
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CRIMINAL

CITATION : KELLY -v- OSBORNE [2023] WASC 353

CORAM : HOWARD J

HEARD : 13 SEPTEMBER 2023

DELIVERED : 13 SEPTEMBER 2023

FILE NO/S : SJA 1002 of 2023

BETWEEN : DAWN MICHELLE KELLY
Appellant

AND

JEFFREY OSBORNE
Respondent

ON APPEAL FROM:

Jurisdiction : MAGISTRATES COURT OF WESTERN
AUSTRALIA

Coram : MAGISTRATE D SCADDAN

File Number : AL 2014 - 2016 of 2022
AL 2112 of 2022

Catchwords:

Criminal law - Appeal against conviction - Magistrate convicted and sentenced in appellant's absence under s 35 of the *Criminal Procedure Act 2004* (WA) - Whether the Magistrate erred in not granting an adjournment where appellant sought to appear by a video link and provided a medical certificate - Appeal

granted - Prosecution Notices to be dealt with again by a different Magistrate

Legislation:

Criminal Appeals Act 2004 (WA)

Road Traffic (Administration) Act 2008 (WA)

Road Traffic (Vehicles) Act 1974 (WA)

Road Traffic Act 1974 (WA)

Result:

Appeal granted

Category: B

Representation:

Counsel:

Appellant : In person

Respondent : Ms K Dias

Solicitors:

Appellant : In person

Respondent : State Solicitor's Office

Case(s) referred to in decision(s):

Delopez v Darry [2014] WASC 370

House v R (1936) 55 CLR 499.

Kelly v Fiander [2023] WASC 187

King v City of Perth [2023] WASC 252

Rendell v Douglas [2015] WASC 36

Saad v Baron [2012] WASC 507

Tallot v Matier [2012] WASC 290

HOWARD J:

(This judgment was delivered extemporaneously on 13 September 2023 and has been lightly edited for clarity from the transcript.)

The appellant's convictions

1 The appellant was convicted on 13 December 2022 in the Magistrates Court at Albany of four offences, namely:

- (1) being the driver of a vehicle failed to stop (date of offence: 11 September 2022) (charge AL 2104/2022), against s 44 of the *Road Traffic (Administration) Act 2008* (WA) (*RTAA*);
- (2) being the driver of a vehicle driven on a road whilst the vehicle had an imitation number plate affixed (date of offence: 11 September 2022) (charge AL 2105/2022), against s 36(2)(e) of the *RTAA*;
- (3) driving a motor vehicle on a road whilst holding a suspended license (date of offence: 11 September 2022) (charge AL 2106/2022), against s 49(1)(a) and (3)(c) of the *Road Traffic Act 1974* (WA) (*RTA*);¹ and
- (4) failing to comply with a *vehicle* surrender notice (date of offence: 15 October 2022) (charge AL 2112/2022) against s 799BB(5) of the *RTA*.²

(Convictions)

2 The above charges had initially been before the same learned Magistrate on 29 November 2022. The appellant was unable to attend the trial on medical grounds, and a medical certificate dated 27 November 2022 by a Doctor at Hillarys Plaza Medical Centre had been provided to the Court. The learned Magistrate had adjourned the trial for hearing to 13 December 2022.

¹ Prosecution Notice dated 8 November 2022 'Charges AL 2104/2022 - 2106/2022'; Transcript of Proceedings at Albany on Tuesday 13 December 2022, pages 4 - 5.

² Prosecution Notice dated 8 November 2022 'Charges AL 2112/2022'; Transcript of Proceedings at Albany on Tuesday 13 December 2022, pages 4 - 5.

HOWARD J

3 On Friday 9 December 2022, the appellant wrote an email to the Magistrates Court at Albany which stated:

Good morning,

Please find attached a medical certificate to verify that we are unable to physically appear in Albany Magistrates Court on Tuesday 13th December.

If there is an issue with this, please provide a video link to facilitate our participation in this matter on the 13th December 2022. Video links are common practice in other courts. As you are aware, we live in Perth, not Albany.

Also, our appeal has been approved by the Supreme Court in regards to Magistrate Dianne Scaddans [sic] decision on 13 September 2022, we trust that you will provide another magistrate to preside over this matter.

Kind regards

[sign off]

4 A medical certificate dated 9 December 2022 was enclosed and signed by a Doctor at Warwick Medical Centre and stated:

...

To whom it may concern,

THIS IS TO CERTIFY THAT

Ms Kelly Dawn has a medical condition and will be unfit for work from 09/12/2022 to 13/12/2022 inclusive.

[Sign off]³

5 On the same day, the Supervising Customer Service Officer of the Magistrates Court at Albany replied by email, which in full stated:

Good afternoon,

Please be advised that your request to appear via video link is not granted.

The below email and attached medical certificate will be placed on file for the attention of the Magistrate when the matter is listed on 13 December 2022.

Kind regards

³ Correspondence between the appellant and the Supervising Customer Service Officer at Magistrates Court Albany dated 9 December 2022.

[Sign off]

6 On Tuesday, 13 December 2022 the matter was called in the Magistrates Court at Albany at 11.19 am.⁴ There was no appearance by the appellant.

7 The Magistrate said:

All right. I have a - something from Ms Kelly that says she has a medical condition and will be unfit for work from 9 to 13 December. What it does not say is what she is purportedly unfit for work for and it doesn't make any reference to the fact that she is or cannot or why she could not attend court for this particular matter and a video link application was not granted and she makes some reference to me with respect to a Supreme Court appeal and requests another magistrate preside over the matter.

I don't consider that I have a conflict of interest. She hasn't raised any grounds for a conflict of interest. Whether she - or not she has an appeal in relation to any decision I have previously made is a matter between her and the Supreme Court. As I've said, the medical certificate does not provide any reason beyond a medical condition, whatever that might be, about why she is unfit for work and how that in any way is relevant to a - her being unfit to attend court.

The medical condition could be anything, for all I know, and it makes no - there is no basis upon which I can reasonably assess its veracity for the purposes of the proceedings today. She was provided with a - an adjournment on the last occasion to two weeks and the matter is listed for a plea. I decline to exercise my discretion in granting a further adjournment and I'm not satisfied of the basis for the request for an adjournment or the substance of the medical certificate, in any event. Accordingly, the application is denied and I will proceed to enter convictions under section 55 that the matters were listed for plea; she had the opportunity to attend court on the notice of adjournment. All right. Thank you ...

... She had a medical certificate last time and I, obviously, gave her the benefit of the doubt on that occasion, but I don't afford her the benefit of the doubt on this occasion. The last medical certificate was as benign as the current medical certificate and I'm not prepared to extend any further adjournments to the accused. In my view, it is demonstrably the case that she's not answering to the court to deal with the charges.⁵

⁴ Transcript of Proceedings at Albany on Tuesday, 13 December 2022, page 2.

⁵ Transcript of Proceedings at Albany on Tuesday, 13 December 2022, pages 2 - 3.

HOWARD J

8 It may be noted that only subsequently to this did the prosecution
seek to proceed pursuant to s 55 of *Criminal Procedure Act 2004*
(WA).

9 The learned Magistrate then convicted the appellant of all the
charges and gave very brief reasons for her decision.⁶

10 The hearing took, from the transcript, nine minutes.⁷

11 The learned Magistrate imposed the following respectively:

- (a) AL 2014/2022: \$1,000 fine and \$264.30 in costs;
- (b) AL 2015/2022: \$400 fine;
- (c) AL 2016/2022: \$1,000 fine and 9-months cumulative
disqualification of their driver's licence; and
- (d) AL 2112/2022: \$600 fine.⁸

Relevant provisions for this appeal

12 The appellant seeks to appeal pursuant to s 7(1) and s 8(1)(a)(i) of
the *Criminal Appeals Act 2004* (WA). The convictions are 'decisions'
which may be appealed: s 6(c) of the *Criminal Appeals Act*.

13 By s 9(1) of the *Criminal Appeals Act*, the appellant requires
leave. By s 9(2) of the *Criminal Appeals Act*, leave must not be granted
unless this Court is satisfied that the ground has a reasonable prospect
of succeeding.⁹

Ground of appeal

14 The appellant raises 10 Appeal Grounds.¹⁰ They are long (more
than 10 pages) and not always easy to follow.

⁶ Transcript of Proceedings at Albany on Tuesday, 13 December 2022, pages 4 - 5.

⁷ Ibid, pages.

⁸ Appeal Notice dated 5 January 2023 (**Appeal Notice**) page 1; Transcript of Proceedings at Albany on
Tuesday, 13 December 2022, pages 4 - 5.

⁹ *Criminal Appeals Act*, s 9(2).

¹⁰ Appeal Notice.

15 Doing the best I can, I summarise and state my understanding of them as follows:

Ground 1: Failure to comply with several statutory regimes

The appellant contends that the Magistrate in her reasoning failed to consider several key statutory regimes, and guidance materials including: *Work Health and Safety Act 2020* (WA); *Public Health Act 2016* (WA); 'Occupational Safety and health in the Public Sector' (Code of Practice); *Privacy Act 1988* (Cth).¹¹

Ground 2: The Magistrate disregarded [the appellant's] medical certificate

The learned Magistrate disregarded the medical certificate provided by the appellant. The appellant contends that the medical certificate was sufficient to grant leave to appeal via video link or to reschedule the hearing.¹²

Ground 3: Denial of Video Link

The appellant was denied leave to appear at their hearing via video link despite providing a medical certificate to the Court (as referenced in Ground 2) evidencing their inability to appear at the hearing in person.¹³

Ground 4: The honourable intention of the appellant to attend the hearing was brought into disrepute¹⁴

Ground 5: The prosecution was determined by the Court without jurisdiction¹⁵

Ground 6: [The appellant] was denied [their] right to plea

The appellant contends that they were denied a right to have their defence heard, when, on a previous occasion their adjournment was granted upon the supply of the same evidence. Whilst on this occasion the Magistrate convicted the appellant pursuant to s 55 of the *Criminal*

¹¹ Appeal Notice, pages 2 - 7.

¹² Ibid, pages 7 - 9.

¹³ Ibid, page 9.

¹⁴ Ibid.

¹⁵ Ibid, pages 9 - 10.

Procedure Act without affording the appellant an opportunity to raise a defence.¹⁶

Ground 7: Defective Notice

The appellant contends that the notice (by which I infer the Prosecution Notice for the four charges) provided to them was 'defective'.¹⁷

Ground 8: Conflict of Interest [of the Magistrate]

The appellant contends that the Magistrate who presided over the trial had a conflict of interest on the basis that the Magistrate had presided over a number of matters involving the appellant in the past. This conflict was flagged by the appellant in their correspondence to the Court dated 9 December 2022.¹⁸

Ground 9: Convicted without proof of identity [of the appellant]

The appellant contends that the Magistrate convicted them without obtaining proof of the appellant's identity.¹⁹

Ground 10: Stacking Charges

It appears that the appellant contends that the Convictions are 'stacking charges' in addition to other charges currently being appealed in the Supreme Court.²⁰

Failure to Adjourn

16 As I understand from the appellant's Grounds, and as confirmed with the appellant this morning, the gravamen of Grounds 2, maybe 3, 4, and 6 is that the Magistrate erred in convicting the appellant in their absence rather than adjourning the matter.

17 Those Grounds assert an error in the learned Magistrate not adjourning the trial pursuant to s 55(2)(a) of the *Criminal Procedure Act* in circumstances where the appellant had sought to appear via video link and had provided a medical certificate.

¹⁶ Appeal Notice, page 10.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*, pages 10 - 11.

²⁰ *Ibid.*, page 11.

HOWARD J

18 The challenge in these Grounds, as I infer them, is not to the Magistrate's power to do what she did, but rather the exercise of her discretion to do so.

19 The appellant must demonstrate a *House v R*²¹ type error to succeed on this Ground: see *Saad v Baron* [2012] WASC 507 [23] (Beech J); *Rendell v Douglas* [2015] WASC 36 [23] (Jenkins J); *Delopez v Darry* [2014] WASC 370 [25] - [27] (Pritchard J).

20 The purpose and rationale of s 55 of the *Criminal Procedure Act* was explained by Beech J (as he then was) in *Saad v Baron* [58] - [61].

21 Importantly, proceeding in the absence of the accused pursuant to s 55 of the *Criminal Procedure Act* denies the accused of opportunity of contesting the prosecution evidence and to make their own submissions: *Saad v Baron* [58]. An exercise under this section allows the Court to take as proved any allegation made or fact stated by the prosecution: *Tallot v Matier* [2012] WASC 290 [12] - [13] (Hall J); *King v City of Perth* [2023] WASC 252 [45] - [46] (Lundberg J).

22 In my judgment, it may be that the learned Magistrate erred as a matter of law in the way she approached the medical certificate, dated 9 December 2022, in that it appears that the learned Magistrate did not give due consideration to the medical certificate but rather pre-emptively dismissed it as applying to an unfitness for work and giving no further consideration as to its relevance to the appellant being able to appear at court.

23 I do not need to decide that error finally, as I infer error (in the outcome) on the part of the learned Magistrate in failing to grant an adjournment on 13 December 2022 where there was both a medical certificate and an application to appear remotely.

24 In my judgment, in all of the circumstances, including that this was only the second occasion that it had been to court, a reasonable exercise of discretion could only have resulted in a decision to adjourn the trial.

25 For the reasons set out by Beech J in *Saad v Baron* [31] - [33], I have not considered the proviso and whether the appellant has demonstrated there has been a miscarriage of justice.

²¹ *House v R* (1936) 55 CLR 499.

26 As I understand the proper concession made by the respondent this morning in the hearing, I am not obliged to do so.

Other Factual Matters

27 As the learned Magistrate stated on 13 December 2022 below, the appellant had a history with the Magistrates Court at Albany and with this Magistrate in particular.

28 Convictions had been recorded against the appellant on 13 September 2022, which were similar to the offences below albeit on a different, earlier date. Those convictions resulted in an appeal to this Court in SJA 1075/2022 and Vandongen J (as he then was) dealt with the matters in *Kelly v Fiander* [2023] WASC 187.

29 I do not need to decide Ground 8 in this Appeal. And, given the conclusion I have reached as to the only reasonable result being an adjournment, I do not need to consider what, if any, role the 13 September 2022 hearing had on the trial below on 13 December 2022.

Disposition

30 Following hearing from the respondent and the appellant, I would make Orders as follows:

1. The appellant have leave to appeal her convictions pursuant to s 9(1) of the *Criminal Appeals Act* on the ground that the learned Magistrate erred in not granting the appellant an adjournment on 13 December 2022;
2. The Convictions, fines and costs order made by the learned Magistrate on 13 December 2022 be set aside pursuant to s 14(1)(b) and (c) of the *Criminal Appeals Act*;
3. The Prosecution Notices be dealt with again by the Magistrates Court, constituted by a different Magistrate pursuant to s 14(1)(e) of the *Criminal Appeals Act*; and
4. The respondent pay the appellant's costs to be taxed if not agreed.

HOWARD J

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

JR

Associate to Hon Justice Howard

18 SEPTEMBER 2023