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**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CRIMINAL

**CITATION** : KWOK -v- GORDON [2023] WASC 325

**CORAM** : TOTTLE J

**HEARD** : 24 AUGUST 2023

**DELIVERED** : 24 AUGUST 2023

**FILE NO/S** : SJA 1015 of 2023

**BETWEEN** : MICHELE KWOK  
Appellant

AND

DARYL GORDON  
Respondent

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**ON APPEAL FROM:**

**Jurisdiction** : MAGISTRATES COURT OF WESTERN  
AUSTRALIA

**Coram** : MAGISTRATE A MAUGHAN

**File Number** : JO 10600/2022

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*Catchwords:*

Single judge appeal - Application for leave to appeal against conviction and sentence - Whether magistrate erred in entering judgment of conviction pursuant to s 55 of the *Criminal Procedure Act 2004* (WA) - Leave to appeal granted - Appeal allowed

*Legislation:*

*Criminal Procedure Act 2004 (WA)*  
*Road Traffic (Administration) Act 2008 (WA)*

*Result:*

Leave to appeal against judgment of conviction granted  
Appeal against judgment of conviction allowed  
Conviction set aside  
Matter remitted to Magistrates Court

*Category:* B

**Representation:**

*Counsel:*

Appellant : In Person  
Respondent : Ms J Kasbergen

*Solicitors:*

Appellant : In Person  
Respondent : State Solicitor's Office

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

Kelly v Fiander [2023] WASC 187

**TOTTLE J:**

1           On 13 January 2023, the appellant was convicted of the offence of  
failing to give information identifying the driver or person in charge of  
a vehicle contrary to s 34(2) of the *Road Traffic (Administration) Act*  
2008 (WA). A fine of \$350 was imposed and the appellant was ordered  
to pay costs in the sum of \$264.30. The appellant has applied for leave  
to appeal against the conviction.

2           At the hearing in the Magistrates Court the learned magistrate  
determined that it was open to him to proceed under s 55 of the  
*Criminal Procedure Act 2004* (WA). In summary, this provision  
confers power on a court to hear a charge if an accused person does not  
appear provided that the court is satisfied that the accused has been  
served with the prosecution notice or an approved notice informing the  
accused of the hearing date.

3           It appears that the magistrate was satisfied that the appellant had  
not appeared for the purposes of s 55 of the *Criminal Procedure Act*.  
This is so because in an exchange with the appellant she was initially  
equivocal as to whether she was in fact the accused and further said,  
'I'm not the person that's summonsed here today'.

4           In response to this statement the magistrate said that the appellant  
should stand in the back of the court and he would deal with the charge  
in the absence of the accused under s 55 of the *Criminal Procedure Act*.  
The approach adopted by the magistrate was the same as that adopted  
by the magistrate whose decision was the subject of appeal in *Kelly v*  
*Fiander* [2023] WASC 187, a recent decision of Vandongen J (as his  
Honour then was).

5           The appellant relies on 57 grounds of appeal. By grounds 28 to 34  
the appellant challenges the magistrate's decision to proceed under s 55  
of the *Criminal Procedure Act* and contends in effect that it was not  
open to the magistrate to proceed under that section because, as should  
have been apparent to the magistrate, she was physical present and had  
appeared before the court.

6           In *Kelly v Fiander*, Vandongen J held that it was not a  
pre-condition to reaching the conclusion that an accused had 'appeared'  
for the purpose of s 55 of the *Criminal Procedure Act* that the accused  
clearly identify themselves in answer to questions from the court. His  
Honour held that an accused appears for the purposes of s 55 when the  
accused is personally before the court or, if they are not personally

before the court, they are represented by counsel, and this is so even if the accused refuses to identify herself.

7           There is no doubt that those accused of charges and who conduct themselves before magistrates as the appellant did on 13 January 2023 disrupt and delay the administration of justice in the State's busiest court and thus both impede the magistrates in the discharge of their duties and disadvantage other members of the public who have matters before the court. They are the cause of considerable frustration to magistrates.

8           That said, with respect to the learned magistrate in this case, it was apparent that the appellant was in fact the accused even though she had refused to identify herself as such. Thus, by proceeding to hear the charge under s 55 of *Criminal Procedure Act* the magistrate erred in a manner that gave rise to a miscarriage of justice.

9           It is unnecessary to consider any of the other grounds of appeal many of which are completely non-sensical.

10          Leave to appeal is granted in respect of grounds 28 to 34 and the appeal will be allowed. For the avoidance of any argument on a subsequent occasion, the appeal is allowed on the ground that the magistrate erred in entering a judgment of conviction against the appellant pursuant to s 55 of the *Criminal Procedure Act*.

11          Leave to appeal is refused in respect of each of the other grounds.

12          The judgment of conviction entered against the appellant on 13 January 2023 is set aside.

13          The charge will be remitted to the Magistrates Court of Western Australia to be dealt with by another magistrate.

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

JM  
Associate to the Honourable Justice Tottle

24 AUGUST 2023