**[2012] WASC 100**

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| **JURISDICTION** | **:** | SUPREME COURT OF WESTERN AUSTRALIA IN CRIMINAL |
| **CITATION** | **:** | GLEW -v- WHITE [2012] WASC 100 |
| **CORAM** | **:** | HALL J |
| **HEARD** | **:** | 13 MARCH 2012 |
| **DELIVERED** | **:** | 26 MARCH 2012 |
| **FILE NO/S** | **:** | SJA 1008 of 2012 |
| **BETWEEN** | **:** | WAYNE KENNETH GLEW<br>Appellant<br><br>AND<br><br>RYAN MICHAEL WHITE<br>Respondent |

**ON APPEAL FROM:**

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| **Jurisdiction** | **:** | MAGISTRATES COURT OF WESTERN AUSTRALIA |
| **Coram** | **:** | MAGISTRATE E C DeVRIES |
| **File No** | **:** | GN 2766 of 2011 |

*Catchwords:*

Application for leave to appeal - Magistrates Court convictions - Whether grounds have reasonable prospects of succeeding - Assault public officer - Obstruct officer - Power of entry under *Bush Fires Act 1954* (WA)

*Legislation:*

*Bush Fire Act 1954* (WA), s 14, s 24E, s 24F, s 24G, s 25 s 56
*Commonwealth Constitution*, s 80
*Criminal Appeals Act 2004* (WA), s 9
*Criminal Code* (WA), s 5, s 318(1)(d),
*Criminal Procedure Act 2004* (WA), s 21, s 23, s 40(4), s 65(4)(d), s 108, s 126, s 142, s 174, pt 3 div 2
*Interpretation Act 1984* (WA), s 67

*Result:*

Application for leave to appeal refused
Appeal dismissed

*Category:* B

**Representation:**

*Counsel:*

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| Appellant | : | In person |
| Respondent | : | No appearance |

*Solicitors:*

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|---|---|---|
| Appellant | : | In person |
| Respondent | : | No appearance |

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

Birch v The Queen (1994) 12 WAR 292
Glew Technologies Pty Ltd v Department of Planning and Infrastructure [2007] WASCA 289
Glew v Shire of Greenough [2006] WASCA 260
Hedley v Spivey [2011] WASC 325
Kable v DPP (NSW) (1996) 189 CLR 51
Krysiak v Hodgson [2009] WASC 16
Krysiak v Hodgson [2009] WASCA 114

Lipohar v The Queen (1999) 200 CLR 485
Plenty v Dillon (1991) 171 CLR 635
Samuels v The State of Western Australia [2005] WASCA 193; (2005) 30 WAR 473
Spratt v Hermes (1965) 114 CLR 226
Williamson v Hodgson [2010] WASC 95

1 **HALL J**: This is an application for leave to appeal against convictions recorded in the Geraldton Magistrates Court on 23 December 2011. On that day the appellant was found guilty of one offence of assaulting a public officer, contrary to s 318(1)(d) of the *Criminal Code* (WA) and one offence of obstructing an officer in the execution of his duty contrary to s 57 of the *Bush Fires Act 1954* (WA). He was fined $1,000 for the first offence, $400 for the second offence and ordered to pay costs.

2 The appellant now seeks leave to appeal against his convictions. He has filed an appeal notice containing 12 proposed grounds of appeal. The meaning and intent of the proposed grounds is not clear. For that reason, and to provide the appellant an opportunity to establish that leave in respect of the grounds should be granted, a hearing was convened.

3 Leave of the court is required in respect of each ground of appeal: s 9(1) *Criminal Appeals Act 2004* (WA). Section 9(2) of the Act provides that the court must not give leave to appeal on a ground unless it is satisfied that the ground has a reasonable prospect of succeeding. This requires that the ground have a rational and logical prospect of succeeding such that it can be said that it has a real prospect of success: ***Samuels v The State of Western Australia*** [2005] WASCA 193 [56]; (2005) 30 WAR 473, 487. Unless the court gives leave to appeal in respect of at least one ground of appeal the appeal is dismissed: s 9(3) of the Act.

## The prosecution case

4 The prosecution case was that on 14 July 2011 two rangers from the City of Greater Geraldton attended at the property of the appellant. They did so in response to a report of a possible fire. As they approached the property they saw smoke.

5 The officers drove their vehicle up the driveway of the property and were there met by the appellant. The appellant told the officers to leave his property and stated that they were trespassing. He was alleged to have used language that was abusive in tone and content.

6 One of the officers, Mr Benoit Tomasino, got out of the car. He was confronted by the appellant and was forced by him to return to the car, this involved being pushed at least twice to the back. The appellant then told Mr Tomasino to get into the car. Mr Tomasino said that the appellant closed the car door against one of his legs, forcing him to withdraw it into the car.

7 Both officers were wearing uniforms identifying their position as rangers of the City of Greater Geraldton. The vehicle that they were driving was also clearly marked as such.

8 The officers considered it prudent to withdraw and seek assistance. They backed down the driveway, parked across the road and from there called the police.

## The defence case

9 The appellant gave evidence at the trial. He did not deny using force on Mr Tomasino and ordering the officers to leave his property. In essence, his defence was that the officers were trespassing, that they had no lawful right to enter his property and that, therefore, he was not obstructing them in the course of their lawful duties.

10 The officers had stated in evidence that they were empowered to enter the land of the appellant pursuant to s 14 of the *Bush Fires Act*. The appellant argued that this power of entry related only to bush fires and that the fire on his property was not such a fire. He also submitted that, in any event, the *Bush Fires Act* was invalid. I will deal with his claims in that regard later in these reasons.

## Ground 1

11 The appellant asserts that the magistrate erred in that he denied the appellant the right to a trial by jury pursuant to s 80 of the Commonwealth Constitution. Section 80 of the Constitution provides, amongst other things, that the trial on indictment for offences against any law of the Commonwealth shall be by jury.

12 The offences to which s 80 relates are those created by laws made by the Federal parliament pursuant to its legislative powers which have derived from the Constitution: ***Spratt v Hermes*** (1965) 114 CLR 226, 244 (Barwick CJ). The offences in this case were not Commonwealth offences but State offences. Section 80 has no application to State offences: ***Birch v The Queen*** (1994) 12 WAR 292; ***Williamson v Hodgson*** [2010] WASC 95.

13 The appellant did not, as he claims, have a right to trial by jury on these charges pursuant to s 80 of the Constitution. Accordingly, he was not denied any such 'right'. The magistrate was not in error.

## Ground 2

14 This ground asserts that the magistrate was in error when he heard the case summarily without the consent of the appellant.

15 Section 5 of the *Criminal Code* provides for indictable offences to be dealt with summarily. That section applies where a provision creating an offence provides for a summary conviction penalty and a person is charged before a court of summary jurisdiction in circumstances where such a penalty applies. In such circumstances, s 5(2) states that the court 'is to try the charge summarily' unless a written law provides to the contrary, or an application is made by the prosecutor or the accused before a plea is entered to the charge for the charge to be tried on indictment, and the court decides under s 5(3) that this is appropriate. Section 5(3) sets out a number of circumstances in which a court may decide that a charge is to be tried on indictment.

16 It is plain from the provisions of s 5 that the presumptive position in respect of offences for which a summary conviction penalty is provided is that charges for such offences will be dealt with in the Magistrates Court. A magistrate can decide that such a charge should be dealt with on indictment, but only in specified circumstances. The consent of the accused person is not required to deal with an indictable charge summarily.

17 The offence of assaulting a public officer was an offence contrary to s 318(1)(d) of the *Criminal Code*. That section provides for a summary conviction penalty. Accordingly, s 5 of the *Criminal Code* applied, the offence was capable of being dealt with summarily and the consent of the appellant was not required. The only circumstance in which consent is needed is where a charge is dealt with summarily on a first appearance: s 40(4) *Criminal Procedure Act 2004* (WA). That was not the case here.

18 The offence of obstructing an officer contrary to s 57 of the *Bush Fires Act 1954*, is a simple offence: s 67 *Interpretation Act 1984* (WA). The procedure for dealing with simple offences is set out in pt 3 div V of the *Criminal Procedure Act*. Such offences are dealt with summarily in the Magistrates Court. No consent in this regard is required.

19 This ground is not consistent with the applicable law. There is no basis for contending that the magistrate was wrong to deal with the case in the summary jurisdiction.

## Ground 3

20 This ground asserts that the magistrate was in error when he recorded a plea of 'not guilty' on each of the charges. The circumstances are that when the appellant appeared for his trial on 7 December 2011 and was asked to plead to the charges he responded by saying that he had 'no case to answer'. The magistrate responded by saying that he would take that as a plea of not guilty to each of the charges.

21 Whether or not an accused has previously entered a plea to a charge, at the start of a trial a court must inform the accused of the charges that he faces and require him to enter pleas: s 142 *Criminal Procedure Act*. The pleas that are available to charges are referred to in s 126(1) of the *Criminal Procedure Act*. The plea entered by the appellant was not one of the permissible pleas. In these circumstances, the magistrate was obliged to enter pleas of not guilty: s 126(5) of the *Criminal Procedure Act*.

22 An accused person can make a submission that on the prosecution evidence there is no case to answer. However, such a submission is not appropriate until the prosecution case is closed: s 108 and s 65(4)(d) of the *Criminal Procedure Act*. In any event, the appellant made no such submission at the end of the prosecution case.

23 If the intention of the appellant was to plead that the Magistrates Court had no jurisdiction to deal with him or the charges, then it is not apparent from either the transcript of the Magistrates Court proceedings or the grounds of appeal, on what basis any such claim could possibly have been made.

24 If the appellant was seeking to raise an argument that he has raised in other cases that the Magistrates Court was not lawfully constituted, then I would note that such an argument has been dismissed in ***Glew v Shire of Greenough*** [2006] WASCA 260; ***Glew Technologies Pty Ltd v Department of Planning and Infrastructure*** [2007] WASCA 289, and also in ***Krysiak v Hodgson*** [2009] WASC 16 and ***Krysiak v Hodgson*** [2009] WASCA 114. If the appellant was seeking to raise another argument that he has previously raised, namely that the charges were defective because the City of Greater Geraldton was unconstitutional, then I would note that a similar argument has also been dismissed in ***Glew v Shire of Greenough*** [2006] WASCA 260.

## Ground 4

25 The appellant asserts that the magistrate was wrong in allowing the case to continue when 'there was no accuser in the court to be cross-examined' by him. This appears to relate to statements made by the appellant at the end of the prosecution case that he was entitled to cross-examine his 'accuser'. By this it was apparent he was referring to the police officer who had signed the prosecution notice. Initially the appellant stated that the prosecution notice was unsigned, but this was clearly wrong. The magistrate stated, in my view correctly, that there was no necessity for the prosecution to call the officer who had signed the prosecution notice.

26 The manner in which a prosecution is commenced is set out in pt 3 div 2 of the *Criminal Procedure Act*. A prosecution is commenced upon the signing of a prosecution notice: s 21 of the *Criminal Procedure Act*. The formal requirements of a prosecution notice are set out in s 23 of the *Criminal Procedure Act*. There is a presumption that a document of this nature which purports to be signed by an authorised person under pt 3 of the *Criminal Procedure Act* has been so signed, unless the contrary is proved: s 174 of the *Criminal Procedure Act*.

27 There was no evidence before the magistrate that the prosecution notice in this case had not been properly signed. In those circumstances there was no requirement for the prosecution to call the officer who signed the prosecution notice.

## Ground 5

28 By this ground the appellant asserts that the magistrate erred when he 'ignored' the decisions of the High Court in ***Plenty v Dillon*** (1991) 171 CLR 635 and ***Lipohar v The Queen*** (1999) 200 CLR 485. The appellant's reliance on these cases proceeds upon a fundamental misunderstanding of the law. At the trial he argued that these cases were authority for the proposition that the officers in this case could not lawfully enter his property without a warrant. He also argued that insofar as the *Bush Fires Act* provides a statutory right of entry in certain circumstances the Act invalid as being contrary to those decisions.

29 The appellant's arguments are simply wrong. ***Plenty v Dillon*** was, of course, a case regarding trespass. It was held that service of a summons did not afford the police officers in that case with a right of entry onto private land. That was because they had neither a warrant to enter the land nor was there any statutory right of entry. However in ***Plenty v***

***Dillon***, and in numerous other cases, it has been recognised that a warrant is not the only possible source of authority for public officials to enter private land. Such officials may also derive authority from a statute. That is the case here.

30 The two officers concerned produced evidence that they had been duly appointed as Bush Fire Control Officers. As such they had a right of entry onto private land for the purposes set out in s 14 of the *Bush Fires Act*. They both stated in evidence that they were acting pursuant to that authority. The suggestion that the *Bush Fires Act* is invalid as being inconsistent with the decisions of the High Court is manifestly absurd.

## Ground 6

31 The appellant asserts that the magistrate was wrong in relying upon the *Bush Fires Act* as giving a right of entry to his property 'without licence from the owner'. At the trial the appellant argued that s 14 of the *Bush Fires Act* was confined to circumstances in which a bush fire, as opposed to any other type of fire, was in existence. He gave evidence that the fire in this case was one involving the burning off, largely, of garden waste. In these circumstances, he argued that the officers had no right of entry under the *Bush Fires Act* and were trespassing.

32 The appellant's arguments betray a misunderstanding of the meaning and intent of the provisions of the *Bush Fires Act*. The Act not only regulates bush fires, but other fires as well. This is apparent from s 24E, s 24F, s 24G and s 25. In particular, that the Act covers the burning off of garden refuse is apparent from s 24F which is entitled 'Burning garden refuse during limited times'. That section provides that a person must not burn garden refuse at a place other than a rubbish tip during the limited burning times for that place, unless it is burned in an incinerator or in accordance with s 24F(3). One of the requirements of s 24F(3) is that the fire is lit between 6.00 pm and 11.00 pm. Accordingly, that provision could have no application in the present case.

33 In any event, the question before the magistrate was not whether the fire in this case was prohibited, but whether s 14 afforded the officers a right of entry. Section 14 permits a Bush Fire Control Officer to enter any land at any time to, amongst other things, examine a fire which he has reason to believe has been lit, or maintained or used in contravention of the Act, to examine anything which he considers to be a fire hazard existing on the land, to investigate the cause and origin of a fire which has been burning on the land, and to do all things necessary for the purpose of giving effect to the Act.

34 Given that the Act expressly extends to fires other than bush fires, there is no reason to interpret s 14 as being confined in its operation only to bush fires. Indeed, any such interpretation would be perverse. The appellant's arguments that s 14 did not provide authority to the officers in the circumstances of this case is entirely without merit.

## Grounds 7, 8 and 9

35 By these grounds the appellant submits that the magistrate was wrong to reject arguments that the Magistrates Court sat as a court constituted under ch III of the Commonwealth Constitution.

36 There is a danger that in trying to ascribe meaning to such grounds that they will be rendered more sensible than they are: in truth, these grounds are largely incomprehensible.

37 The fact is that the Magistrates Court was not sitting as a Federal court nor was it exercising Federal jurisdiction. No issue of the type arising in ***Kable v DPP (NSW)*** (1996) 189 CLR 51 existed in this case. If the argument that the appellant was endeavouring to raise was that raised in ***Hedley v Spivey*** [2011] WASC 325 it must be rejected for the same reasons.

## Grounds 10 and 11

38 These grounds relate to a sign which the appellant had erected adjacent to the driveway of his property. It was, as the appellant described it, a 'no trespassing' sign. It made reference to the High Court's decision in ***Plenty v Dillon***. The appellant appears to believe that the presence of this sign acts to deprive others, in this case, the officers of any lawful right of entry notwithstanding the existence of s 14 of the *Bush Fires Act* or of any other act of the Parliament. He is simply wrong.

## Ground 12

39 The appellant called Mr Donald Backshall as a defence witness. Mr Backshall was a friend of the appellant and had been present on the day in question. He confirmed that he had seen a fire on the property and had observed the appellant asking the shire officers to leave, though he was some distance away. He also gave evidence in regard to whether the fire presented any risk. His opinion in that regard was said to be relevant because he had experience as a fire station officer between 1965 and 1998.

40 The appellant asserts that the magistrate ignored the evidence of Mr Backshall. I cannot accept that this is so. Mr Backshall's evidence simply did not assist the appellant. The question before the magistrate was not whether the fire in question was a dangerous one but whether the shire officers, in particular Mr Tomasino, were performing their lawful duties and whether Mr Tomasino was obstructed and assaulted.

41 Mr Backshall was also asked for his views in regard to whether the *Bush Fires Act* provided authority to the officers to enter the appellant's land. He offered an opinion in that regard which was clearly inadmissible. In any event, in cross-examination Mr Backshall conceded that he was not aware of the provisions of the *Bush Fires Act* and 'wouldn't have a clue' about s 14.

## Conclusion

42 None of the proposed grounds of appeal is reasonably arguable, far less do any of them have any rational prospect of succeeding. Therefore leave must be refused in respect of each of them and the appeal is dismissed.