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**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**CITATION** : KELLY -v- FIANDER [2023] WASC 187

**CORAM** : VANDONGEN J

**HEARD** : 11 APRIL 2023

**DELIVERED** : 1 JUNE 2023

**FILE NO/S** : SJA 1075 of 2022

**BETWEEN** : DAWN MICHELLE KELLY  
Appellant

AND

OWAIN FIANDER  
Respondent

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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) - Leave to appeal granted - Appeal allowed

*Legislation:*

*Courts and Tribunals (Electronic Process Facilitation) Act 2013* (WA)  
*Criminal Appeals Act 2004* (WA)  
*Criminal Code* (WA)  
*Criminal Procedure Act 2004* (WA), s 55  
*Magistrates Court (General) Rules 2005* (WA)  
*Magistrates Court Act 2004* (WA)  
*Road Traffic (Administration) Act 2008* (WA)

*Road Traffic (Vehicles) Act 2012 (WA)*  
*Road Traffic Act 1974 (WA)*  
*Rules of the Supreme Court 1971 (WA)*  
*South Australian Supreme Court Rules 1987 (SA)*

*Result:*

Extension of time granted  
Leave to appeal against judgments of conviction granted  
Appeal against judgments of conviction allowed  
Convictions set aside  
Matter remitted to Magistrates Court  
Leave to appeal against sentence and orders made denied

*Category:* B

**Representation:**

*Counsel:*

Appellant : In person  
Respondent : K Dias

*Solicitors:*

Appellant : In person  
Respondent : State Solicitor's Office

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

CBFC Ltd v Charitopoulos [2009] SASC 30  
DJL v The Central Authority [2000] HCA 17; (2000) 201 CLR 226  
Hofer v The Queen [2021] HCA 36; (2021) 95 ALJR 937  
Krysiak v McDonagh [2012] WASC 270  
Leighton v Garnham [No 4] [2016] WASC 134  
Meads v Meads [2012] ABQB 571  
Mohammadi v Bethune [2018] WASCA 98  
Mustac v Medical Board Of Western Australia [2007] WASCA 128  
Pickett v Western Australia [2020] HCA 20; (2020) 270 CLR 323  
Saad v Baron [2012] WASC 507

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

Sparks v Bellotti [1981] WAR 65

Stearman v Taylor [2014] WASC 247

Strahan v Brennan [2014] WASC 190

Tallot v Matier [2012] WASC 290

**VANDONGEN J:****Introduction**

1           The appellant was charged by a prosecution notice lodged in the Albany Magistrates Court with the following four offences:

- (1)       driving a motor vehicle with an imitation number plate, contrary to s 36(2)(e) of the *Road Traffic (Administration) Act 2008* (WA);
- (2)       using an unlicensed vehicle on a road contrary to s 4(2) of the *Road Traffic (Vehicles) Act 2012* (WA);
- (3)       driving a vehicle on a road while being disqualified from holding a motor vehicle licence contrary to s 49(1)(a) and s 49(3)(ca) of the *Road Traffic Act 1974* (WA); and
- (4)       failing to comply with a direction by a police officer to stop a motor vehicle contrary to s 44 of the *Road Traffic (Administration) Act 2008* (WA).

2           The appellant's charges were listed before the Magistrates Court on 13 September 2022. On that date the presiding magistrate convicted the appellant under s 55(4) of the *Criminal Procedure Act 2004* (WA) (**CP Act**) after she decided to hear and determine each of the charges in the absence of the appellant. Having convicted the appellant, the magistrate then imposed fines totalling \$2,200 and ordered that she pay costs. The magistrate also directed the appellant to pay half the annual motor vehicle licence fee and disqualified her from holding or obtaining a driver's licence for nine months, cumulative on her existing disqualification.

3           The appellant now seeks leave to appeal against the magistrate's decision to convict her of the offences charged, the sentences that were imposed on her, and the orders that were made as a result of those convictions.

4           A notice of appeal was filed on 12 October 2022. The last date for appealing was 11 October 2022. Accordingly, the appellant requires an extension of time. As the delay is inconsequential, I would grant an extension of time in which to appeal.

5 For the following reasons I would grant the appellant leave to appeal against conviction, and I would allow the appeal against conviction and set aside the magistrate's decision to convict the appellant of the offences charged. I would also order that the case should be dealt with again by a different magistrate.

6 In those circumstances it is unnecessary for me to make any orders in respect of the appeal against sentence, or the appeal against the orders that were made as a result of those convictions. Those appeals should be dismissed because they have been rendered redundant. If the appellant is subsequently convicted after her case has been dealt with again in the Magistrates Court, then it will be a matter for the magistrate at that time to exercise the sentencing discretion afresh in light of all relevant material then before the court.

### **General legal framework of appeal**

7 Pursuant to s 7(1) of the *Criminal Appeals Act 2004* (WA) (CA Act), a person who is aggrieved by a decision of a court of summary jurisdiction may appeal to the Supreme Court against that decision. Relevantly for the purposes of this matter, a 'decision' of a court of summary jurisdiction includes a decision to convict an accused of a charge, as well as a sentence imposed or order made as a result of a conviction.<sup>1</sup>

8 An appeal brought pursuant to the right conferred by s 7(1) of the CA Act may be made, relevantly, on a ground that the court of summary jurisdiction made an error of law or fact, or of both law and fact, or that there has been a miscarriage of justice. An appellant may also rely on a ground that the court imposed a sentence that was excessive.

9 Leave is required for each ground of appeal,<sup>2</sup> and if leave to appeal is not granted on at least one ground, the appeal is taken to have been dismissed.<sup>3</sup> 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 succeeding.<sup>4</sup>

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

<sup>2</sup> CA Act s 9(1).

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

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

### The proceedings in the Magistrates Court

10 Before describing what occurred in the Magistrates Court it is necessary to say something about the appellant. It is apparent from the record of the proceedings in the Magistrates Court, the various documents that the appellant has filed in this court, and the proceedings that were conducted before me, that the appellant is an adherent of what has come to be known as 'pseudolaw'.<sup>5</sup> It is also clear that she is an enthusiastic proponent of a theory espoused by pseudolaw devotees that some call the 'strawman duality'.

11 The strawman duality theory is based on the fundamentally misguided notion that there exists a physical human being and, at the same time, a separate non-physical person (a 'doppelganger'). Under this theory, it is said that while governments can exercise power over both the physical and the non-physical person, the capacity to exercise power over the physical person only exists because there is a 'contract' that links the physical person with the non-physical person. This 'contract' is evidenced by documents such as a birth and marriage certificates.

12 The non-physical person is often identified by pseudolaw exponents using an upper-case letter name because, it is said, government and legal documentation such as birth and marriage certificates use capital letters when recording names.

13 A critical component of this strawman theory is the idea that government authority over the physical person can be negated by removing the doppelganger. In very simple terms, this is said to be achieved by revoking or denying the legitimacy of the contract. This then has the effect of removing any government authority over the physical person.

14 One of the appellant's affidavits, on which she sought to rely in support of her appeal amply demonstrates the appellant's peculiar beliefs:

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<sup>5</sup> His Hon Judge Glen Cash QC 'A Kind of Magic: The Origins and Culture of "Pseudolaw"', speech given at the Queensland Magistrates' State Conference, Brisbane (QDC) [2022] Qld J Schol 1. See also, *Meads v Meads* [2012] ABQB 571.

Whereas we, whom; being a sentient living breathing woman of Soul under heaven; known and called by: 'Dawn' and 'Dawn-Michelle', and whom also is known in contract by the name: '©Dawn Michelle Kelly' nee Portch, being a private 'natural living breathing woman of soul'; not an 'Artificial Public Person'; a creation of statute by way of government registration of a birth certificate creating the legal fiction and is a contract vessel name, a transmitting entity listed in the 'UCC' Commercial Code for us on registration; adjoined at the time proceeding soon after our live birth record of our father's surname; the true purpose not disclosed when created. The transfer of one transmitting contract vessel name producing ALL CAPS SURNAME being 'PORTCH' and now 'KELLY' through the marriage contract with he STATE GOVERNMENT OF WESTERN USTRALIA', that was done without full disclosure of government forming the contract name for us to our parents at a time proceeding of my live birth; or, the true purpose for which is was created fraudulently under non-disclosure', and now referred adjoining the sur-name to us without consent as: 'Dawn Michelle KELLY', does domicile at: [redacted] , Original State: Western Australia, The Commonwealth of Australia, a Common Law jurisdiction – it's court system having originated in the common law system of English law worldwide, does make an affirmation and say as follows pursuant to the Commonwealth of Australia Act 1900 U.K. Imperial that We humbly rely upon the blessing of Almighty God, on this day, do hereby proclaim and scribed by our hand in the presence of 'All Mighty God', affirm and declare and say as follows with firsthand knowledge;

15 As will be seen, and for reasons best known to herself, the appellant sought to deploy the strawman duality theory when she appeared in the Albany Magistrates Court on 13 September 2022.

16 According to the certified copy of the prosecution notice, the appellant was due to make her first appearance in the Albany Magistrates Court on 30 August 2022. However, it seems as though the court determined that the appellant did not appear on that date and adjourned the charges to 13 September 2022. A notice of adjournment was issued to the appellant.

17 When the appellant's matter was called by the court orderly on 13 September 2022, the following exchange took place between the person who came forward and the magistrate:

**ORDERLY:** From the K list, calling the matter of Kelly, Dawn Michelle Kelly.

**HER HONOUR:** All right. Remain standing, please. Are you Dawn Kelly?

....., **MS:** I'm - on - for the record, I am Dawn Michelle - Minister Dawn Michelle, executor for the Dawn Michelle Kelly estate.

**HER HONOUR:** All right. Well, unless you're Dawn Kelly, you have standing [sic] to appear in court.

....., **MS:** Okay.

**HER HONOUR:** If you have - are not Dawn Kelly and have no standing to appear in court, you must leave the courtroom. So either

you are Dawn Kelly, or you are not Dawn Kelly. If you [are] not Dawn Kelly, please leave the courtroom.

....., **MS:** Under duress?

**HER HONOUR:** Not under anything.

....., **MS:** Under duress?

**HER HONOUR:** If you are not Dawn Kelly, then - if you are Dawn Kelly, you must announce your appearance in court. If you are not Dawn Kelly, you are to leave the courtroom.

....., **MS:** I'm Dawn Michelle, executor for the Dawn Michelle Kelly estate.

**HER HONOUR:** I don't recognise that in any way. All I can assume is that you are not Dawn Kelly, and you are to leave the courtroom.

....., **MS:** Sorry. I have - just one moment, please.

**HER HONOUR:** Please, unless you are Dawn Kelly and answer yes or no as to whether you are Dawn Kelly - - -

....., **MS:** I am the natural - you know, executor for contracts for the natural private person. So that is a

**HER HONOUR:** This court does not - - -

....., **MS:** Misnomer.

**HER HONOUR:** - - - recognise - - -

....., **MS:** Sorry, what's - - -

**HER HONOUR:** - - - that sort of - - -

....., **MS:** - - - your name?

**HER HONOUR:** - - - nonsense argument.

....., **MS:** What's your name?

**HER HONOUR:** This person is not Dawn Kelly. They have no standing to appear. They refuse to announce their appearance to the court, and they may leave. Thank you. And the matter will now be heard in the absence of any person. Thank you. Please leave, whoever you are.

....., **MS:** I did put documents in, which were sent to your email address, but, anyway



**LOVEROCK, MR:** (indistinct) to proceed by section 55, your Honour.

**HER HONOUR:** I'm satisfied that there is no person who responded in a positive manner and appropriate manner recognised by the court as Dawn Kelly. On that basis, I am satisfied that there has been a notice of adjournment issues by the court on 30 August to the known address of Dawn Kelly. On that basis, I'm satisfied leave will be granted to proceed under section 55.

18 As can be seen, when faced with what can only be described as 'gobbledygook' from the person who was then before the court, the magistrate decided that the summary conviction power provided for in s 55 of the CP Act could and should be invoked.

19 It is not clear from the transcript whether the person who announced that she was 'Minister Dawn Michelle, executor for the Dawn Michelle Kelly estate' was in fact the appellant. However, in written submissions filed in this court on 15 March 2023, and at the hearing conducted on 11 April 2023, the respondent's counsel accepted that the appellant was the person who was before the court.

20 It is also not apparent from the transcript whether the appellant remained in the courtroom after the magistrate told her to leave. During her submissions at the hearing of the appeal on 1 March 2023 the appellant asserted that when the magistrate told her to leave she was 'escorted' out of the courtroom by a security officer, and that she felt that she 'had no choice' in the matter. At the hearing on 11 April 2023, after I pointed out to the appellant that there was no evidence to support this aspect of her submissions, the appellant then elected to give oral evidence to explain what had occurred.

21 In her evidence, which was given without objection and which was not the subject of any serious challenge in cross-examination, the appellant said that a security guard

moved up and stood next to me, and so basically escorted me out. I chose not to - like if I had resisted, physically resisted then I would have - I did not want to create any angst or - I didn't, you know, it's not a - I'm a peaceful woman and I went there in peace and honour.

22 The appellant also gave evidence that she had left the courtroom before the prosecutor first spoke about proceeding in accordance with s 55 of the CP Act. She said that she did not feel as though she had any choice about whether she could stay in the courtroom.

23 Given that the appellant's evidence in this regard was not challenged, and there is nothing in the way in which she gave evidence that gave me any reason to doubt the veracity of what she told me, I accept the appellant's evidence.

24 In light of the appellant's evidence and having regard to the transcript of the proceedings in the Magistrates Court, it is clear that the magistrate decided to hear and determine the charges in the appellant's absence while the appellant was still present in the courtroom. It was only after the appellant was told to leave the courtroom, and was escorted out, that the magistrate then proceeded to hear and decide the matter by convicting the appellant and then imposing sentence.

### **Grounds of appeal and proceedings in this court**

25 The appellant filed an appeal notice in this court on 12 October 2022. That notice indicated that the appellant was applying for leave to appeal against conviction and sentence, as well against the orders that were made as a consequence of conviction.

26 The grounds of appeal were in the following terms:

- (1) Notice of Appearance/Presentation and Testimony was sent to Albany Magistrates Court prior to the hearing by way of Email and Registered post un rebutted. 'Line number 45 and 46': "I did put documents in, which were sent to your email address" [redacted]

We notified the court of our intent to appear as per the Appearance/Presentation document as Dawn-michelle Executor for the Dawn Michelle Kelly Estate. Note: Dawn Michelle Kelly Estate is in reference to the legal name, fictional entity, creature of statute. We were present and that presence was denied. 'Line 32 - 39': sequence of dialogue denial of appearance. Denial of Appearance, "Law of Merchant, Section 5. Bills of Exchange Act 1909 (Cth)".

- (2) Summary judgement, Law of Merchant recognised in the commons pursuant to Section 5. Bills of Exchange 1909 (Cth), Section 55, Criminal Procedures Act 2004, non-appearance. We appeared and were present in the court, sui juris. Right to Trial denied pursuant Section 80, Commonwealth of Australia Constitution Act 1900 (Cth/UK) summary judgment executed; [Law of merchant].
- (3) We appeared sui juris: 'Line 5, 6 and 7': "I'm - on-for the record, I am Dawn-michelle, Minister Dawn-michelle Executor for the Dawn Michelle Kelly Estate". Denied.

- (4) Instructed to answer yes or no by the magistrate "Line 27 and 28": "Please, unless you are Dawn KELLY and answer yes or no as to whether you are Dawn KELLY", and in doing so, committing fraud. We hold the office for the person as signatory officer for the vessel artificial/fictional entity: Dawn Michele KELLY in trust.

We are not the person, as a matter of unlawful conversion. An intent to deceive the defendant by way of yes or no answer at law, Section 129, 135, 143 Criminal Code Compilation Act 1913 Act (WA) to commit fraudulent misrepresentation of self-denial of rebuttal, the Magistrate is operating on the un-rebuttal of presumption to pass verdict. The question of the face of it, is seeking consent to accept a living sentient woman to be a fiction by way of a yes answer - a No answer, eliciting Non-appearance to the summons allowing Section 55, Criminal Procedures Act 2004, non-appearance for summary judgment [Law of Merchant]. The forcing of unlawful joinder for the purpose of committing an offence without contract: 'Line 29 - 30': "I am the natural, you know, the Executor for Contracts for the "Natural Private Person". Right of rebuttal evidence denied.

- (5) Total disregard of Contract Law regardless of precedent foundation set within common law. The magistrate court does not recognise at law the standing and status of the 'unincorporated Natural Private Person' pursuant to the 'Corporations Act 2001'. Line 32 - 38: 'This court does not recognize [sic] that sort of nonsense argument'.
- (6) Denial of Plea pursuant to 'Section 44 Criminal Procedures Act 2004' - by way of summary judgment, conviction [Law of Merchant]. 'Line 47 - 114'. We were not given the opportunity of plea or the adjournment to make a plea.

We appeared as a living sentient free woman sui juris.  
Dawn-michelle Estate, Executor for Dawn Michelle Kelly.

27 As can be seen, the grounds of appeal are largely nonsensical. However, it is possible to discern a contention that the appellant was wrongly convicted pursuant to s 55 of the CP Act, because she did appear before the Magistrates Court at the relevant time.

28 The grounds do not explain why the appellant complains about the sentences that were imposed on her, or the orders that were made consequent upon her convictions. Notwithstanding the fact that the appellant made both written and oral submissions, the precise basis on

which she contended that the magistrate erred in imposing sentence, or by making orders, remained unclear.

29 The appellant filed several affidavits in this appeal. Further, during the first hearing of the appeal on 1 March 2023, the appellant attempted to file another affidavit in court. However, by the end of that hearing the appellant had reconsidered her position and she decided to withdraw her reliance on that affidavit.

30 It is difficult to see how any of the evidence that the appellant sought to rely on is relevant to the proper determination of this appeal. In any event, and as will be seen, I have decided that the appeal should be allowed. I have arrived at that decision without the need to have any regard to the appellant's affidavits. Accordingly, it is unnecessary for me to make any decision about whether any of the affidavits relied on by the appellant should be admitted in this appeal.

31 The hearing of this appeal was originally listed to take place before me on 1 March 2023. It is unnecessary for me to set out in detail what happened at that hearing. It is sufficient to note that after I raised several issues with the respondent's counsel, including issues about the proper construction of s 55 of the CP Act, the hearing was adjourned to 11 April 2023, and orders were made for the filing of further written submissions.

32 When the hearing resumed on 11 April 2023, I attempted to clarify the grounds of appeal with the appellant. Based on my exchanges with the appellant it appeared to me that the appellant's contentions in support of her appeal against conviction were that, firstly, the prosecution notice was invalid because it was not signed in accordance with s 23(2)(d) of the CP Act; secondly, the prosecution of the appellant was invalidly commenced because the person who purported to commence the prosecution was not authorised; thirdly, it was not open to the magistrate to convict the appellant under s 55 of the CP Act; and fourthly, a miscarriage of justice was occasioned because she was forcibly removed from the courtroom.

33 I also understood that the appellant does not really submit that the magistrate erred in imposing any sentence, or in making any order. Rather, the appellant's position on the appeal is that she should never have been sentenced, and that no orders should have been made, at all.

34 It is convenient to deal with the appellant's third and fourth contentions in support of her appeal against conviction, before turning

to deal with her first and second contentions. I will then deal with the appeal against sentence and the orders that were made consequent upon conviction.

### **Conviction Appeal**

#### **The magistrate's decision to convict under s 55 of the CP Act**

35 The fundamental issue raised by the appellant's third and fourth contentions is whether it was open to the magistrate to convict the appellant under s 55 of the CP Act.

36 Section 55 is in the following terms:

#### **55. No appearance by accused and no plea of guilty**

(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.

[(3) *deleted*]

(4) If under subsection (2) or section 51(8)(a) the court decides to hear and determine the charge in the accused's absence and the prosecution notice is signed by a person who in the notice purports to be a person acting under section 20(3), the court -

(a) must presume, in the absence of evidence to the contrary -

(i) that the prosecution notice was signed by a person who was acting under section 20(3); and

- (ii) that the person had the authority to sign the prosecution notice;

and

- (b) may take as proved any allegation in the prosecution notice containing the charge that was served on the accused.
- (5) If under subsection (4) the court convicts the accused -
- (a) the prosecutor must state aloud to the court the material facts of the charge; and
  - (b) section 129(4) applies; and
  - (c) in the absence of evidence to the contrary, the court must take as proved any facts so stated.

37 Section 55 allows a court of summary jurisdiction to hear and determine a charge in the absence of an accused.<sup>6</sup> The section only applies if an accused is charged in a court of summary jurisdiction with a simple offence,<sup>7</sup> and then, by operation of s 55(1), only if on a 'court date'<sup>8</sup> for a charge 'the prosecutor appears and the accused does not appear, and the accused has not pleaded guilty to the charge, whether orally or by means of a written plea'.

38 If s 55 of the CP Act applies, then the court can either adjourn the charge or, alternatively, it may hear and determine the charge in the accused's absence. If the court decides to hear and determine the charge, then subsections 55(4) and (5) operate to facilitate proof of the various matters referred to in those provisions.

39 There is no issue that the appellant was charged with a number of simple offences in a court of summary jurisdiction, nor that 13 September 2022 was a court date for those charges. There is also no question that on that date the appellant had not pleaded guilty to any of those charges, nor that the prosecutor<sup>9</sup> had appeared on 13 September 2022. The critical issue is whether the magistrate erred in finding, as

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<sup>6</sup> *Stearman v Taylor* [2014] WASC 247 [21].

<sup>7</sup> CP Act s 48.

<sup>8</sup> The phrase 'court date' is defined in s 18 of the CP Act to mean (a) the first court date for the notice, or, relevantly for this matter, (b) if the charge has been adjourned to a new court date, the new court date, or (c) any other date set by a court as a date when it will deal with the charge.

<sup>9</sup> The word 'prosecutor' is defined in s 3 of the CP Act, for the purposes of a prosecution in a court of summary jurisdiction, as 'the person who commenced the prosecution or a person who in court represents that person.' That person was entitled to appear before the Magistrates Court, and that entitlement could be performed by a police officer acting in the course of duty: CP Act s 172.

she must have, that the appellant 'does not [appear]', for the purposes of s 55(1) of the CP Act. If the appellant did 'appear' then s 55(1) was not engaged, with the result that s 55 did not apply. Consequently, it would not have been open to the magistrate to decide to hear and determine the charges in the appellant's absence pursuant to s 55(2), or to convict her under s 55(4).

40 While the magistrate must have found that the appellant did not appear, I have found it somewhat difficult to identify the precise basis on which she made that finding. Of course, it is necessary to avoid scrutinising the magistrate's reasons with a fine-tooth comb,<sup>10</sup> particularly as it is likely that she was dealing with a busy list and was understandably frustrated by the appellant's conduct. However, at one point during the hearing the magistrate said, 'This person is not Dawn Kelly. They have no standing to appear.' It is therefore possible to conclude that she found that the person who was before the court was not the appellant, and therefore decided that because the appellant was not physically present in court she had not appeared.

41 If the magistrate did find that the person who presented herself before the court was not the appellant, then she was clearly in error. In that regard the respondent has conceded that the person who presented herself before the magistrate *was* the appellant. In my view that was a proper concession because it should have been obvious to the magistrate that the person who was before the court was the appellant. After all, that person came forward when the matter was called and no one else claimed to be the accused. Further, it could readily be inferred that she intended to contest the charges, albeit in a misguided way. When she was directed to leave the courtroom she made it clear that she did not want to do that and, as she left, she told the magistrate that she had 'put documents in, which were sent to your email address'.

42 All of this should have led the magistrate to be sufficiently satisfied that the person who was alleged in the prosecution notice to have committed the offences (the 'accused')<sup>11</sup> was the person before the court. At the very least the circumstances should have persuaded the magistrate that she could not be positively satisfied that the appellant 'does not [appear]', for the purposes of s 55(1), particularly as such a finding may have led to the appellant being summarily convicted.

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<sup>10</sup> *Strahan v Brennan* [2014] WASC 190 [89] - [90].

<sup>11</sup> The definition of the word 'accused', in s 3 of the CP Act, is 'a person alleged in a prosecution notice or indictment to have committed an offence'.

43 Therefore, if the magistrate did in fact decide that the appellant had not appeared because she was not before the court then I am of the view that it would be well open to conclude that there has been a miscarriage of justice. The appellant would have been unfairly deprived of a trial according to law,<sup>12</sup> in which the prosecution would otherwise have been required to prove that she was guilty of the offences charged, by admissible evidence and to the criminal standard of proof.

44 However, I do not think that the magistrate found that the appellant 'does not [appear]' for the purposes of s 55(1) of the CP Act on the basis that the person who was before the court was not the person charged in the prosecution notice. In my view the proper conclusion to reach, having regard to all the circumstances, is that the magistrate decided that the appellant did not 'appear' because the person before the court insisted that she was 'Dawn Michelle, executor for the Dawn Michelle Kelly estate', and would not clearly acknowledge that she was the person named in the prosecution notice, namely Dawn Michelle Kelly (or Dawn Kelly).

45 Against that background, the critical issue to be determined is whether, in circumstances in which the appellant *was* before the court at the time it was dealing with her charges, it was open to the magistrate to nevertheless find that the appellant had not appeared for the purposes of s 55(1) of the CP Act because she refused to clearly acknowledge that she was the person named in the prosecution notice. The resolution of this issue turns on the proper construction of s 55(1) of the CP Act.

46 The proper approach to statutory construction is well-settled. The relevant principles to be applied were summarised in *Mohammadi v Bethune* [2018] WASC 98 [31] - [33], as follows:

The principles of statutory construction are well known and do not require detailed exposition. Statutory construction requires attention to the text, context and purpose of the Act. While the task of construction begins and ends with the statutory text, throughout the process the text is construed in its context. Statutory construction, like any process of construction of an instrument, has regard to context. As Kiefel CJ, Nettle and Gordon JJ recently explained in *SZTAL*:

'The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should

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<sup>12</sup> *Hofer v The Queen* [2021] HCA 36; (2021) 95 ALJR 937 [41].



be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.'

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.

The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.

47 The starting point is to note that the word 'appear' is not defined anywhere in the CP Act, and none of the provisions in the CP Act specify any procedure that must be followed by any party<sup>13</sup> to a prosecution<sup>14</sup> in order to 'appear'. In particular, there is no statutory requirement that a person, who is before a court that is dealing with a charge of a simple offence, is required to acknowledge that they are the person named in the prosecution notice containing that charge, or that they are required to give such an acknowledgement in any particular way.

48 There are several ordinary meanings of the word 'appear' (and its derivative 'appearance'), including meanings relating to circumstances in which the word is used in a legal context.<sup>15</sup> Although the ordinary meanings suggest that when it is used in a legal context it connotes visible, and therefore personal or physical, attendance in court, they do not support a conclusion that it is necessary that the person attending must acknowledge that they are a party to the relevant proceedings in order for them to be considered to have 'appeared'.

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<sup>13</sup> The word 'party' is defined in s 3 of the CP Act as 'the prosecutor or the accused'.

<sup>14</sup> The word 'prosecution' is defined in s 3 of the CP Act as 'proceedings in a court that allege a person has committed an offence and that are taken for the purpose of having the person tried for the offence'.

<sup>15</sup> For example, the Shorter Oxford Dictionary (5<sup>th</sup> ed) contains several definitions of the word 'appear', including: '[p]resent oneself formally before an authority; come before a court etc. Also, act as legal representative for someone'.

49 The statutory context of s 55(1) confirms that, consistent with the various ordinary meanings of the word, an accused charged before a court of summary jurisdiction with a simple offence will not 'appear' unless they are physically before the court when their charge or charges are being dealt with by the court.<sup>16</sup> In that regard there are numerous provisions that operate on the premise that the accused is before the court, including provisions that oblige the court to provide the accused with certain information,<sup>17</sup> that empower the court to take certain steps but only with the accused's consent,<sup>18</sup> that are concerned with entering pleas,<sup>19</sup> and which are designed to ensure that an accused appears in court on a subsequent date.<sup>20</sup>

50 However, the statutory context also strongly supports a conclusion that it is not open to find that an accused who is before the court 'does not [appear]', for the purposes of s 55(1), merely because they refuse or fail to clearly acknowledge that they are the person whose name appears in the prosecution notice.

51 Significantly, where an accused is charged with a simple offence, and s 55 applies, the court is empowered by s 55(2) to 'hear and determine the charge *in the accused's absence*'. Further, before proceeding to hear and determine a charge the court must first be satisfied that the accused has been served with a notice notifying them that 'the court may deal with the charge *in the accused's absence if the accused does not appear* on [the court date for a charge]'. In this context it would be very peculiar if a court could deal with an accused in their 'absence', based only on the fact that they failed or refused to clearly identify themselves, even if presiding magistrate was actually satisfied that the accused *was* before the court and was therefore not 'absent'.<sup>21</sup>

52 Similar observations could be made regarding other provisions in the CP Act. For example, under s 50 where an accused does not 'appear' on the first court date, but the court has received a written plea of not guilty, the court must adjourn the charge to a new court date. If

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<sup>16</sup> There are some specific exceptions to the requirement that an accused be physically before the court in order to 'appear'. For example, s 77, s 141 and s 177 allow for an accused to 'appear' via an audio or video link. Further, an accused who is charged in a summary court with a simple offence may also 'appear', for the purposes of s 55(1) of the CP Act, if they are represented by counsel who is before the court, even if the accused does not personally attend court at that time: *Saad v Baron* [2012] WASC 507.

<sup>17</sup> For example, s 39 and s 41.

<sup>18</sup> For example, s 40.

<sup>19</sup> For example, s 41.

<sup>20</sup> For example, s 41(3) and (4).

<sup>21</sup> See also, CP Act s 51(4) and (8).

it were necessary that an accused clearly identify themselves as the person named in the prosecution notice in order to 'appear' for the purposes of this provision, then the court would be obliged to adjourn the charge even if the accused was before the court and in circumstances in which it had been provided with a written plea of not guilty.

53 It would also be strange if an accused who refused to identify themselves as the accused named in the prosecution notice, but who had come before the court from custody under an arrest warrant issued under s 28 of the CP Act in relation to the very same prosecution notice, could on that basis be found not to have appeared for the purposes of s 55(1).

54 It is likewise important to note cl 4 in div 1 of sch 1 to the CP Act, which deals with how a prosecution notice may identify an accused. Where an accused is an individual whose name is known, cl 4(1)(a) requires that a prosecution notice identify the accused by means of their 'full name and, if known, date of birth and usual place of residence'. However, cl 4(2), which is in the following terms, recognises that it will not always be possible to identify an accused by reference to their name:

If the circumstances so require, an accused who is an individual may be identified, additionally or alternatively to the requirements of subclause (1)(a), by one or more of the following -

- (a) a photograph of the accused, attached to the prosecution notice or indictment;
- (b) a print of the accused's hands (including fingers), feet (including toes), or ears, that will identify him or her, attached to the prosecution notice or indictment;
- (c) a reference to the accused's DNA profile in the prosecution notice or indictment.

55 It is not easy to justify a conclusion that it is necessary for an accused who is present before the court to clearly identify themselves in answer to questions from the court before they can be considered to have 'appeared', for the purposes of s 55, when the CP Act expressly recognises that there may be occasions on which such identification will not be possible.

56 Finally, the purpose and rationale of that provision, as was explained by Beech J in *Saad v Baron* [2012] WASC 507 [61] - [62],

does not support a construction of s 55 such that it would apply in circumstances in which an accused is before the court, but refuses to acknowledge or clearly accept that they are the person named in the prosecution notice:

On any view, cases of no appearance at all are the core of the operation of the section, and will comprise at least the vast bulk of cases to which the section applies ...

In a situation where an accused does not appear at all, whether in person or by counsel, the purpose and rationale of s 55 may readily be deduced. In that situation, two things can safely be said that explain s 55. First, the accused has chosen not to contest the charges. That may reflect the absence of interest in or concern about the charge, or it may reflect the absence of any issue with what is alleged. Secondly, there is no one in the court to dispute the prosecution case. In those circumstances, the legislature has evidently determined that proof by the prosecution is unnecessary. The process is ... 'streamlined' by permitting the court to take any allegation in the prosecution notice to be proved, without evidence.

57 It could not be concluded that an accused person has chosen not to contest charges, or that they do not take issue with what is alleged by the prosecution, merely because they refuse to identify themselves when asked to do so by a court, or do not clearly identify themselves with a name used in a prosecution notice. As this case demonstrates, the accused may have conducted themselves in this way because they hold misguided beliefs about the legal significance that attaches to a name that appears in a prosecution notice, and not because they do not wish to defend themselves.

58 I accept that in certain legal contexts, the words 'appear' and 'appearance' have acquired a technical meaning, particularly in relation to civil litigation procedure. For example, a defendant to an action commenced in this court may 'appear', and submit to the jurisdiction of the court, by entering an 'appearance'. Under the *Rules of the Supreme Court 1971* (WA), this is done by filing a memorandum of appearance. Of course, this necessarily constitutes a formal acknowledgement that the person or entity filing the document is a party to the relevant proceedings.<sup>22</sup> However, having regard to the overall scheme of the CP Act, and in particular to the fact that none of its provisions place an obligation on an accused to enter an appearance in any similar manner, the word 'appear' is clearly not used in this technical sense in s 55(1) of the CP Act.

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<sup>22</sup> *Rules of the Supreme Court 1971* (WA) O 12. See also, O 58.

59 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.<sup>23</sup> They will also 'appear' when they (or their counsel) are permitted to be before the court via an audio or video link.<sup>24</sup>

60 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.

61 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 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'.<sup>25</sup> Criminal liability attaches to a human being, not to a 'doppelganger'.

62 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'.<sup>26</sup>

63 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

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<sup>23</sup> *Saad v Baron*.

<sup>24</sup> As to which, see s 77, s 141 and s 177 of the CP Act.

<sup>25</sup> *Criminal Code* (WA) s 2: definition of 'offence'. *Pickett v Western Australia* [2020] HCA 20; (2020) 270 CLR 323 [66].

<sup>26</sup> CP Act s 3(1): definition of 'accused'.

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).

64 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.<sup>27</sup> This includes the power to regulate its own practice and procedure.<sup>28</sup> 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.

65 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.

66 The respondent submits that this case is relevantly indistinguishable from the case of *Krysiak v McDonagh* [2012] WASC 270, in which Heenan J dismissed a ground of appeal that asserted that the appellant had been wrongly convicted under s 55 of the CP Act. The respondent submits that *Krysiak* is not plainly wrong and that, as a consequence, it must be followed.

67 *Krysiak* was a case in which there were three separate applications for leave to appeal against certain traffic offence convictions. One of the applications concerned a conviction entered in the Perth Magistrates Court for an offence of driving without a driver's licence while under suspension. At [7] and [8] of the reasons for decision, Heenan J summarised what occurred when the appellant's case came on for hearing:

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<sup>27</sup> *DJL v The Central Authority* [2000] HCA 17; (2000) 201 CLR 226 [25].

<sup>28</sup> *Sparks v Bellotti* [1981] WAR 65.

When the case was called a person, presumably the applicant, came forward but upon being asked to identify himself he refused, preferring instead to make submissions to the effect that he reserved all his rights and again refusing to identify himself, saying, 'I reserve all my rights and I am best described as the authorisation to the accused with limited liability'. His Honour refused to allow this person to speak further unless and until he clearly identified himself and directed him to sit in the back of the court. Again, but with some protest, the person who had come forward did so. Then his Honour, having observed that there was no person in the court who had identified themselves as having the name Krysiak and being the accused, directed that the case should proceed in the absence of the accused under s 55 of the *Criminal Procedure Act 2004* (WA), it having been established that notice to the accused had been given under s 75.

At this point, his Honour announced, obviously speaking to the person at the back of the court, that if he were Tadeusz-Edmund Krysiak and identified himself as that person he could participate in the proceedings but, if not, he would not be allowed to participate and the matter would be dealt with under s 55. At this point, Mr Krysiak identified himself and when asked who he was said, 'I am commonly known as Tadeusz Edmund Krysiak' and when asked if that was his name he said, 'I don't have a name, sorry, your Honour' and at that point his Honour decided to proceed under s 55 as previously proposed.

68 There are obvious parallels between the way in which Mr Krysiak conducted himself, and the way in which the appellant behaved, when they each separately appeared before the Magistrates Court.

69 The appellant in *Krysiak*, who was unrepresented, relied on several grounds of appeal. One of the grounds complained that the magistrate erred by proceeding to convict the appellant under s 55 of the CP Act. All of the grounds of appeal were dismissed. However, when dealing with the ground relating to s 55, Heenan J said the following:

It is necessary finally to address proposed ground 2 in application SJA 1083 of 2011. This addresses the fact that in the proceedings before his Honour, Magistrate Calder, on 26 July 2011 although Mr Krysiak was evidently present in the courtroom but would not answer to his name, he was convicted under s 55 of the Criminal Procedure Act on the basis that there had been no appearance by the accused and no plea of guilty. Counsel for the respondent referred to the decision of White J in the Supreme Court of South Australia in *CVFC Ltd v Charitopoulos* [2009] SASC 30, which involved a question of whether or not a defendant had 'appeared' in circumstances where judgment in default was entered against him. That defendant had appeared before the court to apply for a stay or an adjournment of the proceedings and, upon it

being rejected, he left the courtroom. In that case, White J observed [19]:

'In the context of r 75.14 it is clear enough that parties may 'appear' in the relevant sense either in person or by counsel. That is to say, there are two means by which a party may appear. However, whichever means is used, parties 'appear' in the requisite sense only if they present themselves for the trial. Parties who are present in the body of the courtroom when the action is called on for trial but who do not announce themselves, in person or by counsel, do not 'appear' in the sense required by r 75.14. Nor do parties who present at the bar table (in person or by counsel) but only for the purposes of seeking an adjournment of the trial. Such persons do not 'appear' before the court for the trial.'

Furthermore, as I observed in *Tey v City of Gosnells* [2010] WASC 96 [38] a court cannot be allowed to have its procedures frustrated by the refusal of a litigant to participate and a court is entitled to ensure the efficient running of its business by requiring an accused properly to identify himself when called upon. Mr Krysiak was given every opportunity to 'appear' in the proceedings before his Honour, Magistrate Calder. Even after his Honour indicated a readiness to proceed under s 55 in the absence of the accused, he was given a further opportunity to do so. He declined this by persisting in a tendentious argument that he should be addressed, not by his name, but by a combination of words which gave recognition to an unjustifiable and amorphous status which he asserted as part of his misguided appreciation of legal forms and procedures. There is, accordingly, no reason to conclude that there has been any miscarriage of justice by the procedure which was adopted on that occasion.<sup>29</sup>

70 I will proceed on the assumption that, if the decision in *Krysiak* is not properly distinguishable, then I am required to follow it unless I conclude that it is plainly wrong.<sup>30</sup>

71 In my view *Krysiak* is distinguishable, for the following reasons.

72 Firstly, *Krysiak* is not authority for the proper construction of s 55(1) of the CP Act. It appears from the reasons in *Krysiak* that no attempt was made to construe s 55(1). In particular, the court did not consider what is meant by the phrase 'does not [appear]' in light of the ordinary meaning of the word 'appear', the context in which that word is used, and the purpose of the CP Act. By contrast, I have underretaken

<sup>29</sup> *Krysiak v McDonagh* [47] - [48].

<sup>30</sup> *Leighton v Garnham [No 4]* [2016] WASC 134 [24] - [25]. cf *Mustac v Medical Board Of Western Australia* [2007] WASCA 128 [37] - [46].



the task of construing s 55. The conclusions that I have reached in this case are based on that construction.

73 Secondly, the actual decision made in *Krysiak* was that no miscarriage of justice was occasioned by the particular procedure that was adopted by the magistrate in that case. By contrast, I have found that the magistrate in this case erred in concluding that s 55 applied, because the applicant had refused to identify herself as the accused named in the prosecution notice.

74 Thirdly, to the extent that the court in *Krysiak* referred to the decision of White J in the Supreme Court of South Australia in *CBFC Ltd v Charitopoulos* [2009] SASC 30, that case has no bearing on this appeal. That case was concerned with the application of a specific rule that appeared in the *South Australian Supreme Court Rules 1987 (SA)*, the effect of which was to entitle a plaintiff in a civil action to obtain a default judgment if a defendant does not appear when an action is called on for trial. Quite apart from the fact that the terms of that rule bear no relationship to the text used in s 55(1), the rule regulated an aspect of civil procedure in another state.

### **Did removal from the courtroom constitute a miscarriage of justice?**

75 Given my conclusion that the magistrate erred in finding that s 55 of the CP Act applied on the basis that the appellant 'does not [appear]' for the purposes of s 55(1), it is unnecessary to reach any decision about the significance of the fact that the appellant left the courtroom, as directed, after the magistrate decided to hear and determine the charges in her absence. This is because if, contrary to my conclusion, s 55 of the CP Act *did* apply and it was open to the magistrate to convict the appellant *in her absence*, neither the fact that the appellant was directed to leave the courtroom, nor the fact that she was not in the courtroom at the time she was convicted, could logically have given rise to a miscarriage of justice.

76 I will now turn to deal with the appellant's first and second contentions.

### **Validity of the prosecution notice and the commencement of the prosecution**

77 The appellant submits that the prosecution notice was invalid because it was not signed and because it was issued by an unauthorised

person. She also submits, in effect, that s 55(4) of the CP Act was not engaged because the prosecution notice was not signed, as required.

78 The prosecution notice in this case records that the person issuing the prosecution notice was 'Owain Fiander (12894)', who had the official title of 'Sen Constable'. No signature appears anywhere on the prosecution notice. However, a panel on the first page records that it was signed on 28 July 2022.

79 The starting point for considering the appellant's submissions is s 21(3) of the CP Act, which is in the following terms:

A prosecution is commenced on the day on which a prosecution notice, signed in accordance with section 23, is lodged with the court in which the prosecution is being commenced, whether or not the notice has been served on the accused.

80 Section 23(2)(d) of the CP Act provides that a prosecution notice must be signed by the person who is commencing the prosecution, and s 20(3) relevantly provides that this person may be a police officer acting in the course of their duties.

81 Section 8 of the *Courts and Tribunals (Electronic Process Facilitation) Act 2013* (WA) provides that, where a document lodged with a court is required or permitted to be in writing, the document may be lodged electronically in accordance with any regulations or rules of the court. Accordingly, the prosecution notice in this case did not have to be physically lodged with the court; it was permitted to be properly lodged electronically, as it evidently was.

82 As I have already noted a prosecution notice is required to be signed. However, by operation of s 10(1) of the *Courts and Tribunals (Electronic Process Facilitation) Act* that requirement is taken to be satisfied if the document is authenticated in accordance with any regulations or rules of court:

If, under a provision of an Act to which this Part applies, a document is required to be signed, certified or sealed by any person, that requirement is to be taken to be satisfied if the document is authenticated in accordance with any regulations or rules of court.<sup>31</sup>

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<sup>31</sup> Pursuant to s 6 of the *Courts and Tribunals (Electronic Process Facilitation) Act*, the Part in which s 10(1) appears applies to the CP Act and to the *Magistrates Court Act 2004* (WA).

83 Rule 13A(3) of the *Magistrates Court (General) Rules 2005* (WA) relevantly provides that:

A document lodged electronically under this rule that is to be signed by or on behalf of the person lodging it is authenticated for the purposes of the *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* section 10 if -

- (a) the electronic court management system records the identity of the person who lodges the document; and
- (b) the name of the person who signed the document is stated in the electronic version of the document at any place where the person's signature is required.

84 In this case, the certified copy of the electronically-filed prosecution notice was authenticated by operation of s 13A(3) of the *Magistrates Court (General) Rules*, and is therefore taken to have been signed. In that regard, I infer from the fact that the prosecution notice has been lodged electronically that the identity of the person who lodged the prosecution notice is recorded by the electronic court management system.<sup>32</sup> Further, the name of the person who signed the document, 'Owain Fiander', is stated in the electronic version of the prosecution notice in the place where that person's signature is required.

85 Section 10(4) of the *Courts and Tribunals (Electronic Process Facilitation) Act* provides as follows:

Any provision of an Act to which this Part applies that provides that, or to the effect that, the signature on any document is presumed to be the signature of the person who issued the document, or that judicial notice is to be taken of a person's signature, applies with all necessary changes to and in relation to a document that is authenticated in accordance with subsection (1) or (2) as if the reference to a signature were a reference to authentication.

86 This provision must then be read with s 174 of the CP Act, which provides that if a document required under Part 3 of that Act to be signed by a person who is an 'authorised investigator' purports to have been signed by such a person, it is to be taken to have been signed by such a person unless the contrary is proved. The phrase 'authorised investigator' is defined in s 18 of the CP Act to include a police officer.

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<sup>32</sup> The electronic case management system, or 'ECMS', is defined in r 3 of the *Magistrates Court (General) Rules 2005* as 'the electronic case management system for the management of proceedings in Western Australian courts and tribunals'.

87 Accordingly, the combined effect of s 10(4) of the *Courts and Tribunals (Electronic Process Facilitation) Act* and s 174 of the CP Act is that the prosecution notice must be taken to have been signed by a police officer. This is because there is no evidence to the contrary.

88 It follows from the above that the prosecution was validly commenced by a police officer, as contemplated by s 20(3)(a)(iii) of the CP Act, who signed the prosecution notice as required by s 21(3) and s 23(2)(d) of the CP Act.

89 This means that the appellant's first and second contentions have no merit.

### **Sentence Appeal**

90 The appellant did not make any substantive submissions in support of her appeal against sentence, or against the orders that were made consequent upon conviction. As I have already noted, it appeared to me that the appellant's case on the appeal was that because she should not have been convicted in her absence she should never have been sentenced at all, and that there was also no basis to make any orders consequent on the convictions.

91 The respondent's counsel submitted the appellant had not articulated any grounds in support of her appeal against sentence. Nevertheless, she submitted that the sentences imposed were within appropriate ranges and were therefore not manifestly excessive.

92 In light of my conclusion that the magistrate erred in convicting the appellant under s 55 of the CP Act, it is unnecessary and undesirable for me to reach any conclusions about the sentences that were imposed, or the orders that were made. If the appellant is convicted of any of the offences when she is eventually dealt with in the Magistrates Court the magistrate dealing with her case will be required to exercise their sentencing discretion afresh based on all of the information then before the court.

93 Accordingly, I would refuse the appellant leave to appeal against sentences and the orders that were made consequent upon conviction. In those circumstances, the appellant's appeal against those sentences and orders is taken to be dismissed.

## Conclusion

94 This court well understands the challenges that confront busy magistrates who are regularly required to deal with people who espouse the sorts of misguided beliefs that the appellant holds.

95 I agree with the observations made by Heenan J in *Krysiak* that a court should not allow its processes to be frustrated, including by an accused who, like the appellant, is before the court on a court date but refuses to acknowledge their identity when asked to do so in the usual way. However, this does not mean that it is permissible to summarily convict a person under s 55 of the CP Act when that person is actually before the court. As Hall J said in *Tallot v Matier* [2012] WASC 290 [9]:

The magistrate's frustration with the appellant was entirely understandable, but the procedure that she adopted to deal with him was simply not open to her at law.

96 The respondent has accepted that if I were to find that the magistrate erred in convicting the appellant in accordance with s 55 of the CP Act there is no room for me to conclude, in accordance with s 14(2) of the CA Act, that the appeal should be dismissed on the basis that no substantial miscarriage of justice has occurred.

97 That concession is properly made. The nature and effect of the error in this case plainly prevents me from undertaking an assessment of whether the appellant's guilt has been proved to the requisite standard because she was deprived of the opportunity of a trial. She has not been able to test any admissible evidence relied on by the prosecution, to adduce any evidence in her defence, or to make any submissions about whether the prosecution have discharged their onus of proving her guilt to the requisite standard.

98 Leave to appeal should be granted, but only in relation to the ground that the magistrate erred in convicting the appellant pursuant to s 55 of the CP Act on the basis that she did not appear. I would allow the appeal against conviction on that ground, and order that the decision made in the Magistrates Court to convict the appellant of all of the offences charged be set aside.

99 In the circumstances, it is appropriate that the case should be dealt with again by the Magistrates Court. However, the case should be dealt with by a different magistrate.

100 I would also refuse to grant leave in relation to any ground of appeal against sentence or against any order made as a consequence of the convictions that were entered against the appellant. As I have already said, the fact that the convictions entered against the appellant will be set aside renders those appeals redundant.

**Orders**

101 For the above reasons, I make the following orders:

- (1) The appellant is granted an extension of time within which to commence the appeal.
- (2) Leave to appeal is granted on the ground that the magistrate erred in entering judgments of conviction against the appellant pursuant to s 55 of the *Criminal Procedure Act 2004* (WA).
- (3) The appeal is allowed on that ground.
- (4) The judgments of conviction entered against the appellant on 13 September 2022 are set aside.
- (5) The case is to be dealt with again by the Magistrates Court, constituted by a different magistrate.
- (6) The appellant's appeal against sentence and against orders made as a consequence of conviction is dismissed.

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

KB

Associate to the Judge

1 JUNE 2023