

# VICTORIAN COUNTY COURT SPEED CAMERA CASE

## Summary

On the 20th October 2011, an appeal was heard in the Victorian County Court. The case of Agar v Baker was heard by Judge Allen.

This case involved a mobile speed camera and a speeding fine issued for an alleged speed of 64km/h in a 60km/h zone in November 2008.

The appeal was allowed and the charge dismissed on the basis that the prosecution could not prove their alleged speed beyond reasonable doubt.

The issues were:

- The testing certification was challenged.
- There was alternative evidence of the appellants vehicles speed in the form of his speedometer reading.
- The burden of proof was on the prosecution to prove beyond reasonable doubt their reading.
- The speed camera was only certified in a laboratory.
- There was no certification of the installation or correct operation in the vehicle.
- There was no certification of the photo.
- All of the evidence regarding what could not be proven was provided by the prosecutions own witnesses under cross examination.

## Background

The prosecution called two witnesses:

- The speed camera operator.
- The testing officer from RMIT.
- The appellant had one witness, Dr Richard Brittain from the National Measurement Institute and himself, as the driver of the vehicle.

The prosecution tendered a Certificate under section 83 of the Road Safety Act as evidence that the speed camera was tested and calibrated correctly to indicate speeds "within a limit of error not greater than or less than 3 kilometres per hour or 3 per cent".

The appellant challenged that certificate, as it provided no information regarding the device calibration - it was only a certification of the testing officer's state of mind.

The camera operator was called and in summary gave the following evidence:

- The vehicle was parked and aligned parallel to the gutter within 40mm of front and back wheels.

- He fitted the camera to the vehicle mounts.
- Tested the camera with test photos.
- The correct alignment of the vehicle and the camera equipment in the vehicle was critical to recording accurate readings.
- He did not undertake any tests himself of the correct alignment of the equipment in the vehicle.
- He did not undertake any tests himself on the equipment to test that it recorded speeds correctly. For example, he did not undertake any tests such as those shown on page 61 of the Victorian Auditor General's Audit report on the Road Safety Camera Program.
- He was asked if he was aware that photographs of a vehicle diverging from parallel, such as changing lanes, should be rejected according the Speed Camera Verification Manual. He stated that he was aware that this was the case and that staff who assesses photos undertook that task.

The testing officer was called as the person who both signed the section 83 certificates and wrote the operator's instructions. In summary he gave the following evidence:

- The testing officer provided evidence of the tests he had undertaken.
- He stated that the certification that he signed of +/-3km/h or 3% only applied to equipment tested his laboratory.
- Any errors introduced by the incorrect alignment of the equipment in the vehicle were outside of his certification.
- The correct alignment of the vehicle and the camera equipment in the vehicle was critical to recording accurate readings.
- He did not undertake any tests himself, nor witness tests, of the correct alignment of the equipment in the vehicle. This was done by someone else.
- He stated that the people who install the equipment in the vehicle should be called to give evidence.
- He did not undertake any tests himself on the equipment to test that it recorded speeds correctly. For example, he did not undertake any tests such as those shown on page 61 of the Victorian Auditor General's Audit report on the Road Safety Camera Program.
- He was asked if the vehicle being photographed was not parallel to the speed camera vehicle would that introduce an error. He stated it was 0.6% per 1 degree (which is 20% of the certified accuracy), or 5 degrees gives 3% error (which is 100% additional of the certified accuracy), the photographed vehicle was not parallel to the speed camera vehicle.
- He was asked if he could certify from the photograph if the vehicle in the photograph was parallel to the speed camera vehicle. He replied no, not without extensive analysis equipment and that was the job of the photograph assessors.

The appellant was called and in summary gave the following evidence:

- He knew the road and travelled it often.

- He had clear sight of the camera car.
- He identified the camera car for what it was.
- He checked vehicle speed as he passed the camera car and the speedometer indicated 60mk/h.
- He was driving on cruise control.
- He stated that his checks of the speedometer were that it read slightly fast, when the speedometer said 60km/h estimated the car was travelling at 59km/h.
- He produced photos and graphs of the stretch of road to illustrate the clear sight of the scene.
- He produced photographs of the vehicle instruments to illustrate the clarity of the speedometer.

The prosecution argued that the wording of section 79 and 83 of the Act required the appellant to "prove" the certification process was at fault, or that there was fault with the speed camera.

In discussions with the prosecutor, Judge Allen noted that the Act did not appear to address the correctness of the installation in the vehicle, nor was it required for the appellant to prove the device was incorrect.

Judge Allen reminded the prosecutor of *Liberato v The Queen* (1985), that is was not a question of which evidence balanced out the other, the appellant's evidence created reasonable doubt about the prosecution's case and it was up to the prosecution to prove their case beyond reasonable doubt.

### **Judge Allen's Summary**

Following the evidence of the appellant, Judge Allen stated that there was going to stop the case at that point and that there was no need to call the appellant's expert witness.

He noted:

- Section 79 of the Road Safety Act provides that "evidence of the speed of the motor vehicle or trailer as indicated or determined on that occasion by a prescribed road safety camera or prescribed speed detector 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 or trailer on that occasion." He emphasised "in absence of evidence to the contrary", and noted that it was not a requirement for evidence of proof to the contrary, but rather some evidence to the contrary that cast doubt on the prosecution case. In this case it was an alternative evidence of the appellants vehicle speed.
- He found that the prescribed device itself had been tested and certified for accuracy in the testing offices laboratory, but not its installation and operation in a vehicle. This was confirmed by the testing officer.
- The camera operator could not give evidence of the correct installation and alignment of the device in his vehicle.
- The testing officer stated that the people who installed the equipment in a vehicle should be called to give evidence of correct installation and provide certification.

- As a point of law, the court cannot assume correct installation and operation of the speed camera when the accuracy of the device has been challenged under section 79 and 83 of the Road Safety Act. It has to be proven.
- He heard evidence from both the camera operator and the testing officer that the vehicle being photographed must be travelling parallel to the camera vehicle or error could be introduced.
- The testing officer was asked and could not provide an opinion as to whether the subject vehicle was parallel or not to the camera vehicle based on the photo. This was apparently done by staff in a Verification Department of the Traffic Infringement Department. There had been no evidence led on this issue and the court cannot make assumptions based only on an image.
- This is a criminal case and evidence to the contrary does not have to be proven, rather that it be accepted on the balance of probabilities and is capable of creating doubt in the mind of the court.
- Evidence provided by the appellant as to his vehicle's speed and the circumstances surrounding the event, including his familiarity with the location in this case, was sufficient to create doubt in the mind of the court.
- Judge Allen concluded that he could not be satisfied beyond reasonable doubt that the vehicle in question was in fact travelling at the speed alleged.

### **Judge Allen's Judgement**

The formal orders where that the appeal be allowed, the orders imposed at the Magistrates' Court are set aside and the Appeal against the Order allowed.

### **COMMENTARY**

The approach that has been taken to date in court cases involving speed detection devices in Victoria has been that the Certificate issued under section 83 of the Road Safety Act is conclusive and cannot be challenged and it is up to the accused to prove there is fault with the speed camera.

The County Court disagreed; it is only necessary for the accused to advance credible evidence of their speed to the contrary which casts doubt of the alleged speed and the burden of proof is with the prosecution to prove their alleged speed beyond reasonable doubt.

The Judge agreed that there was reasonable doubt in this case and the burden of proof falls on the prosecution to prove the accuracy of their reading beyond reasonable doubt.

In this case they would need to call two further witnesses:

- The person to certify the installation in the vehicle
- The person who evaluated the photo.

It is worth noting that this case was against the Road Safety Regulations in force in 2008. The current Regulations only require the speed measurement unit to be tested, leaving it simpler to prove that tests have not been undertaken outside the laboratory.

### **Traceability**

There is a legal measurement principle called traceability. The instrument is calibrated against a known certified reference standard and then all subsequent use of the instrument that could result

in further error needs to be accounted for. In this case, the instrument was calibrated in a laboratory to a standard, it was then taken from the laboratory and fixed in a vehicle, precisely aligned, was then taken to the side of the road and the vehicle is precisely aligned to the roadway. There was then a further assumption that the vehicle was travelling parallel to the speed camera vehicle.

What became apparent in this case is that there were steps taken after calibration in the use of the instrument for which the error introduced was unknown to the court. Hence the chain of traceability between the initial laboratory calibration and the measurement of a vehicle speed was broken. This is what Judge Allen identified, although he was not familiar with the term "measurement traceability."

### **Error Introduced at the Side of the Road**

The testing officer gave evidence that for each 1 degree the vehicle being measured was not parallel to the camera car, a 0.6% error in the reading occurred. What does this mean in real life? Simple trigonometry. The average car is 4.5 metres long, over 7 metres travel, 1 degree is 122mm off parallel and 5 degrees is 610mm off parallel.

At 100km/h, if the target car was 2% off parallel to the speed camera or 244mm over 7 metres, it would add an error of 1.2%, or 1.2kmm/h. As people are being booked for doing 104km/h, that can be a significant factor.

It is also worth noting that whether or not the vehicle was parallel to the speed camera car when the reading was taken, this cannot be determined from the photo, as the photo is taken after the speed reading is taken.

### **National Measurement Act**

The appellant had one witness, Dr Richard Brittain from the National Measurement Institute. Dr Brittain, a principal instructor for the National Measurement Act, had provided an expert statement to the effect that based on the testing officer's test results, "the facilities provided by the national measurement legislation and the infrastructure that it facilitates to prove the veracity of the measurements made by it (the speed camera) an adduce that proof into evidence."

He also stated "that facilities other than those of the national measurement legislation and which are also not inconsistent with the latter, must be relied upon to establish the veracity of those measurements in order for them to be used to establish to the appropriate standard of proof, the physical element of speed in any alleged offence concerning a breach of a speed limit."

It should be noted that there is only one measurement system recognised in Australia, the one established by the National Measurement Act.

It was not necessary for Dr Brittain to give evidence, however, what is the significance of his statements? Because the base calibration of the speed camera cannot be shown to be traceable to an Australian Legal Unit of Measurement, even if the prosecution had produced all of the witnesses required to account for the errors, the reading that they submit to the court would carry no more weight than the one provided by the appellant's speedometer, as neither can be stated to be against certified instruments recognised under Australia's measurement system and hence the prosecution reading becomes just another version or opinion as to speed of the accused vehicle.

All other evidence brought before courts involving measurement, weight of drugs, blood alcohol, fraudulent trade etc., are all provided by certified instruments, hence there is a certainty of accuracy of any measurements provided.

## **Onus of proof**

Judge Allen noted during the hearing that speeding matters are treated as criminal matters and referenced the case of *Liberato v The Queen* (1985). As stated in the *Liberato* judgement, "it would be wrong to indicate that guilt or innocence 'turned upon a mere "choice" between' two inconsistent versions."

As this is a criminal trial, the burden or obligation of proof of the guilt of the accused is placed squarely on the Crown. That burden rests upon the Crown in respect of every element or essential fact that makes up the offence with which the accused has been charged. That burden never shifts to the accused. There is no obligation whatsoever on the accused to prove any fact or issue that is in dispute before the court. It is of course not for the accused to prove their innocence but for the Crown to establish their guilt.

A critical part of the criminal justice system is the presumption of innocence. What it means is that a person charged with a criminal offence is presumed to be innocent unless and until the Crown persuades a court that the person is guilty beyond reasonable doubt.