DISTRICT COURT OF QUEENSLAND

CITATION:	*Lekich v Dixon* [2009] QDC 111
PARTIES:	**BILYANA LEKICH** Appellant **AND** **JEFFREY ARTHUR DIXON** Respondent
FILE NO/S:	Appeal 2702/08, MAG: 00114843/08(3)
DIVISION:	
PROCEEDING:	Criminal appeal
ORIGINATING COURT:	Magistrates Court, Caboolture
DELIVERED ON:	8 May 2009
DELIVERED AT:	Brisbane
HEARING DATE:	9 March 2009
JUDGE:	McGill DCJ
ORDER:	**Appeal allowed, conviction and penalty set aside, verdict of acquittal entered.**
CATCHWORDS:	VEHICLES AND TRAFFIC – Offences – speeding – speed camera – evidentiary effect of certificates – whether offence proved EVIDENCE – Documentary evidence – certificate – statements in certificate not covered by statutory provisions not admissible evidence. *Transport Operations (Road Use Management) Act* 1995 ss 59, 60, 118, 120, 124. *Police Service Administration Act* 1990 ss 4.10, 10.12(4). *Allied Pastoral Holdings Pty Ltd v Commissioner for Taxation* [1983] 1 NSWLR 1 – cited. *Re Amos* [1964-5] NSWR 1489 – cited. *Barton v Csidei* [1979] 1 NSWLR 524 – cited. *Bendels v Lilley* [2001] QDC 79 – considered. *Clarke v Japan Business Machines (Aust) Pty Ltd* [1984] 1 Qd R 404 - applied. *G v G* [1970] 2 QB 643 – applied.

Hindson v Ashby [1896] 2 Ch 1 - applied.
Myers v Director of Public Prosecutions [1965] AC 1001 – applied.
R v Cartman [1940] NZLR 725 – cited.
R v Harbach (1973) 6 SASR 427 – cited.
R v Sitek [1988] 2 Qd R 284 - cited.
Smith v R (2001) 206 CLR 650 – cited.
Thompson v Kovacs [1959] VR 229 – cited.
Trezise v Stephenson [1968] SASR 174 – applied.
United States Shipping Board v The Ship St Albans [1931] AC 632 – cited.
Walker v Davlyn Homes Pty Ltd [2003] QCA 565 – applied.

COUNSEL: The appellant appeared in person

K. Overell for the respondent

SOLICITORS: The appellant was not represented

Director of Public Prosecutions for the respondent

[1] This is an appeal pursuant to s 222 of the *Justices Act* 1886 from the conviction of the appellant in the Magistrates Court at Caboolture on 4 September 2008 following a summary trial of one count of driving a vehicle on a road at a speed over the speed limit applying to the road, contrary to s 20 of the *Transport Operations (Road Use Management – Road Rules) Regulation* 1995. The prosecution case was that the appellant was the driver of a vehicle detected travelling at 114 kilometres per hour by the fixed speed camera on the Bruce Highway at Burpengary.

The trial

[2] No witnesses were called in the prosecution case, the evidence for the prosecution being in the form of eight documents which were made exhibits. After the close of the prosecution case the defendant said she wanted to give evidence, but then clarified that as wanting to tender a document. The appellant sought to tender a letter from the Traffic Camera Office; the admissibility of the letter was challenged, the letter was admitted for identification, and ultimately the Magistrate[1] said that he was prepared to look at the letter but was not sure what weight could be attached to it: p 17. The letter was not to the appellant but to someone else, and had evidently been made available to her. She was then asked whether she wanted to give evidence, and later if there was anything else she wanted to say. At that point, without being sworn as a witness, she said that she knew the camera was there, had double checked her speedometer before she entered that area, and she was travelling at 100 kilometres per hour, and was not speeding at that point.

[3] The Magistrate, instead of pointing out that he could not act on that unless it was given as evidence, went on to ask how the court was to know that the speedometer was accurate. This was followed by a question as to whether tests were carried out in accordance with Australian standards to test whether the speedometer was accurate: p 19. If there is an Australian standard for testing speedometers, a matter

1 The trial was before an acting Magistrate.

of which I have no knowledge, then evidence that the speedometer had been tested in that way would certainly have been admissible, but the implication that evidence of other forms of testing was not admissible is plainly wrong. Any evidence which is logically probative of the proposition that the speedometer was accurate when registering a speed of 100 kilometres per hour would be admissible in order to prove the accuracy of the speedometer.[2]

[4] Ultimately, however, the appellant did not give evidence before the Magistrate, although it is not entirely clear that she was properly informed that the Magistrate could not act on factual statements she made unless she did give evidence. It may be, of course, that the Magistrate took the view that if she said these things in evidence it would not have made any difference, although strictly speaking it should have been made clear to the appellant that if she wanted any factual statements on her part to be taken into account it was necessary for her to give evidence of those matters. In the end the matter proceeded on the basis that the appellant had not given evidence.

[5] The grounds of appeal in the notice of appeal were in the following terms:

> "Wrongful identification. Prosecution failure to disclose. Incorrect evidence entered by prosecution. No police witness for defendant to question. Magistrate ignored critical evidence. Magistrate denied defendant right to produce evidence. Magistrate showed prejudice against defendant by allowing improper and incorrect evidence by the prosecution. Magistrate denied defendant right to a fair and impartial trial."

[6] In the light of the various matters raised as grounds, and enlarged upon in various ways in an outline of submissions filed on behalf of the appellant on 28 October 2008, it is necessary to summarise the evidence that was put before the Magistrate.

The evidence

[7] Exhibit 1 was a photograph certified as having been properly taken by a particular photographic detection device at a particular time and date at the Bruce Highway, Burpengary. It was certified by the respondent, a police officer who also certified that he was an authorised delegate of the Commissioner of Police. Section 4.10 of the *Police Service Administration Act* 1990 provides that the Commissioner may delegate powers of the Commissioner under that Act or any other Act to a police officer. So far as I am aware, however, there is no statutory provision by which the fact of the delegation can be proved by the certificate of the delegate. I shall return to this point later, and for the moment address the evidentiary effect of a certificate by someone proved to have been delegated that power.

[8] The purported signature of the respondent was evidence that it was what it purported to be pursuant to s 59 of the *Transport Operations (Road Use Management) Act* 1995 ("the Act"). By s 120 of the Act, an image purporting to be certified by the Commissioner stating that the image was properly taken by a

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2 Indeed, even without evidence of testing, evidence as to the speedometer reading would be admissible, given the nature and function of a speedometer: *Thompson v Kovacs* [1959] VR 229 at 233.

photographic detection device at a specified location and time is evidence of the following matters:

> "(a) The image was taken at the specified location and time;
> (b) The accuracy of the image;
> (c) The things depicted in the image;
> (d) Any requirements prescribed by a regulation about the operation and testing of a photographic detection device were complied with for the specified device at all material times."

[9] In addition, subsection (4) provides:

> "A marking or writing made by a photographic detection device on an image is taken to have the meaning prescribed under a regulation and is evidence of what it is taken to mean."

[10] The marking and writing made by the photographic detection device on the image are contained in the upper right-hand corner of the photograph which is Exhibit 1. The interpretation of that writing and marking, called a data block in s 211(2) of the *Traffic Regulation* 1962, is to be found in Part 3 of Schedule 11 to that Regulation.[3] By reference to Part 3 of Schedule 11, it is apparent that the handwriting at the top is information written by the operator when the particular film magazine was inserted. On the next line, the letter 'A' shows that the target vehicle was travelling away from the camera. The number 114 on the right-hand side shows that the device detected a speed of the target vehicle of 114 kilometres per hour relative to the ground.[4] The following line shows the time in hours, minutes, and, in smaller numbers, seconds, followed by the date, and in the third line the first six digits show the camera's location in accordance with the traffic camera coding manual, the next three digits show the speed limit at that place, and the final three digits the image number within the particular film identified at the top.

[11] Apart from this information, the photograph shows, in about the middle of the photograph, the rear side view of a vehicle travelling away from the camera in the furthest of three marked lanes, having a particular registration number. Not much else is visible; there do not appear to be any other vehicles in the same part of the road, though there are what appear to be the headlights of a vehicle travelling in the opposite direction further away from the camera.

[12] The effect of s 120(2) is that the certified image was evidence that it was taken at 21.43 on 14 March 2008 at the Bruce Highway at Burpengary at location code 580001, that the image was accurate, that is to say that the image accurately depicts that which occurred in front of where the camera was pointing, the things depicted in the image (which seems to me to come to much the same thing),[5] and that any

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3 *Traffic Regulation* 1962 s 211(1)(c).

4 The Schedule and the set up of the data block contemplate that the camera might itself be moving, and make allowance for that possibility, but this particular camera was stationary, indeed fixed.

5 A photograph is primary or real evidence of what is depicted in it: *R v Sitek* [1988] 2 Qd R 284 at 286, 292; *Trezise v Stephenson* [1968] SASR 174 at 178. That is consistent with the analysis in *Smith v R* (2001) 206 CLR 650 at [8], [9]. See also *Re Amos* [1964-5] NSWR 1489; *R v Cartman* [1940] NZLR 725 at 727 per Fair J; *R v Harbach* (1973) 6 SASR 427 at 435; Gillies "Law of Evidence in Australia" (2nd Ed 1987) p 35; Gans and Palmer "Australian Principles of Evidence" (2nd Ed 2004) p 85.

requirement prescribed by a regulation about the operation and testing of the device were complied with for the specified device at all material times.[6] In addition, by subsection (4) the information which can be obtained from the data block was evidence before the court, that is to say, evidence that at a particular time and date and a particular place the detection device detected a vehicle travelling away from the device at 114 kilometres per hour relative to the ground.

[13] This is not one of those cases, as occurred for example in *Bendels v Lilley* [2001] QDC 79, where the matter in issue was whether the speed detected by the detection device applied to one vehicle shown in the image rather than another vehicle shown in the image. In the present case there is only one vehicle which is travelling away from the camera shown in the image, and therefore it is the only vehicle which could be the target vehicle, that is to say, the vehicle the speed of which was measured by the detection device. Accordingly, the detected speed of 114 kilometres per hour applies to the appellant's vehicle. It is therefore unnecessary for me to consider whether any additional evidence would be necessary in circumstances where the image contained two vehicles, either of which could have been the target vehicle, and there is some issue about which of the vehicles was the vehicle detected by the speed camera.

[14] Exhibit 2 was a photograph certified in the same terms as Exhibit 1, but what it shows is an enlargement of the area of the vehicle so that the number plate is more legible, and perhaps a little more of the detail of the rear of the vehicle can be seen; it does not contain a data block, and accordingly its significance is simply to facilitate the identification of the registration number on the vehicle in Exhibit 1.

[15] Exhibit 3 was a certified extract from the traffic camera coding manual showing that site number 580001 was located at the Bruce Highway at Burpengary at which the site speed limit was 100 kilometres per hour. Section 212 of the *Traffic Regulation* 1962 provides that a certificate purporting to be signed by the Commissioner stating a document is a copy of a part of the traffic camera coding manual is evidence of that fact. Again, the signature of the respondent in effect proved itself pursuant to s 59 of the Act.

[16] There were then a series of exhibits which were designed to prove that the appellant was driving the vehicle shown in the photograph at the relevant time, or at least is taken to be criminally responsible for the speed at which the vehicle was travelling.[7] These were Exhibit 4, a certificate that a particular infringement notice related to the vehicle having a particular registration number ; Exhibit 5, a certificate that the registered owner of that vehicle was the appellant; Exhibit 6, a certificate that that particular infringement notice was sent by mail to the appellant; and Exhibit 7, a certificate that the appellant, having been served with the infringement notice, did not provide a statutory declaration within 28 days in compliance with s 114 of the Act. It is unnecessary to go into this aspect of the matter in any detail, because the appellant admitted that she had been driving the vehicle at the relevant time.[8]

[17] Finally, Exhibit 8 was a certificate by an authorised delegate of the Commissioner that photographic detection device serial number 2892 was tested at 1.30 pm on

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6 For example, that the requirements of the *Traffic Regulation* 1962 s 210 had been complied with.

7 See the Act s 114; there was no dispute here that the appellant was driving the relevant vehicle.

8 In view of that, any technical deficiencies in those certificates are now irrelevant.

8 November 2007 in accordance with s 124(1)(pa) of the Act, and at that time was found to be producing accurate results.

[18] Section 124(1)(pf) of the Act provides as follows:

> "A certificate purporting to be signed by the Commissioner, chief executive or a superintendent certifying that a photographic detection device used in conjunction with a stated induction loop speed detection device, laser-based speed detection device, piezo strip speed detection device or radar speed detection device has been—
> (i) tested at a stated time under paragraph (pa); and
> (ii) found to produce accurate results at the time of testing,
>
> is evidence of the matters stated and evidence the photographic detection device used in conjunction with a stated induction loop speed detection device, laser-based speed detection device, piezo strip speed detection device or radar speed detection device was producing accurate results when so tested and for one year after the day of testing."

[19] The tests referred to in paragraph (pa) are that the device was tested at a stated time in accordance with the appropriate Australian Standard for testing the device, as in force on the day of testing, or, if there is no appropriate Australian Standard for testing the device in force on the day of testing, the manufacture's specifications. One purpose of this certificate appears from s 112 of the Act which provides:

> "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."

[20] The advantage of the certificate is that it is made evidence not just that the device was accurate at the time it was tested, but that that was the situation for the next year after that day. Accordingly, it was evidence that the device was producing accurate results at the time of this detection, which was a little over four months later, as well as that s 112 had been complied with.

[21] Exhibit 8 is odd if it purports to rely on paragraph (pf), since it does not certify that the device was used in conjunction with a stated speed detection device, but merely that a photographic detection device having a particular serial number was tested. On its face therefore it is not what is required as a certificate under paragraph (pf). When this was pointed out to counsel for the respondent,[9] it was conceded that the inconsistency between the wording of the subsection and the wording of the certificate may invalidate the certificate. In my opinion, it does, and as a result this Exhibit was of no evidentiary effect. It appears that the wording of s 124(1)(pf) was amended in 2007 by Act 6 of 2007, before this certificate was given (on 17 July 2008), but the wording of the certificate had not been adjusted to accommodate the

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[9] After the hearing, by letter from my associate seeking further submissions on this and another point.

amendment. In the circumstances, it is not necessary to consider whether this certificate was vital, so that without it the prosecution should have failed.

Submissions of the parties – the absence of notice from the appellant

[22] The first point made by the appellant in her written submissions was that the magistrate erred in finding that the defendant did not comply with s 3 of what was simply referred to as "the Act". I do not know whether this is a reference to s 3 of the Act in the sense that I am using that expression, but that section simply provides the objectives of the Act which include to improve road safety, and to establish rules for on road behaviour. It is not apparent there was any failure to comply with that provision. I cannot find a reference in the decision of the magistrate to her having failed to comply with s 3 of any Act. It was then submitted that there was nothing which required written notice of a challenge to the photographic image taken by a speed detection device if the defendant's submission was to be that the interpretation of that image by the prosecutor was wrong.

[23] Section 118 of the Act relevantly provides:

> "(4) If the person intends to challenge the image from a photographic detection device at a hearing, the person must give the commissioner written notice of the intention at least seven days before the day fixed for the hearing.
>
> (5) A notice under subsection (4) must be in the approved form and must also state the grounds on which the person intends to rely to challenge the image from the photographic detection device."

[24] No such notice was given by the appellant in the present case. It is not entirely obvious what is covered by the concept of challenging the image referred to in subsection (4),[10] but s 113 of the Act defines a "photographic detection device" as a device that captures an image, and s 120(2) of the Act provides that an image purported to be certified in the way indicated is evidence of the various matters specified including "the accuracy of the image". Subsection (4) of the same section makes the marking or writing made by the device on an image evidence of what it is taken to mean in accordance with the regulation, as I have explained.

[25] Plausibly the concept of challenging the image could be confined to challenging "the accuracy of the image" of which the certified image is evidence pursuant to s 120(2)(b), or it could be a reference to challenging the image in the sense of challenging any of the propositions identified in s 120(2) of which the certified image is evidence, or it could extend to challenging the accuracy of the marking or writing made by the photographic detection device on the image which is made evidence by subsection (4). The structure of s 120 suggests that the matters which become evidence pursuant to subsection (4) are not treated as part of the image for the purposes of that section, and that the image is strictly speaking the photograph itself, this being what is captured by the photographic detection device. It is, however, not necessary to decide that, as the appellant's argument appears to be

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10 In principle, evidence can be challenged in a number of ways: *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 22 per Hunt J.

directed to the proposition that the interpretation of the image is not a matter which is precluded by the terms of s 118.

[26] It seems to me clear that, whatever the true scope of s 118(4), it does not extend to a prohibition on a challenge (without notice) to the interpretation of the image, and in particular, on making a submission as to whether the speed detected by the detection device is applicable to the vehicle in respect of which the defendant has been prosecuted. That appears to be consistent with the approach of this court in *Bendels v Lilley* [2001] QDC 79, where submissions were advanced and entertained as to the correct interpretation of the image in circumstances where no notice had been given under s 118, although the submissions were rejected on their merits by both the magistrate and the judge on appeal.

[27] In the present case, however, it does not appear that the magistrate misinterpreted the section in this way. Indeed, even if there was some such misinterpretation, it is not apparent how it could have been relevant to the outcome of the proceedings, since the evidence in the present case, and particularly the evidence of the image and the information recorded on it by the device, appears to be entirely unambiguous, and to admit to only one possible interpretation. In his reasons for convicting the appellant the magistrate referred to the relevant provisions of s 118, and went on to quote the statement from *Bendels v Lilley (supra)* that where there is no such notice "the evidentiary content of the image relied upon is such that it is open to the magistrate to find the charge proved beyond reasonable doubt."

[28] With respect I would entirely agree. His Honour there said that it was open to the magistrate to find the charge proved, that is to say, that there was evidence before the magistrate capable of supporting a finding of satisfaction of guilt beyond reasonable doubt, not that such a finding was inevitable, not did his Honour say that the effect of the legislation was that there was no room for any issue of interpretation. There is no reason to think that the magistrate in the present matter misinterpreted the remarks of his Honour that he cited. The short answer to the first argument advanced on behalf of the appellant is that it is founded on a misunderstanding of the approach of the magistrate.

— absence of witnesses and fairness of the trial

[29] It was then submitted by the appellant that she was deprived of a fair trial because no witnesses were called by the prosecution so that she was unable to put her case forward. In circumstances where a legislative regime has been put in place under which documentary evidence can be given of various matters, the prosecution is not acting unfairly by taking advantage of that regime. If in the particular circumstances of the case the legislative regime goes so far as to create a situation where a prosecution can be mounted entirely on the basis of documents made admissible by statute, it can hardly be unfair for the prosecution to take advantage of a situation deliberately created in that way by the legislature.

[30] In addition, the defendant is not prevented from putting her case forward by the absence of prosecution witnesses. The obligation to put her case in cross-examination cannot attach in circumstances where there was no-one to

cross-examine.[11] It may be that she was deprived of a possible opportunity to prove her case, or to weaken the prosecution case in some significant way, by the cross-examination of prosecution witnesses, but that does not render the trial unfair, particularly in circumstances where documentary evidence is made specifically admissible by statute. There was nothing to prevent the defendant from giving or calling evidence so as to put forward her case before the magistrate.

[31] None of the statutory provisions have the effect of making the contents of any particular certificate conclusive evidence of anything in particular; they merely have the effect of making various things evidence. Nor does a failure to comply with s 118 have the effect of making any of the evidentiary material before the magistrate conclusive evidence about any point; at most, it prevents the defendant from challenging the image, which presumably means contradicting whatever evidentiary effect "the image" has, the point I have left open previously. It may be that the practical effect of having the image unchallenged is that satisfaction beyond reasonable doubt of something or other may be more likely to occur, but that is another matter; strictly speaking the evidence is not made conclusive evidence by anything in the statute.

[32] It is always open to a defendant to call other evidence as to the speed of the defendant's vehicle at the relevant time. Depending on the nature and content of that evidence it may be sufficient to give rise to some reasonable doubt as to whether the defendant's vehicle was exceeding the speed limit at the time, notwithstanding the evidence of the speed camera. On their face, the effect of the certificates was that there was evidence that the speed camera detected the vehicle shown in the photograph as travelling at 114 kilometres per hour, and that the speed camera had been properly set up and was operating accurately in accordance with the Australian Standards or manufacturers instructions, and had been tested and found to be operating accurately within the last 12 months, and that the last time a film magazine was inserted into the camera the camera's testing mode indicated that it was operating correctly.

[33] Given that the whole purpose of the device is to detect the speed of motor vehicles in such circumstances, evidence of this nature is necessarily compelling, but its capacity to persuade beyond reasonable doubt depends upon its inherently compelling nature rather than the legislative effect of any particular certificate. In these circumstances, it is plainly open to a magistrate to be satisfied beyond reasonable doubt that the vehicle was travelling at the speed attributed to it by the speed detection device at the relevant time, particularly in a case where it is apparent from the image that there can be no issue about the attribution of the detected speed to the defendant's vehicle.

[34] That may well remain the case even if the defendant gives evidence of a belief that at the time the speedometer of the vehicle was indicating a lower speed. Such evidence may be mistaken, or may be the product of some inaccuracy of the vehicle's speedometer. Obviously such evidence is admissible in relation to the issue, and whether it gives rise to reasonable doubt in a particular case will be a matter for the magistrate, though it would be unsurprising if evidence which went

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[11] The purpose of the rule in *Browne v Dunn* is not engaged unless there is a witness who might be able to respond to the case put: see *Allied Pastoral Holdings Pty Ltd v Commissioner for Taxation* [1983] 1 NSWLR 1 at 23 per Hunt J.

no further than the statements of the appellant in the present case did not. It is possible to imagine a situation where a vehicle incorporated a technical device, which had been properly calibrated and recently tested, and which reliably recorded the vehicle's speed at any given time, and from which it was possible to provide evidence which on its face was comparable with the reliability of the speed camera, suggesting that the speed camera was inaccurate and that the vehicle was in fact at the time travelling at a lower speed, and within the speed limit.[12] In such a situation, of course, one would certainly expect that a magistrate would have at least a reasonable doubt as to whether the offence had been proved. It does not appear to me that there is anything in the Act and regulation which would prevent a prosecution from being defended, and indeed successfully defended, on such a basis; no doubt in practice what prevents this is the unavailability of such evidence. Obviously these are extreme examples; there could be a whole range of other admissible evidence, some of which may and some of which may not give rise to a reasonable doubt.

— evidence of the delegation

[35] One of the matters raised in the appellant's outline on p 2, after the submission about the fair trial, was:

> "We submit that the prosecution in this matter further failed to provide correct documentation in this matter as was noted by his Honour in regard to incorrect and unauthorised issuing of certificates that stated the accuracy and calibration of the device and the section of road the alleged offence took place at."

[36] This could be seen as enlarging on the ground in the notice of appeal, "incorrect evidence entered by prosecution." It does not appear that there was any specific objection raised to the admissibility of the certificates by the appellant in the course of the hearing, but the appellant was not legally represented during the hearing, and the issue which arises as to the admissibility of the certificates is an issue of law. In any case, this is an appeal from a criminal proceeding, and in such matters issues are sometimes raised for the first time on appeal. Although the argument was developed specifically in relation to questions that the magistrate raised in relation to some of the exhibits (transcript pp 24-25) the submission is in general terms, as was the reference to this point in oral submissions, where the point was not developed at any length.

[37] In her reply the appellant referred to the magistrate having said at the trial that the respondent was not authorised to sign the certificates, and it should have been the Commissioner of Police, but there was no statement to that effect by the magistrate at the trial; on the contrary the following exchange occurred in relation to the certificate on the photograph which became Exhibit 1 at pp 9-10:

> "BENCH: … I see the certificate is signed by an Acting Senior Sergeant Jeffrey A. Dixon. Obviously he is not the Commissioner of Police but his authority to sign that is as a result of a different Act.

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12 This is a hypothetical example only; I do not know of such a thing having occurred in practice, or of any such vehicle having in fact produced an apparently scientifically reliable indication of the vehicle's speed inconsistent with that generated by an approved photographic detection device.

SGT HERRMANN: Yes.

BENCH: That's the Police Service Administration Act?

SGT HERRMANN: Yes, your Honour, and it is a delegation.

BENCH: Section 4.10.

SGT HERRMANN: Thank you, your Honour.

BENCH: It is on that basis that you tender that ---

SGT HERRMANN: Yes, your Honour.

BENCH: --- photographic – the photograph. All right. Ms Lekich, do you follow that, ma'am?

DEFENDANT: Yes, I did.

BENCH: All right, thank you. That will be admitted as Exhibit 1."

[38] In effect, this was presented by the magistrate as a fait accompli. The appellant was given no opportunity to object. The difficulty for the respondent is that s 4.10 of the *Police Service Administration Act* 1990 did not amount to a delegation to the respondent; it permitted a delegation to be made, relevantly, to the respondent. In order to show, however, that the certificate of the respondent was effective as a certificate for the purpose of s 120 of the Act, it was necessary for the respondent to prove the fact of that delegation. Without proof of that, the certificate was not capable of having the evidentiary effect provided for by s 120 in the case of a certificate by the Commissioner. The respondent sought to prove the delegation by including reference to it in the certificate. The difficulty with that approach is that I am not aware of any statutory authority under which the delegation can be proved by the certificate of the delegate.

[39] The starting point, of course, for any criminal prosecution is that the evidence is to be given orally. Evidence in writing is *prima facie* hearsay and is inadmissible unless it comes within a statutory exception to the rule against hearsay.[13] The fairly limited general provision for documentary evidence in criminal proceedings in s 93 of the *Evidence Act* 1977 was not wide enough to cover a certificate of this nature. Although there are a great many certificates of various things made admissible under s 124 of the Act, or by s 60 or elsewhere in Division 2 of Part 5 of Chapter 3 of the Act, none of them includes a certificate by a person to whom something has been delegated that that delegation has occurred.

[40] Section 27A(14) of the *Acts Interpretation Act* 1954 provides that "a certificate signed by the delegator (or, if the delegator is a body, by a person authorised by the

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[13] *Myers v Director of Public Prosecutions* [1965] AC 1001, *G v G* [1970] 2 QB 643 at 653. These two decisions illustrate the inconvenient consequences of this technical rule. See generally Cross on Evidence (Aust Ed) [33360]; *Barton v Csidei* [1979] 1 NSWLR 524 at 533.

body for the purpose) stating anything in relation to a delegation is evidence of the thing." Accordingly, a certificate signed by the Commissioner would have been admissible as evidence of the delegation, and by subsection (15) a document purporting to be such a certificate is to be taken to be such a certificate unless the contrary is established, so that on the face of it such a certificate could simply have been tendered. But there is nothing in that Act by which a certificate by the delegate is made evidence of the existence of the delegation. There is certainly nothing in s 120 of the Act which permits the delegate to certify to the existence of the delegation where the Commissioner's power has been delegated.

[41] Counsel for the respondent, in supplementary written submissions, did not identify any statutory basis by which the certificate of the respondent was evidence of the fact of the delegation to him of the power to give certificates under s 120 of the Act. Counsel submitted:

> "It would appear that the signature alone does not prove the delegation, but that there is a rebuttable presumption that it is the signature of the delegate which may be proven if challenged in the prescribed way."

[42] That was a reference to the provisions of s 10.12(4) of the *Police Service Administration Act* 1990. That subsection provides:

> "If, in a proceeding, a person intends to question the power of an officer to act under a delegation under this Act, the person must give to the Commissioner notice of the intention at least seven days before the power is questioned in the proceeding."

[43] I accept that no notice under that subsection had been given by the appellant, and in those circumstances the appellant may well not have been entitled to question the power of the respondent to Act under any delegation. But that is not an answer to the difficulty that confronts the respondent; the respondent sought to tender a certificate by him under s 120 of the Act. In order to make that certificate admissible under that provision, it was necessary for the respondent to prove the existence of the delegation, and to do so by admissible evidence. If the certificate itself was not admissible evidence of that fact, and there was no other admissible evidence of that fact, the respondent failed to prove that the document certified by him was effective as a certificate under s 120 of the Act. Accordingly, the photograph and certificate lacked the evidentiary effect given to it by that provision.

[44] This does not involve any questioning of the effect of the delegation by the appellant; it is simply a matter of the respondent failing to prove his case. Relevantly the effect of subsection 10.12(4) is that, if there had been some evidence of the existence of a delegation, and the appellant wished to challenge its existence or scope, notice under this subsection was required. But a failure to give such notice did not excuse the respondent from the need to prove the fact of the delegation by admissible evidence.

[45] I am not aware of any statutory provision under which the certificate of the respondent was admissible evidence of the fact of the delegation, and no such provision has been drawn to my attention by counsel for the respondent. I cannot guarantee that there is not a provision, lurking in some Act somewhere, which has

the effect of making the respondent's certificate evidence of the fact of the delegation.[14] All I can say is that it has not been shown before me that there was any evidence of that fact before the magistrate. In the absence of evidence of that fact, the purported certificate was inadmissible, as on its face it was not a certificate by the Commissioner, and it had not been proved that it was a certificate of a person to whom the power to issue certificates under s 120 of the Act had been validly delegated.

[46] It follows that there was no admissible evidence before the magistrate to verify that the photograph in Exhibit 1 was what it purported to be, or of the various things referred to in the certificate. A photograph does not prove itself; it must be proved by admissible evidence.[15] In the absence of admissible evidence of the delegation, the certified photograph was not properly proved, and the tender of it should have been rejected by the magistrate. The magistrate erred in law in admitting Exhibit 1 into evidence, and by attributing to it the effect provided by s 120 for an image certified in accordance with that section. The same applies to Exhibit 2, although that did not add anything to Exhibit 1.

[47] Without Exhibit 1 there was no evidence before the magistrate to prove the offence, and accordingly the prosecution ought to have failed. In these circumstances, it is unnecessary for me to go on and consider whether the same difficulty applied to the other certificates which were put in evidence before the magistrate. Given the importance of s 120, it seems surprising that the power to issue certificates is on the face of the section confined to the Commissioner, and there is no specific statutory mechanism for proof of the delegation of the Commissioner's power to anyone else. The difficulty could have been overcome by tendering a certificate of the Commissioner as to the existence of the delegation, but that was not done.

[48] A copy of the delegation was provided to me with additional submissions in writing on behalf of the respondent, but that cannot be received as evidence on the appeal. Although there is a power in s 223(2) of the *Justices Act* 1886 to admit fresh, additional, or substituted evidence on the hearing of the appeal, that power is confined to a situation where the court is satisfied that there are special grounds for giving leave. Such leave was not expressly sought in the written submissions on behalf of the respondent, and in any case there is no reason to think that this evidence was not available to the respondent at the trial, so that the ordinary rules governing the receipt of fresh evidence on appeal[16] would not be satisfied in this case.

[49] I do not know how common the evidentiary deficiency that occurred in this matter has been; there was another speed camera appeal argued before me on the same day as this matter, in which that deficiency also arose. If this deficiency reflects the ordinary practice adopted in these prosecutions by the traffic camera office, it seems to me that that practice requires review.

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14 The Act itself is a mess; apart from anything else, there are separate provisions for certificates in ss 60 and 124.

15 *Trezise v Stephenson* [1968] SASR 174 at 178; *Hindson v Ashby* [1896] 2 Ch 1 at 27, approved in *United States Shipping Board v The Ship St Albans* [1931] AC 632 at 642.

16 *Clarke v Japan Business Machines (Aust) Pty Ltd* [1984] 1 Qd R 404 at 408; *Walker v Davlyn Homes Pty Ltd* [2003] QCA 565 at [11].

Other submissions

[50] For completeness, I will say something about the remaining submissions of the appellant. The appellant submitted that she was deprived of a fair hearing because there was no timely disclosure of all of the evidence to be used against her. It seems to me that there is no substance to this submission. Division 3 of Chapter 62 of the *Criminal Code* covers the obligation to disclose in advance evidence to be led at a summary trial.[17] Failure to comply does not affect the validity of the proceeding,[18] although in a particular case an accused person may be entitled to a reasonable adjournment if evidence led at the trial took that person by surprise.[19] In the present case, the essential evidence relied on against the appellant was the evidence in the form of the photograph, and there is a statutory provision in s 118 for prior inspection of that. Apart from the fact that the infringement notice had been sent to her, a copy of s 118 was served at the same time as the complaint and summons, so that the appellant had actual notice of the mechanism by which the image could have been inspected in advance of the prosecution. In the light of this specific statutory regime, it cannot be said that there was any unfairness in the failure of the prosecution to provide some other notice of the evidence. Most of the other material before the court was directed to proving that it was the appellant who was criminally responsible for the offence and the appellant did not dispute that she was driving the relevant motor vehicle at the relevant time, so any failure to give earlier notice of an intention to rely on those certificates was really of no consequence.

[51] It was then submitted that the prosecution had behaved in an improper manner by not disclosing evidentiary material which would have significant probative value. I do not understand this submission; it appears to be a complaint that relevant evidence was suppressed by the prosecution, but no particular evidence said to have been suppressed in this way was identified. If it was another way of putting the argument that the evidence to be relied on at the trial ought to have been disclosed in advance, I have already rejected that submission. Insofar as the development of this argument in the written submissions suggests that the specific provisions of the Act were not to take precedence over the nature of judicial power and the essential character of the court, I do not agree. It is the essence of the exercise of judicial power by a court that it acts according to law, which includes the law laid down by parliament in, for example, the Act.

[52] The next submission was that the magistrate erred in concluding that the evidence satisfied him of the appellant's guilt of the charge beyond reasonable doubt, not being conclusive evidence. I have in substance already dealt with that submission. There was no evidence properly before the magistrate on which it was open to him to be satisfied beyond reasonable doubt that the accused was guilty of the offence charged. It was next submitted that the evidence was open to interpretation because of the indication that there was also a vehicle travelling in the opposite direction. However, the markings made on the image by the camera included one to the effect that the vehicle detected was one travelling away from the camera. There was nothing in the image to indicate that there was potentially more than one vehicle

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17 *Justices Act* 1886 s 41.

18 *Criminal Code* s 590AC(2).

19 The police prosecutor said in this matter that a copy of the police brief had been provided to the appellant, but did not say when: p 8. It ought to have been at least 14 days before the trial: *Criminal Code* s 590AI(2)(a).

travelling away from the camera which could have been the vehicle detected. In those circumstances there was really no room for argument about the interpretation of the image.[20] A reference to a television current affairs program, which was not the subject of evidence at the trial, was therefore irrelevant as well as being inadmissible.

[53] A complaint was made about the letter from the Traffic Camera Office being ignored. However, the letter was not properly proved, and the magistrate ought not to have admitted it in evidence, except perhaps for identification. Having admitted it on that basis he should not have had regard to it. It does appear that at one point in his reasons he did have some regard to it, but concluded that it did not assist the appellant. I can only add that, for what it is worth, I also cannot see how there is anything in the letter which assists the appellant.

[54] The appellant's argument was based on the proposition that the vehicle travelling in the other direction had left the detection area whereas her vehicle had not left the detection area, and therefore could not have been the vehicle detected. There are two problems with this argument: the first is that, as I have just indicated, the detection device was detecting a vehicle travelling away from it rather than towards it, and there was only one vehicle travelling in that direction. The second is that it was based on an assumption as to the location of the detection area by reference to certain markings on the road. There was no evidence as to the location of the detection area, except insofar as the general location may be inferred from the fact that s 210 of the Act, among other things, requires the operator to ensure that the camera is positioned so as to photograph the front or rear of the vehicle the speed of which is being measured by the device, and there was evidence that it was aimed in accordance with the manufacturer's instructions; that these steps had been taken was part of what was covered by s 120(2)(d) of the Act, so that there was evidence of this from Exhibit 1.[21]

[55] Strictly speaking, however, there was no evidence, it seems to me, as to the location in the photograph of the detection zone, that is to say the particular position of the vehicle detected at the moment of detection. That may or may not have some relationship to the white markings on the road. All that would have been covered by the certificate, had it been properly proved, was that the camera was aimed to ensure that the front or rear of the vehicle, the speed of which was detected by the device, was photographed. Since the image shows that the appellant's vehicle was photographed, and that it was the only vehicle travelling away from the camera which was photographed, it necessarily follows in the present case that the effect of the image was that it was the appellant's vehicle that was detected.

[56] There was also a challenge to the appropriateness of locating a fixed speed camera in this particular position of the Bruce Highway. This raised considerations which are not relevant to any question that either the Magistrates Court or this court on appeal has to decide, and cannot affect the validity of the conviction.

[57] The ground of appeal, that the magistrate showed prejudice against the defendant by allowing improper and incorrect evidence by the prosecution, was not advanced

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20 There was no evidence that the accuracy of the measurement of the speed of a vehicle moving away from the device could have been affected by the presence of another vehicle moving towards the device.

21 Subject to the admissibility of the relevant certificates.

further in the written submissions or in oral submissions. It was not supported by anything in the transcript, which reveals that the magistrate went to some trouble to ensure that the appellant, as a self-represented party, understood what was happening. Although some of the prosecution evidence has been shown to be inadmissible, the fact that it was admitted into evidence does not in the circumstances provide any support for the proposition that there was prejudice against the appellant.

[58] In these circumstances, none of the other grounds of appeal have been made out, and no other reason has been shown to interfere with the decision of the magistrate convicting the appellant. There was, however, no evidence properly before the magistrate by which to prove the offence charged. In these circumstances he ought to have acquitted the appellant. Accordingly, I allow the appeal, set aside the conviction and penalty, and order that a verdict of acquittal be entered.