

SUPREME COURT OF QUEENSLAND

CITATION: *Dixon v LeKich* [2010] QCA 213

PARTIES: **DIXON, Jeffrey Arthur**
(respondent/applicant)
v
LEKICH, Bilyana
(appellant/respondent)

FILE NO/S: CA No 144 of 2009
DC No 2702 of 2008

DIVISION: Court of Appeal

PROCEEDING: Application for leave s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 13 August 2010

DELIVERED AT: Brisbane

HEARING DATE: 4 May 2010

JUDGES: McMurdo P and Fraser and White JJA
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal refused**

CATCHWORDS: EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS, AND WEIGHT AND SUFFICIENCY OF EVIDENCE – PRESUMPTIONS – OF REGULARITY – WHERE PERSONS ACTING IN PUBLIC CAPACITY – DUE APPOINTMENT – where the applicant proceeded against the respondent for a speeding offence – where the prosecution relied on documentary evidence including two photographs – where each photograph bore a certificate signed by the applicant as a duly authorised delegate of the Commissioner – where the respondent did not object to the admission of the photographs – where the magistrate found the respondent guilty – where the respondent appealed to the District Court – where the primary judge held that the magistrate erred in admitting the photographs into evidence, allowed the appeal, set aside the conviction and ordered a verdict of acquittal be entered – where the applicant sought leave to appeal – where the applicant argued that the primary judge erred in failing to apply the presumption of regularity and in holding that the photographs were inadmissible – whether the presumption of regularity should have been applied to infer that the applicant was the object of a valid delegation by the Commissioner – whether the photographs were admissible in the absence of admissible evidence of a valid delegation

Acts Interpretation Act 1954 (Qld), s 27A
Police Service Administration Act 1990 (Qld), s 4.10(1),
s 10.12(4)
Transport Operations (Road Use Management) Act 1995
(Qld), s 59(c), s 120(2)

Cassell v The Queen (2000) 201 CLR 189; [2000] HCA 8,
cited
Day v The Queen (1984) 153 CLR 475; [1984] HCA 3, cited
Dillon v The Queen [1982] AC 484, cited
Huth v Petersen, ex parte Petersen [1975] Qd R 340, cited
Impagnatiello v Campbell (2003) 6 VR 416; [2003] VSCA
154, cited
Knox County v Ninth National Bank of City of New York
(1893) 147 US 91; [1893] USSC 8, cited
Lekich v Dixon [2009] QDC 111, cited
MacPherson v The Queen (1981) 147 CLR 512; [1981] HCA
46, cited
McLean Bros & Rigg Ltd v Grice (1906) 4 CLR 835; [1906]
HCA 1, cited
*Minister for Natural Resources v NSW Aboriginal Land
Council* (1987) 9 NSWLR 154, cited
Page v South Australia [1997] SASC 6244; (1997) 95
A Crim R 25, cited
Pertl v Kahl (1976) 13 SASR 433; (1976) 31 FLR 380, cited
R v Cox [1986] 2 Qd R 55, cited
R v Soma (2003) 212 CLR 299; [2003] HCA 13, cited
The Commonwealth v Anti-Discrimination Tribunal (Tas)
(2008) 169 FCR 85; [2008] FCAFC 104, cited
Yamasa Seafood Australia Pty Ltd v Watkins [2000] VSC
156, cited

COUNSEL: P J Flanagan, with G del Villar, for the applicant
The respondent appeared on her own behalf

SOLICITORS: Queensland Police Service Solicitor for the applicant
The respondent appeared on her own behalf, with D Lekich
assisting

- [1] **McMURDO P:** The application for leave to appeal should be refused for the reasons given by Fraser JA.
- [2] **FRASER JA:** On 4 September 2008 the applicant, Senior Sergeant Dixon, proceeded against the respondent, Mrs LeKich, in the Caboolture Magistrate’s Court for a speeding offence. The prosecution relied entirely on documentary evidence. The critical documents, which were admitted as exhibits 1 and 2, were photographs of Mrs LeKich’s car on a section of highway taken by a fixed speed camera (a “photographic detection device”). The images were endorsed with markings made by the photographic detection device which recorded the speed of Mrs LeKich’s car as 114 km per hour in a 100 km per hour zone. She did not dispute that she was driving the car on the relevant section of roadway at the time or that the photographic detection device took the photographs, but she asserted from

the bar table that she was not guilty of speeding. She did not give or call evidence. The magistrate found Mrs LeKich guilty beyond reasonable doubt, convicted her, and fined her \$200.

- [3] Mrs LeKich appealed to the District Court against her conviction. The District Court judge who heard the appeal held that the magistrate had erred in admitting the photographs in evidence, allowed the appeal, set aside the conviction and penalty, and ordered that a verdict of acquittal be entered.
- [4] The applicant then applied for leave to appeal to this Court against those orders. When the application first came before the Court it was adjourned because for reasons within the applicant's responsibility the matter was not ready to proceed. At the adjourned hearing the parties acquiesced in the Court treating the argument on the application as argument on the appeal in the event that the Court was minded to grant leave to appeal. The applicant was represented by senior counsel. Mrs LeKich was unrepresented, as she had been throughout. The Court adopted the exceptional course of acceding to her request to grant leave for her husband to make submissions on her behalf and to cross-examine deponents of affidavits upon which the applicant relied.
- [5] At the adjourned hearing the matter proceeded on the applicant's amended application for leave to appeal filed on 3 December 2009. It confined the proposed appeal to grounds concerning the admissibility of the photographs. Mrs LeKich opposed the appeal by adopting the primary judge's reasons on that question. She and her husband also repeated arguments which the primary judge had rejected, but they did not identify any error in the reasons given by the primary judge.¹ It is therefore sufficient to record that I agree with his Honour's reasons on those points. It is necessary to discuss only the grounds of the applicant's proposed appeal.
- [6] I will discuss those grounds after I have first referred to relevant aspects of the proceedings in the District Court, the reasons of the primary judge for allowing the appeal to that court, and Mrs LeKich's argument that there was no acceptable evidence in this Court of the photographs or the certificates endorsed on those photographs.

The District Court proceedings

- [7] In the District Court Mrs LeKich's notice of appeal contained eight grounds. None of them contended that the photographs were inadmissible. The primary judge rejected all eight grounds but upheld the appeal to the District Court on a ground which was agitated for the first time in submissions in reply by Mrs LeKich. She argued that the photographs should have been rejected because they were not certified by the Commissioner of Police as required by s 120(2) of the *Transport Operations (Road Use Management) Act 1995* ("TORUM") (Qld).² Mrs LeKich apparently derived the argument from a reference in the transcript of proceedings in the Magistrates Court to the relevant certificate having been signed by Acting Senior Sergeant Dixon (the applicant) rather than by the Commissioner. Section 120 of *TORUM* provided:

"120 Evidentiary provisions

¹ *Lekich v Dixon* [2009] QDC 111 at [22]-[34], [50]-[58].

² See Reprint No. 9E.

- (1) This section applies to a proceeding for an offence involving a motor vehicle under this or another Act.
- (2) An image produced by the prosecution purporting to be certified by the commissioner stating that the image was properly taken by a photographic detection device at a specified location and time is evidence of the following matters—
 - (a) the image was taken at the specified location and time;
 - (b) the accuracy of the image;
 - (c) the things depicted in the image;
 - (d) any requirements prescribed by a regulation about the operation and testing of a photographic detection device were complied with for the specified device at all material times.
- (3) If an image produced under subsection (2) is one in a series of images also produced under subsection (2)—
 - (a) the image may be numbered; and
 - (b) the time it was taken may be identified by reference to another image in the series.
- (4) A marking or writing made by a photographic detection device on an image is taken to have the meaning prescribed under a regulation and is evidence of what it is taken to mean.
- (6) Evidence of the condition of the photographic detection device is not required unless evidence that the device was not in proper condition has been given.”

[8] Mrs LeKich pointed out that s 120(2) refers only to a certificate by the Commissioner. That overlooked s 4.10(1) of the *Police Service Administration Act 1990 (Qld)*,³ which provides that the Commissioner may delegate powers under that Act or any other Act to a police officer or staff member. That section empowered the Commissioner to delegate the Commissioner’s power to certify under s 120(2) of *TORUM* to the applicant.

[9] However the primary judge found for Mrs LeKich on the ground that the applicant had not proved that the Commissioner had exercised the power to delegate the certifying power to the applicant. In a supplementary written submission apparently made at the primary judge’s request, the applicant’s counsel referred to and attached

³ See Reprint No. 4B.

a copy of what was submitted to be the relevant delegation and advanced arguments to the effect that the applicant had certified the photographs as the Commissioner's duly appointed delegate. The primary judge rejected those arguments.

[10] The primary judge quoted the following extract from the transcript of proceedings in the Magistrate's Court:

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

SGT HERRMANN: Yes.

BENCH: That's the Police Service Administration Act?

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

BENCH: Section 4.10.

SGT HERRMANN: Thank you, your Honor.

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

SGT HERRMANN: Yes, your Honour.

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

DEFENDANT: Yes, I did.

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

[11] The primary judge then said:⁴

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

⁴ *Lekich v Dixon* [2009] QDC 111 at [38]-[40].

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

Section 27A(14) of the *Acts Interpretation Act 1954* provides that “a certificate signed by the delegator (or, if the delegator is a body, by a person authorised by the body for the purpose) stating anything in relation to a delegation is evidence of the thing.” Accordingly, a certificate signed by the Commissioner would have been admissible as evidence of the delegation, and by subsection (15) a document purporting to be such a certificate is to be taken to be such a certificate unless the contrary is established, so that on the face of it such a certificate could simply have been tendered. But there is nothing in that Act by which a certificate by the delegate is made evidence of the existence of the delegation. There is certainly nothing in s 120 of the Act which permits the delegate to certify to the existence of the delegation where the Commissioner’s power has been delegated.”

- [12] After referring to and finding inapplicable various other statutory provisions, the primary judge concluded that there was no admissible evidence before the magistrate to verify the photographs. Accordingly his Honour held that the magistrate erred in law in admitting the certified photographs and attributing to them the effect provided by s 120 of the Act for an image certified in accordance with that section. The primary judge referred to the respondent’s supplementary submissions in the following passage:⁵

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

- [13] Without the evidence of the photographs there was insufficient evidence to prove the charge. The primary judge therefore allowed the appeal and set aside the conviction.

⁵ *Lekich v Dixon* [2009] QDC 111 at [48].

The grounds of the proposed appeal to this Court

- [14] The applicant did not argue that if the photographs were inadmissible the primary judge should nevertheless have dismissed the appeal on any of the following bases: the ground upon which Mrs LeKich succeeded was not in her notice of appeal to the District Court; she had not given any notice of an intention to challenge the photographs;⁶ there is no rule that subject only to statutory exceptions evidence must be given orally in criminal proceedings; Mrs LeKich did not object to the admission of the photographs so that once that evidence was admitted its weight was a matter for the magistrate to decide;⁷ whilst the magistrate was obliged to ensure that the trial was conducted fairly and in accordance with the law (including by excluding evidence tendered against an accused, especially an unrepresented accused which was not shown to be admissible⁸) it did not follow that the admission of inadmissible evidence justified setting aside the conviction;⁹ and where there was no suggestion that the applicant was not in fact the object of the necessary delegation there was no miscarriage of justice occasioned by the admission of the inadmissible photographs. None of those arguments was advanced at the hearing of the application in this Court, perhaps because the applicant considered that such fact specific points would not attract a grant of leave to appeal. I hasten to add that I do not express an opinion about the merits of those points. I mention them only to explain that they are not in issue in this application and to make the point that the result in the District Court would not necessarily follow in other cases in which similar certificates were admitted in the Magistrates Court without objection.
- [15] When the matter first came on for hearing in this Court the applicant foreshadowed a further argument, that this Court should admit further evidence to prove that the Commissioner had duly delegated the power of certification. Such an argument was developed in the applicant's outline filed on 4 December 2009. At the adjourned hearing the applicant abandoned that outline of argument.
- [16] The application proceeded on the applicant's amended application for leave to appeal filed on 3 December 2009. The grounds of the amended application are that the primary judge erred in holding that the photographs were inadmissible and in failing to apply the presumption of regularity to those photographs despite being invited to do so. The issues in the applicant's proposed appeal are confined to those contentions.

The contentious photographs and certificates

- [17] Before considering those contentions it is necessary to mention Mrs LeKich's contention that there was no acceptable evidence in this Court of the photographs or the certificates endorsed on them. Unfortunately the record does not include the photographic exhibits. Those exhibits were apparently mistakenly removed from the District Court file before the expiry of the appeal period. Possibly they were returned to the Queensland Police Service but a search has failed to find them. With the Court's leave the applicant supplemented the record with an affidavit of the police prosecutor, Ms Herrmann. She exhibited to her affidavit photographs that she swore were copies of the photographs exhibits 1 and 2, including the

⁶ C.f. *TORUM*, s 118(4).

⁷ See, for example, *R v Cox* [1986] 2 Qd R 55 per Thomas J at 64.

⁸ *MacPherson v The Queen* (1981) 147 CLR 512 per Gibbs CJ and Wilson J at 523.

⁹ C.f. *R v Soma* (2003) 212 CLR 299 at 303-305, [11]-[15], and 312-313, [41]-[44].

endorsements showing the details of the offence. She explained that she had printed those photographs from the original negatives, which remained intact. She also verified the accuracy of the text of the certificates exhibited to her affidavit. Her evidence was in every respect consistent with the transcript of the proceedings in the Magistrates Court and the District Court, in which exhibits 1 and 2 were described in detail. Mr LeKich told the Court that he held a photograph in which the image and endorsements differed from those exhibited by Ms Herrmann. Ms Herrmann explained that this other photograph was one taken a very short time apart from the photographs exhibits 1 and 2. It has no enduring relevance. Mr LeKich's cross examination of Ms Herrmann was ineffective. I accept her evidence and that each of the photographs exhibits 1 and 2 bore the following certificate:

“QUEENSLAND POLICE SERVICE
Certificate of Photograph Taken by an
Approved Photographic Detection Device

Division 2 (Photographic Detection Devices) of
Part 7 (Detection Devices) of the Transport Operations
(Road Use Management) Act 1995
120(2)

I, **JEFFREY A DIXON**, occupy the office of Senior Sergeant, Traffic Camera Office. I am an authorised delegate of the Commissioner of the Police Service, under Section 4.10 of the *Police Service Administration Act 1990*.

I certify that-

- * Gatso Speed Camera bearing serial number **2982** was a photographic detection device as defined under Section 113 of the Transport Operations (Road Use Management) Act 1995, and
- * at **21:43** on **14/03/2008** the photographic detection device was used upon **Bruce Highway, Burpengary** being location code **580001**, and
- * this photograph was properly taken by the photographic detection device.

<p>_____ JEFFREY A DIXON Acting Senior Sergeant Traffic Camera Office (A duly authorised delegate of the Commissioner of the <i>Queensland Police Service, under Section 4. 10 of the Police Service Administration Act 1990</i>)”</p>	<p style="text-align: center;"><u>21 July 2008</u> Date</p>
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[18] The applicant's senior counsel accepted that the applicant's assertions in the certificate that he was a duly authorised delegate of the Commissioner were not admissible.

[19] I turn now to discuss the arguments which the applicant advanced under the two grounds of the proposed appeal.

The presumption of regularity

[20] The presumption of regularity has been described as “a rule of very general application, that where an act is done which can be done legally only after the

performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act.”¹⁰ The applicant argued that the primary judge erred in failing to apply the presumption of regularity in relation to the photographic exhibits despite having been invited to do so.

- [21] The applicant did not ask the magistrate to apply the presumption of regularity and I cannot accept the applicant’s contention that he invited the District Court to apply that presumption. Section 10.12(4) of the *Police Service Administration Act 1990* (Qld) provides that if a person “intends to question the power of an officer to act under a delegation given under this Act” in a proceeding the person must give the Commissioner at least seven days’ notice. The applicant’s supplementary submissions in the District Court referred to that section and submitted that there was “a rebuttable presumption” that the applicant’s signature on the certificate in the form specified by s 120(2) of *TORUM* “is the signature of the delegate which may be proven if challenged in the prescribed way.” The argument seemed to be that a rebuttable presumption arose by implication from the respondent’s omission to give notice under s 10.12(4) of the *Police Service Administration Act 1990* (Qld). The submission did not mention the presumption of regularity or cite any authority on that topic.
- [22] The primary judge rejected the applicant’s argument in the following passage of his Honour’s reasons:¹¹

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

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

- [23] I did not understand the applicant to challenge that reasoning. Rather, in this Court the applicant cited authorities for the different proposition that in the absence of evidence which indicated that the Commissioner had not made the delegation upon which the applicant purported to act in certifying the photographic exhibits, the presumption of regularity justified the inference that the applicant was the object of

¹⁰ *Knox County v Ninth National Bank* (1893) 147 US 91 per Brewer J at 97, quoted by Griffith CJ in *McLean Bros & Rigg Ltd v Grice* (1906) 4 CLR 835 at 850.

¹¹ *Lekich v Dixon* [2009] QDC 111 at [43] - [44].

a valid delegation. That argument was not advanced in the District Court and it is therefore unsurprising that the primary judge did not consider it. That bears upon the question whether this Court should grant the applicant leave to appeal on this ground. I will return to that question after I have considered the merits of the proposed appeal.

- [24] It is clear that the presumption of regularity may be applied in an appropriate case to justify an inference that an official was the object of a delegation which the official purportedly exercised. In *Minister for Natural Resources v NSW Aboriginal Land Council*,¹² the New South Wales Court of Appeal applied the presumption in holding that a Minister had delegated to the Secretary for the Western Lands Commission the power to grant a permissive occupancy of Crown land where the Secretary had purported to exercise such delegated power.
- [25] The question is whether a presumption of that character has any application in this case. The applicant cited a number of decisions¹³ for the proposition that the presumption is capable of application in criminal cases with some qualifications,¹⁴ which the applicant argued did not apply here. In *Pertl v Kahl*¹⁵ it was held that the presumption of regularity justified the inference that the Commissioner had delegated to the Deputy Commissioner of Taxation the power purportedly exercised by the Deputy Commissioner to require the appellant to furnish an income tax return. Walter J held that in the absence of any evidence to rebut the presumption, the appellant was rightly convicted of the offence of failing to lodge the required return.¹⁶ I note that in *Page v South Australia*¹⁷ Bleby J applied *Pertl v Kahl* in presuming the validity of administrative orders concerning prison discipline apparently made under a delegated power. In *Yamasa Seafood Australia Pty Ltd v Watkins*, Eames J discussed the similar presumption that a person acting in a public office is evidence that the person was duly appointed to that office.¹⁸ His Honour held that the presumption could be applied in relation to proof of an authority to prosecute to overcome the absence of an instrument of delegation “where the power of delegation existed and appeared to have been exercised, as was the case here”.¹⁹
- [26] The applicant referred also to other cases, but in none of the cited cases was the presumption applied to permit a party to take advantage of a statutory provision facilitating the admission of evidence in legal proceedings where that party had omitted to prove a fact the proof of which was necessary under the statute to render the evidence admissible. The consequences of a delegation by the Commissioner are by no means insignificant. It arms a police officer with power to provide *prima facie* proof of an offence merely by signing a certificate which s 120(2) of *TORUM* otherwise requires to be signed by the Commissioner. It does not seem unduly pedantic to insist upon proof of such a delegation where, as the primary judge

¹² (1987) 9 NSWLR 154 per Kirby P at 157, McHugh JA at 164-165 and Clarke AJA at 169-170.

¹³ *Yamasa Seafood Australia Pty Ltd v Watkins* [2000] VSC 156; *Impagnatiello v Campbell* (2003) 6 VR 416; *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85; *Pertl v Kahl* (1976) 13 SASR 433.

¹⁴ See *Dillon v The Queen* [1982] AC 484 at 487; *Day v The Queen* (1984) 153 CLR 475 per Gibbs CJ, Mason, Wilson and Dawson JJ at 485 and Brennan J (dissenting) at 489; and *Impagnatiello v Campbell* (2003) 6 VR 416 per Callaway JA at 417, [1], and Eames JA at 423, [17], 426, [27]-[28]. (1976) 13 SASR 433.

¹⁵ (1976) 13 SASR 433 at 436-437.

¹⁶ (1976) 13 SASR 433 at 436-437.

¹⁷ (1997) 95 A Crim R 25 at 28.

¹⁸ [2000] VSC 156 at [95] - [101]; and see *Cassell v The Queen* (2000) 201 CLR 189 at 193, [17].

¹⁹ [2000] VSC 156 at [98].

explained, the applicant could have taken advantage of the simple mode of proof which the legislature has provided in the *Acts Interpretation Act 1954* (Qld). Subsection 27A(13) of that Act provides that writing purporting to be a delegation is evidence of the delegation. Pursuant to ss 27A(14) and (15) a certificate signed by the delegator is evidence of anything stated in the certificate in relation to the delegation and a document purporting to be such a certificate is taken to be one unless the contrary is established. Section 59(c) of *TORUM* provides that a signature purporting to be the signature of the Commissioner is evidence that it was that signature. Accordingly, the applicant could have proved the delegation simply by tendering a certificate purporting to be signed by the Commissioner. The applicant omitted to do so. In the absence of any admissible evidence that there was such a delegation, the photographs were inadmissible.

- [27] As I earlier indicated, the applicant did not pursue arguments based upon Mrs LeKich's failure to object to the tender of the photographs, but confined his proposed appeal on this ground to contentions that the photographs were rendered admissible by application of the presumption of regularity. The only case cited for the applicant that concerned a similar situation is against his argument. *Huth v Petersen, ex parte Petersen*²⁰ concerned the proof of an offence under the *Traffic Act 1949-1974* (Qld) of being in charge of a motor vehicle with a blood alcohol concentration above a specified percentage. The Full Court held that a certificate by a police officer stating he was an authorised member of the police force was not evidence of that fact and the presumption of regularity did not apply. Kneipp J, with whose reasons Stable and Douglas JJ agreed, explained:²¹

“The legislation on the subject constitutes an elaborate code, both as to substantive matters and as to evidentiary matters. A great deal of care has been taken to facilitate proof by the prosecution. The consequences of a conviction can be serious. If there is any lack of proof of matters of which proof is simple, if they can be proved, I do not think it would be right to allow reliance on a presumption which was no doubt originally designed to overcome difficulties as to proof.”

- [28] The relevant provisions were summarised in the following passage:²²

“Those of the foregoing provisions which relate to evidentiary matters are plainly designed to facilitate proof that a person is an authorized member of the police force, and of the result of a test performed by him, in two different sets of circumstances. If he is called as a witness, his mere statement that he is authorized is sufficient evidence of that fact (reg. 179), and he is able to give verbal evidence of the result of the test, as is contemplated by s 16(15)(e)(i). If it is not desired to call him as a witness, his authorization may be proved by the tendering of a certificate signed by the Commissioner pursuant to subs 8(e)(iii) (proof of the appointment of the Commissioner is not necessary: s 49(1)(a)); and the result of his test may be proved by a certificate given under s 16A(15)(a) and made admissible by s 16A(15)(e)(i).”

²⁰ [1975] Qd R 340.

²¹ [1975] Qd R 340 at 343-344.

²² [1975] Qd R 340 at 342.

- [29] The applicant argued that *Huth v Petersen, ex parte Petersen* should be distinguished on the ground that *TORUM* and the *Police Service Administration Act* (Qld) do not constitute an “elaborate code” in relation to speeding offences. That is not a valid point of distinction. True it is that those Acts say nothing about how a delegation can be proved, but unambiguous provisions on that topic are contained in the *Acts Interpretation Act* 1954 (Qld). Those provisions were designed to facilitate the necessary proof in a variety of legal proceedings, including proceedings for traffic offences. The statutory mode of proof is perfectly straightforward. The effect of the relevant provisions is that if specified requirements are satisfied the applicant is relieved of the necessity of calling a witness to prove that the Commissioner had delegated the relevant power. Those provisions constitute a code on that topic, non-compliance with which merely left the applicant in the position of having to prove the delegation in the ordinary way.
- [30] This case should be distinguished from those in which the presumption was applied to conduct by a non-party outside the litigious process. The issue is whether it should be presumed that a complainant was authorised to certify a document so as to render it admissible in evidence to prove an offence by the defendant. It would be inimical to the imperative that justice be done and be seen to be done for a court simply to presume that the complainant possessed the requisite authority, particularly where the complainant omitted to take advantage of a statutory provision which facilitated proof of the authority. In this case as in *Huth v Petersen, ex parte Petersen* there is no warrant for overlooking the requirements of the statutory short-cut for proof by invoking a presumption which was instead designed to overcome difficulties in proof.
- [31] For these reasons I would reject the applicant’s argument that the photographs were rendered admissible in evidence by the presumption of regularity.

Section 27A(3D) of the *Acts Interpretation Act* 1954 (Qld)

- [32] The applicant’s senior counsel also argued that s 27A(3D) of the *Acts Interpretation Act* 1954 (Qld) rendered admissible the applicant’s statement in the certificate that he was an authorised delegate of the Commissioner. Subsections 27A(3C), (3D), (6), and (7) of that Act presently provide:

“(3C) Laws apply to the delegate, and to other persons in relationship to the delegate, in the performance of the delegated function or in the exercise of a delegated power as if the delegate were the delegator.

(3D) Anything done by or in relation to the delegate in relation to the delegation is taken to have been done by or in relation to the delegator.

Example –

Under an Act an evidentiary certificate purporting to be signed by an office holder is evidence of the content in any proceeding (the *facilitation provision*). The Act confers a general power of delegation on the office holder. The office holder uses the power to delegate the function of issuing the certificate to someone else. Under subsections (3C) and (3D) (and (6) and (7)), the facilitation provision is taken to provide for the certificate purporting to be signed by the delegate as having been signed by the delegator.

...

- (6) A delegated function or power that purports to have been performed or exercised by the delegate is taken to have been properly performed or exercised by the delegate unless the contrary is proved.
- (7) A delegated function or power that is properly performed or exercised by the delegate is taken to have been performed or exercised by the delegator.”

- [33] The example given under s 27A(3D) was not in the Act when the trial was held,²³ but otherwise s 27A was in the same form. The applicant’s senior counsel argued that the example nevertheless reflected the proper construction of s 27A(3D).
- [34] The applicant did not put this argument in the District Court so that it, like the applicant’s other argument, was not dealt with in the primary judge’s reasons. This argument was not specifically mentioned in the draft notice of appeal and it was not advanced in the applicant’s outline of argument. It was advanced for the first time in oral submissions at the hearing of the application. Unsurprisingly Mrs LeKich was in no position to respond to it.
- [35] No authority was cited on this point. It depends upon the proper construction of the statutory provisions. Assuming, without deciding, that it is legitimate to rely upon an example in a section to elucidate the meaning of the section before the example was added by amendment, I would nevertheless reject the applicant’s argument. Subsections 27A(3C), (3D), (6), and (7) all apply in relation to “the delegate”. They do not dispense with the necessity of proving that there is a delegation. Similarly, the example in s 27A(3D) postulates that the office holder (in this case, the Commissioner), “uses the power to delegate the function of issuing the certificate to someone else.” The effect of that subsection appears to be that an act done by a person who is in fact a delegate is deemed to have the same statutory consequence as if the act had been done by the delegator. For example, if the applicant was in fact a delegate of the Commissioner, a certificate by the applicant would take effect under s 120(2) of *TORUM* as if it were a certificate by the Commissioner. But that fact must be proved.
- [36] By ss 27A(13), (14) and (15) of the *Acts Interpretation Act 1954* (Qld) the legislature has facilitated proof of a delegation by unambiguous language which renders a certificate by a delegator admissible in evidence. If the legislature had intended to produce the rather more surprising result, that a person who claimed to be the object of a delegation could prove that fact merely by certifying that it was so, one would expect to see clear statutory words to that effect. I do not accept that s 27A(3D) provides such a rule.

Disposition and order

- [37] An acting inspector of police, Mr Embelton, swore an affidavit in which he deposed that on the basis of his knowledge and statistical information which had been provided to him by others, photographs from detection devices were routinely used in the prosecution of speeding offences, and such prosecutions were common and in large number. An exhibited spreadsheet which was said to summarise the number

²³ See Reprint No. 14E.

of traffic offence prosecutions for the 2008 and 2009 period indicated that in those periods briefs were prepared for potential hearings in 475 matters and 406 matters respectively, there having been a “Prosecution Pending List” concerning speed offences of 1,556 matters and 1,719 matters respectively in the same periods. Mr LeKich’s cross examination confirmed that which was clear on the face of the affidavit, namely that Mr Embelton did not have personal knowledge of the bases of the statistics. It is nevertheless obvious that there must be a great many proceedings of this character. It also appears from unchallenged evidence in Mr Embelton’s affidavit and in Ms Herrmann’s affidavit and oral evidence that the course taken in this case reflected that which is usually taken in the absence of any challenge to the relevant photographs. There was also no challenge to the statement by Mr Embelton that the effect of the decision in the District Court had been applied by some magistrates throughout Queensland in subsequent decisions.

- [38] However, as I explained earlier, it should not be assumed that defendants who failed to object to the admission of an inadmissible certificate should routinely succeed on appeal to the District Court. The predicament described by Mr Embleton has apparently arisen only because prosecutors have routinely failed to take advantage of the simple mode of proving delegations provided by the *Acts Interpretation Act 1954 (Qld)*. We were informed that since the District Court’s decision prosecutors have been proving delegations under those provisions. Importantly, the applicant did not agitate in the District Court either of the arguments he sought to raise in his proposed appeal and I have concluded that neither argument should succeed.
- [39] For these reasons I would refuse leave to appeal.
- [40] **WHITE JA:** I have read the reasons for judgment of Fraser JA and for those reasons I would refuse leave to appeal also.