SUPREME COURT OF SOUTH AUSTRALIA

(Magistrates Appeals: Criminal)

WOOLMER v POLICE

[2020] SASC 184

Judgment of The Honourable Justice Parker

2 October 2020

MAGISTRATES - APPEAL AND REVIEW - SOUTH AUSTRALIA - APPEAL TO SUPREME COURT

TRAFFIC LAW - OFFENCES - EVIDENCE

EVIDENCE - PROOF - FACILITATING PROOF - MATTERS RELATING TO MACHINES, PROCESSES AND OTHER DEVICES

STATUTES - ACTS OF PARLIAMENT - INTERPRETATION

This is an appeal against conviction and an application for an extension of time in which to appeal.

The appellant was found guilty of being the owner of a motor vehicle involved in the commission of a prescribed offence contrary to s 79B of the Road Traffic Act 1961 (SA) (the RTA).

At trial, the prosecution tendered a "Certificate of Testing and Operation" relating to the Traffistar device pursuant to s 79B(10)(b) and (c) of the RTA signed by a police inspector which certified, amongst other facts, that the device operated and was tested according to the requirements of the Road Traffic (Miscellaneous) Regulations 2014 (SA) (the Regulations); and did operate as it was designed and set to operate in compliance with the Regulations. The evidence of the inspector was that the results of the induction loop testing of the red light camera linked to the right-hand or turning lane were recorded on a "trim sheet" which she conceded that she was not provided with at the time of, or prior to, signing the Certificate of Testing and Operation.

The Magistrate found the charge proven.

On Appeal from MAGISTRATES COURT OF SOUTH AUSTRALIA (MAGISTRATE FISHER) AMC-18-11638

Appellant: DAVID WOOLMER Counsel: MS K STANLEY - Solicitor: STANLEY LAW
Respondent: POLICE Counsel: MR M BOISSEAU - Solicitor: CROWN SOLICITOR'S OFFICE

Hearing Date/s: 17/04/2020

File No/s: SCCIV-20-149

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The sole ground of appeal advanced by the appellant is that the Magistrate erred in: (1) finding that there was no proof to the contrary of the facts contained in the Certificate of Testing and Operation; and (2) finding that the testing conducted on 26 February 2018 complied with the Regulations.

Held per Parker J (allowing the appeal):

1. The extension of time in which to appeal is granted.

2. Applying the reasoning of Peek J in Police v Hanton (2018) 131 SASR 226, the appellant has succeeded in proving, on all of the evidence before the Court and on the balance of probabilities, that the relevant photographic detection device had not been tested in accordance with the statutory requirements, contrary to the facts asserted in the Certificate of Testing and Operation signed by the inspector under s 79B(10) of the RTA.

3. The Magistrate erred in his finding that the testing requirements established by reg 32(2)(d) and (g) of the Regulations can be read down with the support of s 22 of the Acts Interpretation Act 1915 (SA).

4. The Bunning v Cross discretion cannot be employed to receive the Certificate of Testing and Operation into evidence as there was no suggestion that the police acted unlawfully or improperly to obtain relevant and probative evidence, rather there was a failure to adhere to the statutory testing process.

5. Without the assistance of the Certificate of Testing and Operation as aid to proof, the photographs of the appellant's vehicle turning right while the red light is showing does not establish beyond reasonable doubt that the appellant breached Rule 60 of the Australian Road Rules.

6. Appeal allowed.

7. The finding of the Magistrate that the charge against the appellant of breaching Rule 60 of the Australian Road Rules on 14 March 2018 be set aside.

Acts Interpretation Act 1915 (SA) s 22; *Australian Road Rules* r 60; *Road Traffic (Miscellaneous) Regulations 2014* (SA) reg 20, 32(2)(g), 32(2)(d), 32(2)(e), 32(2)(g); *Road Traffic Act 1961* (SA)ss 79B, 80, 175(3)(ba), referred to.
Police v Hanton (2018) 131 SASR 226; *Police v Henderson* [2018] SASC 98; *Police v Miller* [2018] SASC 97, applied.
Police v Cooke [2010] SASC 357, distinguished.
Police v Butcher (2014) 119 SASR 509; *Police v Young* (2012) 114 SASR 567, discussed.
Evans v Benson (1987) 46 SASR 317; *Police v Bulgin* [2010] SASC 143; *Bunning v Cross* (1978) 141 CLR 54, considered.

WOOLMER v POLICE
[2020] SASC 184

Magistrates Appeal: Criminal

1 **PARKER J:** This is an appeal against conviction. The appellant was found guilty following a trial in the Magistrates Court of being the owner of a motor vehicle involved in the commission of a prescribed offence contrary to s 79B of the *Road Traffic Act 1961* (SA) (the RTA). The Magistrate found that on 14 March 2018, the appellant's vehicle entered the intersection of Magill Road and Portrush Road, Beulah Park, when a red traffic arrow was showing contrary to Rule 60 of the *Australian Road Rules*.

2 The appellant seeks an extension of time in which to appeal. The filing of the appeal was delayed as the appellant's solicitor was required to take unplanned leave when her home was affected by bushfire. The respondent consents to the application. Under these circumstances, I grant an extension of time to the extent required.

Ground of Appeal

3 The appellant agitates one ground of appeal, namely, that the Magistrate erred in finding that the prosecution had proved that there had been compliance with the relevant provisions of the *Road Traffic (Miscellaneous) Regulations 2014* (SA) (the Regulations) and thereby erred in finding the charged proved. Specifically, the appellant submits that the Magistrate erred in:

1. Finding that there was no proof to the contrary of the facts contained in P3.

2. Finding that the testing on 26 February 2018 complied with the Regulations.

3. Finding that compliance with the Regulations would necessarily be dangerous or disruptive such that compliance would be inconsistent with the object of the *Road Traffic Act.*

4. Finding that Inspector Healey could validly certify that testing had been conducted in compliance with the Regulations.

4 The appellant seeks orders setting aside the finding of guilt and substituting a verdict of not guilty. He also seeks an order for costs.

Legislation

5 Rule 60 of the *Australian Road Rules*[1] provides that:

> If traffic arrows at an intersection or marked foot crossing are showing a red traffic arrow, and a driver is turning in the direction indicated by the arrow, the driver must not enter the intersection or marked foot crossing.

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[1] Made by the Governor under s 80 of the *Road Traffic Act 1961* (SA).

Offence provision.

6 Regulation 30(2)(g) of the Regulations provides that an offence against Rule 60 is a prescribed offence.

7 Section 79B of the RTA relevantly provides that:

> (2) If a vehicle appears from evidence obtained through the operation of a photographic detection device to have been involved in the commission of a prescribed offence, the owner of the vehicle is guilty of an offence against this section …
>
> …
>
> (10) In proceedings for an offence against this section or proceedings for a prescribed offence—
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> (a) a photograph or series of photographs produced by the prosecution will be admitted in evidence if—
>
> (i) the photograph or each of the photographs was produced from an exposure taken, or electronic record made, by a photographic detection device; and
>
> (ii) the requirements of this Act and the regulations as to the operation and testing of photographic detection devices were complied with in connection with that use of the device,
>
> and a denotation as to date, time and location that appears as part of such a photograph will be accepted as proof, in the absence of proof to the contrary, of the date, time and location at which the exposure was taken or the electronic record made by the photographic detection device; and
>
> (b) a document produced by the prosecution and purporting to be signed by the Commissioner of Police, or any other police officer of or above the rank of inspector, and purporting to certify—
>
> (i) that a specified device used at a specified location during a specified period was a photographic detection device; and
>
> (ii) that the requirements of this Act and the regulations as to the operation and testing of photographic detection devices were complied with in connection with the use of that device during that period,
>
> will be accepted as proof, in the absence of proof to the contrary, of the facts so certified; and
>
> (c) if it is also certified in a document of a kind referred to in paragraph (b) that the device was designed and set to operate according to a specified system during that period, it will be presumed, in the absence of proof to the contrary, that the device was designed and set to operate according to that system during that period and did, in fact, so operate.

8 Regulation 32(2)(d) of the Regulations directs that:

(d) if the device is used to provide evidence of red light offences, the device must be programmed and set to operate, and the induction loop and the traffic lights or twin red lights referred to in paragraph (a) must be linked up with the device, so that, following a programmed delay after the traffic lights commence showing a red traffic light, or the twin red lights commence operating, as the case may be, if a vehicle is detected by the device passing over the induction loop while the red traffic light is showing, or the twin red lights are operating, as the case may be, at least 2 exposures are taken, or at least 2 electronic records are made, of that vehicle from the rear—

(i) the first of which is taken or made following the detection of the vehicle by the device; and

(ii) at least 1 of which is taken or made (as that vehicle or both that vehicle and other vehicles proceed over the intersection or crossing) following a programmed delay after the first is taken or made; and

(iii) on each of which is recorded the date, time and code for the location at which the exposure or record is taken or made, together with the lane in which the vehicle is travelling;

9 Regulation 32(2)(g) further requires that once in every 28 days while the device is being used to provide evidence of red light offences:

(i) a test must be carried out to ensure that the device detects and takes exposures, or makes electronic records, of vehicles passing over the induction loop and accurately indicates the lane in which any such vehicle is travelling; and

(ii) the device must be checked to ensure that the device—

(A) indicates the correct date, time and code for the location at which exposures or electronic records are taken or made by the device; and

(B) is set to operate in accordance with paragraph (d) or (e); and

(iii) if a fault is indicated by the test referred to in subparagraph (i), corrective action must be taken and the test must be repeated until no fault is indicated; and

(iv) if a fault is indicated by the check referred to in subparagraph (ii), corrective action must be taken until no fault is indicated;

The evidence

10 At trial, the prosecution relied upon several documents to prove its case. The documents admitted into evidence were:

- Extract from Register of Motor Vehicles Certificate providing that, at the date of the relevant offence, the appellant was the registered owner of a White Holden Sedan with a specified registration number (**P1**).

- Two photographs taken by a Traffistar SR520 photographic detection device located at the intersection of Magill Road and Portrush Road (Traffistar device), depicting a white Holden sedan with the specified registration number (the vehicle) at 3:28 pm on 14 March 2018 (**P4**). The first photograph depicts the vehicle entering the intersection .89 seconds after the right-hand traffic arrow had turned red and the second photograph depicts the vehicle in the intersection 1.89 seconds after the right-hand traffic arrow had turned red.

- Letter Enclosing Photographic Evidence as Requested – enlarged photograph depicting the specified registration number (**P6**).

- Digital Red Light/Speed Camera Disposition Sheet (**D1**), signed by Mr Dellow and certifying that the Traffistar device was tested on 26 February 2018, and that the device was tested in compliance with the Regulations and it operated correctly and as programmed. The relevant intersection has two through lanes (lanes 1 and 2) and one right turning lane (lane 3). D1 records the results of the Induction Loop tests on lanes 1 and 2, but not lane 3.

- Certificate of Testing and Operation relating to the Traffistar device pursuant to s 79B(10)(b) and (c) of the RTA (**P3**). Certificate P3 is signed by Inspector Healey and certifies that:

    - The Traffistar device manufactured by Jenoptik Robot GmbH of Germany, that is linked to and used in conjunction with an induction loop vehicle detector, is a photographic detection device as approved under reg 29 of the Regulations for a specified period of 28 days from 1938 hours on 26 February 2018;

    - The Traffistar device was operated and tested according to the requirements of the Regulations; and

    - The Traffistar device did operate as it was designed and set to operate in compliance with the Regulations.

11 The prosecution did not call witnesses to give oral evidence. However, Inspector Healey (who certified P3) and Mr Dellow (who was responsible for testing the Traffistar device on 26 February 2018) were made available for cross-examination.

Inspector Healey

12 The evidence of Inspector Healy was that when signing the certificate (Exhibit P3) she relied on three matters, first, the Disposition Sheet (Exhibit D1), secondly, the Photographs (Exhibit P4), and thirdly, her knowledge of the training undertaken by police officers assigned to test cameras. Inspector Healey

stated that she also cross checked the RTA and Regulations against the particular facts.

13 Inspector Healey conceded that the Disposition Sheet D1 does not record induction loop testing of the red light camera linked to the right-hand or turning lane (lane 3). However, the results of that test are recorded on a "trim sheet". The latter includes certification that the test was conducted in accordance with the Regulations. Inspector Healey admitted that she was not provided with the trim sheet at the time of, or prior to, signing the certificate P3. Her evidence was that she interpreted the "certification of testing" contained on the Disposition Sheet D1 to include the testing of the lane 3 red light camera.

Mr Dellow

14 Mr Dellow gave evidence that he conducted a test of the Traffistar device on 26 February 2018. The through lanes (lane 1 and 2) were tested differently to the right turn lane (lane 3). According to Mr Dellow's, evidence the test conducted with the right turn lane was as follows:

> When I'm standing at the camera I have a connection to the camera which is a screen in front of me and as I observe the cars go over the loops, loops are activated on the screen in front of me, it shows the lane the time and the speed of the vehicle that's going through the loop. That is the test that I complete to satisfy the requirement the red light testing each 28 days.

15 He then explained:

> [T]wo tests were done, the lanes one and two which have the ability for speed and red-light activation lane three only has the red-light activation so when we conducted, when I conducted the testing of lanes one and two we actually used a vehicle to travel through to test the speed capability. Once lane's one and two were tested I then did my system test for lane three which required me to stand there when I was still connected to the camera and to observe the loop activation on the camera, when I was standing there. That was the system test that I was required to do.

16 Mr Dellow agreed that he did not see any vehicles go through the red arrow in lane 3 and he did not conduct a test while the arrow was red. He stated that exposures were taken of the test vehicle in lanes one and two but not in lane three. Mr Dellow stated that he made electronic records of vehicles passing over the induction loops by plugging his laptop into the camera and by observing vehicles travelling over the induction loops.

The Magistrate's reasons

17 The Magistrate accepted certificate P3 as proof that the Traffistar SR520 device manufactured by Jenoptik Robot GmbH of Germany and located at the intersection of Magill Road and Portrush Road was a photographic detection device.

18 The Magistrate was satisfied beyond reasonable doubt that a white Holden sedan with the specified registration number was depicted in Photographs P4. The extract P1 from the entry in the Register of Motor Vehicles proved that the appellant was the owner of that vehicle at the relevant time.

19 The Magistrate found that Photographs P4 clearly depict that the vehicle turned right at the intersection contrary to a red arrow governing traffic in that direction and in breach of Rule 60. That is a prescribed offence.

20 The Magistrate observed that the certificate P3 would be accepted as proof, in the absence of proof to the contrary, that the Traffistar device was tested in compliance with the Regulations. The appellant sought discretionary exclusion of the certificate P3 on the basis that it was more prejudicial than probative. Alternatively, the appellant contended that there is "proof to the contrary" of the facts stated in P3 such that the court could not place evidentiary weight on its contents.

21 The Magistrate summarised the two matters of contention arising out of the testing of the Traffistar device, as follows:

1 whether the evidence of Mr Dellow is proof that the device was not tested in accordance with the Regulations; and

2 whether Inspector Healey could validly certify that the testing had been conducted in compliance with the Regulations as she purported to do in P3.

22 The appellant contended that, according to Mr Dellow's own evidence, the test undertaken by him was incapable of ensuring that the Traffistar device was "set to operate" in accordance with reg 32(2)(g). In respect of the right turn lane, the only test conducted was to ensure that the device detected a vehicle travelling over the induction loop. Because Mr Dellow did not observe any vehicles go through the red light, it was not possible for him to be satisfied that certain things occurred "after the traffic lights commence showing a red traffic light" as required by regs 32(2)(g)(ii)(B) and 32(2)(d). Mr Dellow did not conduct testing while there was a red light and was not able to ensure that the device was set to operate "so that, following a programmed delay after the traffic lights turned red, the device took at least 2 exposures or 2 electronic records".

23 The Magistrate observed that:

> … [i]t is not surprising that Mr Dellow did not conduct a test taking exposures of a vehicle turning right contrary to a red arrow, given the danger (and illegality) of such a test on one of Adelaide's busiest intersections, or the disruption that such a test would cause if traffic was stopped in all directions for the test to be conducted.

24 The Magistrate rejected a submission by the prosecutor that the display on Mr Dellow's computer screen of the detection of vehicles travelling over the induction loop in lane 3 comprised an electronic record.

25 After applying s 22(1) of the *Acts Interpretation Act 1915* (SA)[2] the Magistrate held:

> Having regard to the purpose of the [the RTA] I am of the view that Parliament did not intend that someone in Mr Dellow's position either disobey a red light, or wait until they witnesssed a member of the public disobey a red light (without closing the intersection to traffic) to test the device. It is also unlikely in my view that Parliament intended that the intersection be closed to traffic every 28 days to conduct the test, given the disruption that would cause.
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> Mr Dellow gave evidence that he followed his instructions and connected his equipment to the device and the device registered vehicles travelling over the induction loops. He also gave evidence that he conducted speed checks in relation to the same device in the through lanes one and two, which was at a speed of 35 kph, and that the device took exposures in those lanes. I accept his evidence. Mr Dellow then signed the Disposition Sheet, certifying that the device operated correctly as programmed.
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> The assertion in the Certificate P3, that the device operated and tested in compliance with the Regulations, will be accepted as proof in the absence of proof to the contrary. The [appellant] relies on no other evidence than that of Mr Dellow as proof to the contrary.
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> In my view, the [appellant] has not discharged his onus of providing proof to the contrary. As I have indicated, Mr Dellow cannot have been required to travel through a red light, as it is suggested by the [appellant], to test the device. No expert evidence was called to offer the opinion that the test Mr Dellow conducted was insufficient to determine that the device was not "set to operate" in the prescribed fashion. I am mindful of the dangers of making findings in matters demanding expertise in the absence of expert evidence. On the evidence as it stands, the Court is not in a position to find that the test conducted by Mr Dellow was insufficient.

26 The appellant further contended that the certificate P3 should be excluded in the exercise of the Court's discretion on the basis that it was more prejudicial than probative. The appellant asserted that P3 is not probative because Inspector Healey was acting outside her area of competence in signing the certificate. It was clear from her evidence that there was insufficient information for her to form the required "belief on reasonable grounds" necessary to enable her to certify that the red light camera was "tested in compliance with the Regulations and it operated correctly and as programmed". In particular, Inspector Healey's evidence was that the speed camera and red light camera were two separate devices and were required to be tested separately pursuant to different testing procedures.

27 The Magistrate noted that Inspector Healey did not purport to be an expert in the operation of the Traffistar device and nor was she required to be. All that was required of Inspector Healey was that she had "a belief based on reasonable grounds that the required statutory obligations had been met". The Magistrate

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[2] Which states "… where a provision of an Act is reasonably open to more than one construction, a construction that would promote the purpose or object of the Act (whether or not that purpose is expressly stated in the Act) must be preferred to a construction that would not promote that purpose or object".

accepted her evidence that she held such a belief. His Honour then turned to consider whether there were reasonable grounds to hold that belief. His Honour said:

> Inspector Healey had regard to the "Digital Red Light/Speed Camera Disposition Sheet" (D1) and the photographs (P4). D1 refers to the relevant device and the intersection in question. It includes a certification from Mr Dellow that he "tested and checked the programming of [the relevant device] at [the intersection of Magill Road and Portrush Road] at 1938 hours on 26 February 2018. The camera was tested in compliance with the [Regulations] and it operated correctly and as programmed". She referred to her knowledge of the training that staff, including Mr Dellow, had received and her confidence that staff conducted the tests in accordance with their training. That confidence was not undermined by the photographs in P4, which she considered, and which appeared to be produced consistently with the device having operated as it was designed and set to operate.
>
> She was aware, that as part of the testing procedure, the device was tested to ensure that the device detected vehicles travelling over the relevant induction loop although she conceded that the actual record of that having been done was not included in the Disposition Sheet (D1). It was not unreasonable for her to have proceeded on the basis that the induction test had been done to the right turn lane having regard to her knowledge of the procedures to be followed which, in fact, had been done by Mr Dellow. She believed that the test met the requirements of the Regulations. Without the benefit of further evidence, I cannot conclude, on the evidence as it stands, that the test did not meet the requirements of the Regulations. Given that the device took exposures as it was programmed to do during the speed test, it is not unreasonable to conclude that the device was working correctly and will take exposures as it programmed to do where a vehicle travels over an induction loop facing a red light.
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> ...
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> Inspector Healey acted reasonably in certifying P3 on the information that she had before her and on what she knew of the testing process. It was reasonable of her to accept that Mr Dellow had tested the device, as he had been trained to do, and to rely on D1 to certify in P3 that the device was operating properly. Furthermore, it would have been quite unreasonable, in my view, for Inspector Healey to have required Mr Dellow, or someone on his behalf, to have disobeyed a red light as part of the test referred to in reg 32(2)(e), as the [appellant] seems to suggest was required, or to have closed the intersection for the test.
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> (Footnotes omitted)

28 In light of these findings, the Magistrate declined to exclude the certificate.

29 The Magistrate further held that, if he was wrong in his findings, and that Inspector Healey and Mr Dellow were wrong in their understanding that the test was conducted in accordance with the Regulations, he would not have exercised his discretion to exclude that evidence. His Honour said:

> In applying the criterion outlined by the High Court [in *Bunning v Cross*], the evidence in this matter should not be excluded. There is no deliberate or reckless illegality on behalf of either Inspector Healey or Mr Dellow. The photographs of the [appellant's] vehicle entering the intersection contrary to the red traffic arrow for traffic in that direction (P4)

> comprise clear, compelling and reliable evidence. Whatever irregularity there may have been in relation to the testing with respect to the right turn lane, there is no suggestion that the reliability of what was depicted in those photographs is affected by that irregularity. The probative value of P4 is high. I also note the obiter remarks of Gray J in *Police v Cooke* with respect to the admissibility of similar photographs in comparable circumstances at common law, subject to the *Bunning v Cross* discretion. Any irregularity of the kind suggested by the [appellant] in this matter does not result in any significant prejudice to the [appellant].

30 The Magistrate found the charge proven beyond reasonable doubt.

Appellant's submissions

31 The appellant contends that the Magistrate erred in finding that, despite non-compliance with the Regulations, there was "no proof to the contrary" of the facts contained in certificate P3.

32 The appellant asserts that the testing undertaken by Mr Dellow on 26 February 2018 failed to demonstrate that the Traffistar device was "set to operate" in accordance with reg 32(2)(d) in that:

1. No exposures or electronic records were made; and

2. The test did not show that if a vehicle was detected passing over the induction loop on a red light that at least two exposures or electronic records were made following a programmed delay after the traffic lights commenced showing a red traffic light.

33 Mr Dellow conceded in evidence that when conducting the test on the turning lane, he did not take any exposures. The Magistrate rejected a submission that what appeared on Mr Dellow's computer screen was an electronic record. Accordingly, the appellant contends that his Honour implicitly found that the Regulations had not been complied with.

34 The appellant also contends that the test performed by Mr Dellow failed to show that the camera activated when a vehicle passed over the induction loop. It also failed to show that exposures or electronic records were made following a programmed delay after the light turned red or as a vehicle proceeded over the intersection. Mr Dellow's own evidence was that he did not observe any vehicles travel through the red light.

35 The appellant contends that the Magistrate erred in drawing an inference that, because the testing of lanes one and two took exposures as required for speed and because the device detected vehicles passing over the induction loop in the right turn lane, it was sufficient to conclude that the device was set to operate correctly. The tests for speed and red lights are different. When testing for speed there is no requirement to test that exposures are taken after a programmed delay following the signal turning red. There is also no requirement that an exposure is taken as the vehicle enters the intersection.

36 An offence against Rule 60 of the *Australian Road Rules* requires the prosecution to prove that a part of a vehicle entered the intersection when a red traffic arrow was displayed. The timing of exposures is fundamental to proving a charge. If no test is conducted to ensure that exposures or electronic records were taken after a programmed delay, and that one of those exposures or records was taken as the vehicle entered the intersection, the testing has not satisfied the requirements of the Regulations. Without proof of testing in compliance with the Regulations, the prosecution could not prove that the appellant's vehicle entered the intersection after it commenced showing a red traffic light.

37 Mr Dellow and Inspector Healey gave evidence that all that was required to comply with red light testing was the *observation* of a vehicle passing over the induction loops. Accordingly, the appellant questions whether the Traffistar device has ever been tested to ensure that the camera activates after a programmed delay and that one exposure is taken as the vehicle proceeds over the intersection. The testing conducted by Mr Dellow on 26 February 2018 falls short of the testing required by the Regulations and evidence of this deficiency in testing amounts to proof to the contrary of P3 and P4.

38 The appellant contends that the Magistrate erred in finding that, in reliance on s 22 of the *Acts Interpretation Act*, compliance with the Regulations would be inconsistent with the object of the RTA. The appellant contends that there is nothing ambiguous about reg 32. It requires a test to be carried out at certain times to ensure that the photographic detection device is "programmed" and "set to operate".

39 The Magistrate found that testing in accordance with the Regulations could only be done by conducting a test on a vehicle acting illegally (by disobeying the red light) or by closing the intersection. No expert evidence was called by the prosecution. There may be other less onerous or potentially dangerous ways of conducting the test in accordance with the Regulations. However, the onus is not on the appellant to provide such alternatives. The fact that Police may find compliance with the statutory requirements for testing to be difficult, time consuming or impractical does not negate the requirement for compliance or render the Regulations open to a construction other than their literal meaning.

40 The appellant contends that the Magistrate erred in finding that Inspector Healey acted reasonably in certifying the certificate because it would have been unreasonable for her to require the tester to act illegally or close the intersection.

41 The appellant relies on the decision of this Court in *Police v Hanton*[3] as establishing two significant propositions. First, a certificate which is to be given special evidentiary weight must be within the area of competence of the certifying officer signing the certificate. Secondly, the certifying officer must

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3 (2018) 131 SASR 226.

have access to all relevant information and must have a belief on reasonable grounds when signing the certificate. The issue in this case is whether Inspector Healey had sufficient information before her to form the necessary "belief on reasonable grounds"[4] to enable her to certify that the red light camera was tested in compliance with the Regulations and that it operated correctly and as programmed. In the appellant's submission, she did not.

42 When certifying that testing had been done, and done in accordance with the Regulations, Inspector Healey relied on the Disposition Sheet (D1). The Disposition Sheet refers only to testing of the speed camera in lanes 1 and 2 and does not provide any evidence of the testing of the red light camera in lane 3. The evidence of Mr Dellow was that he recorded the test results of lane 3 on a separate document known as a "field sheet". However, that document was not provided to Inspector Healey. Inspector Healey relied on the Disposition Sheet, which made no mention of the red light camera testing, to certify that the testing had been done, and that it had been done in compliance with the Regulations.

43 Inspector Healey was not provided with any photographs or electronic records of the testing conducted on 26 February 2018. Rather, she relied on photographs taken on 14 March 2018 as evidence that on 26 February 2018 the camera operated as designed. The photographs dated 14 March 2018, do not prove that the test conducted on 26 February 2018 complied with the Regulations.

44 Inspector Healey acknowledged that the requirements for programming and testing a speed camera differ from the requirements for programming and testing a red light camera. Despite the requirements being different, Inspector Healey relied on satisfaction as to the testing of the speed camera as evidence that the red light camera had been properly tested. The appellant contends that the Magistrate erred in finding that it was not unreasonable for Inspector Healey to draw that conclusion.

45 Inspector Healey stated in evidence that the only testing required to comply with the Regulations was testing that the induction loops work. However, the appellant submits that it is clear from the Regulations that more than the mere testing of the induction loops is required. Accordingly, the appellant contends that the approach taken by Inspector Healey demonstrates her misunderstanding of the requirements under the Regulations.

46 The appellant contends that the matters referred to in the preceding paragraphs demonstrate that Inspector Healey did not have the necessary information in front of her to enable her to hold the "belief on reasonable grounds" necessary to certify certificate P3. The Magistrate erred in this respect and thus the certificate P3 was admitted in error.

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4 Ibid at [84].

Respondent's submissions

47 The central question in this appeal is what reg 32(2)(g) requires by way of testing. The respondent submits that a photographic detection device used to provide evidence of red light offences must, once in every 28 days:

- By reason of r 32(2)(g)(i), be tested "*to ensure that the device detects and takes exposures, or makes electronic records, of vehicles passing over the induction loop and accurately indicates the lane in which any such vehicle is travelling*"; and

- By reason of reg 32(2)(g)(ii)(A), be checked to ensure that the device indicates the correct date, time and code for the location at which exposures or electronic records are taken or made; and

- By reason of reg 32(2)(g)(ii)(B), be checked to ensure that the device is ***set to operate*** in accordance with reg 32(2)(d). That is, checked to ensure it is *"programmed and set to operate, and the induction loop and the traffic lights ... linked up with the device ... so that, following a programmed delay after the traffic lights commence showing a red traffic light ... if a vehicle is detected by the device passing over the induction loop while the red traffic light is showing ... at least 2 exposures are taken, or at least 2 electronic records are made, of that vehicle from the rear*", the first following the detection of the vehicle and one following a programmed delay after the first.

48 The respondent contends that, contrary to the appellant's submission and, as a matter of statutory construction, the requirement that a photographic detection device be "*checked* to ensure that the device … is ***set to operate***" in a particular manner does not require the *check* to show that the device *was in fact* operating in that manner. A device is "set to operate" in a particular way if the settings of the device are adjusted so that it will operate that way.

49 The respondent submits that there is a distinction between the language of reg 32(2)(f)(i) and reg 32(2)(g)(ii). Where a camera is used to detect speeding offences, reg 32(2)(g)(ii) requires a "*test ... to ensure*" the device "*accurately indicates speed*". These words connote the requirement of a physical test of the device as distinct from a "*check ... to ensure*" a device is "*set to operate*" in a particular way as required by reg 32(g)(ii) in respect of red light offences.

50 Secondly, the respondent contends that s 79B(10)(c) distinguishes between certifying that a device was "designed and set to operate according to a specified system" and the consequential presumption that the device "did, in fact, so operate". Section 79B(10)(c) does not require the certificate to certify that the device "*did, in fact, so operate*", rather all that is required is certification that the device was "*designed and set to operate according to a specified system*". The sub-section establishes not only the presumption of the fact certified, but also the consequential fact that the device did, in fact, operate as it was designed and set. This is consistent with the Regulations not requiring the testing officer to verify whether the device operates as it was designed and set.

51 The respondent contends that this construction is preferable as a matter of purpose. To require the checker to disobey a red light or wait until they saw another person disobey the red signal would be contrary to the public safety purpose of the RTA. Regulation 32(2)(f)(i) expressly requires that a device used to provide evidence of a speeding offence be tested by reference to speeds not exceeding the applicable speed limit. This indicates an overall intention within the Regulations not to authorise the commission of an offence in order to test a camera. Police are not entitled to commit an offence because it will enable them to discharge their duties. Such authorisation must be express and it is questionable whether delegated legislation could create a defence to an offence created by the *Australian Road Rules* and the RTA.

52 The respondent contends that, having regard to the whole of the evidence, the appellant failed to prove, contrary to the presumption established by certificate P3, that the Traffistar device was not checked to ensure that the device was programmed and set to operate in accordance with reg 32(2)(d).

53 Neither Inspector Healey or Mr Dellow were questioned about the training undertaken by officers in relation to establishing that a photographic detection device was set to operate in accordance with reg 32(2)(d). Thus, the appellant failed to demonstrate that Mr Dellow neglected to ensure it was set to operate in accordance with his training.

54 The appellant's cross examination of Mr Dellow was directed towards establishing a failure to observe a vehicle travelling through the intersection whilst the red arrow was showing and a failure to take exposures or electronic records of vehicles going through the induction loop when a red arrow was showing. The appellant did not ask questions or call evidence sufficient to establish that the test Mr Dellow conducted was insufficient to determine that the device was not "set to operate" as required by the Regulations.

55 The respondent disputes the appellant's interpretation of *Hanton*. It contends that this case did not establish a separate basis for challenging a certificate by reference to considerations of reasonableness or adequacy of material before the certifying officer. The decision is also not authority for the proposition that an unreasonable certification by a certifying officer authorises the discretionary exclusion of a certificate.

56 The respondent contends that *Hanton* is distinguishable from the present case and, in any event, was wrongly decided. In both *Hanton* and *Police v Miller*,[5] Peek J held that the appellants had discharged their onus of demonstrating "proof to the contrary". In each case, the testing officer's evidence was that the certificate was issued on the basis of an entirely different test; a test performed six months before the date of the alleged speeding offence and not "on the day" of the alleged offence as required by s 175(3)(ba) of the RTA.

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5 [2018] SASC 97; (2018) 85 MVR 110.

57 Peek J noted that neither the testing officer nor the certifying officer were able to say what the testing methods actually demonstrated. The fact that the certifying officer was unable to explain the basis for the certification amounted to proof that the device was not shown by the test to be as accurate as certified. The respondent contends that this approach conflated an absence of evidence with proof to the contrary.

58 Even if *Hanton* and *Miller* were correctly decided, the respondent submits that the appellant did not cross-examine Mr Dellow as to what the "system test" actually established about how the camera was set to operate. Thus, the appellant did not rebut the statutory presumption created by the certificate.

Consideration

59 It is necessary to consider the statutory presumptions created by the admission into evidence of a certificate issued under 79B(10) of the RTA. The further issue is whether those statutory presumptions have been rebutted by the appellant. That requires a careful assessment of the evidence relied upon by the appellant at trial.

Statutory presumptions

60 Section 79B(10) of the RTA creates several statutory presumptions. These are as follows:

1 A photograph produced from the relevant photographic detection device denoting the time, date and location at which the exposure was taken, is proof of those facts, in the absence of proof to the contrary.

2 A certificate certifying that the requirements of the RTA and the Regulations as to the "operation and testing" of the relevant device were complied with in connection with the use of that device during the relevant period is proof of those facts, in the absence of proof to the contrary.

3 If the certificate certifies that the relevant device was "designed and set to operate" according to a specified system during that period, it will be presumed, in the absence of proof to the contrary, that the device was designed and set to operate acceding to that system and did, in fact, so operate.

4 If the certificate certifies that the relevant device is a "photographic detection device", the certificate is proof of that fact, in the absence of proof to the contrary.

61 The appellant does not suggest that there is any evidence to the contrary that might prove that the particular red light camera is not a "photographic detection device". Similarly, there is no suggestion by the appellant of any contrary evidence that might establish that the photographs taken by the red light

camera do not display the correct time, date and location. Thus, the issues are, first, whether the appellant has proven on the balance of probabilities that, during the relevant period, the device was not set to operate according to a specified system and, secondly, whether he has proven that the requirements of the RTA and the Regulations as to the operation and testing of the device were not complied with.

The statutory testing regime

62 It is necessary to examine closely the provisions of reg 32(2) concerning the use and testing of red light cameras. A key issue is the proper construction of reg 32(2)(g) which provides for the regular testing of such devices. That testing regime is plainly intended to ensure that the device is set to operate in accordance with the offence detection provisions in reg 32(2)(d) and must be understood in that light.

63 The chapeau to reg 32(2)(g) requires that while the device is being used to provide evidence of red light offences it must be tested once in every 28 days in accordance with the regime established by the subsequent provisions of reg 32(2)(g).

The purpose of the testing regime is stated in reg 32(2)(g)(i) as being to ensure that:

- the device detects and takes exposures:
- of vehicles passing over the induction loop; and
- accurately indicates the lane in which such a vehicle is travelling.

As I note below at [109], the evidence of Mr Dellow about the testing he undertook was sufficient to establish that each of the requirements in reg 32(2)(g)(i) was satisfied.

64 Regulation 32(2)(g)(ii) requires that the device must be checked to ensure that it:

- indicates the correct date, time and code for the location and which exposures are taken; and
- is set to operate, in accordance with, in this instance, reg 32(2)(d).

65 The appellant does not suggest that the device did not accurately indicate the correct date, time and code. The remaining two subparagraphs of reg 32(2)(g) specify the action to be taken if a check or a test indicates a fault. Those provisions are not relevant to this appeal. Thus, the issue is whether the device was checked to ensure that it was set to operate in accordance with reg 32(2)(d).

66 The elements of reg 32(2)(d) are as follows:[6]

- the device must be programmed and set to operate; and
- the induction loop and the traffic lights must be linked up with the device;

so that:

- following a programmed delay after the traffic lights commence showing a red traffic light;
- if a vehicle is detected by the device passing over the induction loop while the red traffic light is showing at least two exposures are taken of that vehicle from the rear;
- the first exposure is to be taken following the detection of the vehicle by the device; and
- at least one of the exposures is taken as that vehicle, or that vehicle and other vehicles, proceed over the intersection following a programmed delay after the first exposure is taken; and
- on which is recorded the date, time and code for the location at which the exposure is taken together with the lane in which the vehicle is travelling.

67 The respondent has focussed its submissions on the requirement that the device must be "programmed and set to operate" as prescribed in reg 32(2)(d). In that respect, the respondent draws a distinction between being "programmed and set to operate" and in fact operating in accordance with the prescribed requirements.

Onus of proof

68 The central issue in this appeal is whether the appellant has discharged the onus of proof that he carries as a result of the admission into evidence of the certificate signed by Inspector Healey.

69 There are many decisions of this Court concerning the legal effect of evidentiary certificates issued under the RTA. In view of the contention by the respondent that both *Hanton* and *Miller* were wrongly decided, it is necessary to examine the decision in *Hanton* in detail and also to refer to some other authorities. In doing so, it must be recognised that, with one exception, these authorities relate to the evidentiary effect of a certificate issued under

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[6] I have omitted the alternative reference in reg 32(2)(d) to the taking of at least two electronic records as that is not relevant to this appeal.

s 175(3)(ba) of the RTA rather than s 79B(10). It is also highly significant that the operation of s 79B(10) depends upon compliance with reg 32(2).

70 I have set out above at [7] to [9] the terms of s 79B(10) and the relevant provisions of reg 32(2). As most of the authorities are concerned with s 175(3)(ba) of the RTA, it will assist with the understanding of those cases if I state the effect of that provision.[7] Section 175(3)(ba) provides that a certificate signed by a senior police officer certifying that a specified traffic speed analyser had been tested on a specified day, and was shown by the test to be accurate to the extent indicated in the certificate constitutes, in the absence of proof to the contrary, proof of the facts certified and also that the analyser was accurate to that extent on the day on which it was tested. The chaussette to s 175(3)(ba) confirms that this evidentiary presumption operates even though the alleged speed of the vehicle differs from that at which the analyser was tested or the circumstances of testing differ from those of the alleged offence.

71 Peek J referred in *Hanton* to decisions of this Court, of the Supreme Courts of other jurisdictions and of the High Court, where it had been made very clear that there must be strict adherence to the terms of provisions such as s 79B(10) and s 175(3)(ba) that seek to reverse the onus of proof in respect of an element of a criminal offence.[8] That principle must be applied in this appeal.

Police v Bulgin

72 In *Police v Bulgin* White J held that the phrase "absence of proof to the contrary" in s 79B(10) and s 175(3) of the RTA imposed upon a defendant the persuasive onus of establishing on the balance of probabilities proof to the contrary of the matter in question.[9] Thus, his Honour stated that a defendant must do more than merely adduce or point to some evidence to the contrary in order to displace the operation of the presumption or to deny the availability of the statutory aid to proof. White J observed that in taking this approach, he followed the decision of the Full Court in *Evans v Benson.*[10] The latter case was concerned with the proof required to rebut the statutory presumption that the blood alcohol reading recorded by a breath analysis device was correct.

Police v Cooke

73 The respondent in *Police v Cooke* had been acquitted of failing to comply with a red traffic signal.[11] Gray J allowed the appeal on the basis that the

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7 For completeness, I note that following the decisions in *Hanton*, *Miller* and *Police v Henderson* [2018] SASC 98, the *Road Traffic (Evidentiary Provisions) Amendment Act 2018* (SA) was enacted with effect from 13 December 2018. That Act amended s 175(3) of the RTA by adding a new s 175(3)(baa) and varying s 175(3)(ba). The apparent intention of the amendments was to render legally effective the police approach to testing of speed detection devices that had been found by Peek J to be contrary to the legislative scheme as it had then stood.

8 (2018) 131 SASR 226 at [29]–[41].

9 [2010] SASC 143 at [46].

10 (1987) 46 SASR 317.

11 [2010] SASC 357.

Magistrate had misconstrued the relevant Regulation. However, his Honour made *obiter dictum* observations as to the admissibility and use of an evidentiary certificate if the requirements of s 79B(10) are not met. His Honour observed:[12]

> There is nothing in section 79B(10) of the *Road Traffic Act* as earlier extracted which seeks to exclude the evidence of the photographs. The section is designed to address the circumstances in which photographic evidence "will be admitted". The section provides that if a number of conditions are met, the photographic evidence "will be admitted". However, the section does not limit the admissibility of the evidence in the event that those conditions are not met. It does not address the question of the relevance or probative value of the evidence. The photographs remain admissible if shown to be relevant and probative. Additionally the principle known as the *Bunning v Cross*[13] principle would appear to have application.

Police v Young

74 The appellant in *Police v Young* was convicted of exceeding the speed limit.[14] The prosecution had relied upon a reading obtained through the use of a laser speed gun. To prove the accuracy of the speed gun, the prosecution had tendered a certificate issued under s 175(3)(ba*).* Peek J held:[15]

> [I]t is vital to delineate precisely the boundaries of what the prosecution may, and may not, certify (thus enlivening that effective reversal) and to insist upon strict observation of those boundaries.

75 The evidence of the police officer who had tested the speed gun in *Young* was that he had checked to ensure that all of the characters in the display were visible and checked to confirm that it identified vertical and horizontal targets. The officer had also conducted a range test which confirmed that the device was correctly measuring distances of 25 and 50 metres. The range test also indicated that the stationary objects at which the device was targeted recorded a speed of zero.

76 The certificate tendered by the prosecution in *Young* purported to certify that the specified traffic speed analyser had been tested before and after use on a certain date "and was accurate to within Australian Standard 4691.1 – 2003 namely + or – 2 km/h." Peek J observed that the correct formulation should have been "*was shown by the test to be accurate* …".

77 The appellant in *Young* did not challenge the expertise of the officer in testing the device and nor did he call any expert evidence as to the meaning and significance of the factual matters upon which he sought to rely. Peek J held with some hesitation that, while the drafting of the certificate was imprecise, it was, only just, sufficiently clear to establish that the device was "shown by the test to be" accurate to within the required extent. On that basis, Peek J held that

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12 Ibid at [33].
13 *Bunning v Cross* (1978) 141 CLR 54.
14 (2012) 114 SASR 567.
15 Ibid at [27].

the Magistrate had correctly ruled that there was insufficient evidence to constitute "proof to the contrary" so as to defeat the operation of the statutory presumption.

78 Peek J discussed in *Young* the type of evidence that may suffice to constitute "proof to the contrary" and thereby defeat the statutory presumption created by the evidentiary certificate. His Honour referred to four different situations that tend to occur.

79 The first such example referred to by Peek J was based upon the impugning of the testing process. His Honour stated that "[t]he main presumption may be defeated if, for example, there is sufficient evidence that the specified tests did not occur at all or, if they did occur, they were not capable of establishing, or did not establish, the specified level of accuracy." For the reasons that I will explain later, while not precisely analogous, this example is relevant to the present appeal.

80 The second example referred to by Peek J involved impugning the speed detection process by evidence relating to the subject vehicle rather than the speed detection device. His Honour provided an example of evidence that proved that a vehicle was incapable of travelling at the speed alleged. That example is obviously not relevant to the present case.

81 Under the third example referred to by Peek J, the speed detection process was impugned by evidence that directly related to the accuracy or reliability of the device. There is no evidence of this type in the present matter.

82 The fourth example referred to by Peek J involved impugning the process of the operation of the device. Once again, that is not relevant to the present matter, where the focus of the appellant's contentions is upon the testing process.

Police v Butcher (2014)

83 In the 2014 case of *Police v Butcher*, the respondent contended that the senior police officer who had signed an evidentiary certificate issued under s 175(3)(ba) could not have been satisfied that the traffic speed analyser had been tested for its accuracy.[16] That was said to be due to the insufficiency of information provided to the senior officer by the constable who had conducted the test. The constable had provided his notebook which merely contained the word "test" and a record of two times on the relevant day. It was contended that the senior officer could not certify the facts recited in the certificate as there was no evidence before him of the actual tests performed and the results of those tests.

84 The constable's oral evidence was that he had tested the speed gun and the test showed that the device was operating correctly. The respondent had relied

[16] (2014) 119 SASR 509.

upon a passage in the cross-examination of the constable where he had conceded that he did not know whether the device would record a different speed if it had been pointed at the tyre of the vehicle. The constable stated that this was probably a question for an expert and he was not qualified to answer. Stanley J rejected a submission that this evidence established that the constable lacked the expertise to test the accuracy of the device. Stanley J held:[17]

> … this submission misunderstands the operation of s 175(3)(ba).
>
> It provides that a document produced by the prosecution and purporting to be signed by a relevant police officer and purporting to certify that a specified traffic speed analyser had been tested on a specified day, and was shown by the test to be accurate to the extent indicated in the document, constitutes proof of the facts certified and that the traffic speed analyser was accurate to the extent indicated in the document on that day unless the person charged proves to the contrary. A submission that the police officer could not, as a matter of fact, have been satisfied of the matters certified in the document misunderstands the very intent and purpose of the statutory provision. The purpose of the certificate is to establish a statutory presumption without regard to the facts. In effect, it reverses the onus of proof. It shifts the onus to the person charged to discharge the evidentiary burden of disproving the facts certified in the document. That is not achieved by pointing to the absence of sufficient evidence of the facts certified before the relevant police officer. The operation of s 175(3)(ba) requires the accused person, if he is to discharge the evidentiary burden that the provision has shifted to him, to prove on the balance of probabilities the contrary of the facts certified.

85 Accordingly, the statutory presumption created by the certificate had not been displaced. The prosecution appeal succeeded.

Police v Butcher (2016)

86 In the subsequent 2016 case of *Police v Butcher,* Stanley J stated:[18]

> [20] … the persuasive onus the respondent bore at trial was not to prove that the speed gun was not accurate to the extent indicated in the certificate but that the test conducted by Senior Constable Goldsmith on 14 September 2012 did not show that the speed gun was accurate to that extent.

Police v Hanton

87 The appellant in *Police v Hanton* had been convicted of a speeding offence that had been proved to the satisfaction of the Magistrate upon the tendering of a certificate under s 175(3)(ba).[19] Peek J upheld the appeal and held that the Magistrate had erred.

88 The respondent contends that *Hanton* was wrongly decided as Peek J incorrectly conflated an absence of evidence with proof to the contrary.

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17 Ibid at [64]-[65].

18 [2016] SASC 130.

19 In *Police v Miller* and *Police v Henderson*, Peek J made findings to the same effect as he had made in *Hanton*.

Stanley J had specifically warned against that error in *Police v Butcher*.[20] However, the respondent submits that this matter may be decided without considering the correctness of the approach adopted by Peek J. Despite that submission, I consider it necessary to explore fully the reasoning of Peek J in *Hanton*.

89 Peek J held that the central subject of a certificate issued under s 175(3)(ba) is that a specified traffic speed analyser had been tested on a specified day and was shown by the test to be accurate to a particular stated extent. His Honour described that process as the "statutory test".[21]

90 Peek J stated that function of the statutory test was to show the extent of accuracy that the speed analyser actually had at the time of the statutory test. His Honour distinguished that matter from what might be asserted or purportedly specified by design specifications, manufacturer's instructions or Australian Standards. Such matters, and also internal police procedures, could not impinge upon the requirements of the statutory test nor its central importance.[22]

91 Peek J held that in order to furnish a certificate under s 175(3)(ba), a senior officer must believe on reasonable grounds that the "statutory test" showed that the device was, at the relevant time, accurate to a particular stated extent. Furthermore, the senior officer must be able to specify the particular extent of accuracy. These requirements must be clearly distinguished from a mere general belief that the device was accurate, whatever may be the basis for such a belief.[23]

92 Peek J further held that a defendant who wished to contest the facts certified in a certificate was required to prove, on the whole of the evidence before the court, that the purported statutory test had failed to show the particular extent of accuracy stated in the certificate. It was not necessary for the defendant to prove that the device was not accurate to the particular extent stated in the certificate or that it was generally inaccurate.[24]

93 In *Hanton* the prosecution called a police officer who had completed what was described as a "five step test" on the speed gun on the day of the alleged speeding and provided the results of that test, together with the outcome of a "calibration check" performed much earlier, to the senior officer who had signed the certificate. The evidence of the senior officer was that when he issued the certificate he had relied upon the five step test and the calibration check.

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[20] See the passage cited above at [84].
[21] (2018) 131 SASR 226 at [19].
[22] Ibid at [19] and [44].
[23] Ibid at [21].
[24] Ibid at [22].

94 The police officer described the "five step test" as follows. He stated that he inspected the device to see that the labels had not been removed or damaged.[25] The second step involved turning the device on and checking whether an error code appeared on the LCD screen. The third step was to press a button on the device and then check whether any anomalies appeared on the LCD screen, or whether anything was missing from the screen. The fourth test was to aim the device at a fixed object, at least 70 m distant, and look through the scope to determine whether there was a change in pitch when the crosshairs of the sight moved across the chosen object. If there was a change in pitch, that would establish that the crosshairs were aligned with the laser beam. The fifth test was described by the officer as the "fixed distance zero velocity test". This was said by the officer to ensure that the instrument was calculating measurement, distance and time accurately over a known distance of 20 m. The officer stated that this fifth step had not revealed any anomalies in the operation of the device.

95 The evidence given by a police officer in *Miller* provided more information about the fixed distance zero velocity test. In that case, the officer stated that aiming the device at a reflector on a solid object over a measured distance of 20 metres produced a reading that the object was located 20 m away and had a speed of zero. The officer described the other elements of the five step test in effectively the same terms as the officer who gave evidence in *Hanton*.

96 The judgments in *Hanton*, *Miller* and *Henderson* do not provide any detail as to what was involved in the "calibration test" or "calibration check" performed by or on behalf of SAPOL. What is clear is that this particular test or check may be performed at any time within the previous 12 months. In that light, Peek J made the following observations:[26]

> [20] … A problem that has arisen, perhaps incrementally, is that SAPOL have (in purported compliance with the statutory test), erected a system whereby the result of the last "calibration test" of a TSA unit (if it occurred within the previous 12 months) will be taken to be the current extent of accuracy of that unit, provided that the rudimentary test (which may be referred to as the "five step test plus calibration check" procedure) is "passed". What has been lost sight of is that RTA s 175(3)(ba) requires that first, the statutory test be performed proximate to the measurement of the speed the subject of a charge and second, that the statutory test must itself show that the TSA unit is then accurate to a particular stated extent.

97 Peek J made the following further observations concerning the task of the senior police officer who issues the certificate under s 175(3)(ba) (of the RTA):

> … the senior police officer must believe on reasonable grounds that "the statutory test" showed that the TSA unit was, at the relevant time, accurate to particular specific extent; and he or she must be able to specify that particular extent of accuracy. These

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[25] It is apparent from information contained elsewhere in the judgment that the "labels" were actually seals.

[26] *Police v Hanton* (2018) 131 SASR 226 at [20].

> requirements must be clearly distinguished from merely being of a general belief that the TSA is accurate, whatever might be the basis of such a belief.

98 The senior officer who had certified the certificate was called by the defence on subpoena. His evidence was that when he had signed the certificate under s 175(3)(ba) he had relied upon the five-step test and also had regard to the result of the calibration test.

99 Peek J concluded that:[27]

> The magistrate has substituted for the statutory test (which here must be carried out on the same day, or the day after, the day of the alleged speeding) a quite different test, namely a calibration test which may have been performed at any time up to a year before the alleged speeding by the defendant.

100 Consistently with the preceding observations, Peek J held that the defendant had succeeded in discharging his onus of proof by proving that, on all of the evidence before the Court, the testing undertaken by the police officer had failed to show that the device had been tested in accordance with the statutory requirements. For that reason, the prosecution could not rely on the presumption otherwise created by s 175(3)(ba). As the other evidence was incapable of proving the charges beyond reasonable doubt, the appeal in *Hanton* was upheld. The same conclusion was reached by Peek J in *Miller* and *Henderson*.

101 The fundamental point that emerges from the judgments in *Hanton*, *Miller* and *Henderson* is that an evidentiary certificate issued by a senior police officer under the RTA may only provide proof of the matters identified in the statutory provision that empowers the issue of such a certificate. Furthermore, it is necessary that the statutory procedural requirements be observed, i.e. under s 175(3)(ba) that requirement concerns the time of testing. If a defendant persuades the Court on the balance of probabilities, having regard to the entirety of the evidence led by both the prosecution and the defence, that the statutory requirements for the issue of a certificate have not been observed, then the prosecution cannot rely on that certificate as proof of the facts asserted therein.

102 In *Hanton* Peek J undertook a helpful examination of several possible scenarios where it may be asserted that "proof to the contrary" had been established in relation to an evidentiary certificate under the RTA.

103 The first such scenario was a case where an evidentiary certificate had been signed by a senior police officer and a calibration report had been prepared six months prior to the date of the alleged driving offence. A constable gave evidence as to how he or she had used the speed detection device and recorded that the defendant was exceeding the relevant speed limit. The defendant did not give any evidence, tender any document or call any witness.

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[27] Ibid at [148].

104 Peek J observed that the details of any testing and the basis upon which the senior officer had issued the certificate were completely unknown. However, it was possible that the senior officer had referred to material that was capable of founding a reasonable belief that the device was shown by a test to be accurate to the extent indicated in the certificate, and that he or she had formed that belief. In the absence of proof to the contrary, the certificate was capable of proving that the device had been tested on the date specified in the certificate and was shown to be accurate to the extent indicated in the certificate.

105 The present case is clearly different to the first scenario referred to by Peek J. In this case the details of the testing are known, as is the basis upon which the senior officer signed the certificate.

106 The facts in the second scenario referred to be Peek J were identical to the first scenario, save that the constable was cross-examined as to the testing of the device performed before and after the defendant's alleged speeding offence. The evidence of the constable was that the device passed the five step test and also the calibration check procedure and those facts had been reported to the senior officer. Peek J observed that in this instance it was possible that the senior officer had referred to material that was capable of supporting the required reasonable belief, and in fact such a belief had been formed. Peek J expressed the view that in the absence of proof to the contrary, in this second scenario the certificate was capable of proving that the device had been tested and was shown to be accurate.

107 Once again, this second scenario differs from the facts of the present case. That is because there is evidence to explain the basis upon which the senior officer signed the certificate.

108 In the third scenario referred to by Peek J, the senior officer also gave evidence. The evidence was that the senior officer had considered a report from the constable that indicated that the device had passed the five step test and also the calibration check procedure. The senior officer conceded that he had no idea what the passing of the five step and the calibration check procedure demonstrated, but as the calibration report was current he had decided that he would issue a certificate, given that the device had also passed the five step procedure. Peek J observed that this evidence established that he had not issued the certificate on the basis of a belief on reasonable grounds that the device had been tested on a specified day (as the statute requires) and was shown by that test to be accurate to a particular extent. The evidence made clear that the certificate had been issued on the basis of a completely different test to that required by the statute. In these circumstances, Peek J expressed the view that the preponderance of evidence before the Court was that the statutory test had failed to show that the device was accurate to a particular extent. Thus, the prosecution would not be entitled to rely upon the certificate. This third scenario accords with the facts before Peek J in *Hanton.*

The evidence of testing

109 The evidence of Mr Dellow shows that the testing he conducted established that the induction loop was activated when crossed by a vehicle in the right-hand turn lane. While his evidence was not as clear as it might have been, it also appears that the testing confirmed that the activation of the induction loop by a vehicle caused the camera to operate. I take that to be the effect of his evidence that he observed on his laptop or similar device what he described as "the loop activation on the camera".

110 Leaving aside for the moment the effect of the evidentiary certificate, the evidence of Mr Dellow is notable for what it did not establish. He did not refer to testing so as to ensure exposures were taken following a programmed delay after the traffic lights commenced showing a red signal. His evidence also did not establish that a second exposure was taken following a further programmed delay after the taking of the first exposure. Those deficiencies in the evidence are highlighted by Mr Dellow's confirmation that he had not observed any vehicles travelling through the red light.

111 The Magistrate inferred that, because the testing of the photographic detection device in relation to lanes one and two had measured the speed recorded by the device and compared that to the known speed of a vehicle, combined with the fact that the device was shown to detect vehicles passing over the induction loop in the right turn lane, those facts established that the device was set to operate correctly. For the reasons that follow, I consider that there was no proper basis for the Magistrate to make that inference.

112 As the appellant has observed, the statutory tests for speed and red light cameras are different. Unlike the situation with red light cameras, there is no requirement that a speed camera take two exposures following two programmed delays after the traffic light turns red. In fact, the operation of the speed camera is not dependent upon the display of a red traffic light. Because of the very different requirements for testing of speed cameras and red light cameras, it was not open to the Magistrate to draw the inference that he did.

113 The essence of the submission advanced by the respondent is that reg 32(2)(g)(ii)(B) requires no more than that the testing ensures that the device is <u>set to operate</u> in accordance with paragraph (d). That is also the case with s79B(10)(c). Thus, the respondent contends that it is not necessary for the testing to establish that the device in fact operated in accordance with reg 32(2)(d).

114 A device operated in accordance with reg 32(2)(d) is intended to provide evidence as to whether a vehicle contravened Rule 60 of the *Australian Road Rules* by entering an intersection when a red traffic arrow is being shown. The testing referred to in the evidence of Mr Dellow merely established that the particular device activated the camera when a vehicle passed over the induction loop.

115 Most importantly, Mr Dellow did not test to confirm that the device was set to operate so that the activation of the camera by the induction loop only occurred following a programmed delay after the traffic lights commenced to show a red traffic light. That matter is of fundamental importance where it is alleged that a motorist breached Rule 60 of the *Australian Road Rules* by entering an intersection after a red light was shown. Mr Dellow also did not test to confirm that the device was set to operate so that two exposures were taken and nor did he test to confirm that it was set to operate so that the second exposure was taken following a programmed delay after the first exposure was taken.

116 Because of the preceding omissions, I consider that the testing conducted by Mr Dellow did not establish that the device was programmed and set to operate in accordance with reg 32(2)(d). Thus, his testing did not meet the positive obligation in reg 32(2)(g)(ii)(B) that the device be checked every 28 days to ensure that it was set to operate in accordance with reg 32(2)(d).

117 The testing conducted by Mr Dellow was recorded on the Disposition Sheet received into evidence as exhibit D1. He stated in this document that "[t]he camera was the tested in compliance with the Road Traffic (Miscellaneous) Regulations and it operated correctly and as programmed". For the reasons previously given, it is quite clear that the testing conducted by Mr Dellow was not done in accordance with the requirements of reg 32(2)(g)(ii)(B) as he did not check to confirm the device was programmed and set to operate in accordance with each of the requirements in reg 32(2)(d). His testing addressed only one of those requirements, i.e. that the device takes exposures of vehicles passing over the induction loop.

118 In making that finding, I make no criticism of Mr Dellow. While he was not asked about the training he had received, I have no reason to think that he was not carrying out his duties in accordance with his training. The problem appears to be that the training does not correctly address the requirements imposed by the Regulations.

Reliance upon the certificate

119 Inspector Healey stated that she relied upon the contents of the Disposition Sheet together with her knowledge of the training undertaken by testing officers and her examination of the RTA and Regulations as the basis for her to sign the certificate issued under s 79B(10). As I have already said, it is apparent from the evidence of Mr Dellow that the Disposition Sheet incorrectly stated that the testing had been conducted in accordance with the Regulations.

120 The reference by Inspector Healey to her knowledge of the training undertaken by testing officers does not assist the respondent's case. That is because the approach to testing adopted by Mr Dellow suggests that the training did not properly and fully address the requirements of the Regulations.

121 Because the evidence given by Mr Dellow established that he had not conducted testing to confirm that the device was programmed and set to operate in accordance with each of the requirements of the Regulations, I am satisfied that the Magistrate should have found that the appellant had proven on the balance of probabilities that the facts stated in the certificate signed by Inspector Healey were not correct. For that reason, the respondent was not entitled to rely in support of the prosecution case on the facts asserted in the evidentiary certificate.

122 The facts of this matter are not relevantly distinguishable from the third scenario discussed by Peek J in *Hanton* or, for that matter, the actual findings made by his Honour in that case. In this case, and also in *Hanton*, the appellant has succeeded in proving on the balance of probabilities that the relevant device has not been tested in accordance with the statutory requirements, that being contrary to the assertion made in an evidentiary certificate.

123 I do not consider that my finding in this case is inconsistent with the observation of Stanley J in the 2014 case of *Butcher* where his Honour observed that an accused person does not discharge the evidentiary burden of disproving the facts certified in an evidentiary certificate issued under the RTA by pointing to the absence of sufficient evidence of the facts certified. Stanley J observed that the accused person must prove on the balance of probabilities the contrary of the facts certified. In the present case, the appellant has discharged that burden by establishing on the balance of probabilities that the testing conducted by Mr Dellow did not address each of the requirements in the Regulations. Thus, the Magistrate should have found the appellant not guilty.

Reading down of the testing requirements

124 For completeness, I will consider the finding by the Magistrate that the testing requirements established by reg 32(2)(d) and (g) can be read down with the support of s 22 of the *Acts Interpretation Act 1915* (SA), on the basis that the Governor could not have intended that testing would require the police to act unlawfully by driving a vehicle through the intersection contrary to the red arrow.

125 I reject that approach to interpretation for three reasons. First, s 22 provides that where a provision of an Act is reasonably open to more than one construction, a construction that would promote the purpose or object of the Act must be preferred. The text of reg 32(2) is quite specific as to the requirements of the testing regime. I firmly consider that it is not reasonably open to more than one interpretation.

126 Secondly, the police might potentially expand their testing process, or use different testing equipment or a revised computer program, to ensure that the device is tested as required by reg 32(2)(d) and reg 32(2)(g). If that is not possible, testing might potentially be conducted by closing the intersection (at

least partially) at a time when there will be a minimal disruption to traffic flow and then driving a vehicle through the red light. The effect of that vehicle movement on the photographic detection device could be observed to confirm whether the device does operate precisely as required by reg 32(2)(d) and reg 32(2)(g). In this context, I note that the testing performed by Mr Dellow occurred at 7:38 pm on a summer evening. Testing might possibly be conducted at a later time or in the early morning when there is little traffic about. While there will probably be practical difficulties in modifying the police testing regime so as to ensure that it complies with the statutory requirements, that does not provide a basis to read down the clearly stated testing requirements under reg 32(2)(d).

127 Thirdly, I doubt the correctness of the suggestion by the respondent that it may not be possible to amend the Regulations or the *Australian Road Rules* to authorise police to commit what would otherwise be an offence to facilitate testing of photographic detection devices. While it is unnecessary to express a concluded view on this issue, and I have not heard the parties on the issue, I note that several provisions in the *Australian Road Rules* authorise police in prescribed circumstances to commit what would otherwise be a breach of those Rules. By way of example, I refer to the exemptions provided to police under Rules 305, 307 and 308. Although the *Australian Road Rules* have been adopted as part of a national scheme to adopt uniform road laws throughout Australia, they have been enacted as South Australian subordinate legislation under s 80 of the RTA. In various respects, the South Australian regime departs from the national scheme. While I express only a preliminary view, it is not obvious to me why an amendment could not be made, if necessary, to facilitate testing of photographic detection devices. Alternatively, the RTA and the Regulations might potentially be amended as occurred after the decision in *Hanton*.

The *Bunning v Cross* discretion

128 The Magistrate held that if he was incorrect in his finding that the device had been tested in accordance with the Regulations, he would have applied the *Bunning v Cross* discretion to receive the certificate into evidence.[28] His Honour observed that there was no deliberate or reckless disregard of the law on the part of the police. The photographs of the appellant's vehicle entering the intersection contrary to the red traffic arrow comprised clear, compelling and reliable evidence. Whatever irregularity there may have been in relation to the testing of the device, there was no suggestion that the reliability of the photographs was affected by that irregularity. Thus, the probative value of the photographs was high. His Honour also referred to the *obiter* observations made by Gray J in *Police v Cooke*. Moreover, any irregularity that had occurred did not result in significant prejudice to the defendant.

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[28] (1978) 141 CLR 54.

129 Whilst the *obiter* suggestion made by Gray J in *Police v Cooke* might possibly be correct in some factual circumstances, I do not consider that the *Bunning v Cross* discretion is relevant to the present matter. That discretion may potentially be applied to receive evidence that was obtained unlawfully or improperly after weighing the competing public interests. However, the issue in this case is not whether the police acted unlawfully or improperly to obtain relevant and probative evidence that might be excluded in the exercise of a judicial discretion. There is no suggestion of unlawful or improper conduct but rather a failure to adhere strictly to the statutory testing process. In that light, the issue is whether the totality of the evidence is such that the respondent has persuaded the Court on the balance of probabilities that the facts asserted in the evidentiary certificate are not correct. As the respondent has discharged that burden by proving that testing of the device did not occur as required by the Regulations, the prosecution cannot rely on the aid to proof otherwise provided by the certificate. The *Bunning v Cross* discretion cannot be employed to overcome that deficiency in the prosecution case.

Reliance upon the photographs

130 The Magistrate held that the probative value of the photographs (Exhibit P4) depicting the appellant's vehicle turning right while the red light is showing is high. Counsel for the appellant did not object to the admission of those photographs into evidence.

131 One photograph shows the vehicle at an early stage of the right-hand turn while the second photograph depicts the vehicle with the turn being almost complete. The appellant was charged with a breach of Rule 60 of the *Australian Road Rules*. To make out that offence it was necessary for the prosecution to prove beyond reasonable doubt that the appellant's vehicle had entered the intersection when a red traffic arrow was showing. The photographs clearly show a red traffic arrow but they do not give any indication as to whether that red arrow was showing at the instant when the vehicle entered the intersection, i.e. the red arrow may possibly have first appeared a moment after the vehicle entered the intersection. That element of the prosecution case relied upon the evidentiary effect of the certificate signed by Inspector Healey. Without the assistance of that aid to proof, the prosecution could not establish that the light was already red at the instant that the appellant's vehicle entered the intersection. Thus, without the support of the certificate, the photographs do not establish beyond reasonable doubt that the appellant breached Rule 60.

Conclusion

132 I find that the Magistrate should have found that the totality of the evidence established that the relevant photographic detection device had not been tested in accordance with the requirements of the Regulations. Thus, I am satisfied on the balance of probabilities that the appellant has provided proof contrary to the facts

asserted in the certificate signed by Inspector Healey under s 79B(10) of the RTA.

133 I uphold the appeal and quash the finding of the Magistrate that the charge against the appellant of breaching Rule 60 of the *Australian Road Rules* on 14 March 2018 had been proven beyond reasonable doubt. I quash the appellant's conviction.

134 I will hear the parties as to costs.