

29/12; [2012] VSC 328

SUPREME COURT OF VICTORIA

STATE OF VICTORIA v LANE

Kyrou J

25 July, 7 August 2012

MOTOR TRAFFIC – SPEED CAMERA OFFENCES – SUMMONS FOR PRODUCTION OF SERVICING RECORDS – WHETHER LEGITIMATE FORENSIC PURPOSE – MAGISTRATE’S REFUSAL TO SET ASIDE SUMMONS ALLEGEDLY VITIATED BY ERROR OF LAW ON THE FACE OF THE RECORD – WHETHER MAGISTRATE IN ERROR: ROAD SAFETY ACT 1986. SS81(1), 83A(1).

L. was charged with five charges of speeding over a period of 19 days. The speeds were detected by three cameras on Eastlink at the same location. L. denied he was speeding and had no prior convictions. L. issued a summons for production of documents relating to the service history and calibration details of the three speed cameras that were fixed to the Dandenong Bypass Bridge on Eastlink together with documents relating to the certification of the accuracy of the cameras. The Magistrate concluded that there was a reasonable possibility that the production of the documents would materially assist L. in defending the charges and that he had a legitimate forensic purpose in seeking them. Accordingly, the magistrate refused to set aside items 1 and 2 of the Summons. Upon application for review—

HELD: Application for review dismissed.

1. The legal principles relevant to this proceeding were:

(a) Where an accused in a criminal proceeding seeks production of documents pursuant to a subpoena, the accused must satisfy the Court that he or she has a legitimate forensic purpose. That purpose must be identified expressly and with precision.

(b) In order to demonstrate a legitimate forensic purpose, the accused must show that ‘it is on the cards’ that the documents would materially assist the accused in his or her defence. The expression ‘on the cards’ means ‘reasonable possibility’. Accordingly, the test for determining whether there is a legitimate forensic purpose is whether a reasonable possibility exists that the documents would materially assist the defence.

(c) The reasonable possibility test should be applied flexibly and with common sense in order to give the accused a fair opportunity to test the Crown’s case and to take advantage of any applicable defences.

(d) Mere speculation that the documents might assist the accused’s defence is insufficient to satisfy the reasonable possibility test. This is because mere speculation amounts to a fishing expedition which can never constitute a legitimate forensic purpose. Mere relevance to an issue in the proceeding is also not sufficient to establish a legitimate forensic purpose.

(e) Where the accused wishes to rely on a statutory defence, the absence of evidence from which an inference can be drawn that the documents sought will satisfy the requirements of the defence does not necessarily mean that the reasonable possibility test is not met. This is particularly so where there is only one statutory defence available to the accused and that defence involves technical information exclusively in the possession of the Crown; insistence by the court that the accused present evidence which provides a basis for a positive inference that the documents sought will satisfy the requirements of the defence may effectively ‘eviscerate’ the defence. It follows that the importance of the requested documents to an accused’s ability to establish a defence can inform the application of the reasonable possibility test.

2. It was not in dispute that the Magistrate’s Reasons demonstrated that her Honour was aware that a fishing expedition was insufficient to satisfy the reasonable possibility test. At para 34 of her Reasons, the Magistrate concluded that L.’s proposed evidence and the uncontested facts that the alleged offences occurred at the same location over a short period of 19 days in September 2009 provided ‘some foundation’ for ‘Mr Lane’s concern that the [cameras] were not operating properly’. On the basis of this material, her Honour found that there was a reasonable possibility that the Documents would materially assist Mr Lane’s defence.

3. In the present case, there was material before the Magistrate which enabled her Honour to conclude that L. had a legitimate forensic purpose in seeking the Documents and that he was not

engaging in a fishing expedition. Items 1 and 2 of the Summons were confined to documents relating to the three cameras that were relied upon to allege L.'s speeds.

Glare v Bolster (1993) 18 MVR 53, distinguished.

4. L. did not rely on a mere assertion of belief that he was not travelling at the speed allegedly detected by the three cameras but relied on a number of matters which, in combination, enabled the Magistrate to conclude that he had demonstrated a legitimate forensic purpose. It followed that the outcome of the present case, as in all cases of this type, depended on its facts.

5. It was open to the Magistrate to find that L.'s proposed evidence gave rise to a reasonable possibility that the three speed cameras had inaccurately measured his speeds and that this provided a proper legal basis for disclosure of the Documents. Clearly, if the Documents revealed any flaws in the operation of the speed camera, they would have improved L.'s prospects of displacing the evidentiary effect of the certified speeds and of establishing his defence that he was not travelling at speeds exceeding the applicable limit.

KYROU J:

Introduction and summary

1. The plaintiff, the State of Victoria, acting through the Department of Justice ('Department'), seeks judicial review^[1] of an order made by a Magistrate on 11 August 2011.^[2] By that order, the Magistrate refused the plaintiff's application to set aside items 1 and 2 of a summons for production of documents that was issued by the first defendant, Barry Lane ('Summons').

2. Items 1 and 2 of the Summons sought production of documents relating to the service history and calibration details of three speed cameras that were fixed to the Dandenong Bypass Bridge on Eastlink, and documents relating to the certification of the accuracy of the cameras ('Documents').

3. The Summons was issued in a proceeding in the Magistrates' Court ('Magistrates' Court proceeding') in which Mr Lane was charged with five speeding offences under the Road Safety Road Rules 2009. The charged offences were as follows:

- (a) on 7 September 2009, at 5:14 pm, Mr Lane was travelling at 106 kilometres per hour southbound in lane 3 on Eastlink at the Dandenong Bypass Bridge;
- (b) on 18 September 2009, at 5:18 pm, Mr Lane was travelling at 106 kilometres per hour southbound in lane 3 on Eastlink at the Dandenong Bypass Bridge;
- (c) on 19 September 2009, at 10:38 am, Mr Lane was travelling at 112 kilometres per hour southbound in lane 3 on Eastlink at the Dandenong Bypass Bridge;
- (d) on 22 September 2009, at 5:14 pm, Mr Lane was travelling at 107 kilometres per hour southbound in lane 3 on Eastlink at the Dandenong Bypass Bridge;
- (e) on 25 September 2009, at 6:43 am, Mr Lane was travelling at 106 kilometres per hour northbound in lane 2 on Eastlink at the Dandenong Bypass Bridge.

4. The prosecution relied on certificates issued under ss81 and 83A of the *Road Safety Act* 1986 ('Act') to prove the alleged speed at which Mr Lane was travelling and that the speed cameras were tested, sealed and used in the prescribed manner.

5. Counsel who appeared for Mr Lane in the Magistrates' Court proceeding (who did not appear in this proceeding) informed the Magistrate that Mr Lane intended to plead not guilty to all charges and to give the following evidence: that he did not exceed the speed limit and was not travelling at the alleged speeds; that he is 50 years of age; that he has no prior criminal history; that no traffic matters are recorded against his name; that he is a careful driver; that while driving on Eastlink he used his cruise control and a satellite navigation system to monitor his speed; that he travels on Eastlink regularly between his home and his work; and that he has not received any infringements for speeding on Eastlink either before or after the dates of the alleged offences.

6. The plaintiff applied to the Magistrate to set aside the Summons on the basis that Mr Lane did not have a legitimate forensic purpose in seeking documents relating to the three cameras. In opposing this application, counsel for Mr Lane submitted that his defence was that the cameras were malfunctioning and that he had a legitimate forensic purpose in obtaining the Documents so that he could pursue his defence.

7. The Magistrate concluded that there was a reasonable possibility that production of the

Documents would materially assist Mr Lane in defending the charges and that, accordingly, he had a legitimate forensic purpose in seeking them. On this basis, the Magistrate refused to set aside items 1 and 2 of the Summons. Her Honour did, however, set aside items 3, 4 and 5 of the Summons. Those items are not relevant to this proceeding.

8. In this Court, the plaintiff argued that the Magistrate made an error of law on the face of the record by finding a legitimate forensic purpose when there was no evidence for such a finding, and by misconstruing the Act.

9. For the reasons discussed below, I have concluded that the Magistrate did not make an error of law and that the application for review should be dismissed.

Procedural history

10. The Summons was directed to Victoria Police, who informed Mr Lane that the requested items were held by the Department. By agreement, the plaintiff assumed responsibility for the Summons without requiring the issue of a fresh summons. Mr Lane did not contest the plaintiff's standing either before the Magistrate or before this Court.

11. In the Magistrates' Court proceeding, the plaintiff relied on a secondary argument that it was not obliged to produce the requested items because they were protected by public interest immunity. The parties agreed that the Magistrate should deal with the primary issue of legitimate forensic purpose as a preliminary matter and only hear submissions on public interest immunity if the plaintiff was unsuccessful on the legitimate forensic purpose issue.

12. However, when the Magistrate published her decision in relation to the legitimate forensic purpose issue, the plaintiff commenced this proceeding rather than pursuing the public interest immunity issue before the Magistrate. Accordingly, the Magistrate has not yet heard submissions on the public interest immunity issue.

13. At the hearing of this proceeding, I asked the parties whether the fact that not all issues relating to the Summons had been finally determined by the Magistrate meant that the Magistrates' Court proceeding was being fragmented. I was particularly concerned about the possibility that, if the plaintiff was unsuccessful in this Court on the legitimate forensic purpose issue and was subsequently unsuccessful in the Magistrates' Court on the public interest immunity issue, there might be a further judicial review application. After a brief adjournment, I was informed that the plaintiff had abandoned reliance on public interest immunity.

Relevant provisions of the *Road Safety Act*

14. Sections 81(1) and 83A(1) of the Act, as in force at the date of the alleged offences relevantly provided:

Certain matters indicated by speed cameras are sufficient evidence

(1) If in proceedings for an offence to which section 66 applies the speed at which a motor vehicle or trailer travelled on any occasion is relevant, evidence of the speed of the motor vehicle or trailer as indicated or determined on that occasion by—

(a) a detection device prescribed for the purposes of section 66 when tested, sealed and used in the prescribed manner; or

(b) an image or message produced by a detection device prescribed for the purposes of section 66 when tested, sealed and used in the prescribed manner; or

...

is, without prejudice to any other mode of proof and in the absence of evidence to the contrary, proof of the speed of the motor vehicle or trailer on that occasion.

83A Evidence relating to prescribed detection devices

(1) A certificate in the prescribed form purporting to be issued by an authorised person certifying—
(a) that a prescribed detection device for the purposes of section 66 was tested, sealed or used in the prescribed manner; or

(b) that an image or message described in the certificate was produced by a detection device prescribed for the purposes of section 66 or by a prescribed process; or

...

is admissible in evidence in any proceedings and, in the absence of evidence to the contrary, is proof of the matters stated in the certificate.

15. Section 66 of the Act, to which ss81(1) and 83A(1) refer, provide (among other things) that a prescribed offence that is detected by a prescribed road safety camera is an ‘operator onus offence’ for the purposes of pt 6AA of the Act.

Relevant legal principles

16. The parties were in agreement about the legal principles that were relevant to this proceeding. Those principles are briefly summarised below.

17. Where an accused in a criminal proceeding seeks production of documents pursuant to a subpoena, the accused must satisfy the Court that he or she has a legitimate forensic purpose. That purpose must be identified expressly and with precision.^[3]

18. In order to demonstrate a legitimate forensic purpose, the accused must show that ‘it is on the cards’ that the documents would materially assist the accused in his or her defence.^[4] The expression ‘on the cards’ means ‘reasonable possibility’. Accordingly, the test for determining whether there is a legitimate forensic purpose is whether a reasonable possibility exists that the documents would materially assist the defence.^[5]

19. The reasonable possibility test should be applied flexibly and with common sense in order to give the accused a fair opportunity to test the Crown’s case and to take advantage of any applicable defences.^[6]

20. Mere speculation that the documents might assist the accused’s defence is insufficient to satisfy the reasonable possibility test.^[7] This is because mere speculation amounts to a fishing expedition which can never constitute a legitimate forensic purpose.^[8] Mere relevance to an issue in the proceeding is also not sufficient to establish a legitimate forensic purpose.^[9]

21. Where the accused wishes to rely on a statutory defence, the absence of evidence from which an inference can be drawn that the documents sought will satisfy the requirements of the defence does not necessarily mean that the reasonable possibility test is not met.^[10] This is particularly so where there is only one statutory defence available to the accused and that defence involves technical information exclusively in the possession of the Crown; insistence by the court that the accused present evidence which provides a basis for a positive inference that the documents sought will satisfy the requirements of the defence may effectively ‘eviscerate’ the defence.^[11] It follows that the importance of the requested documents to an accused’s ability to establish a defence can inform the application of the reasonable possibility test.^[12]

Magistrate’s decision

22. The Magistrate published detailed reasons for her decision to refuse to set aside items 1 and 2 of the Summons. In her Reasons, the Magistrate set out the applicable legal principles, which were along the lines of the principles set out at [17] to [21] above. Unsurprisingly, in this proceeding, the plaintiff did not seek to impugn the Magistrate’s statement of the legal principles. Rather, the plaintiff challenged the Magistrate’s application of those principles to Mr Lane’s case and her Honour’s construction of the Act.

23. In her Reasons, the Magistrate made the following relevant findings:

34. I note the particular facts that will be alleged in this case by Mr Lane. Mr Lane will maintain that he was not speeding on the five occasions. He will give evidence that he is 50 years of age, he has no prior criminal history and no traffic matters recorded against him. He is a careful driver and while driving on Eastlink used his cruise control and a satellite navigation system to monitor his speed. He travels on Eastlink regularly for driving between his home and work. He has not received infringements for speeding on Eastlink either before or after the alleged offence dates. It is uncontested that all the offences arise at the same location, the Dandenong Bypass Bridge, on five occasions within a short period of 19 days in the month of September 2009. If his evidence is accepted then Mr Lane’s concern that the devices were not operating properly is not without some foundation.

35. Counsel for the witness submits that in the face of the facilitative provisions of the Act – the requirements of s81 and the s83A certificate to prove the factual matters required by s81 – there is no justification for the defence to seek the testing (service history and calibration) records underpinning the s 84A (sic) certificate. Counsel submits that to uphold this witness summons would allow persons to go behind the legislative scheme and undermine the efficiency of the system.

36. I agree that the legislative scheme contains facilitative provisions that assist in the efficient prosecution of speed camera offences. This is an important goal. The legislative scheme does not however provide that the speed as shown by the image (as provided by s81 as being proof of speed) and the matters certified in the s 83A certificate are conclusive. Both sections include the phrase 'in the absence of evidence to the contrary'. As set out above, higher courts have found that 'evidence to the contrary' in effect means evidence 'to the opposite effect'. By including these words the Parliament is providing an opportunity for evidence to the contrary or 'to the opposite effect' to the speed indicated on the image and/or to the matters certified in the s 84A (sic) certificate including that the device was tested, sealed and used in the prescribed manner. If I was to accept the submission of Counsel for the witness in this case, the phrase 'in the absence of evidence to the contrary' in these sections would not be given any meaningful work to do.

37. Under the legislation it is open for Mr Lane to seek to adduce evidence to the contrary in relation to the speed and the matters certified in the s84A (sic) certificate including the testing, sealing and use of the devices concerned and whether this was as prescribed by the regulations.

38. It is not reasonable to expect that Mr Lane will be able to point to a flaw in the devices before finding that the reasonable possibility test is met. It is highly unlikely if not impossible that a motorist travelling on a freeway would be able to point to any such flaw in a camera fixed to a bridge high above. Further I note that documentation going to the accuracy of the devices and the testing, sealing and use of the devices is solely in the possession of the Crown.

39. Mr Lane's ability to have access to the technical documents that are in the sole possession of the Crown is, to use the words of Justice Kyrrou in *Johnson v Poppeliers*, 'of fundamental importance' to his desire to challenge the evidence of speed through being able to adduce evidence to the contrary in relation to the accuracy and the testing, sealing and use of the devices. As provided by Justice Kyrrou in *Johnson v Poppeliers* these circumstances should inform how the 'reasonable possibility' test is applied.

40. I note the particular circumstances of this case including the facts that will be alleged by Mr Lane, the circumstances of the alleged offences including the particular locations of the devices and dates, the ability under the legislation for an accused to adduce 'evidence to the contrary' and the fact that the technical documents that would provide such evidence to the contrary are solely in the possession of the Crown. In the light of these particular circumstances I am satisfied that there is a reasonable possibility that documents relating to the accuracy and the testing, sealing and use of the devices in question would materially assist the defence. To decide otherwise would deprive the accused of a fair opportunity to test the Crown's case as permitted by the legislative scheme.^[13]

Grounds of review

24. The plaintiff's application for judicial review relied on the following three grounds:

Magistrate Spencer:

- (a) erroneously found that a legitimate forensic purpose had been established;
- (b) failed to correctly construe the legislative scheme in respect of the proof of offences detected by automatic detection devices established by the *Road Safety Act 1986*; and
- (c) failed to properly apply the decision of this honourable Court in *Glare v Bolster* (1993) MVR 53.

25. As grounds (a) and (c) overlap, I will consider them together.

First and third grounds of review: Legitimate forensic purpose

26. The plaintiff submitted that, as Mr Lane had not foreshadowed adducing any evidence to suggest that the three cameras had not operated properly, he had failed to establish a legitimate forensic purpose. According to the plaintiff, the Summons was speculative and no more than a fishing expedition to see whether the Documents contain something that might assist Mr Lane.

27. I reject this submission. It was not in dispute that the Magistrate's Reasons demonstrate that her Honour was aware that a fishing expedition was insufficient to satisfy the reasonable possibility test. At para 34 of her Reasons, the Magistrate concluded that Mr Lane's proposed evidence and the uncontested facts that the alleged offences occurred at the same location over a short period of 19 days in September 2009 provided 'some foundation' for 'Mr Lane's concern that the [cameras] were not operating properly'. On the basis of this material, her Honour found that there was a reasonable possibility that the Documents would materially assist Mr Lane's defence.

28. The plaintiff submitted that the Magistrate's finding constitutes an error of law on the face

of the record because there was no evidence to support that finding.^[14] As the plaintiff applied to set aside the Summons prior to the calling of any evidence in the Magistrates' Court proceeding, the question is whether the evidence foreshadowed by Mr Lane, when given, would constitute evidence upon which the Magistrate could make her finding. In my view, it would be open to the Magistrate to make such a finding on the basis of such evidence. It is not to the point whether this Court would make the same finding on that evidence.

29. The present case can be distinguished from *Glare v Bolster*.^[15] In that case, the accused issued three summonses seeking a broad range of documents, including documents relating to the 'operation, repair and/or maintenance' of a particular make of speed camera that was then used by Victoria Police. Counsel for the accused sought to identify his legitimate forensic purpose by stating, in substance, that 'issues would arise at the hearing of the case as to whether the speed camera was operating accurately at the relevant time, whether it complied with the provisions of the Act and the regulations, whether it had been operated in accordance with the operating instructions and matters of a like nature'.^[16] Counsel also said that 'production of the documentation and the camera may enable experts called on behalf of [the accused] to express opinions in relation to the matter'.^[17]

30. Beach J held that 'there was no material before the magistrate ... which identified with any degree of precision the reason why [the accused's] solicitors require production of the documentary material referred to in the summonses and the speed camera'.^[18] His Honour also held that it was 'very difficult to conclude that the solicitors for [the accused] are engaged on anything other than a fishing expedition and are simply seeking to use the summonses to witness as a means of obtaining discovery in a criminal proceeding'.^[19]

31. Unlike the position in *Glare*, in the present case, there was material before the Magistrate which enabled her Honour to conclude that Mr Lane had a legitimate forensic purpose in seeking the Documents and that he was not engaging in a fishing expedition. Items 1 and 2 of the Summons were confined to documents relating to the three cameras that were relied upon to allege Mr Lane's speeds. In contrast, the accused in *Glare* sought disclosure of documents relating to a particular kind of device. Beach J acknowledged that 'it may be entirely proper in the circumstances of a particular case for a defendant to challenge the reliability of the device which measured the speed of his motor vehicle'.^[20] His Honour said that it 'is another thing to attempt to challenge the reliability of speed detection devices generally'.^[21]

32. There is no substance in the plaintiff's contention that the Magistrate erred in law by failing to properly apply *Glare*. That case does not stand for any general proposition that, on a charge of exceeding the speed limit, where the accused's speed is sought to be proved by a certificate stating the speed detected by a speed camera, the accused can never demonstrate a legitimate forensic purpose in seeking production of documents relating to the servicing of the camera. The legal principles applied by Beach J are consistent with those set out at [17] to [21] above and are thus consistent with those that were applied by the Magistrate. Beach J's findings that, in the case before him, the accused was engaging in a fishing expedition, was seeking discovery in a criminal proceeding, and had failed to demonstrate a legitimate forensic purpose, were based on the evidence before his Honour. Given the different factual position in the present case, her Honour was not bound to make the same findings as in *Glare*.

33. The plaintiff relied on the fact that, unlike the position in *Glare*, counsel for Mr Lane did not inform the Magistrate that Mr Lane's purpose in seeking the Documents was to refer them to experts for advice, with a view to calling expert evidence. In my opinion, the failure of counsel for Mr Lane to expressly mention referral of the Documents to an expert did not preclude the Magistrate from finding that Mr Lane had demonstrated a legitimate forensic purpose. This failure would not have prevented Mr Lane from seeking leave to call expert evidence if the contents of the Documents warranted this. In any event, depending on their contents, the Documents may have been capable of being effectively used in Mr Lane's defence without the involvement of an expert.

34. It follows from what I have said that there is nothing in *Glare* that compelled the Magistrate to set aside items 1 and 2 of the Summons. The position might have been different if the only basis upon which Mr Lane sought the Documents was a mere assertion that he did not believe that he

was travelling at the speed allegedly detected by the three cameras and that the Documents might demonstrate that he was not travelling at the alleged speeds. In such a situation, it might have been difficult for the Magistrate to reach any conclusion other than that Mr Lane was embarking on a fishing expedition and was seeking discovery in a criminal proceeding.

35. That situation, however, is far removed from the facts of the present case. Mr Lane did not rely on a mere assertion of belief that he was not travelling at the speed allegedly detected by the three cameras. Mr Lane relied on a number of matters which, in combination, enabled the Magistrate to conclude that he had demonstrated a legitimate forensic purpose. It follows that the outcome of the present case, as in all cases of this type, depends on its facts.

36. The plaintiff also submitted that the Magistrate erred in law in failing to distinguish *Johnson v Poppeliers*,^[22] on the basis that that case dealt with a drink-driving offence rather than a speeding offence and the only defence available for the former offence was that the breath testing device was not in proper working order or was not properly operated. There is no substance to this submission. The existence of a sole statutory defence based on a fault in the relevant device may be a relevant consideration in applying the reasonable possibility test, but it cannot be determinative.

37. For the above reasons, grounds 1 and 3 fail.

Second ground of review: Misconstruction of the Act

38. The plaintiff submitted that the Magistrate misconstrued the provisions of the Act dealing with proof of offences by automatic detection devices. In support of this submission, the plaintiff relied, in particular on the statement in para 36 of the Magistrate's Reasons that an inability by an accused to seek documents relating to such devices would not give the phrase 'in the absence of evidence to the contrary' any meaningful work to do.^[23]

39. The plaintiff contended that the evidence referred to at [5] above that Mr Lane proposed to give could constitute 'evidence to the contrary' and that acceptance of that evidence did not depend upon production of the Documents. The Magistrate was wrong, so the plaintiff submitted, to conclude that to deny Mr Lane access to the Documents would effectively prevent him from adducing evidence to the contrary.

40. I reject the plaintiff's submissions. The Magistrate referred to well-established authority for the proposition that the expression 'evidence to the contrary' means 'evidence to the opposite effect'.^[24] Her Honour's discussion of Mr Lane's proposed evidence clearly indicates that she was aware that the expression 'evidence to the contrary' embraced any evidence that was to the opposite effect of the evidence in the certificates. All that her Honour meant by her statement that the phrase 'in the absence of any evidence to the contrary' would not be given any meaningful work to do was that the plaintiff's submissions about the narrow circumstances in which it could be required to produce the Documents would unduly restrict the practical operation of that phrase.

41. The plaintiff also submitted that the failure by Mr Lane to articulate a clear link between his proposed evidence and the forensic purpose to be served by production of the Documents indicates that the Magistrate misconstrued the expression 'evidence to the contrary'.

42. This submission must also be rejected. I have already concluded that it was open to the Magistrate to find that Mr Lane had demonstrated a legitimate forensic purpose. The fact that it was open to Mr Lane to rely solely on his proposed evidence to establish 'evidence to the contrary' does not mean that there was no link between the Documents and the proposed evidence. Implicit in Mr Lane's proposed evidence that he was not travelling at the speeds derived from the cameras was that the cameras had recorded incorrect speeds. It was open to the Magistrate to conclude that there was a reasonable possibility that the Documents would materially assist Mr Lane's defence by corroborating his evidence. There is nothing in the authorities to suggest that, in order to demonstrate a legitimate forensic purpose in seeking production of documents, those documents must constitute the primary 'evidence to the contrary' as distinct from evidence that corroborates other evidence to the contrary.

43. Finally, the plaintiff submitted that Mr Lane's stated purpose in seeking the Documents

was misconceived because it conflated two separate evidentiary provisions in the Act: the ‘evidence to the contrary’ provision in s81(1) and the ‘evidence to the contrary’ provision in s83A(1). The plaintiff submitted that, as Mr Lane’s defence was that he was not travelling at the speeds alleged in the certificates relied upon for the purposes of s81(1), the speed camera servicing records were not relevant to this defence.

44. In support of this submission, the plaintiff relied on *Agar v Dolheguy*.^[25] In that case, Macaulay J discussed the different roles of certificates under the Act and how evidence adduced by an accused could operate to displace their evidentiary effect.^[26] The plaintiff’s reliance on *Agar* is misplaced. In my opinion, there is nothing in the Act or in *Agar* that suggests that the evidence that may be used to displace the effect of each certificate is mutually exclusive. As a matter of logic, the same evidence could displace the effect of more than one certificate. For example, evidence showing that a camera had not been sealed properly and had been tampered with in the period between tests could constitute evidence to the contrary which displaced the evidentiary effect of a certificate under s83A(1) as well as a certificate under s81(1).

45. In the present case, it was open to the Magistrate to find that Mr Lane’s proposed evidence gave rise to a reasonable possibility that the three speed cameras had inaccurately measured his speeds and that this provided a proper legal basis for disclosure of the Documents. Clearly, if the Documents reveal any flaws in the operation of the speed camera, they will improve Mr Lane’s prospects of displacing the evidentiary effect of the certified speeds and of establishing his defence that he was not travelling at speeds exceeding the applicable limit.

46. It follows that ground 2 fails.

Proposed orders

47. For the reasons set out above, the application for review will be dismissed. I will hear from the parties on the precise form of the order to be made by this Court and on the question of costs.

^[1] Under O56 of the *Supreme Court (General Civil Procedure) Rules* 2005.

^[2] *Dolheguy v Lane* (Unreported, Magistrates’ Court of Victoria, Magistrate Spencer, 30 November 2011) (‘Reasons’).

^[3] *R v Saleam* (1989) 16 NSWLR 14, 18; 39 A Crim R 406 (‘Saleam’); *Commissioner of the Australian Federal Police v Magistrates’ Court of Victoria* [2011] VSC 3 (11 February 2011) [28] (‘CAFP’).

^[4] *Alister v R* [1984] HCA 85; (1984) 154 CLR 404, 414-15; (1983) 50 ALR 41; (1984) 58 ALJR 97 (‘Alister’); *Saleam* (1989) 16 NSWLR 14, 18; 39 A Crim R 406; *Shaw v Yarranova Pty Ltd* [2011] VSCA 55 (3 March 2011) [26] (‘Shaw’).

^[5] *DPP v Selway [No 2]* [2007] VSC 244; (2007) 16 VR 508, 510 [4], 514 [10]; (2007) 212 FLR 243; (2007) 172 A Crim R 359 (‘Selway’); *Ragg v Magistrates’ Court of Victoria* [2008] VSC 1; (2008) 18 VR 300, 323-4 [95]-[97]; (2008) 179 A Crim R 568; *Johnson v Poppeliers* [2008] VSC 461; (2008) 20 VR 92, 106 [42]; (2008) 190 A Crim R 23; (2008) 51 MVR 444 (‘Johnson’), *CAFP* [2011] VSC 3 (11 February 2011) [28]. *Selway* and *Ragg* were cited with approval by the Court of Appeal in *Shaw* [2011] VSCA 55 (3 March 2011) [26] n 32. Accordingly, in my opinion, the Court of Appeal’s use (in *obiter*) of the expression ‘appear likely that the documents will materially assist the applicant’ does not reflect a preference for a different test. See *Shaw* at [26].

^[6] *Johnson* [2008] VSC 461; (2008) 20 VR 92, 106-7 [42]; (2008) 190 A Crim R 23; (2008) 51 MVR 444.

^[7] *A-G (NSW) v Chidgey* [2008] NSWCCA 65; (2008) 182 A Crim R 536, 550 [58], 552 [68] (‘Chidgey’); *CAFP* [2011] VSC 3 (11 February 2011) [28]; *Shaw* [2011] VSCA 55 (3 March 2011) [26].

^[8] *Alister* [1984] HCA 85; (1984) 154 CLR 404, 414-15, 456; (1983) 50 ALR 41; (1984) 58 ALJR 97; *Glare v Bolster* (1993) 18 MVR 53, 62 (‘Glare’); *Johnson* [2008] VSC 461; (2008) 20 VR 92, 106 [42]; (2008) 190 A Crim R 23; (2008) 51 MVR 444; *CAFP* [2011] VSC 3 (11 February 2011) [28].

^[9] *Chidgey* [2008] NSWCCA 65; (2008) 182 A Crim R 536, 550 [59]-[60]; *CAFP* [2011] VSC 3 (11 February 2011) [28].

^[10] *Alister* [1984] HCA 85; (1984) 154 CLR 404, 414-15, 451; (1983) 50 ALR 41; (1984) 58 ALJR 97; *Johnson* [2008] VSC 461; (2008) 20 VR 92, 106-7 [42]; (2008) 190 A Crim R 23; (2008) 51 MVR 444.

^[11] *Alister* [1984] HCA 85; (1984) 154 CLR 404, 451; (1983) 50 ALR 41; (1984) 58 ALJR 97; *Johnson* [2008] VSC 461; (2008) 20 VR 92, 106-7 [42].

^[12] *Johnson* [2008] VSC 461; (2008) 20 VR 92, 107-8 [47]; (2008) 190 A Crim R 23; (2008) 51 MVR 444.

^[13] Reasons, [34]-[40] (citations omitted).

^[14] The plaintiff’s written submissions appear to suggest that the record included parts of the transcript containing exchanges between counsel and the Magistrate during argument. At the hearing before me, senior counsel for the plaintiff disavowed that suggestion. See s10 of the *Administrative Law Act* 1978.

^[15] (1993) 18 MVR 53.

^[16] *Glare* (1993) 18 MVR 53, 62.

^[17] *Glare* (1993) 18 MVR 53, 62.

^[18] *Glare* (1993) 18 MVR 53, 62.

^[19] *Glare* (1993) 18 MVR 53, 62, 64.

^[20] *Glare* (1993) 18 MVR 53, 65.

^[21] *Glare* (1993) 18 MVR 53, 65.

^[22] [2008] VSC 461; (2008) 20 VR 92; (2008) 190 A Crim R 23; (2008) 51 MVR 444.

^[23] Para 36 of the Reasons is set out at [23] above.

^[24] See *DPP v Cummings* [2006] VSC 327; (2006) 46 MVR 84 (11 September 2006) [35]; *Roads and Traffic Authority (NSW) v Baldock* [2007] NSWCCA 35 (21 February 2007) [35]-[36]; Reasons [36]; (2007) 168 A Crim R 566; (2007) 47 MVR 306.

^[25] [2010] VSC 506; (2010) 246 FLR 179 (*Agar*).

^[26] *Agar* [2010] VSC 506; (2010) 246 FLR 179, 184 [32], 188 [59], 189 [61].

APPEARANCES: For the Plaintiff The State of Victoria: Mr R Ray QC with Mr R Taylor, counsel. Maddocks, solicitors. For the first defendant Lane: Mr L Carter with Mr S Norton, counsel. Robert Stary Lawyers. For the second defendant The Magistrates' Court at Dandenong: No appearance.
