
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CRIMINAL

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

CORAM : TOTTLE J

HEARD : 24 AUGUST 2023

DELIVERED : 24 AUGUST 2023

FILE NO/S : SJA 1015 of 2023

BETWEEN : MICHELE KWOK
Appellant

AND

DARYL GORDON
Respondent

ON APPEAL FROM:

Jurisdiction : MAGISTRATES COURT OF WESTERN
AUSTRALIA

Coram : MAGISTRATE A MAUGHAN

File Number : JO 10600/2022

Catchwords:

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:

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

Result:

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

Category: B

Representation:

Counsel:

Appellant : In Person
Respondent : Ms J Kasbergen

Solicitors:

Appellant : In Person
Respondent : State Solicitor's Office

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

Kelly v Fiander [2023] WASC 187

TOTTLE J:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JM
Associate to the Honourable Justice Tottle

24 AUGUST 2023