SUPREME COURT OF QUEENSLAND

CITATION:	*Harvey v Queensland Police Service & Director of Public Prosecutions (Queensland)* [2019] QCA 5
PARTIES:	**HARVEY, Barry** (applicant) **v** **QUEENSLAND POLICE SERVICE** **DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)** (respondent)
FILE NO/S:	CA No 28 of 2018 DC No 402 of 2017 DC No 683 of 2017 DC No 684 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane – [2017] QDC 310 (Smith DCJ)
DELIVERED ON:	1 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2018
JUDGES:	Morrison and Philippides and McMurdo JJA
ORDER:	**Application for extension of time refused.**
CATCHWORDS:	CRIMINAL LAW – APPLICATION FOR EXTENSION OF TIME TO APPLY FOR LEAVE TO APPEAL – DELAY – where the applicant was convicted of driving under the influence of liquor, public nuisance and serious assault – where, in relation to the conviction of driving under the influence of liquor, the proposed grounds of appeal alleged error in the finding that the applicant was driving, error in the finding that the blood sample taken from the applicant was taken within three hours of the applicant's driving – where the applicant also alleged error in not accepting the applicant's evidence and failing to apply *He Kaw Teh v The Queen* (1985) 157 CLR 523 – where the applicant further alleged error in allowing the certificate of blood analysis to be admitted into evidence – where the applicant alleged error in not finding that the magistrate was biased – where, in relation to the public nuisance charge, the applicant alleged error in the finding that "people moved and were disturbed" – where, in relation to the serious assault charge, the applicant alleged error in not accepting the applicant's evidence regarding a "Ptooey" gesture to

	a security guard – whether good reason for delay – whether it is in the interests of justice to grant an extension of time
	District Court of Queensland Act 1967 (Qld), s 118
	McDonald v Queensland Police Service [2018] 2 Qd R 612; [2017] QCA 255, applied *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, applied
COUNSEL:	The applicant appeared on his own behalf S J Bain for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have read the reasons of Philippides JA and agree with those reasons and the order her Honour proposes.

[2] **PHILIPPIDES JA:**

Background

[3] Following a summary trial in the Brisbane Magistrates Court, the applicant was convicted of three charges arising out of events that occurred on 2 January 2016. The first offence was one of driving under the influence of liquor, for which he was fined $1,500 and disqualified from holding or obtaining a driver's license for nine months. The second was of causing a public nuisance, for which he was fined $1,000. The third was an offence of serious assault of a police officer, for which he was fined $1,800.

[4] The applicant unsuccessfully appealed his convictions and sentence to the District Court pursuant to s 222 of the *Justices Act* 1886 (Qld).[1] The applicant now seeks an extension of time in which to file an application for leave to appeal against the decision of the District Court judge (Smith DCJ) pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld) (the Act).

The application for an extension of time

[5] The application for an extension of time within which to file the application for leave to appeal was some four weeks out of time.[2] In considering whether to grant an extension of time, the Court will examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension, which may involve some assessment of whether the appeal seems to be a viable one.[3]

[6] The reason the applicant gave for the delay was the closure of the registry over the two week Christmas period. Clearly that does not account for the whole period of the delay. He also submitted that he suffered from post-traumatic stress disorder which

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[1] Harvey v Queensland Police Service [2017] QDC 310 (Reasons) at [14]-[33].
[2] The applicant had until 19 January 2018 to file a notice of application for leave to appeal, Uniform Civil Procedure Rules 1999 (Qld), r 748.
[3] R v Tait [1999] 2 Qd R 667.

made completing the application very difficult and that the QPS had possession of his files and devices up to 2 February 2018. Those explanations as to delay were not supported by objective evidence. But even if those contentions were accepted, the application for an extension should, in my opinion, be refused as the applicant has not explained how those matters impacted on the additional delay. Further, and importantly, a provisional assessment of the strength of the applicant's appeal in this case does not demonstrate that it is in the interests of justice to grant the extension.

[7] The principles which apply to appeals to the Court of Appeal from judgments of the District Court in its appellate jurisdiction were recently dealt with comprehensively in *McDonald v Queensland Police Service*.[4] The Court's discretion under s 118(3) of the Act, although unfettered, will not be exercised lightly, given that the applicant has already had the benefit of two judicial hearings. Mere error is not ordinarily, by itself, sufficient to justify the granting of leave to appeal. Rather, leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected.

[8] The grounds set out in the application are as follows:

> "DC Judge Smith got it wrong when he misapplied Swaffield. The prosecution admitted the illegally obtained Certificate of Analysis would prejudice me and so it was inadmissible ab initio. Judge Smith got it wrong when he failed to rule inadmissible the evidence of the Ambulance Officer who said he heard me tell the corrupt Officer Lisa Thompson I was driving was hearsay evidence. Judge Smith got it wrong when he failed to exclude the inconsistent evidence that could not identify me as driving the vehicle in accordance with He Taw Keh (1985) 157 CLR 523. Judge Smith got it wrong when he ruled I should have put to the prosecution witnesses my drinking after the accident under Browne and Dunne because I can only xexamine (sic) the witnesses on the evidence they gave and cannot adduce new evidence and because there was no contrary evidence I should be granted the benefit of the evidence under He Taw Keh (1985) 157 CLR 523. Judge Smith got it wrong when he said people moved and were disturbed and that my conduct was not emergent and I was not under arrest and got it wrong not finding that I made a ptoohey (sic) gesture to a dog security guard that tried to kill me in an MMA choke hold."

[9] The applicant's outline expanded on those proposed grounds and, adopting that document, the applicant's complaints may be distilled to the following general contentions that the District Court judge erred:

1. In relation to the UIL offence:
   (a) in finding that the applicant was driving at the requisite time;
   (b) in finding that the blood sample taken from the applicant was taken within three hours of the applicant's driving;
   (c) in not accepting the applicant's evidence and failing to apply *He Kaw Teh v The Queen*;[5]

[4] [2018] 2 Qd R 612.
[5] (1985) 157 CLR 523.

(d) in allowing the admission of the Certificate of Blood Analysis (the BAC); and

(e) in not finding that the magistrate was biased.

2. In relation to the public nuisance offence, in finding "people moved and were disturbed" in what was alleged as the public nuisance.

3. In relation to the serious assault offence, in finding the applicant was under arrest and in not accepting the applicant's evidence regarding a "ptoohey (sic) gesture" to the security guard.

[10] For the reasons that follow, the applicant's grounds of complaint, for which leave to appeal is sought, do not demonstrate error nor that injustice has been suffered. Accordingly, the application for an extension of time in which to appeal should be refused.

The evidence

[11] The following is a summary of the evidence. On 2 January 2016, a vehicle registered to the applicant came to be involved in a collision on Biarra Street, Deagon, as a result of which it came to rest on its passenger side. A witness who lived on Biarra Street, Mr Anderson, gave evidence of hearing a very loud bang at around 10.00 to 10.30 pm.[6] Another witness who also lived on that street, Mr O'Donoghue, also heard the bang and gave the time of the bang as close to 10.00 pm.[7] He went out of his house and to the applicant's vehicle, which did not take him long.[8] When he arrived at the vehicle, the applicant was the only person inside and it took about 10 minutes to get him out.[9] When he first got to the vehicle, the applicant was sitting on the passenger door.[10] The applicant was concerned he had hit someone.[11] He asked whether the police had been called and said something like "oh shit" or "I'm fucked"[12] when told they were on their way.

[12] Paramedics from Queensland Ambulance were also called to the scene and the applicant was transported to the Prince Charles Hospital.[13] Evidence was given by the advanced care paramedic, Mr Jay, who attended to the applicant. He said that the applicant admitted to driving and to clipping a car on the side of the road, causing his car to roll.[14] There was a police escort because the applicant's behaviour was quite unusual and quite aggressive.[15] Once they got to the triage area, the applicant went "off again".[16]

[13] The evidence of the applicant's conduct alleged to constitute public nuisance was given by Plain Clothes Constable Thomas, who attended at the hospital and also by Mr McDermott, a security officer at the hospital, and by Dr Scott MacKenzie, who was present at the hospital. They gave evidence that the applicant behaved in a manner

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[6] Affidavit of C M Brown sworn 10 August 2018, ex A at 13.017.
[7] Affidavit Brown, ex A at 133.7.
[8] Affidavit Brown, ex A at 133.32.
[9] Affidavit Brown, ex A at 133.41.
[10] Affidavit Brown, ex A at 141.34.
[11] Affidavit Brown, ex A at 139.6.
[12] Affidavit Brown, ex A at 139.12.
[13] Affidavit Brown, ex A at 167.43.
[14] Affidavit Brown, ex A at 167.20.
[15] Affidavit Brown, ex A at 157.23.
[16] Affidavit Brown, ex A at 157.29.

that was belligerent, abusive,[17] angry,[18] making derogatory comments,[19] making accusations towards police[20] and calling security officers "cunts".[21] Footage from the hospital and a body worn camera capturing the incident were tendered in evidence. The applicant was thereupon arrested for public nuisance by Constable Thomas.[22]

[14] Later, Officer Peter Griffiths attended the hospital, by which time the applicant had been handcuffed to a hospital bed. His evidence was that the applicant went into "a tirade of abuse" and then sucked his cheeks in and spat at him.[23] He did not recall if any spit hit him.[24] Body worn footage, which recorded the events, was tendered into evidence.

[15] A certificate of analysis was also tendered, by which it was established that Dr Samota took a specimen of blood from the applicant at 11.40 pm on 2 January 2016 and that the applicant had a BAC of 0.15.

[16] The applicant gave evidence. He said he had been worried about his son and had been drinking and that he was a passenger in his vehicle at the relevant time. He could not recall who was driving.[25] He maintained that, while he was at the hospital, he was not under arrest.[26] People were being aggressive towards him and he was being aggressive back.[27] He said he was told he would be arrested if he did not stop and therefore he went to leave. He was then arrested and his breathing was restricted.[28] That was after he stopped the "behaviour".[29] Regarding the serious assault charge, the applicant maintained that there was no spit but rather he simply made a gesture.[30]

The District Court decision

[17] In relation to the UIL offence, Smith DCJ found that the magistrate was entitled to find beyond reasonable doubt that the applicant was the driver of the vehicle and that he would have exercised the discretion in the same way. The possibility that the applicant had consumed liquor after the crash of the vehicle could be excluded beyond reasonable doubt. His Honour was not satisfied that the magistrate had erred in exercising his discretion to admit the BAC, notwithstanding breaches of s 80 of the *Transport Operations (Road Use Management) Act* 1995 (Qld) (the TORUM). Further, his Honour also found that, even if the BAC were to be excluded, the evidence established beyond reasonable doubt that the applicant was under the influence of liquor at the relevant time. His Honour rejected the contention that the magistrate was biased and concluded that the conviction was justified.

[18] In relation to the public nuisance offence, having considered all of the evidence and having watched the videos, his Honour concluded that the magistrate was correct in finding the charge proved beyond reasonable doubt and that the defence of emergency under s 25 of the *Criminal Code* (Qld) (the Code) had been disproved.

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[17] Affidavit Brown, ex A at 322.44.
[18] Affidavit Brown, ex A at 198.40.
[19] Affidavit Brown, ex A at 199.4.
[20] Affidavit Brown, ex A at 198.41.
[21] Affidavit Brown, ex A at 199.27; 323.1.
[22] Affidavit Brown, ex A at 207.37.
[23] Affidavit Brown, ex A at 336.26.
[24] Affidavit Brown, ex A at 336.32.
[25] Affidavit Brown, ex A at 347.15.
[26] Affidavit Brown, ex A at 348.35.
[27] Affidavit Brown, ex A at 348.37.
[28] Affidavit Brown, ex A at 349.4.
[29] Affidavit Brown, ex A at 349.45.
[30] Affidavit Brown, ex A at 349.31.

[19] In relation to the serious assault offence, his Honour held that the police had been entitled to arrest the applicant for public nuisance and detain him for the purpose of taking a blood sample. His Honour also found that Officer Griffiths was acting in the execution of his duty when the applicant committed assault by:[31]

> "… a bodily act or gesture to threaten to apply force of any kind to the person and other without the other's consent under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose. In my view there was a clear spitting motion with the head moving forward towards the police officer who was in the immediate vicinity. In my view this was an attempt or threat to apply force and the police officer would have apprehended this."

[20] His Honour held that self-defence and defence of emergency had been excluded beyond reasonable doubt and mistake of fact had no application.

[21] His Honour also found that the punishments imposed by the magistrate for the offences were well within the sentencing range and appropriate.

Proposed grounds of appeal

The UIL offence

Error in finding that the applicant was driving

[22] The applicant argued that there was an error in finding that he was driving at the requisite time and that the evidence did not allow that conclusion beyond reasonable doubt.

[23] The applicant submitted that Smith DCJ erroneously followed the magistrate in relying on evidence that the applicant was the owner of the vehicle to establish that he must have been driving it. It was argued that the arresting officer proffered no evidence that the applicant was or said that he was driving the vehicle. The only person who stated that the applicant said he was driving at any time was the ambulance officer, Mr Jay, who gave evidence of the applicant's admission of having been driving. The applicant argued Mr Jay's evidence was hearsay as he admitted he only asked the applicant medical questions and "allegedly heard [the applicant] say it to the arresting officer".[32] That evidence should not have been admitted nor relied upon. It was argued that it was the only evidence referred to in his Honour's reasons, other than ownership of the vehicle, used to establish that the applicant was the driver.

[24] Further, it was argued by the applicant, that the onus was on the prosecution to prove that the applicant was driving, at the requisite time, not on the applicant to prove he was not the driver. His Honour "should have ruled that the Prosecution were not able to positively identify [the applicant] as the driver of the vehicle involved in the crash".[33] The applicant argued that the only people who saw the applicant in the vehicle "only saw [him] in the passenger seat and said in evidence there could have been someone else in the car as it was too dark to tell and that they came out about 10 minutes after hearing a bang, giving the driver of the car plenty of time to flee".[34]

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[31] Reasons at [84].
[32] Applicant's outline of argument at [e].
[33] Applicant's outline of argument at [e].
[34] Applicant's outline of argument at [e].

The applicant submitted that his uncontested evidence was that someone else drove the car and he was the passenger and, further, that both the driver and passenger's airbags went off. This was said to prove on the balance of probabilities (which is the applicant's evidentiary burden) that there was a driver and a passenger in the car. Relying on *He Kaw Teh v The Queen*,[35] the applicant argued he should be "given the benefit of uncontested or conflicting evidence". His Honour should have quashed the conviction on the ground that there was "no evidence beyond a reasonable doubt that he was driving the vehicle at any material time for the offence to be proven".

[25] As the respondent submitted, the finding that the applicant was the driver was plainly open given the evidence of Mr O'Donoghue and the admission the applicant made to Mr Jay. His Honour was entitled reject the evidence of the applicant, who could not, or refused to say who the driver was, or how that person came to be driving the vehicle. Further, as his Honour also observed, at no stage in the body camera footage with audio did the applicant allege he was not the driver. His Honour put the applicant's evidence to one side and considered the evidence of those first on the scene who attended within minutes of hearing a bang.[36] In any event, it is also to be observed that his Honour's finding that the applicant was driving at the time of the crash did not depend on the evidence of the admission made to Mr Jay. His Honour expressly found that, even if that evidence should have been excluded, the other circumstances of those attending almost immediately after and finding the applicant alone at the vehicle in the street where he lived would justify the conclusion that the applicant was the driver beyond reasonable doubt.[37] Smith DCJ was not obligated to accept the applicant's evidence and there was compelling evidence that the applicant was the driver at the relevant time. There was evidence to support the finding of fact made and the finding was not unreasonable.

Error as to when the blood sample was taken and the finding by Smith DCJ

[26] The applicant also argued that his Honour erred in finding that the blood sample was taken within three hours of the applicant's driving. It was submitted that the prosecution was not able to positively identify the time of the alleged offence to meet the three hour rule. Further, neither witness called by the prosecution looked at a timepiece and only estimated the time on the basis of what they remembered doing on the night some 11 months previously. The ambulance officer, Mr Jay, placed the event at after midnight on 2 January. The magistrate's decision, with which Smith DCJ agreed, was biased. On the basis of *He Kaw Teh*, the applicant should be given the benefit of uncontested or conflicting evidence. Moreover, the magistrate and judge erred in not accepting some of the applicant's evidence because it was not put to the prosecution witnesses, particularly his evidence that he drank straight spirits after the crash. The applicant was not required to put any evidence to anybody, and so Smith DCJ misapprehended that *Browne v Dunn* applied.

[27] The applicant misconceives *He Kaw Teh*. It does not support the proposition the applicant contends for. His Honour was entitled to find that there was clear evidence that the crash occurred around 10.00 to 10.30 pm with the result that the blood sample was taken within the prescribed time frame. Further, the finding that the possibility that the applicant had consumed alcohol after the crash was able to be excluded beyond a reasonable doubt for the reasons stated by his Honour.[38]

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[35] (1985) 157 CLR 523.
[36] Reasons at [45]-[46].
[37] Reasons at [47].
[38] Reasons at [48].

Admission of BAC

[28] Turning to the complaints raised in relation to the UIL offence, the first matter raised by the applicant as a proposed ground of appeal was the contention of error in allowing the certificate of blood analysis to be admitted into evidence.

[29] Smith DCJ found that the request for the blood specimen was made under s 80(8)(f) or s 80(8C) of the TORUM and the specimen was taken under s 80(9B) of the TORUM. His Honour also found that s 80(10C) of the TORUM required the health care professional to provide the applicant another specimen of his blood and that there was non-compliance with this section.[39] However, as mentioned, his Honour considered that the discretion to permit the BAC to be admitted into evidence was properly exercised. In addition, his Honour considered whether there was a breach of s 80(16A) of the TORUM, which required the sample to be delivered in the way prescribed under a regulation. While not convinced that there was a breach, his Honour concluded that, even if there was, it was correct not to exclude the evidence.[40]

[30] The applicant referred to the acknowledgment by the police prosecutor[41] that the evidence of the BAC was prejudicial to the applicant. It was inadmissible as Smith DCJ failed to properly apply *R v Swaffield*[42] and *Em v The Queen*[43] in that having been "declared or found to be unfair, or in the words of the police prosecutor, prejudicial", there was no discretion whatsoever to allow the admission of the BAC and reliance on it by the prosecution. In that regard, before the magistrate, the applicant relied on the following paragraph from *Em* (from the judgment of Gummow and Hayne JJ) listing propositions relevant to considering whether some out of court admissions to the police ought to be excluded under s 90 of the *Evidence Act* (NSW):[44]

> "Fourthly, the evidence was not to be excluded under s 137. It was not submitted that the probative value of the evidence was 'outweighed by the danger of unfair prejudice to the defendant'. If that imbalance had been demonstrated, the trial judge would have been bound to exclude the evidence."

[31] It was also argued that Smith DCJ erred in "ignoring the supporting evidence" that there was a breach of s 80(16A) of the TORUM which required the sample to be delivered in the way prescribed under a regulation and that the certificate ought to have been excluded irrespective of its prejudicial nature.

[32] The applicant's argument that because the prosecuting police officer admitted there was some prejudice in the admission of the BAC, it followed that there was no discretion to be exercised as to its admission misconceives the law. There remains a discretion to exclude evidence admissible as a matter of law, which has been obtained unlawfully or improperly. In such cases, the illegality or impropriety may involve an element of unfairness to the accused and thus affect the quality of the evidence. Alternatively, although not affecting the quality of the evidence, the discretion remains to exclude evidence wrongly obtained to mark the Court's disapproval of the illegality.[45] As the respondent submitted, having found illegality,

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[39] Reasons at [50].
[40] Reasons at [52].
[41] Exhibit A at 254.
[42] [1998] HCA 1.
[43] (2007) 232 CLR 67.
[44] (2007) 232 CLR 67 at [102].
[45] R v Ireland (1970) 126 CLR 321; Bunning v Cross (1978) 141 CLR 54.

his Honour properly proceeded to consider the principles in *Bunning v Cross*[46] as to the exercise of the discretion and concluded that no error has been demonstrated in the exercise of that discretion. Smith DCJ was correct to approach the issue of the discretion to exclude the BAC as his Honour did. Relevant to the inquiry as to whether the evidence of the certificate ought to be excluded were the following factors considered by his Honour. The unlawfulness was not deliberate in the sense that there was no setting out to thwart the legislative prescriptions, no trickery or subverting of rights. The failure to provide a sample was a mere oversight. The reliability of the certificate was not seriously challenged. His Honour also found that, in any event, even if the BAC ought to have been excluded and there was error in its admission by the magistrate, given the other evidence going to the indicia of intoxication, the conclusion that the applicant was under the influence of alcohol could still be made beyond a reasonable doubt.

Bias of the magistrate

[33] The applicant further contended that Smith DCJ erred in not finding that the magistrate was biased. It was contended that:[47]

> "[His Honour] should have ruled that [the magistrate] perverted the course of justice by at times constructing interpretations of TORUM to suit the prosecution case when he failed to follow the correct rule of statutory interpretation in relation to Section 80(10C) in the voir dire. His vacillation on his exercise of power of statutory interpretation, in the favour of the prosecution to help their case is demonstrative of actual bias."

[34] In rejecting the contention of bias, his Honour concluded, after having considered the transcript and the applicant's submissions, that there was "no evidence of ostensible or actual bias".[48] My own review of the transcript of the hearing before the magistrate and Smith DCJ accords with that conclusion.

The offence of public nuisance

[35] The applicant's contention that there was error in finding that "people moved and were disturbed" relating to the public nuisance and that the applicant's conduct was not emergent has no merit. The applicant's submission that there was merely a lively conversation but no disruption or disturbance is without merit. His Honour's finding,[49] after having considered all the evidence and the video footage was that the applicant "was abusive, obnoxious, was swearing at people, was disturbing the peace in the hospital, people were moving away from the area and were staring at the situation".[50] That finding and the finding that each element of the offence had been proved was supported by evidence and was plainly not an unreasonable finding.

The offence of serious assault

[36] The applicant withdrew an argument that he was not charged with serious assault under the Code. The applicant's remaining argument concerning the serious assault

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[46] (1978) 141 CLR 54.
[47] Applicant's outline of submissions at [d].
[48] Reasons at [62].
[49] Reasons at [67].
[50] Reasons at [67].

charge, that his Honour erred in not finding that the applicant merely made a "ptoohey (sic) gesture" to a security guard who tried to "kill" the applicant in a chokehold lacks substance. The contention that the applicant did not attempt to spit, but just perform a gesture, was rejected by the judge on his own review of the evidence of Officer Griffiths and the video evidence, his Honour found that[51] there "was a clear spitting motion with the head moving forward towards the police officer who was in the immediate vicinity" such that "there was an attempt or threat to apply force and the police officer would have apprehended this". In that regard, his Honour found there was relevantly "a bodily act or gesture to threaten to apply force of any kind to the person and other without the other's consent under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose". There can be no dispute of the finding that the police officer was acting in the execution of his duty, having arrested the applicant for public nuisance and detained him for the purpose of taking a blood sample. Any complaint as to the judge's finding that the offence had been made out is ill-founded.

Order

[37] The application for an extension of time should be refused. Even accepting the reasons for delay, there is no merit in the matters sought to be raised in the proposed grounds of appeal in relation to the applicant's conviction of the offences.

[38] **McMURDO JA:** I agree with Philippides JA.

[51] Reasons at [84].