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

**CITATION** : REYNOLDS -v- NONKOVIC [2023] WASC 326

**CORAM** : FORRESTER J

**HEARD** : ON THE PAPERS

**DELIVERED** : 25 AUGUST 2023

**FILE NO/S** : SJA 1009 of 2023

**BETWEEN** : KELLAN JOHN REYNOLDS  
Appellant

AND

ZELJANA NONKOVIC  
Respondent

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**ON APPEAL FROM:**

**For File No** : SJA 1009 of 2023

**Jurisdiction** : MAGISTRATES COURT OF WESTERN  
AUSTRALIA

**Coram** : MAGISTRATE D SCADDAN

**File Number** : AL 2416 – 2417 of 2022

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*Catchwords:*

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

*Legislation:*

*Criminal Appeals Act 2004 (WA)*

*Criminal Procedure Act 2004 (WA)*

*Road Traffic (Vehicles) Regulations 2014 (WA)*

*Result:*

Leave to appeal granted in relation to grounds 1, 3 and 6

Appeal allowed

Matter remitted

*Category:* B

**Representation:**

*Counsel:*

Appellant : No appearance

Respondent : No appearance

*Solicitors:*

Appellant : In Person

Respondent : State Solicitor's Office

**Cases referred to in decision:**

Kelly v Fiander [2023] WASC 187

Samuels v The State of Western Australia [2005] WASCA 193; (2005) 30 WAR  
473

**FORRESTER J:**

**Introduction**

1 On 5 January 2023, the appellant was convicted in his absence, pursuant to s 55 of the *Criminal Procedure Act 2004* (WA) (CPA), of two offences (AL 2416/2022 and 2417/2022) alleging that, being a person in charge of a vehicle, he failed to ensure that each number plate issued for the vehicle by the Department of Transport was rigidly fixed to the vehicle and displayed in accordance with the *Road Traffic (Vehicles) Regulations 2014* (WA). He was fined \$200 on each offence and ordered to pay costs in the sum of \$264.30.

2 On 1 February 2023, the appellant filed an appeal against his conviction.

3 The respondent conceded that the appeal should be allowed.

4 For the reasons which follow, I accept that the respondent's concession was properly made. The appeal will be allowed, the convictions and sentences set aside, and the matter remitted to the Magistrates Court to be heard according to law.

**Background**

5 On 5 January 2023, the two charges were called on in the Albany Magistrates Court. After the matter was called, the following exchange took place:<sup>1</sup>

**HER HONOUR:** All right. Remain standing, please. Are you Kellan Reynolds?

**ACCUSED:** No, ma'am. I'm Kellan John.

**HER HONOUR:** Well, if you're not Kellan Reynolds, then please leave the bar table.

**ACCUSED:** No, ma'am. I've issued service by way of notification to honourably- - -

**HER HONOUR:** If you are not Kellan Reynolds- - -

**ACCUSED:** - - - attend here for the prosecution notice, ma'am.

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<sup>1</sup> Transcript, *Western Australia Police v Kellan John Reynolds*, Magistrates Court of Western Australia, 5 January 2023, 1.

**HER HONOUR:** - - - you are not recognised as an accused in this matter . Please leave the bar table.

**ACCUSED:** No. I'm here to honourably serve the - - -

**HER HONOUR:** I will be asking the court staff to remove you if you are not Kellan Reynolds. Please leave the bar table - - -

**ACCUSED:** Can I not tender documents to the - - -

**HER HONOUR:** Please leave - - -

**ACCUSED:** - - - bench, please, ma'am.

**HER HONOUR:** - - - the bar table. I will adjourn whilst the court staff remove you from the courtroom.

- 6 After the appellant was removed from the court, on the application of the prosecution, the learned magistrate convicted the appellant in his absence pursuant to s 55 of the CPA and proceeded to sentence, fining him \$200 on each charge and ordering that he pay costs.

### **Grounds of appeal**

- 7 The appellant's grounds of appeal against his conviction are numerous, largely nonsensical, and reflect the appellant's adherence to what is commonly known as 'pseudolaw'.

- 8 However, it is possible to discern from each of grounds 1, 3 and 6 the contention that the appellant should not have been convicted pursuant to s 55 of the CPA because, at the relevant time, he physically appeared in the Magistrates Court.

- 9 Having regard to my decision in relation to grounds 1, 3 and 6 it is unnecessary to set out or deal with grounds 2, 4 and 5. However, this should not be taken in any way as a finding that any of grounds 2, 4 and 5 has a reasonable prospect of success.

### **Statutory framework**

- 10 The application for leave to appeal is made under div 2 of pt 2 of the *Criminal Appeals Act 2004* (WA) (CA Act). A decision to convict an accused of a charge is a decision which may be appealed.<sup>2</sup>

- 11 Leave to appeal must not be granted on a ground of appeal unless the court is satisfied that the ground has a reasonable prospect of

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<sup>2</sup> CA Act s 6(c) and s 7(1).

succeeding,<sup>3</sup> meaning that the ground is required to have a rational and logical prospect of succeeding.<sup>4</sup> Unless leave to appeal is granted on at least one ground, the appeal is taken to have been dismissed.<sup>5</sup>

12 Even if a ground of appeal might be decided in favour of the appellant, the court may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.<sup>6</sup>

**Disposition - grounds 1, 3 and 6**

13 The transcript does not reflect that the appellant was the person who appeared before the learned magistrate. However, by his appeal, the appellant asserts he was the person who appeared, and this was accepted by the respondent.

14 When the learned magistrate was confronted by the appellant refusing to acknowledge he was the person named in the prosecution notice, she declined to 'recognise' him 'as an accused' in the matter. The transcript records that her Honour then adjourned in order to enable the appellant to be removed by 'the court staff'. On resumption, and on the application of the prosecution, the learned magistrate proceeded to deal with the matter pursuant to s 55 of the CPA.

15 Section 55 of the CPA allows a court of summary jurisdiction to hear and determine a charge of a simple offence<sup>7</sup> in the accused's absence. The section relevantly provides:

- (1) This section applies if on a court date for a charge the prosecutor appears and the accused does not and the accused has not pleaded guilty to the charge, whether orally or by means of a written plea.
- (2) If on the court date the court is satisfied that the accused has been served under this Part with the prosecution notice containing the charge and a court hearing notice, or an approved notice, notifying the accused of that date and that the court may deal with the charge in the accused's absence if the accused does not appear on that date, the court may -
  - (a) adjourn the charge; or
  - (b) hear and determine the charge in the accused's absence.

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<sup>3</sup> CA Act s 9(2).

<sup>4</sup> *Samuels v The State of Western Australia* [2005] WASCA 193; (2005) 30 WAR 473 [56].

<sup>5</sup> CA Act s 9(3).

<sup>6</sup> CA Act s 14(2).

<sup>7</sup> Including at the first court date see CPA s 18.

16 There is no dispute in this matter that, if the appellant had failed to  
appear, the remaining preconditions for the operation of s 55 were  
satisfied.

17 The appellant answered to the calling of the matter of Kellan John  
Reynolds. He identified himself as 'Kellan John'. He attempted to  
make further statements, but was prevented from doing so by her  
Honour, who ordered his removal from the courtroom and dealt with  
him in his absence.

18 After the appellant was convicted and sentenced, the decision in  
*Kelly v Fiander*<sup>8</sup> was handed down. The circumstances of that case  
were substantially the same as in this case; the appellant attended court  
and answered to the calling of the matter, but declined to acknowledge  
her name as being that contained in the prosecution notice, whereupon  
she was removed from the courtroom and the matter heard and  
determined in her absence, pursuant to s 55 of the CPA.

19 In *Kelly*, having considered the statutory context of s 55 of the  
CPA in some detail, Vandongen J, as his Honour then was, said:

In my opinion, where an accused is charged in a court of summary  
jurisdiction with a simple offence, an accused 'appears' on a 'court date  
for a charge' for the purposes of s 55(1) of the CP Act if the accused is  
before the court at the time the court is dealing with the accused's  
charges. A person 'appears' when they are personally before the court at  
that time or, if they are not personally before the court, they are  
nevertheless represented by counsel. They will also 'appear' when they  
(or their counsel) are permitted to be before the court via an audio or  
video link.

Importantly, an accused person who is before the court 'appears', for the  
purposes of s 55(1), even if they refuse to accept or clearly  
acknowledge that they are the person named in the relevant prosecution  
notice, or that they identify themselves with that name. The issue for  
the court to decide is whether it is sufficiently satisfied that the person  
who is before them *is the accused who is named in the prosecution  
notice*; that they are the person who is alleged to have committed the  
specified charge or charges.

This is because, in deciding whether an accused has appeared for the  
purposes of s 55(1) of the CP Act, the court should be concerned with  
the question of whether the person who is alleged in the prosecution  
notice to have committed the specified offence is before the court, no  
matter by what name or other incantation they identify themselves with

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<sup>8</sup> *Kelly v Fiander* [2023] WASC 187.

at that time. Under the system of law that operates in this state, only a *person* can do (or be deemed to have done) 'an act or omission which renders the person doing the act or omission liable to punishment'. Criminal liability attaches to a human being, not to a 'doppelganger'.

The procedure that the magistrate attempted to adopt in this case would be very familiar to judicial officers who preside over, and legal practitioners who appear in, criminal cases in this state. Properly understood, it is a procedure that is used as a means to enable a court to determine whether the *person* who is before the court is the 'accused'.

The need to confirm whether the accused is present before the court is obvious. Quite apart from it being a necessary step in ascertaining whether the accused has 'appeared' for the purposes of s 55 of the CP Act, the presence of the accused before a court of summary jurisdiction that is dealing with a simple offence is necessary for several other reasons. For example, it is necessary to be satisfied that the accused has a copy of the prosecution notice and understands the charge (s 59(2)), and that the accused is before the court for the purposes of determining issues before trial (s 64), and for the purposes of taking a plea to a charge from the accused (s 126).

The Magistrates Court, which is a court that exercises its powers and criminal jurisdiction in accordance with the *Magistrates Court Act 2004* (WA), has various powers including those that are expressly or by necessary implication conferred by that Act. This includes the power to regulate its own practice and procedure. In my view, the procedure that the magistrate attempted to adopt in this case is an example of the exercise of an implied power. However, if a court is unable to determine, using that procedure, whether the person before the court is the accused named in the prosecution notice, it does not follow that the accused has not 'appeared' for the purposes of s 55(1) of the CP Act.

If a court is unsure about whether a person who is before the court is the person who was alleged in the prosecution notice to have committed the offences charged, it would be open to the court, in the exercise of the implied power to regulate its own procedure, to adopt another reasonable means, appropriately adapted to the circumstances of the case, to decide that question.

20 I respectfully agree with the conclusion reached by Vandongen J as to the meaning of 'appear' in the context of s 55 of the CPA.

21 The respondent has conceded that this appeal ought to be determined in accordance with the decision in *Kelly*. In my view, that concession is properly made. On the basis of the very brief inquiry made of the person who answered to the call of the matter at the bar table, the learned magistrate could not, in my view, have been satisfied that the appellant had not 'appeared'.

22 I have had regard to a transcript from 5 May 2022 in relation to other matters involving the appellant before the learned magistrate. On that occasion, the appellant declined to acknowledge his name. The learned magistrate directed that the appellant be taken back into custody and the police verify his identity. On resumption, the prosecutor confirmed that the appellant's identity had been established by reference to fingerprints. Her Honour then proceeded to deal with the matter.

23 In the course of that hearing, the learned magistrate referred to the fact that the appellant 'indulges in these nonsensical arguments that have been [resoundingly] disabused by the Supreme Court' and said:<sup>9</sup>

I have significant doubts that Mr Reynolds is going to contribute in any meaningful way to sentencing today, based on his two prior presentations today, and furthermore his prior presentations before this court historically, where I've had some lengthy dealings with Mr Reynolds as a result of being the only magistrate in the Great Southern ...

24 In my view, on 5 January 2023, it should have been plain to her Honour, and was in fact plain, that the appellant was the person the subject of the prosecution notice. It was his refusal to acknowledge his name as being that contained in the prosecution notice which resulted in her Honour refusing to 'recognise' him as an accused in the matter.

25 While it would no doubt have been time consuming, and frustrating in the context of a busy and high-volume court, if her Honour was not satisfied that the appellant was the person named in the prosecution notice, it was necessary for her Honour to have made further queries before determining whether the appellant had not 'appeared.' From previous experience, the learned magistrate was aware that there was another means available to her to verify the appellant's identity. However, rather than utilise it, her Honour had the appellant removed and dealt with him in his absence.

26 In the present case there was no proper basis for a finding that the appellant did not 'appear' and therefore s 55 of the CPA could not apply. Error has been made out.

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<sup>9</sup> Transcript, *Western Australia Police v Kellan John Reynolds*, Magistrates Court of Western Australia, 5 May 2022, 4.



**Proviso**

27 In the absence of a plea of guilty, the appellant was entitled to have the charge against him proved beyond reasonable doubt. As no evidence was adduced at first instance, it is not possible for me to determine that no substantial miscarriage of justice has occurred. Accordingly, there is no room for the application of s 14(2) of the CA Act.

**Provisional Decision**

28 On 17 July 2023, at a directions hearing before me, the respondent volunteered to file brief written submissions in advance of the appellant being required to file his written submissions in this matter. The respondent then filed written submissions conceding that the appeal should be allowed on the basis that the learned magistrate had wrongly heard and dealt with the matter pursuant to s 55 of the CPA.

29 On that basis, I determined it was appropriate to make a decision on the basis of the documents lodged and without requiring a hearing of the appeal, pursuant to r 60(1)(c) of the *Criminal Procedure Rules 2005* (WA) (CPR).

30 Pursuant to r 63 of the CPR, the provisional decision was served on the parties. As no Form 25 was lodged within 5 working days of service, the decision has now become final.

31 The respondent is to be commended for the proactive approach it adopted in making its proper concession, which has saved the appellant and the court significant unnecessary effort.

**Orders**

32 Leave to appeal is granted in relation to each of grounds 1, 3 and 6.

33 Leave to appeal is refused in relation to each of grounds 2, 4 and 5.

34 The appeal is allowed.

35 The convictions and sentences imposed by the learned magistrate on 5 January 2023 are set aside.

36 The order as to costs in the sum of \$264.30 is set aside.

FORRESTER J

37 The matter is remitted to the Magistrates Court, differently constituted, to be heard and determined according to law.

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

AT  
Associate to the Honourable Justice Forrester

25 AUGUST 2023