal*'.
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> [66] Mr James elaborated on this point during his cross-examination. He testified that the camera is normally set to focus at 60m, and that blurring would result from a shorter detection distance of 31m. In re-examination, the witness explained the device's technical capabilities such that it would detect irregular panning and produce an error message. He also explained that a closer detection distance on a slight angle would result in a lower speed-reading.
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> [67] The appellant gave evidence about *'panning'* based on his lay research.
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> [68] At the appeal hearing, the appellant also asserts a conflict in evidence given by witnesses in the separate trial hearings (subject of the two appeals) about the use of panning or sweeping. He referred to the evidence of Senior Constable Belcher about the impermissibility of '*panning*' adduced in precursor trial of Appeal 93/15. That evidence was and is not admissible in the earlier hearing. Even if it was admissible, in my view the evidence does not contradict the evidence before the trial magistrate in Appeal 85/15."[11]

[15] His Honour said that on his own independent examination of the evidence, he was satisfied that the magistrate had acted reasonably and that there was a logical and rational connection between the facts found, and his deductions and conclusions. The verdict was reasonable, supported by the evidence and according to law.[12] At that point, he observed:

> "…There [is] insufficient evidence to support the appellant's proposition that the device or image it produced was inaccurate due to the use of panning/sweeping. To the extent that the appellant asserted competing inferences, the trial magistrate properly drew on the corroborated certified evidence consistent with guilt, and in my view no other reasonable inference was available."[13]

The basis on which leave under s 118(3) is granted

[16] Very recently, both McMurdo P and Fraser JA agreed with the following description of the basis on which this Court approaches the grant of leave under s 118(3) given by Daubney J in *R v Al Shakarji*:[14]

> "Whilst it is clear that this section confers a general discretion on this Court which is exercisable according to the nature of the case (*Smith*

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11 AB371.
12 At [69], [70].
13 At [69].
14 [2016] QCA 29 at p 2.

v Ash (2010) 200 A Crim R 115 per Fraser JA at [50]), it is equally well established that such leave:

> '…is usually only granted where an appeal is necessary to correct a substantial injustice to the applicant, or there is a reasonable argument that there is an error which should be corrected.' (*Commissioner of Police v Al Shakarji* [2013] QCA 319 per Morrison JA at [4]).

Moreover, as this would be an appeal from a decision of the District Court in its appellate jurisdiction, it would be a 'strict appeal' limited to errors of law rather than an appeal by way of rehearing (ibid, per North J at [75] and *Gobus v Queensland Police Service* [2013] QCA 172 per Fraser JA at [5])."

[17] Thus the focus of the Court's attention is on whether an applicant for leave to appeal can demonstrate a substantial injustice to him or her which requires correction, or that the decision below is infected by an error of law.

[18] The applicant, who again, is acting for himself as he did before the learned primary judge, states in his application that the reason why this Court should grant leave is that his experience of amendments made to the TORUM Act in February 2014, including an amendment made to s 120, is that they are "totally unworkable in a modern, sophisticated, free and democratic society". Leave is requested "to present argument that will attempt to highlight the difficulties both sides have when working with this legislation".[15]

[19] It ought be said at once that it is insufficient for a grant of leave under s 118(3) that an applicant have a grievance about the workability of duly enacted statutory provisions which he or she would wish to ventilate before this Court. A substantial injustice in application of such provisions or an error of law on the part of the learned primary judge need be shown. It is relevant then to consider whether the applicant here has a plausible argument that the decision of the learned primary judge is defective in such respects.

Has the applicant demonstrated a basis for a grant of leave?

[20] In his application, the applicant also states that there are "glaring inconsistencies in the evidence presented by the prosecution in both trials".[16] This is a statement which, if true, would concern the quality of at least parts of the evidence in the prosecution case. It is not a complaint of error of law on the part of the learned primary judge.

[21] The applicant's written submissions also contain a catalogue of extracts from the evidence of prosecution witnesses in each of the trials in the Magistrates Court, supplemented by his comments on each extract. The comments relate to whether the applicant disputes what is said in the extract, whether he regards it as "unsubstantiated", or whether he contends that it is inconsistent with other evidence in the prosecution case. That, too, is not demonstrative of error on his Honour's part.

[22] There is a complaint that the applicant's defence at the summary trial in April 2015 was compromised because an adjournment sought by him to obtain "photographic evidence" concerning "the difference in size of the reticle on the infringement notice", was refused. That was not the subject of complaint by the applicant before the learned

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15 AB395.
16 AB394.

primary judge. Nor did the applicant seek leave to adduce such evidence for the re-hearing of the matter in the District Court. In those circumstances, the applicant cannot complain of an injustice on account of the refusal of the adjournment which his Honour failed to correct.

[23] At the hearing of the application, the Court invited the applicant to focus upon the reasons for judgment delivered by the learned primary judge and to identify any error of law which he contended had been made. The applicant observed that there had been "a lot of confusion" over whether a TruCAM device is a photographic detection device, on the one hand, or a radar speed detection device or laser-based speed detection device, on the other. He disagreed with a state of affairs in which a photographic detection device was built and tested according to Australian Standards but was not required by law to be used in compliance with an Australian Standard. He questioned how, if there were no "protocols" for use of a photographic detection device, photographs taken by the device could have any evidentiary value.

[24] During the hearing, the applicant was referred by the Court to the conclusions expressed by his Honour that upon a proper construction of the applicable regulation and statutory provision, a TruCAM device was, at all material times, prescribed to be a photographic detection device;[17] that s 112 of the TORUM Act did not at any relevant time apply to such a device;[18] and that, consequently, compliance with an Australian Standard was not required in the use of a TruCAM device.[19] The applicant did not attempt to identify any error in his Honour's conclusions or the reasoning on which he based them.

[25] The applicant also referred to paragraph 45 of his Honour's reasons. In written submissions, he has taken issue with the attribution to him of an argument that the recticle icon depicted in the photographic image is not a depiction of the actual laser beam or its width. That, he says, is the argument of the manufacturer of the device and of "every pre-eminent expert in the industry – including the Court Expert". Hence, this complaint, even if valid, is merely one of misattribution. It is not a complaint of insufficiency of evidence for, or other error in, the finding.

[26] Relying on the same paragraph, the applicant contends that it must follow from his Honour's finding that because a reticle icon is not a depiction of the actual laser beam or its width, any reticle depicted on a photograph "must have been placed there". He asks rhetorically: how else could it be placed there?

[27] Whilst this contention is not one of error of law, it does appear to me that the applicant has misconstrued what his Honour said. He stated that the reticle, as seen on the photograph, is, at best, a "photographic representation of the aim or focal point of the device", that is, a representation of the point at which the beam hits the vehicle: that is to say, although the reticle is not the "actual" beam; in essence, it is a representation of it. In a relationship of that kind between actual beam and reticle, it is not the case, that a reticle observed on a photograph must necessarily have been placed there by an act independent of the operation of the device.

[28] In any event, the applicant's contention is unavailing in the face of the evidentiary provisions of s 120 of the TORUM Act to which his Honour referred and their effect which he accurately summarised.[20]

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17 At [28].
18 At [34], [36].
19 At [37].
20 At [38]-[40].

[29] Lastly, I would mention the topic of panning which the applicant described as a "no-no". The topic was discussed by the learned primary judge in paragraphs 65 to 68 of his reasons which I have set out. The applicant referred to a misstatement by counsel for the respondent[21] in addressing the learned primary judge to the effect that there was evidence in the trial in which Mr James testified that a TruCAM device is "fail-safe".[22] The applicant made the point that, in his evidence, Mr James had acknowledged that panning can occur.[23] The learned primary judge expressed doubt about any machine being fail-safe. It is evident that he did not act upon what he was told. Furthermore, the applicant did not attempt to attribute any error of law to his Honour's discussion of the topic.

[30] In these circumstances, the applicant has failed to demonstrate any basis for a grant of leave to appeal. His application must be refused.

Order

[31] I would propose the following order:

1. Application for leave to appeal refused.

[32] **BURNS J:** For the reasons expressed by Gotterson JA, I agree that the application for leave to appeal must be refused.

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21 Different counsel appeared for the respondent on this application.

22 AB357 ll12-17.

23 AB37 ll28-36. Mr James also gave evidence at that point that an error message would be given when panning occurred.