50/10; [2010] VSC 506

SUPREME COURT OF VICTORIA

AGAR v DOLHEGUY & ANOR

Macaulay J

27 September, 11 November 2010 — (2010) 246 FLR 179

MOTOR TRAFFIC – EXCEEDING SPEED LIMIT – PROOF OF TESTING, SEALING AND USE OF SPEED MEASURING DEVICE – COMBINED ERROR TOLERANCES OF SPEEDOMETER AND POLICE SPEED MEASURING DEVICE – DEFENCE OF HONEST AND REASONABLE MISTAKE – WHETHER APPLICABLE – STATUTORY CONSTRUCTION – MEANING OF "SATISFIED" – INTERNATIONAL CONVENTION ESTABLISHING INTERNATIONAL ORGANISATION OF LEGAL METROLOGY – WHETHER APPLICABLE: *ROAD SAFETY ACT* 1986 (VIC), SS79, 83; *ROAD SAFETY (GENERAL) REGULATIONS* 1999, R306; *NATIONAL MEASUREMENT ACT* 1960 (CTH), SS4, 18(2)(I).

Reg 306 of the *Road Safety (General) Regulations* 1999 provides that a speed measuring device is tested in the prescribed manner if the testing officer who tests the device is satisfied that the device is in a satisfactory electrical condition, has been satisfactorily maintained and that the device is properly calibrated.

HELD:

1. The word "satisfied" in reg 306 is not to be construed in a manner that mandates the use of a particular scientific method before the relevant testing officer could reach the state of satisfaction required by the regulation. The legislation contemplates that the assertion that a testing officer was relevantly "satisfied" may be challenged. If so, he or she could not be found to have been "satisfied" of the relevant matters if that state of mind is seen to be baseless or pretended or indeed not held at all. As an ordinary English word, to be satisfied, in the relevant connotation, means to be furnished with sufficient proof or information, to be assured or convinced. The tester's state of mind is a matter of fact. That state of mind is, *prima facie*, established if a schedule 2 certificate is admitted because that "satisfaction" is one of the elements which the certificate implicitly proves. But if it is challenged, as it may be, the challenger may seek to adduce evidence to prove that the testing officer was not so "satisfied".

2. When the Victorian Parliament legislated as to the method by which a speed measuring device is to be tested for the purpose of law enforcement, it was not obliged to import any specific legal metrology methodology. It chose not to specify any method of testing the relevant devices but, rather, it adopted an alternative, rational method of assuring certain qualitative standards by prescribing the technical competence of the testing officer. In those circumstances, there is no warrant to imply the application of legal metrological principles in construing the meaning of "satisfied" where it appears in reg 306, either as a necessary legal consequence of Australia's treaty obligations or as a consequence of the Commonwealth legislation.

3. The error tolerance in the speed measuring device is taken into account because, as is clear from the legislative regime, it is the speed indicated by that device that is used by the prosecuting authority to establish a case against the driver, not the driver's vehicle's speedometer. Proof of the prosecution case does not involve any assumption as to the accuracy of the speedometer in the car driven by the appellant.
***Van Reesma v Police* [2010] SASC 201 at [13], considered.**

4. The defence of honest and reasonable mistake of fact did not apply.
***Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377, applied.**

MACAULAY J:

Introduction

1 Mr Agar (the Plaintiff) seeks judicial review of a decision of a County Court judge who, on an appeal from a Magistrates' Court decision, convicted and fined Mr Agar for driving a vehicle at a speed exceeding the speed limit.

2. On 29 August 2006 Mr Agar was detected driving his motor vehicle at 78km/h in a 70km/h zone on the Nepean Highway, Seaford. After electing to contest a traffic infringement notice Mr

Agar was charged with driving over the speed limit contrary to reg 20 of the Road Rules. The speed alleged was 75km/h.

3. On 31 March 2008 the Magistrates' Court at Frankston found the charge proved. Mr Agar was convicted and fined $50 and ordered to pay witness costs in the sum of $700.

4. Mr Agar appealed to the County Court against conviction and sentence pursuant to the then existing provisions of s83 of the *Magistrates' Court Act* 1989. On 15 May 2009 his Honour Judge Campbell set aside the orders of the Magistrate, found the offence proven and made orders identical to those made by the Magistrate.

5. By Originating Motion filed in this Court, Mr Agar invokes the court's power to supervise the exercise of jurisdiction by the County Court rather than pursue any avenue of appeal. The proceeding is brought pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005 which prescribes the procedure for the conduct of a review formerly commenced by prerogative writ. Mr Agar seeks an order in the nature of *certiorari* to quash the decision of the County Court. As he did before Judge Campbell, Mr Agar represented himself before this Court.[1]

6. As explained by the High Court in *Craig v South Australia*[2], where such a writ runs:

> ... it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record". Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for certiorari can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record. [citations omitted]

7. Fourteen grounds were listed by Mr Agar as the basis for arguing that the County Court's decision was affected by "error on the face of the record" or was otherwise susceptible to being quashed.[3]

8. In substance, and as argued before me, those grounds reduced to three fundamental complaints: first, Judge Campbell misconstrued, and thus failed to correctly apply, reg 306 of the *Road Safety (General) Regulations* 1999[4] (General Regulations) with respect to the testing of the relevant speed measuring device; secondly, his Honour wrongly failed to take into account the combined error tolerances of both the police speed measuring device and the speedometer fitted to Mr Agar's vehicle; and, thirdly, his Honour wrongly denied him the defence of honest and reasonable mistake in answer to the charge.

9. The Crown contended that none of those complaints, even if established as errors, constituted jurisdictional errors. Further, it argued that for the purpose of any alleged error on the face of the record, only the documents initiating the proceeding and recording the outcome (ie. the Charge and Summons, the Notice of Appeal to the County Court, and the County Court Result of Appeal) could properly be taken into account – neither the Reasons for Judgment nor the transcript or evidence were relevant for that ground. That argument does not appear to take account of s10 of the *Administrative Law Act* 1978 (Vic).

10. In any event, contended the Crown, the judge below was not in error on any of the grounds argued by Mr Agar.

11. Addressing Mr Agar's principal complaints, and, putting to one side for the moment whether such issues give rise to any jurisdictional question, the issues to decide are:

- Did Judge Campbell correctly apply reg 306 on the evidence before it?

- Should his Honour have allowed Mr Agar the benefit of the combined error tolerances of both his speedometer and the police speed measuring device?

• Is the defence of honest and reasonable mistake available in respect an offence of the kind alleged against Mr Agar?

12. For reasons which I elaborate below, I do not agree that an error was made by the County Court on any of the bases argued. Whether the alleged errors could properly be characterised as having a jurisdictional quality or, as possible errors of law, were disclosed on the "record" as properly understood, are matters which I find unnecessary to answer.

Regulation 306

13. The relevant offence with which Mr Agar was charged was that of exceeding the applicable speed limit (ie. Road Rule 20). The speed measuring device used in detecting his speed was a Gatsometer MRC System (Gatsometer), a speed camera, with an identifying number RG050.

14. Section 79 of the *Road Safety Act* 1986 (Vic) provides:

> If in any criminal proceedings the speed at which a motor vehicle travelled on any occasion is relevant, evidence of the speed of the motor vehicle as indicated or determined on that occasion by a prescribed speed measuring device when tested, sealed and used in the prescribed manner 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 on that occasion.

[underlining added]

15. Exceeding the speed limit was (at the relevant date) a "prescribed offence" which may be detected by an "automatic detection device"[5]; such automatic detection devices included the Gatsometer[6]; and a prescribed speed measuring device, as referred to in s79, includes the Gatsometer referred to in reg 302(c)[7].

16. As can be seen from s79 of the *Road Safety Act*, the relevant speed measuring device can only supply admissible proof of the speed of the vehicle on the relevant occasion if it has been tested, sealed and used in the prescribed manner.

17. Regulations 303, 306 and 307 of the General Regulations prescribe the manner for the use, testing and sealing of the speed measuring devices, including the Gatsometer.

18. In relation to the use of a speed measuring device, in particular the Gatsometer, reg 303(b) provides that it is used in the prescribed manner if –

> (i) the device is used in accordance with operating instructions approved by a testing officer; and
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> (ii) the device has been tested in accordance with regulation 306 ...; and
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> (iii) the device has been sealed in accordance with regulation 307 ... .

19. As to the testing of the speed measuring device, reg 306 states it is tested in the prescribed manner if the testing officer who tests the device –

> (a) is satisfied that the device is in a satisfactory electrical condition and, in particular, that any maintenance carried out on the device has been carried out in a satisfactory manner; and
>
> (b) is satisfied that the device is properly calibrated so that it operates within the following limits of error – ...
>
> (ii) in the case of an automatic detection device referred to in regulation 302(b) and (c), the frequencies or speeds at which calibration is effected indicate speed readings within a limit of error not greater than or less than 3 kilometres per hour or 3 percent (whichever is greater) of the true speeds determinable from those frequencies or speeds; ... and
>
> (c) records and retains the results of the test, including –
>
> (i) a statement showing the frequencies or speeds at which the calibration was effected and the number of times that each frequency or speed the calibration was effected; and
>
> (ii) the date of the test and the ambient temperature at the time of the test.

[underlining added]

20. Mr Agar's arguments on this ground paid particular attention to the word "satisfied" where it appears as underlined above. I will return to those arguments shortly.

21. Little, if any, attention was paid in argument to the requirement of sealing the device, so that element can conveniently be put aside.

Tested in the prescribed manner

22. The statutory scheme provides a means of proof (at least *prima facie* proof) that a speed measuring device has been tested (and sealed) in the prescribed manner. Section 83 of the *Road Safety Act* provides:

> A certificate in the prescribed form to the effect that any device referred to in section 79 or 82 has been tested or sealed in the prescribed manner, signed or purporting to be signed by a person authorised to do so by the regulations is, without prejudice to any other mode of proof and in the absence of evidence to the contrary, proof that the device has been so tested or sealed.

23. In order to constitute acceptable proof of the testing (and sealing) of the device s83 requires, first, a certificate in the prescribed form and, secondly, that the certificate be signed by a person authorised by the regulations to do so.

24. As to the prescribed form, reg 311(1) prescribes the form set out in schedule 2 to those regulations. As to the authorised signatory, reg 311(2) authorises a "testing officer" to sign a schedule 2 certificate.

25. "Testing officer" is a defined term: reg 105 of the General Regulations. Such a person means –

> (a) a technical officer or the head of the faculty, school or department of electrical engineering, electronics or communications at a university … [specified in particular Acts]; or
>
> (b) a person skilled in the development and operation of speed measuring devices and authorised in writing by the Chief Commissioner of Police; or
> (c) a principal testing officer of a testing body accredited in the field of electrical testing by the National Association of Testing Authorities, Australia (NATA).

26. In this particular case Judge Campbell received into evidence a schedule 2 certificate, dated 22 March 2006, purporting to be signed by C Burden who was described as a "technical officer of the Department of Communications at Royal Melbourne Institute of Technology being a university in Victoria". Mr Burden was called as a witness and confirmed his qualification as so described.

27. The certificate conforms with the requirements of schedule 2 of the General Regulations stating, in substance, that the automatic detection device number RG050 was tested in accordance with the General Regulations on 22 March 2006, and that the test confirmed that the device was operating correctly, and had been properly sealed, in accordance with the requirements of those regulations.

28. Thus, the certificate was signed by a testing officer meeting the definition in reg 105 of the General Regulations, and was in conformity with schedule 2 of those regulations. In those circumstances it was proof – absent evidence to the contrary – that the device had been tested (and sealed) in the prescribed manner.

29. Implicit in the proof that the device had been tested in the prescribed manner the certificate was proof that the testing officer was satisfied about the device's electrical condition (reg 306(a)); the testing officer was satisfied as to its proper calibration (reg 306(b)(ii)); and the testing officer had recorded and retained results as required (reg 306(c)).

30. In order to meet the set of conditions required under s79 of the Act for the speed indicated by the Gatsometer to amount to proof of the vehicle's speed, there also needed to be evidence that the speed testing device had been used in the prescribed manner (as stipulated in reg 303(b)). Evidence on that issue was given to the County Court by the person responsible for setting up and operating the Gatsometer on the day in question.

31. Accordingly, such evidence having been adduced, Judge Campbell had before him sufficient

proof as to the testing, sealing and use of the speed measuring device to enable him to receive and act upon the speed indicated by the Gatsometer as proof of the speed of the vehicle on the relevant occasion.

32. Nevertheless, as the various provisions which have been outlined above indicate, there were two relevant points at which the legislative scheme contemplated the admission of evidence to the contrary which may have disturbed the *prima facie* proofs:

> (a) first, notwithstanding the *prima facie* proof of the proper testing and sealing of the device supplied by the schedule 2 certificate, the court may have regard to any other evidence to the contrary before being satisfied that the device had been tested or sealed in the prescribed manner (s83); and
>
> (b) secondly, notwithstanding the speed indicated by such a speed measuring device, the court was able to have regard to any evidence which contradicted the speed indicated by the device in reaching its conclusion on the question of speed for the purpose of the proceeding (s79).

33. Focusing first on proof of proper testing, by qualifying s83 with the words "and in the absence of evidence to the contrary", the legislature contemplated that a person may challenge the *prima facie* conclusion that a device has been tested in the prescribed manner – implying that a challenge may be made to any of the elements specified in reg 306.

34. It is to be noted that the prescription of the "manner" in which a device is to be tested, as set out in reg 306, is expressed in terms of the outcome of the testing and the satisfaction of the testing officer, rather than any methodology to be employed in achieving that outcome or the requisite satisfaction.

35. Neither the Act nor the regulations stipulate how the testing officer is to go about his or her task. Instead, the legislation achieves a measure of qualitative assurance in the testing process by specifying the technical competence of the testing officers through the definition of that term in reg 105, and the requirement that only such person be authorised to sign a schedule 2 certificate.

36. With that background it is necessary to turn to the decision of the County Court in the light of the evidence before it and the arguments that were advanced by Mr Agar.

Meaning of "satisfied" in regulation 306

37. Mr Agar argued that the General Regulations, properly understood, required the Gatsometer to be calibrated by the testing officer adopting and applying "standard Australian metrological practice". Evidence was called by Mr Agar from two witnesses as to what such practice would require in the context of testing a speed measuring device such as a Gatsometer.

38. In essence, it was said, such practice would require a particular methodology of testing and documentation of results to be followed. Such methodology and documentation, if adopted, would mean the testing could be independently verifiable and reproducible. The testing as carried out by Mr Burden was criticised as not being independently verifiable or reproducible.

39. That argument was rejected by the County Court. It turned upon what was meant by the word "satisfied" where, in reg 306, it is stated that a device is properly tested if the testing officer is satisfied of certain things. Mr Burden, a testing officer with the qualifications required under the regulations, gave evidence he was so satisfied. He was cross-examined as to his state of satisfaction. Mr Agar's argument was that the court could not accept that he was so satisfied unless he had carried out his testing in accordance with particular "metrological" practices.

40. Judge Campbell did not agree that the word "satisfied" was to be construed in a manner that mandated the use of a particular scientific method before the relevant testing officer could reach the state of satisfaction required by the regulation.

41. Mr Agar advanced similar arguments of construction before me. Those arguments were presented both in detailed written form, and also in oral submissions. I was much assisted by Mr Agar's oral argument in understanding the essence of his complaints. His arguments may be summarised as follows:

(a) "satisfied" cannot be judged purely by the subjective state of mind on the part of the testing officer – it must at least be subject to some criteria of reasonableness;

(b) "satisfied", in respect of testing a measuring device's condition and accuracy, must mean satisfied against some sort of standard: and that standard must at least require that the test be verifiable, reproducible and have accommodated all possible variables that might affect the device's operation (which, for example, would require testing in the field as well as the laboratory);

(c) the word "satisfied" must be understood to mean "satisfied in accordance with accepted metrological principles" because, since 1959, Australia has been a signatory to the Convention that established the International Organisation of Legal Metrology, and legislation should be construed in accordance with our treaty obligations; and

(d) further, because a "testing officer" as defined in reg 105 includes, amongst the three classes of persons so defined, one class which, by definition, *would* apply metrological principles, that means that all testing officers are required to do so when carrying out a task under the regulations.

42. There are aspects of Mr Agar's argument with which I can agree. The legislation contemplates that the assertion that a testing officer was relevantly "satisfied" may be challenged. If so, he or she could not be found to have been "satisfied" of the relevant matters if that state of mind is seen to be baseless or pretended or indeed not held at all. As an ordinary English word, to be satisfied, in the relevant connotation, means to be furnished with sufficient proof or information, to be assured or convinced. The tester's state of mind is a matter of fact. That state of mind is, *prima facie*, established if a schedule 2 certificate is admitted because that "satisfaction" is one of the elements which the certificate implicitly proves. But if it is challenged, as it may be, the challenger may seek to adduce evidence to prove that the testing officer was not so "satisfied".

43. A conclusion that a testing officer could only reach the requisite standard of satisfaction if he or she carried out the testing according to a particular scientific method, could be derived from a view that Parliament had demonstrated an intention that testing should only be carried out in that manner (ie. an exercise in statutory construction). Alternatively such a conclusion may proceed from the judge being convinced, as a matter of fact, that the evidence established that satisfaction of a particular state of affairs would logically require a particular method to be used (ie. a forensic finding).[8]

44. On the point of construction, the judge did not accept that "satisfied" was used in any special way, but rather was used in accordance with the ordinary English meaning of the word. I agree with that construction of the regulation for the reasons set out below.

Construction argument

45. In substance, Mr Agar contends that reg 306 should be construed as if it said "satisfied in accordance with legal metrological principles", or some similar wording, wherever "satisfied" appears. There is certainly no explicit indication in the legislation that the statutory provisions should be so construed.

46. One then turns to Mr Agar's arguments by which he says the use of the metrological method is to be implied: that is, either by reference to the definition of "testing officer", or by observing Australia's international Convention obligations.

47. Recourse to the three-fold definition of "testing officer" in reg 105 does not assist Mr Agar. It is drawing an exceedingly long bow to suggest that Parliament intended to mandate the use of the metrological method simply because one of the three categories of permitted testers would typically use metrological principles in their testing method (giving Mr Agar the benefit of that assumption as a matter of fact). I reject that argument.

48. Mr Agar further relies upon the fact that in 1959 Australia became a signatory to the Convention establishing an International Organization of Legal Metrology (which uses the acronym OIML). That is indeed the case. The Convention entered force for Australia on 17 September 1959. Mr Agar appears to proceed from having made that observation to a conclusion that the language and principles of metrology, and in particular legal metrology, are immediately applicable to any law or regulation involving scientific measurement. That process of reasoning involves a leap which is flawed.

49. In Mr Agar's written response to the Crown's written outline of submission he quotes from some publications of OIML). He also refers to various provisions of the *National Measurement Act* 1960 (Cth) and the regulations made thereunder.

50. OIML's purposes, as expressed in the Convention, include to establish model draft laws and regulations for measuring instruments and their use, and to determine necessary and adequate characteristics to which measuring instruments must conform in order for them to be approved by member states.[9] In 'Elements for a law on Metrology', a publication to which Mr Agar refers, OIML published "elements to be considered [by member states] when drawing up national laws related to metrology".[10] The proposed provisions included draft recommendations as to what subject matter national regulations may cover, including: "regulations on measurements"[11] and "regulations on measuring instruments".[12]

51. To the extent Australia has adopted the recommendations of OIML, its compliance appears to be enshrined in the *National Measurement Act*. Its provisions do not compel States to adopt or apply metrological principles in their regulatory provisions with respect to measuring instruments (eg their use and testing), except perhaps in relation to measuring instruments used in trade and, as I will show, in relation to an "evidential breath analyser". Furthermore, given that Australia has, through the Commonwealth Act, given effect to its Convention obligations, it is not obvious that there is any further "legitimate expectation that its provisions would be applied"[13] otherwise than through the machinery of that Act.

52. I will not deal in detail with the provisions of that Act, but I will mention a few. The objects of the Act include to establish a national system of units and standards of measurement of physical quantities and to provide for the uniform use of them throughout Australia. Importantly, the Act does not apply to the exclusion of any State law except in the case of inconsistency (s4). Thus, if a State has legislated on a matter of measurement, and it is not inconsistent with a provision of the Commonwealth Act, the State Act applies unaffected.

53. The Act also establishes a National Measurement Institute and a Chief Metrologist. The metrological functions of the Commonwealth are the responsibility of the Institute, and they include "fulfilling Australia's international obligations with respect to measurement" (s18(2)(i)).

54. Pursuant to the Act, regulations may be made for the approval and verification of patterns of measuring instruments suitable for any legal purpose (which must not be inconsistent with any specification published by OIML), s19A; with respect to certificates as to limits of error in a measuring instrument and procedures to ascertain whether the instrument operates within those limits, s19AAA; and providing for the certification of measuring instruments, s20.

55. Under those powers, regulations have been prescribed in the *National Measurement Regulations* 1999 with respect to "maximum permissible uncertainty" in relation to certain measurements (but not speed), and "maximum permissible error" in relation to a breath analyser.[14] No regulation has been made in relation to a speed measuring device.

56. I conclude from this analysis that when the Victorian parliament legislated as to the method by which a speed measuring device is to be tested for the purpose of law enforcement, it was not obliged to import any specific legal metrology methodology. It chose not to specify any method of testing the relevant devices but, rather, it adopted an alternative, rational method of assuring certain qualitative standards by prescribing the technical competence of the testing officer.

57. In those circumstances, there is no warrant to imply the application of legal metrological principles in construing the meaning of "satisfied" where it appears in reg 306, either as a necessary legal consequence of Australia's treaty obligations or as a consequence of the Commonwealth legislation.

58. For completeness, I mention that Mr Agar also argued the implicit application of certain Australian Standards to the process of testing required by reg 306. I accept the Crown's argument that where this is required, one would expect the standard to be specifically incorporated by reference in the legislation. None have been so incorporated.

Forensic argument

59. Such a conclusion does not preclude a person from challenging the factual conclusion of the tester that the device was in proper electrical condition or calibrated to the correct tolerance limits, or that the tester was satisfied about those matters, or that the correct records were adequately made and retained. A person may indeed do so to seek to undermine, as a question of fact, the *prima facie* conclusion derived from the schedule 2 certificate that the device was properly tested and sealed or that proper records were made and retained.

60. Mr Agar took the opportunity to challenge that evidence. He cross-examined Mr Burden. He called witnesses to give their view of what should have been done. Neither actually tested the device themselves. The judge made findings about their evidence. It is not necessary for me to summarise it, save to note that his Honour did not accept that their evidence undermined the evidence that the device had been properly tested and sealed. No error of law is disclosed in his Honour's reasoning. The argument that Mr Agar was denied natural justice (ground 5) has no merit having regard to the opportunity afforded him at trial to call evidence on the very subject.

61. The second opportunity contemplated by the legislation for a person to adduce contrary evidence is to adduce other evidence of the vehicle's speed, on the occasion in question, notwithstanding the speed indicated by the speed measuring device.[15] This Mr Agar did. He gave oral testimony as to his observations about his speed immediately before and after the camera flashed, and he was cross examined on the subject. His Honour evidently was not persuaded that Mr Agar's evidence displaced the evidence of the speed camera reading. No error of law is disclosed in his Honour's reasoning.

62. Having reached conclusions on the issue of construction with respect to reg 306, and his Honour's application of that construction to the evidence before him, I turn to deal with the remaining arguments advanced by Mr Agar.

Combined error tolerances

63. Mr Agar has pointed out that, not only does reg 306 of the General Regulations permit a limit of error for the Gatsometer of plus or minus 3 kilometres per hour, but the *Road Safety (Vehicle) Regulations* 1999 (incorporating 'Australian Design Rule 18/02 – Instrumentation') provides, relevantly, that vehicles may lawfully be registered in Victoria if the speedometer is calibrated to an accuracy of plus or minus 10 per cent of actual vehicle speed.

64. Moving from that observation Mr Agar argued two things: either –

> (a) the Court should not be persuaded that a driver has exceeded the speed limit unless the error tolerance of *both* the police speed measuring device and the vehicle's speedometer have been taken into account, or
>
> (b) a driver should be allowed the defence of honest and reasonable mistake if he or she has relied upon the vehicle's speedometer indicating a lawful speed and the alleged speed (after allowing for the error tolerance of the speed measuring device) is within the permitted error tolerance for that instrument.

65. It is not clear whether the first of the two arguments was raised in the court below – it was certainly discussed in the context of the second argument. In any event, the argument misunderstands the purpose of allowing for an error tolerance in the speed measuring device used by the police. The error tolerance in the speed measuring device is taken into account because, as is clear from the legislative regime set out earlier, it is the speed indicated by that device that is used by the prosecuting authority to establish a case against the driver, not the driver's vehicle's speedometer. As observed by Vanstone J in *Van Reesma v Police*[16], when the same argument was raised, "...[p]roof of the prosecution case did not involve any assumption as to the accuracy of the speedometer in the car driven by the appellant".

66. A driver might misconstrue his or her actual speed because the error tolerance latent in the vehicle's speedometer is greater than that in the detection device. But drivers can meet that risk by having their instrument's actual error tolerance measured, or drivers can drive at a speed that allows for a potential under-reading of 10 per cent of actual speed.

67. These observations are sufficient bases to reject the first argument. However, the best answer is found when considering the second of the two arguments, namely whether a defence of honest and reasonable mistake is available for this offence.

Honest and reasonable mistake

68. Mr Agar's third fundamental complaint was that the defence of honest and reasonable mistake should be available for the offence with which he was charged, at least in circumstances where the alleged speed is within the "grey" area of the vehicle's speedometer error tolerance.

69. In this case the alleged speed of 75kph was within plus or minus 10 per cent of 70kph – although I note that the actual speed indicated by the Gatsometer was 78 kph, just outside the 10 per cent range. Be that as it may, Mr Agar sought to distinguish the decision of the appeal division of this Court in *Kearon v Grant*[17] because that case concerned an allegation of grossly excessive speed whereas his case does not.

70. In *Kearon* Brooking J, with whom Kaye and Murphy JJ agreed, said at 323 –

> ... I think it clear that the defence, as I shall call it, of honest and reasonable belief is not open on a charge under this regulation of exceeding the speed limit. In my view, the subject matter and character of this regulation are such as to make it likely that the exclusion of this defence was intended.
>
> These speed limits are imposed by the regulations in the interests of road safety. This must be apparent to all without having regard to the title of the regulations, the *Road Safety (Traffic) Regulations* 1988, or the title of the Act under which they are made, the *Road Safety Act* 1986, or to the objects of the Act and regulations as stated in s1 of the Act and cl102 of the regulations. If ever one might expect an intention to impose strict responsibility, it would be in relation to this offence of driving a motor vehicle at an excessive speed. ....
>
> Speeding motor cars have become dreadful engines of destruction. The cost to the community in terms of death and injury and economic loss has been enormous. I would expect a provision of this kind to require drivers to keep within the applicable speed limit at their peril. If the defence of honest and reasonable belief were applicable, then mistakes could be of two kinds. There could be a mistake of fact, the fact bearing on whether one was in a speed zone, and there could be a mistake of fact as to the speed at which the vehicle was travelling. I think that the intention here is that motorists shall at their peril be aware of the applicable speed limit, and shall then at their peril so govern their speed as to keep within it. I do not think that they can be heard to say, except in mitigation, that a badly parked pantechnicon obscured a speed restriction sign from their view, or that a power failure at night led them to believe that there was no provision for street lighting along the road, or that they believed their faulty speedometer to be working properly, as in *Hearn v McCann* (1982) 29 SASR 448; (1982) 5 A Crim R 368, or that for any other reason they believed they were not breaking the speed limit. Human ingenuity and human nature being what they are, I should not expect the law to recognise mistake as a defence to a charge of this kind.

71. There have been no other iterations of the purposes and objects of the *Road Safety Act* to suggest that any purpose different from that considered by Brooking J should be inferred. The force of his Honour's reasoning still applies – so does the authority of the decision.

72. Mr Agar incorrectly assumed that the offence with which the driver in *Kearon* was charged was, by definition, an offence involving speed of at least 25 kph in excess of the speed limit. He misapplies the defined term "excessive speed infringement" in s3 of the *Road Safety Act* to the circumstances of that case. It only has relevance to mandatory suspension under s28(1)(a). In *Kearon* the driver was charged under reg. 1001(1)(c) of the *Road Safety (Traffic) Regulations* 1988 with exceeding the speed indicated on a speed restriction sign in a speed zone. The degree by which the driver exceeded the speed limit played no part in the reasoning of the Court.

73. Indeed, in my view, it would make no sense at all, having regard to the reasoning behind the conclusion that the offence was one of strict liability, to pay any attention to whether the alleged speed exceeded the speed limit by a few or by many kilometres per hour. Much public attention has been drawn to the self-evident fact that exceeding a speed limit by just a few notches can cause injury as readily as driving at speeds well above a limit.

74. In the County Court Mr Agar appears to have argued that *Kearon* was wrong because it did not take into account the reasoning of the High Court in *He Kaw Teh v R*[18]. That argument featured

less in the submissions before me, the focus being upon the asserted ground for distinguishing *Kearon* from the present as already discussed. To the extent Mr Agar still relies upon an error in failing to apply *He Kaw Teh* instead of *Kearon*, I have been unable to discern any basis for finding an error.

75. In conclusion, his Honour was not in error in declining to afford to Mr Agar the defence of honest and reasonable mistake of fact (assuming for present purposes that such a defence might have been made out on the facts of the case).

Jurisdictional error

76. Thus far what I have written disposes of the three arguments advanced by Mr Agar to contend that his Honour's decision reveals an error of law. Because of the conclusions I have reached it becomes unnecessary that I consider whether the asserted errors might be either jurisdictional errors or errors of law on the face of the record.

Conclusion

77. For the reasons given, none of the arguments relied upon by Mr Agar warrant a conclusion that the decision of the County Court be quashed. The proceeding will be dismissed.

78. The parties each addressed written submissions to me on the question of costs. Costs are at the discretion of the court. In essence Mr Agar submits that, if he fails, he should not have to pay the Crown's costs because the matters he has raised need to be resolved "in order that all Victorian motorists can have certainty as to the integrity of speed measuring devices".

79. Such an argument presupposes that there has been widespread public uncertainty about such integrity. I am not aware of there being any evidence on that subject, and I am not prepared simply to assume it in Mr Agar's favour. It may well be a matter on which Mr Agar, and some others, have great personal interest but, subject to any other argument the parties may raise, I am not persuaded there is sufficient public interest in the questions he has raised to displace the usual practice that costs should follow the event.

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[1] The second defendant informed the Court that it did not intend to appear in the proceeding but would abide the decision of the Court in accordance with the principles in *R v Australian Broadcasting Tribunal, ex parte Hardiman & Ors* [1980] HCA 13; (1980) 144 CLR 13, 35; 29 ALR 289; (1980) 54 ALJR 314.
[2] [1995] HCA 58; (1995) 184 CLR 163 at 175; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[3] Those grounds bore a striking similarity to the grounds advanced before Vanstone J in *Van Reesma v Police* [2010] SASC 201.
[4] References in this judgment to the road safety legislation and ancillary regulations are references to the relevant statutory provisions in force at the time of the alleged offence.
[5] Reg 301 of the *General Regulations* and s66 of the *Road Safety Act*.
[6] Regs 302(c) and 105.
[7] Reg 305.
[8] These alternative ways of approaching the issue may be relevant to the question whether any conceivable error might involve a jurisdictional error, had I found that necessary to decide.
[9] Article I, clauses 5 and 7.
[10] Part 1, Edition 2004(E).
[11] V.2.
[12] V.4.
[13] *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273, 290; (1995) 128 ALR 353; (1995) 69 ALJR 423; (1995) 39 ALD 206; [1995] EOC 92-696; [1996] 1 CHRLD 67; (1995) 7 Leg Rep 18.
[14] Schedule 12.
[15] *Road Safety Act* s79.
[16] [2010] SASC 201 at [13].
[17] [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377.
[18] [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.

APPEARANCES: The plaintiff Agar appeared on his own behalf. For the first defendant Dolheguy: Mr D Bliss, counsel. Craig Hyland, Solicitor for Public Prosecutions. For the second defendant The County Court of Victoria. Victorian Government Solicitor's Office.
