SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**Jakaj v Kinnane**
Citation:	**[2020] ACTCA 19**
Hearing Date:	18 March 2020
Decision Date:	22 April 2020
Before:	Burns J
Decision:	See [18]-[19]
Catchwords:	**APPEAL** – JURISDICTION, PRACTICE AND PROCEDURE – Application for certain orders preliminary to an appeal – applicant sought 23 orders, including certain declarations, undertakings and orders to produce evidence – consideration of the phrase "practice and procedure" in s 37J(1)(k) of the *Supreme Court Act 1933* (ACT)
Legislation Cited:	*Acts Interpretation Act 1901* (Cth) *Australian Capital Territory (Self-Government) Act 1988* (Cth) *Australian Constitution* ss 5, 42, 71, 117 *Australian Road Rules* r 300 *Commonwealth of Australia Constitution Act* (Imp) cl 2, ss 58, 42, 76 *Court Procedure Rules 2006* (ACT) r 300 *Crimes Act 1900* (ACT) *Director of Public Prosecutions Act 1990* (ACT) Judiciary Act *1903* (Cth) s 78B *Legislation Act 2000* (ACT) *Magistrates Court Act 1930* (ACT) s 208(1)(c) Supreme Court Act *1933* (ACT) ss 37J, 37N
Cases Cited:	*Byrnes v Barry* [2004] ACTCA 24; 150 A Crim R 471 *Minister of State for the Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369
Texts Cited:	Nygh, P E, and Butt, P, *Butterworths Australian Legal Dictionary* (Butterworths, 1997)
Parties:	Eduard Jakaj (Appellant) The Magistrates Court of the Australian Capital Territory (1st Respondent) Damien Kinnane (2nd Respondent)
Representation:	**Counsel** Self-represented (Appellant)

K McCann (2nd Respondent)

Solicitors

Self-represented (Appellant)

ACT Director of Public Prosecutions (2nd Respondent)

File Number:	ACTCA 16 of 2019	
Decision under appeal:	Court/Tribunal:	ACT Supreme Court
	Before:	McWilliam AsJ
	Date of Decision:	22 March 2019
	Case Title:	Jakaj v Kinnane
	Citation:	[2019] ACTSC 71

BURNS J:

1. By an application in proceeding dated 4 March 2020, the applicant applied to the ACT Court of Appeal constituted by a single judge for certain orders preliminary to an appeal currently listed to be heard in the Court of Appeal on 7 May 2020.

2. As I understand the history of this matter, the applicant was charged in the ACT Magistrates Court with an offence of using a mobile telephone while driving a motor vehicle, contrary to r 300 of the *Australian Road Rules* (the Rules). This offence was said to have occurred on 12 August 2017. The applicant represented himself in the course of that proceeding. On 10 August 2018, a Magistrate convicted the applicant and ordered that he pay a fine of $416, court costs of $80 and the Victim Services Levy of $60.

3. The applicant had a right of appeal from the orders made by the ACT Magistrates Court under s 208(1)(c) of the *Magistrates Court Act 1930* (ACT) (the Magistrates Court Act). He did not seek to exercise that right. Instead, the applicant sought judicial review of the Magistrate's decision on the grounds, including, that the ACT Magistrates Court lacked jurisdiction to hear the charge against him, that he was denied procedural fairness and that the Magistrate had failed to give sufficient reasons. The application for judicial review was heard by McWilliam AsJ on 19 March 2019 and dismissed by her Honour on 22 March 2019 with written reasons being published on that date. Essentially, her Honour found that the Magistrate had denied the applicant procedural fairness in failing to allow him to develop his arguments concerning whether the ACT Magistrates Court had jurisdiction to deal with the charge. Her Honour found, however, that nothing that the applicant could have said to the Magistrate could have made a difference to the Magistrate's ruling that she had jurisdiction to hear the charge. On that basis, although her Honour was satisfied that there had been a failure of procedural fairness in the ACT Magistrates Court, her Honour declined to grant any relief in the exercise of the Court's discretion. Her Honour dismissed the remainder of the application.

4. Undaunted, on 23 April 2019 the applicant filed a Notice of Appeal from the orders made by McWilliam AsJ. The grounds of appeal take up 163 paragraphs, but are divided into the following 10 overarching "issues", which I will very briefly attempt to summarise:

- Issue 1 - The oath of office sworn in the ACT Magistrates Court

The applicant contends that the oath of office sworn by Magistrates in the ACT is invalid as it is inconsistent with oaths required to be taken by certain Commonwealth office holders. His submission is that ss 5 and 42 of the *Australian Constitution* (the Constitution), when read together, require all judges of every State and Territory to swear an oath of allegiance to the Crown, and that it has not been established that the Magistrate who presided over the hearing of his charge had sworn an oath of allegiance to the Crown.

- Issue 2 – Denial of procedural fairness in relation to discovery

The applicant does not accept that in the proceedings before the Magistrate and those before McWilliam AsJ, the prosecution proved that any of the legislation relied upon to conduct the prosecution was validly enacted. This included, but was not limited to, the Rules, the Magistrates Court Act, the *Australian Capital Territory (Self-Government) Act 1988* (Cth), the *Director of Public Prosecutions Act 1990* (ACT), and various enactments governing road transport in the ACT. The applicant asserted that the onus fell on the prosecution to prove the validity of the enactments or other laws which were said to underpin his prosecution. In the proceeding before the ACT Magistrates Court, the applicant purported to seek discovery from the prosecution of certain documents, including a certified copy of the original certificate of proclamation for the legislation relied upon by the prosecution to found the charge against him. He also sought certified copies of any act, enabling act, instrument, bill or legislation assented to "as per the Commonwealth of Australia Constitution Act Section 58, providing Australian Capital Territory exemption from or removing Australian Capital Territory's legal and lawful responsibilities from any Imperial laws, acts or statutes". The prosecution did not provide the applicant with the requested documents, and the Magistrate declined to allow him to agitate the issue before her Honour. In the proceeding before McWilliam AsJ, her Honour concluded that the application for discovery had been misconceived by the applicant. The purported notice for discovery was not, her Honour said, a document issued pursuant to any rule applicable in criminal proceedings in the ACT Magistrates Court. Her Honour was not persuaded in the circumstances that the failure of the Magistrate to enquire further on the issue in the proceeding before her Honour was a denial of procedural fairness. In any event, her Honour would have refused relief on discretionary grounds.

- Issue 3 – The Australian Road Rules have not been properly passed by the Territory and did not apply to the applicant

The applicant asserts that there has been no discovery of documents to establish that the alleged legislation relied upon by the prosecution has been passed under the Constitution and the *Acts Interpretation Act 1901* (Cth), such that it is not established that the ACT Magistrates Court had jurisdiction to deal with the charge against him. The applicant also asserts that "being from another state, namely Victoria" s 117 of the Constitution prohibits discrimination against him. The applicant submits that the "Court [R]egistry" had discriminated against him by failing to accept certain documents he attempted to file relating to his "interlocutory application to determine the

existence of jurisdiction". The applicant further asserts that as the Rules do not claim to relate to subjects of her Majesty Queen Elizabeth II, the Rules cannot provide jurisdiction for the prosecution.

- Issue 4 – Denial of procedural fairness in relation to the conduct of the hearing

The applicant submits that the refusal of the "alleged [M]agistrate" to compel the prosecution to satisfy his discovery request is a jurisdictional error. He submits that the fact that administrative staff at the Court Registry refused to accept an interlocutory application from him regarding the jurisdiction of the ACT Magistrates Court, in which he sought the return or destruction of property unlawfully taken from him, including DNA samples, was unlawful discrimination and an error of law. The applicant asserts that McWilliam AsJ erred in refusing relief on discretionary grounds after finding that there had been a denial of procedural fairness in the ACT Magistrates Court. He further asserts that her Honour did not have a discretion to grant costs against him after finding that there had been a denial of procedural fairness in the ACT Magistrates Court.

- Issue 5 – The identity of the prosecution

The applicant asserts that in all criminal proceedings, not being proceedings by one subject against another, all prosecutions must be brought in the name of the Crown. To the extent that the prosecution in the proceedings before the Magistrate relied upon legislation as permitting a prosecution to be brought in the name of a police informant, the prosecution had not proved that that legislation had been properly enacted.

- Issue 6 – Whether the Magistrate acted in bad faith

The applicant submits that the actions of the Magistrate in proceeding to deal with the charge against him on its merits without effectively dealing with his issue of jurisdiction, and the issue of discovery, manifested bad faith. The applicant further submits that McWilliam AsJ erred in failing to accept the proposition that the Magistrate had acted in bad faith.

- Issue 7 – Whether the Magistrate had power to enter a not guilty plea

As the applicant declined to accept the jurisdiction of the ACT Magistrates Court, he also declined to clearly enter a plea of either "guilty" or "not guilty" to the offence. The Magistrate entered a plea of not guilty on his behalf and then proceeded to hear evidence before finding the applicant guilty of the offence. The applicant submits that the ACT Magistrates Court had no jurisdiction to hear the charge, and accordingly had no jurisdiction to enter a plea of not guilty on his behalf. To the extent that the prosecution relied upon provisions of the *Crimes Act 1900* (ACT) and the *Legislation Act 2000* (ACT) to assert that the Magistrate had a power to proceed with the hearing of the charge against him after entering a plea of not guilty on his behalf, the applicant submitted that there had been no proof that those enactments had been validly made.

- Issue 8 – Whether the applicant was under duress

The applicant submitted that he was clearly "under duress" at the time of his appearance before the ACT Magistrates Court because he had been told that if he did not attend, he would be arrested and brought before the Court. The other aspect of duress, which the applicant alleged, was that he was not given a proper opportunity to present his arguments relating to jurisdiction. The applicant submits that McWilliam AsJ erred in failing to determine that he was acting under duress in the proceedings before the Magistrate.

- Issue 9 – The applicant's request for the return or destruction of DNA samples

The applicant complained that he attempted to "record into the Court [R]egistry" an application to seek the return or destruction of property unlawfully taken from him and held by police, including but not limited to DNA samples. He complained that the court staff discriminated against him by refusing to accept for "recording and actioning" his application, thereby denying him a remedy. McWilliam AsJ observed that the applicant did not accept that DNA samples taken when he was in custody were lawfully obtained, and that he requested that those samples be returned. Her Honour said that this issue was separate from, and outside the scope of, the judicial review proceedings before her Honour. The decision which was the subject of the challenge before her Honour was the applicant's conviction, and whether DNA samples had been taken unlawfully from the applicant was outside the ambit of those proceedings. In the present appeal, the applicant seeks to challenge that determination.

- Issue 10 – Failure to give reasons

McWilliam AsJ accepted that neither immediately before nor after conviction did the Magistrate give reasons for finding the offence proved. Her Honour noted that the applicant conceded that he was not participating in the proceedings before the Magistrate and that he refused to accept the evidence. Her Honour was satisfied that although the Magistrate did not at the point of conviction give reasons for finding the offence proved, her Honour had effectively done so earlier in the hearing by explaining to the applicant what her reasoning would be if he did not challenge the witness' evidence, namely that the eye witness account of him using a mobile telephone while driving a motor vehicle would be accepted. Her Honour went on to say that in light of the simplicity of the charge brought, the clarity of the unchallenged evidence and the Magistrate's discussions with the applicant, and considering that her Honour had been able to readily discern the Magistrate's reasoning process from what the Magistrate said to the applicant, her Honour was not satisfied that there was any failure to fulfil the obligation to give reasons. The applicant submits that a mere recitation of evidence without any commentary as to why the evidence is said to lead to findings does not disclose the path of reasoning and does not amount to adequate reasons.

5. As I said, the above is not intended to be a comprehensive description or analysis of the matters raised by the applicant in his Notice of Appeal. The above brief description is provided to give context to the remainder of these reasons.

6. The application in proceeding referred to at [1] above seeks 23 orders. I do not propose to set out in full the application, but a brief summary of the orders sought is as follows:

    - orders compelling the production of "coram judice orders" from the ACT Magistrates Court in relation to the proceeding before it, and from the ACT Supreme Court in relation to the proceeding before McWilliam AsJ;
    - an order compelling the ACT Supreme Court to produce evidence that "it can fulfil the presumption that it is capable of producing a coram judice order as a Chapter Three (3) Court under the Commonwealth of Australia Constitution Act 1900 UK";
    - an order compelling the Director of Public Prosecutions for the ACT to provide evidence that "it has subject matter jurisdiction that is traceable to the Commonwealth of Australia Constitution Act 1900 UK";
    - an order that undertakings be provided prior to the hearing of the appeal in the ACT Court of Appeal that the participating judges will produce "a coram judice order that will be validated by the signatures of the judges and which will bear the coat of arms that the Court is executing judgment under";
    - a declaration that if the applicant as a "loyal subject of Her Majesty Queen Elizabeth ll under the Crown of the United Kingdom within the protection of the Commonwealth of Australia Constitution Act 1900 UK were exposed to a coram non judice 'court' that it would be evidence of an attempt to pervert the course of justice and/or be evidence of an attempt to pervert the judicial power";
    - an order that undertakings be provided prior to the hearing of the appeal in the ACT Court of Appeal that the participating judges have "taken oaths with explicit reference to Her Majesty Queen Elizabeth ll under the Crown of the United Kingdom as required under Section 42 of the Commonwealth of Australia Constitution Act 1900 UK and under Clause 2 of the Commonwealth of Australia Constitution Act 1900 UK";
    - an order that undertakings be provided prior to the hearing of the appeal in the ACT Court of Appeal that the participating judges "will be sitting within the jurisdiction conferred under s 76 of the Commonwealth of Australia Constitution Act 1900 UK", and will be sitting as a Court of competent jurisdiction;
    - an order that the Attorney General for the ACT attend the hearing of the appeal to assist the prosecution to demonstrate the validity or otherwise of the legislation upon which the prosecution relies;
    - an adjournment of the proceedings in the event that it is necessary to issue notices under s 78B of the Judiciary Act *1903* (Cth) (the Judiciary Act) in order to give the Court the opportunity to demonstrate that Parliament had "the capacity within the Commonwealth of Australia Constitution Act 1900 UK to include 78B within the Judiciary Act and that the parliament did then properly pass that amendment in strict compliance with the Commonwealth

of Australia Constitution Act 1900 UK to provide it with subject matter jurisdiction";

- a declaration that the ACT Court of Appeal cannot compel the applicant as a loyal subject of the Queen "under the Crown of the United Kingdom within the protection of the Commonwealth of Australia Constitution Act 1900 UK to operate in a jurisdiction that is foreign to the foundation of law, namely the Commonwealth of Australia Constitution Act 1900 UK";
- a declaration that the alleged legislation that the prosecution is relying on is not applicable to a loyal subject of the Queen;
- a declaration that no loyal subject of the Queen can be exposed to any form of discrimination as prescribed in s 117 of the Constitution;
- a declaration that "upon default for failure to satisfy discovery to establish jurisdiction, the prosecution is estopped under the doctrine of laches from ever later attempting to satisfy discovery to establish jurisdiction";
- a declaration that the ACT Court of Appeal "take mandatory judicial Notice of and take as Res Judicata any successful High Court precedent relating to the requirement for the establishment of subject matter jurisdiction", and that it take judicial notice of the decision in *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369;
- a declaration that upon a failure by the prosecution to demonstrate that all legislation that they rely upon does not trace back to the Constitution and the Queen, he has a right to rely on the "irrefutable presumption" that the alleged legislation holds no authority;
- a declaration that the questioning of the existence of subject matter jurisdiction is neither frivolous nor unknown to law;
- a declaration that the Courts of the ACT are all vested with federal jurisdiction as created under s 71 of the Constitution;
- a declaration that the Courts of the ACT are bound by the Constitution; and
- in the alternative, if all of the above orders and declarations are not made, an order striking out "with prejudice" the original charges in the ACT Magistrates Court "with the provision of equitable compensation".

7. At a preliminary level, I make two comments. According to the Butterworth's Australian Legal Dictionary, 1997 edition, the Latin phrase "coram judice" means "before a judge"; unsurprisingly, "coram non judice" means "not before a judge". It is tolerably clear that in those orders where the applicant seeks a "coram judice order", he is seeking an order compelling the court or judicial officer to which the order is directed to produce evidence that they had jurisdiction to hear or otherwise deal with the charges against him. At the hearing of the application on 18 March 2020, the applicant was unable to identify any legislation or prior authority supporting the proposition that such an order is recognised at law. Secondly, many of the orders sought by the applicant are in the nature of final relief and are not matters appropriate to be dealt with on an interlocutory basis.

8. At a more fundamental level, as a single judge constituting the ACT Court of Appeal, my power to hear and decide matters before the Court of Appeal is limited by s 37J of the Supreme Court Act *1933* (ACT) (Supreme Court Act), which provides:

> **37J Appeal court constituted by single judge**
>
> (1) The Court of Appeal may be constituted by a single judge for hearing and deciding any of the following matters (***incidental matters***) in relation to an appeal:
>
> (a) leave or special leave to appeal;
>
> (b) extension of time to institute an appeal;
>
> (c) leave to amend the grounds of an appeal;
>
> (d) amendment or stay of an order of the court from which the appeal is brought;
>
> (e) suspension of the operation of an order to which the appeal relates;
>
> (f) including, removing or substituting a party;
>
> (g) a consent order disposing of the appeal (including an order for costs);
>
> (h) dismissal of an appeal or other proceeding for want of prosecution or for any other reason prescribed under the rules;
>
> (i) dismissal of an appeal or other proceeding on the application of the appellant or other applicant;
>
> (j) directions about the conduct of the appeal (including directions about use of written submissions and limiting time for oral argument);
>
> (k) any other question of practice and procedure in the Court of Appeal;
>
> (l) costs and other matters incidental to a matter mentioned in paragraphs (a) to (k).
>
> (2) The rules may provide for incidental matters to be dealt with without an oral hearing, subject to any conditions prescribed under the rules.
>
> (3) The rules may provide that the jurisdiction and powers of the Court of Appeal may be exercised by a single judge in particular kinds of proceedings.

9. The only possible paragraph of s 37J(1) which could apply is (k), "any other question of practice and procedure in the Court of Appeal". The phrase "practice and procedure" is not defined in the Supreme Court Act and accordingly it is necessary to look to previous authorities which may bear upon the subject. In *Minister of State for the Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459, Latham CJ said:

> In *Payser v Minors* [(1881) 7 QBD 329 at 334] Lush LJ said that the term "practice" denoted the mode of proceeding to enforce a right as distinguished from the law which gives or defines the right, and that he took "practice" and "procedure", as applied to that subject, to be convertible terms. "Practice" in the common or ordinary sense of the word denotes "the rules that make or guide the *cursus curiae*, and regulate the proceedings in a cause within the walls or limits of the Court itself" [*Attorney-General v Sillem* [(1864) 10 HLC 704 at 723 per Lord Westbury].

10. In *Byrnes v Barry* [2004] ACTCA 24; 150 A Crim R 471, French J (as his Honour then was) said, at [67]:

> The ordinary meaning of the word 'practice' in its application to the law is defined in the Second Edition of the Oxford English Dictionary (1989) as 'the method of procedure used

in the law-courts'. This refers back to a definition in Tomlins Law Dictionary of 1809 of 'Practice of the Courts' as:

> ...the form and manner of conducting and carrying on suits or prosecutions at Law or in Equity, civil or criminal ...; according to the principals of Law and the rules laid down by the several courts.

The definition applicable to the law fits within the wider concept of 'practice' as:

> A habitual way or mode of acting; a habit, custom; (with pl.) something done constantly...

11. On an appeal from a decision of a single judge of the ACT Supreme Court to the ACT Court of Appeal, the Court must have regard to the evidence given in the proceeding out of which the appeal arose: s 37N(1), Supreme Court Act. The ACT Court of Appeal may, however, receive further evidence: s 37N(3), Supreme Court Act. Any application that the ACT Court of Appeal receive further evidence on appeal is governed by r 5606 of the *Court Procedure Rules 2006* (ACT) which requires the application to be made on the hearing of the appeal and prescribes the procedure to be followed. The difficulty with reading the present application as an application to adduce further evidence is that it is not framed as such, that is, it does not seek an order that any of the matters referred to in the application be received as further evidence on the appeal. In addition, the applicant himself does not know what any such documents would contain, even if they were to be produced. While I appreciate that the applicant is not a lawyer, that does not relieve him of the responsibility of complying with the law and practice of the Court regarding applications. When a lay person assumes the responsibility of conducting a legal proceeding on their own behalf, they assume the responsibility of understanding so much of the law and the practices of the Court as will enable them to properly conduct the proceeding.

12. To the extent that the applicant wishes to assert that the onus of proving the validity of legislation underpinning the charge against him lay on the prosecution, and that the prosecution had not satisfied that onus in the proceeding in the ACT Magistrates Court, no further evidence is necessary. He is either right or wrong about those assertions. I dare say that the respondent to the appeal would embrace the proposition that it did not adduce evidence of the validity of such legislation in the proceeding before the Magistrate, but it would argue it had no obligation to do so.

13. It appears that the applicant either wishes to challenge the jurisdiction of the ACT Court of Appeal to hear his appeal, to challenge the right of individual judges to sit on the appeal, or at the least to receive undertakings from the Court as to certain matters. The applicant is entitled to raise these issues before the ACT Court of Appeal on the hearing of the appeal.

14. The applicant has identified no power which may be exercised by the ACT Court of Appeal which would permit it to require the Attorney-General to attend to assist the respondent. How any such assistance could facilitate the resolution of the narrow issues raised on the appeal is not obvious. Similarly, the applicant has not identified any power which may be exercised by the Court to require the ACT Director of Public Prosecutions to provide evidence of his entitlement, or that of his office, to act on behalf of the respondent in the proceeding before the Magistrate or in the present appeal.

15. Many of the declarations sought by the applicant anticipate the submissions he apparently intends to put before the ACT Court of Appeal. He wishes to argue that legislation relied upon by the prosecutor in the prosecution has not been proven to be valid. He also wishes to argue that it has not been proved that the Magistrate who heard the charge was validly appointed, or that those who conducted the prosecution were entitled to do so. So be it. He may argue those matters if he chooses, and he will either be successful or unsuccessful. Seeking declaration on these matters in advance of the hearing of the appeal is not a matter of practice and procedure.

16. The applicant has not identified any power residing in this Court, constituted by a single judge and in advance of the appeal, to simply strike out the charge which was before the ACT Magistrates Court and to award him damages.

17. I decline to make any of the orders sought by the applicant on the grounds:

    (a) I am not satisfied that as a single judge I have power to make the order pursuant to s 37J of the Supreme Court Act;

    (b) in any event, the applicant has not identified any power which may be exercised by the ACT Court of Appeal to make the orders sought; and

    (c) even if I am wrong regarding the above two reasons, it is inappropriate to make the orders sought in advance of the hearing of the appeal.

Orders

18. The application will be dismissed.

19. The parties have liberty to file any application regarding costs within 14 days of publication of these reasons.

I certify that the preceding nineteen [19] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Burns.

Associate: Georgina Flaherty

Date: 22 April 2020