SUPREME COURT OF QUEENSLAND

CITATION:	*Millar v Queensland Police Service* [2019] QCA 211
PARTIES:	**MILLAR, Andrew John** **(applicant)** **v** **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	CA No 329 of 2018 CA No 155 of 2018 DC No 3602 of 2017 DC No 3601 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane – [2018] QDC 219 (Rosengren DCJ) District Court at Brisbane – Unreported, 28 March 2018 (Ryrie DCJ)
DELIVERED ON:	11 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2019
JUDGES:	Gotterson and Philippides and McMurdo JJA
ORDERS:	**In each application:** **1. Application for leave to appeal refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – where the applicant was convicted in the Magistrates Court of various offences – where the applicant's appeals were dismissed by the District Court – whether leave to appeal against the decisions of the District Court should be granted – whether there is a reasonable argument that there is any error to be corrected
COUNSEL:	The applicant appeared on his own behalf D Balic for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** The applicant, Andrew John Millar, has applied for leave pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld) to appeal to this Court against two decisions given by different judges of the District Court in

two separate matters involving the applicant. In one of those decisions the subject of CA No 329/18, given on 7 November 2018, a judge of the District Court quashed a conviction for an offence of stealing but otherwise dismissed the appeal as it related to convictions for two other offences. In the other decision, the subject of CA No 155/18 which was given on 28 March 2018, a judge of the District Court ordered the applicant's appeal be dismissed.

[2] Both applications were heard on the same day. I propose to deal with them in the order in which they were addressed by the applicant at the hearing.

CA No 329/18

[3] On 28 August 2017 in the Magistrates Court at Brisbane, the applicant was found guilty on one charge of entering premises and committing an indictable offence, one charge of stealing and one charge of fraud by dishonestly obtaining property from another.

[4] It was alleged against the applicant that on 9 February 2017, he had entered the premises of Mr Daniel Van Hoof-Harkin and committed at these premises an indictable offence, namely, stealing a bicycle that belonged to Mr Van Hoof-Harkin. It was further alleged that between 9 and 19 February 2017, the applicant dishonestly obtained a sum of money from Mr Richard Weise by selling Mr Van Hoof-Harkin's bicycle to Mr Weise.[1]

[5] Mr Van-Hoof Harkin gave evidence at the hearing in the Magistrates Court. He said that on 9 February 2017, he reported to police that his bicycle, an Avanti Giro bicycle with the serial number V119K00042, had gone missing from his garage in a residential complex in Taringa. He had last seen his bicycle in his garage when he left his home at approximately 7 am that day. When he returned home that evening, he noticed his garage door was slightly ajar and appeared as if it had been forced open in some way.[2]

[6] Two weeks later, Mr Van-Hoof Harkin noticed his Avanti bicycle was advertised for sale on Gumtree by a second-hand bicycle shop owned and operated by Mr Weise. Mr Van Hoof-Harkin went to the shop the following day to identify his bicycle and confirmed with Mr Weise that it was his.[3]

[7] Mr Weise also gave evidence at the hearing. His evidence was that he had bought Mr Van Hoof-Harkin's bicycle from the applicant, from whom he had previously purchased bicycles.[4] Mr Weise said that, on 10 February 2017, he met with the applicant in a side street at the back of the Rocklea Hotel at a little past 2 pm and purchased the Avanti bicycle from him for $200.[5] Mr Weise said that he completed a Seller's Statement for this transaction,[6] but did not include the purchase in his Transaction Register, as he ordinarily would, because he was very busy that week.[7]

[8] Mr Weise testified that he met with the applicant again on 18 February 2017, after the latter had telephoned him to arrange a meeting to sell him further bicycles.

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1 AB 3-9.
2 AB 24 l39 – AB 26 l23.
3 AB 26 l42 – AB 27 l8; AB 33 ll11-41.
4 AB 47 l22 – AB 48 l17.
5 AB 48 l23 – AB 49 l38; AB 60 ll25-32.
6 AB 68 ll5-9.
7 AB 58 ll20-27.

According to Mr Weise, the applicant met him on this date in a side street near the Holland Park Hotel. At this meeting, Mr Weise said that the applicant asked him to record the previous purchase of the Avanti bicycle in the Transaction Register with two other bicycles that he was going to purchase from the applicant that day. Mr Weise said he complied with the applicant's request and "screwed up" the Seller's Statement that was completed at the meeting on 10 February 2017.[8]

[9] Next, they both filled out information on a Seller's Statement dated 18 February 2017. Mr Weise said that the applicant wrote the description of the bicycles and signed the statement.[9] That Seller's Statement, which became an exhibit in the hearing,[10] detailed the sale of an Avanti Giro bicycle as well as two other bicycles. The 18 February 2017 sale transaction was also recorded by Mr Weise in his Transaction Register and information from the sale was uploaded to the SPIR police database.[11] A perusal of the documentary evidence reveals that the serial number of the Avanti bicycle in the Transaction Register for the 18 February 2017 sale matches the serial number of the Avanti bicycle that Mr Weise delivered to the police on 25 February 2017 after Mr Hoof-Harkin identified his bicycle.[12]

[10] Mr Weise said that he was later questioned by police about his involvement in the sale by the applicant of the Avanti bicycle to him and told them that he had not accurately filled out the paperwork for the sale. He disclosed in evidence that he was subsequently charged in relation to the destruction of the Seller's Statement dated 10 February 2017.[13]

[11] The other witnesses in the prosecution case were Constable Tiraa, who gave evidence about the receipt by police of the Avanti bicycle; Acting Sergeant Detective McCarthy and Constable Asnicar, who both gave evidence about the conduct of the investigation; Detective Sergeant P Williams, who gave evidence about the SPIR database; and Detective Senior Constable Gillespie, who gave evidence about data obtained from the applicant's mobile phone, but which was not relied upon in the magistrate's decision or upon the rehearing in the District Court.

[12] The applicant, who represented himself at the trial, denied the allegations against him.[14] He sought to rely upon what he called "concrete alibi evidence" for the events in question.[15] The applicant also called his partner, Ms Spain, who gave evidence of a general nature about her usual routine on a Saturday morning and of the applicant's routine.[16]

[13] The Chief Magistrate who constituted the court found Mr Weise to be a witness of truth and that his version of events was credible. He concluded that the applicant was guilty of all the charges against him.[17]

The appeal to the District Court

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8 AB 55 l20 – AB 57 l45; AB 69 ll32 – AB 72 l2.
9 AB 53 l11 – AB 54 l47.
10 Exhibit 2: AB 442.
11 Exhibit 7: AB 446-450. See also AB 58 l11 – AB 62 l44.
12 See Exhibit 3: AB 443; Exhibit 4: AB 444; Exhibit 5: AB 445; Exhibit 6 and Exhibit 7: AB 446-449.
13 AB 65 l35 – AB 66 l31.
14 AB 266 ll9-11.
15 See AB 268 l27 – AB 275 l27.
16 AB 355 l28 – AB 356 l35.
17 AB 429 l33 – AB 430 l13.

[14] The applicant appealed to the District Court pursuant to s 222 of the *Justices Act* 1886 (Qld). In his notice of appeal, the applicant relied on three grounds of appeal.[18] In her reasons, the learned District Court judge addressed and rejected some 15 points that she identified the applicant as having raised in written and oral submissions in support of his grounds of appeal.[19]

[15] Her Honour observed that she was required to conduct a real review of the evidence and of the magistrate's reasons below.[20] Upon her review of the record, her Honour was satisfied the applicant was guilty of the offences of entering premises and committing an indictable offence and fraud in the context of dishonestly obtaining property from another. Her Honour's reasons for that conclusion were as follows:

> "[65] The prosecution case against the appellant in the Magistrates Court was based upon inferences which it submitted should be drawn from the fact that the appellant was found to be in possession of the Avanti bicycle which was stolen from Mr Van Hoof-Harkin's garage shortly after it was stolen.
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> [66] With regard to the charge of entering premises and commit an indictable offence, the evidence revealed that at some time between 7am and 6.40pm on 9 February 2017, a person entered Mr Van Hoof-Harkin's garage through the garage door and stole his Avanti bicycle and helmet. The prosecution case against the appellant with respect to this charge was based on recent possession…
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> [67] The prosecution case was that the appellant sold the Avanti bicycle to Mr Weise on the following afternoon. Evidence of the appellant being in possession of the Avanti bicycle which had been stolen the previous day is circumstantial evidence which is capable of supporting an inference of the appellant having stolen it, which needed to be considered in the context of all the other evidence. Whether the possession of stolen goods is sufficiently recent to justify the making of an inference that the person in possession was the person who stole it is a question of fact, to be determined by the tribunal of fact.
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> [68] Mr Van Hoof-Harkin identifying his stolen Avanti bicycle at Mr Weise's bicycle shop was compelling. The evidence of the appellant selling the Avanti bicycle so soon after it was stolen was further compelling evidence that the appellant was the person who committed the offence of entering Mr Van Hoof-Harkin's garage and at the time he entered it, he intended to commit an indictable offence, namely stealing. The inferences drawn by the learned magistrate were not only open to him, but were, in my opinion, the only rational inferences to be drawn from the relevant circumstances. I am satisfied that the prosecution have excluded beyond reasonable doubt as a reasonable hypothesis consistent with the appellant's

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18 AB 647-649.

19 Reasons [45]-[62]: AB 571-575.

20 Reasons [9]-[13]: AB 564-565, citing *Robinson Helicopter Inc v McDermott* (2016) 90 ALJR 679, 686-687.

innocence that he did not steal the Avanti bicycle from the garage and did not have it in his possession on the day after it was stolen from the garage.

[69] As to the charge of fraud – dishonestly obtaining property from another, it was alleged by the prosecution that between 9 and 19 February 2017 the appellant dishonestly obtained a sum of money from Mr Weise. The prosecution case was that Mr Weise paid the appellant $200 to purchase from the appellant the Avanti bicycle, which in fact did not belong to him. The credibility of witnesses is a material consideration in this case. The learned magistrate had the benefit of hearing and seeing all of the witnesses including Mr Weise and the appellant. Both witnesses were extensively cross-examined. Mr Weise was unshaken on the identity of the appellant on both 10 and 18 February 2017. Upon my own review of the record, I am satisfied the learned magistrate was entirely justified in accepting the evidence of Mr Weise that on 10 February 2017, Mr Weise paid the appellant $200 for the Avanti bicycle. Likewise it was clearly open to the learned magistrate to reject as untruthful the appellant's version as to his interactions with Mr Weise. In my opinion that was correct.

[70] In reaching this conclusion, the learned magistrate considered and rejected as he was entitled to do, the appellant's case that he did not sell the Avanti bicycle for $200 to Mr Weise on 10 February 2017 or indeed on any other date and did not meet with him on 18 February 2017. Further, the appellant would have the court believe that he sold Mr Weise another Avanti bicycle on 8 February 2017 and that the Sellers Statement dated 18 February 2017 was in fact the Sellers Statement from the earlier sale of this other bicycle. I concur with the learned magistrate's conclusion in this regard."

[16] In the course of the appeal, her Honour granted two applications brought by the applicant to adduce further evidence in the form of a record of interview between police officers and Mr Weise and a statutory declaration of Detective Sergeant McCarthy. However, this additional evidence did not cause her Honour to alter her conclusions as to the ultimate issues on appeal.[21]

[17] Her Honour accepted a concession by the prosecution that the charge of stealing ought to be quashed, in light of the prosecution's submission that the criminality of the charges of stealing and enter premises and commit an indictable offence were the same.[22] In orders made on 7 November 2018, her Honour quashed that conviction but otherwise dismissed the appeal.

The application for leave to appeal to this Court

[18] The applicant filed a Form 27 Notice of Application for Leave to Appeal to this Court pursuant to s 118(3) of the *District Court of Queensland Act* on 4 December

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21 Reasons [74]-[77]: AB 577-578.

22 Reasons [4]: AB 564.

2018. As Sofronoff P observed in *Forrest v Commissioner of Police*, it is well settled that:[23]

> "an applicant for leave must show that 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 on appeal."

[19] Furthermore, leave to appeal is not granted lightly, given that an applicant has already had the benefit of two judicial hearings.[24]

[20] Relevant to these applications are the further observations of Sofronoff P in *Bode v Commissioner of Police* concerning the grant of leave:[25]

> "where there have been two concurrent findings of fact, it would require an applicant to show a manifest error and a substantial injustice before leave would be granted to permit a third agitation of the same issues."

The applicant's proposed grounds of appeal

[21] The applicant, who is again acting for himself, states in his application for leave that the reason why leave should be granted is that "there has been a miscarriage of justice against the applicant." The applicant sets out three grounds for his application which evidently are the grounds of appeal on which he would rely were leave granted. They are:[26]

> "1. Her Honour took into account irrelevant considerations.
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> 2. Her Honour's judgment and reasoning were against the weight of evidence.
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> 3. Her Honour failed to take into account and or give weight to matters of fact presented by the applicant which proved perjury by the witnesses."

[22] Consistently with the authorities, it is relevant to consider whether these grounds have any reasonable prospects of success.

Consideration of the applicant's submissions

[23] In his written outline of submissions to this Court, the applicant has provided commentary on the evidence given by the witnesses in the Magistrates Court hearing and on the findings of the Magistrate in his reasons for judgment.[27] These submissions are irrelevant to this application as they do not concern an error of a kind articulated in the above grounds of appeal on the part of the learned District Court judge.

[24] The applicant's written submissions also contained challenges to findings of fact made by her Honour. These include a complaint by the applicant that it is "disturbing" that her Honour found that the Avanti bicycle was sold to Mr Weise by

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23 [2017] QCA 132 page 6.
24 *McDonald v Queensland Police Service* [2018] 2 Qd R 612 at [39].
25 [2018] QCA 186 at [34].
26 AB 1-2.
27 Applicant's Outline of Submissions ("AOS") pages 1-7.

him at "a little over 2 pm. About 2 pm" on 10 February 2017 and a further complaint that her Honour "misstated the dealings" Mr Weise had with the police in their investigation of the sale of the Avanti bicycle.[28]

[25] These complaints lack any merit as the applicant has not shown how her Honour made an error of fact having regard to the evidence available upon rehearing. To the contrary, the findings made by her Honour were supported by the evidence.

[26] As I understand his submissions, the applicant also challenges her Honour's factual findings as being against the weight of the evidence, in light of what the applicant contends is "concrete alibi evidence" that was accepted by the magistrate below.[29]

[27] The applicant's complaint is misguided in two respects.

[28] The first is that the evidence which the applicant contends is "alibi evidence" does not fall within the meaning of that term as it is used in the *Criminal Code* (Qld). Evidence in support of an alibi is defined in section 590A thereof as being evidence tending to show that because a person was at a particular area at a particular time, they could not, or it is unlikely that, they were at the place where the offence is alleged to have been committed. In the applicant's case, it was found that the offence of stealing took place on 8 February 2017 and the offence of fraud occurred on 9 February 2017. Hence, the applicant's evidence, which is detailed in the next paragraph, about his movements on 18 February 2017 falls outside the scope of alibi evidence as defined.

[29] Secondly, a review of the reasons demonstrates that the applicant's evidence was not accepted in either proceeding below. It is convenient to set out the magistrate's treatment of the applicant's evidence in full:[30]

> "Mr Millar attempted to establish an alibi and the alibi is essentially raised by him in the following way. He provided documentation from his UBET account – UBET or TAB – his betting account – which shows bets being placed on a computer which he says is the computer of his girlfriend – partner, Ms Kim Spain – and I will speak about her evidence shortly. And that shows that he put a $10 bet on the 18th of February at 2.05, with a bet at 2 o'clock and a bet at 1.58. He says he subsequently went to the Valley, over the Story Bridge, and returned to the Lord Stanley Hotel where he put money on his account at 2.59 pm. He says that that shows, clearly – and if the evidence from the cameras on the Story Bridge were available, would show clearly that he did not go to the Holland Park Hotel at 2 o'clock as Mr Wiese said they did. It could not be suggested that Mr Millar did not have opportunity between 2.05 and 2.58 or 2.59 to go to the Holland Park Hotel and it is fair to say that there is no evidence to suggest that the transaction took place at exactly 2 o'clock, in any event, although the transaction register and the seller's statement – both are timed at 2 pm. They are exhibit 2 and exhibit 3.

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28 AOS pages 7-8.
29 AOS pages 8-9.
30 AB 428 l12 – AB 429 l41.

> The transaction register also shows the location that the document was filled out was "at shop". In response, to which Mr Wiese said, in his evidence, that he had done the wrong thing in accepting the three bikes on that day and that there were two different places where the transactions had taken place so he wrote "at shop" on that document, which is not satisfactory from a legal point of view but would make me take the view that nothing significant turns on that entry.
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> As I said – sorry – and as for the evidence given by the girlfriend, Ms Bain, she gave evidence that Mr Millar was at her place that weekend and I accept that that was – that her evidence is correct in that regard – no reason to believe that she was lying. However, she basically said that he regularly comes over and they basically do whatever each one wants to do, do not keep tabs on each other, they come and go as they please and that she does not like him using her computer to bet…
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> … the clear evidence of hers, which I accept, is that he was at her house, he did put the bets on and that they do not keep tabs on each other and they come and go as they please and that, in fact, he did spend, on his own evidence, some time out of the house in Fortitude Valley. Mr Millar, in his extensive record of interview, speaks about finding a Avanti bike on the side of the road in what he described as a rubbish put out type situation but that was on the 6th or the 8th and, therefore, could not be the bike in question.
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> Of course, once again, this is evidence by Mr Millar given in his own behalf and would, on one interpretation of it, put a bike of this type in his possession and even though he says it was on a different date, which, of course, would not be accepted by me. I am satisfied – Mr Millar also points to the fact that there is no phone calls from his phone to Mr Wiese on the 18th and that appears to be the case from the read outs of his telephone provider. However, once again, it seems to me that that is just one interpretation of how Mr Wiese may have been called and is not a full answer.
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> And even though Mr Wiese was cross-examined in relation to both his credibility, his honesty and the events, he, as I said, impressed me as a witness of truth. He had learned his lesson, it seemed to me, from having falsified the documents and was disappointed that he had been caught up in doing something which he should not have done. He did admit that he had delayed in putting the report into [SPIR] from the first sale on the 10th. He said that he was busy in his IT business. In any event this evidence seems to me to set out a complete history of his dealings with Mr Millar and the bike. There was no reason why he should be discredited in that so that I should not believe his version of it, and I do believe it."

[30] As is apparent from these passages, the magistrate did not accept Mr Millar's evidence and instead accepted the evidence of Mr Weise in relation to the dealings between the applicant and Mr Weise on the relevant dates. It is wrong for the applicant to suggest that his own evidence was accepted.

[31] Further, it is clear from her Honour's reasons extracted above that she also rejected Mr Millar's evidence about his interactions with Mr Weise.

[32] Not only was the applicant's evidence rejected, but there was also other evidence to support the charges, in the form of Mr Weise's oral testimony as well as documentary evidence recording that the applicant sold Mr Weise an Avanti bicycle identified as belonging to Mr Van Hoof-Harkin. In these circumstances, the applicant has failed to demonstrate how her Honour erred in law in any way comprehended by the grounds of appeal.

[33] In his submissions during the hearing of the application, the applicant raised an allied complaint about his "concrete alibi evidence". In particular, he contended that the prosecution should have obtained the telephone records of Mr Weise for the relevant dates, CCTV footage of the Lord Stanley Hotel and Brisbane City Council CCTV footage in the vicinity of the Story Bridge recorded during the afternoon of 18 February 2017, in compliance with its disclosure obligation under Chapter 62, Division 3 of the *Criminal Code*.[31]

[34] The learned District Court judge heard a variation of this submission in the proceeding below and indicated to the applicant it was a matter for the prosecution how they wished to run their case in order to prove the charges according to the requisite standard.[32] In her reasons, her Honour dismissed the applicant's complaint. She found, correctly, that the prosecution was not required to have obtained and disclosed such evidence because "the prosecution case was not dependent on any such evidence."[33]

[35] The applicant complains that it is very difficult for a civilian to obtain such evidence. That may be so. But it is irrelevant to whether this disclosure obligation is engaged. The applicant has not otherwise raised any submission to doubt this conclusion of her Honour.

[36] Finally, the applicant in his submissions advances several arguments in support of his third ground of appeal. These included propositions that there was evidence of criminal misconduct on the part of Mr Weise by falsely attributing other bicycle sales to the applicant, in entries he made in the Seller's Statement dated 18 February 2017 and in the Transaction Register dated 19 February 2017;[34] and that there was evidence of perjury on the part of Detective Sergeant McCarthy in his denial that he did not receive emails from the applicant after his record of interview with the police.[35]

[37] The submission that her Honour did not take these arguments into account is without any merit. Her Honour considered the applicant's argument that he had nothing to do with the handwriting on the Seller's Statement, but found against the applicant on the basis of Mr Weise's evidence.[36] Her Honour also considered any dealings alleged on 19 February 2017 to be irrelevant to the matter.[37] As to the allegation of perjury on the part of Detective Sergeant McCarthy, her Honour found

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31 Appeal Transcript ("AT") 1-6 ll6-35.
32 AB 520 l27 – AB 533 l32.
33 Reasons [52]: AB 572.
34 AT 1-10 l10 – AT 1-14 l36.
35 AOS page 4.
36 Reasons [52], [60] and [69]-[70]: AB 572, AB 574, AB 576.
37 Reasons [76]: AB 578.

there was no basis to characterise his evidence in this way.[38] I am unpersuaded there was any error of her Honour in this regard.

Disposition

[38] I am satisfied that the applicant has no viable prospects of succeeding in an appeal to this Court. He has not demonstrated that he has suffered a substantial injustice. This application must therefore be refused.

CA No 155/18

[39] After a trial over five days in the Magistrates Court at Brisbane, on 1 September 2017 the applicant was found guilty of an offence against s 421(1) of the *Criminal Code* (Qld) and one offence against s 421(2) thereof.

[40] It was alleged against the applicant that on an unknown date between 3 and 7 July 2016 he entered premises of the body corporate for the property known as Coronation Towers located at 24 Dunmore Terrace, Auchenflower, with intent to commit an indictable offence therein (the s 421(1) offence). It was further alleged that between those dates, he entered the premises of Ms Fiona Louise May within that property and stole from her (the s 421(2) offence).[39]

[41] At the trial, the prosecution tendered CCTV footage obtained from the Coronation Towers complex.[40] This footage, dated 4 July 2016, depicted a man entering premises of the body corporate for Coronation Towers, namely the underground carpark, and later taking furniture out from it. During cross-examination, the applicant accepted that he was the person depicted in the CCTV footage.[41]

[42] The prosecution also called four witnesses during the hearing. Ms May gave evidence that she owned a separate lock-up garage within the underground carpark at Coronation Towers. She said that on 6 July 2016, she realised certain items of her property, particularly a dining table and a piano stool, were missing from her garage and reported it to the police.[42] She told them that she thought the theft must have happened between 4.30 pm on 5 July and 10 am on 6 July.[43] Ms May was shown the CCTV footage during her examination-in-chief. The footage depicted certain furniture, namely a dining table and a piano stool, being carried by the applicant. She identified it as being property of hers that had been stored in her garage.[44]

[43] The prosecution also called evidence from Sergeant L Pearce and Senior Constable M J Bray, who each gave evidence about the police investigation of the matter,[45] as well as from Mr Wright, the manager of Coronation Towers, who gave evidence about the complex and the operation of the security cameras.[46]

[44] While he had accepted that he had been at Coronation Towers on the relevant date, the applicant nevertheless denied the allegations against him. The version of events

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38 Reasons [53]: AB 572.
39 AB 11-14.
40 Exhibit 3.
41 AB 239 ll7-8.
42 AB 100 l1 – AB 101 l23.
43 AB 133 ll16-32.
44 AB 107 l33 – AB 108 l3.
45 AB 41 l14 – AB 58 l2; AB 144 l17 – AB 145 l11.
46 AB 166 l28 – AB 172 l37; AB 179 l39 – AB 193 l9.

he gave in oral evidence was that he was at Coronation Towers to purchase furniture from a person named John whom he had met earlier on 4 July, and that the furniture he was seen carrying in the CCTV footage was purchased from John for about $200. He also alleged that the CCTV footage tendered was incomplete and that his transactional interactions with John had been recorded on the portions of the footage that were missing.[47]

[45] In his reasons for judgment, the learned magistrate considered that the applicant's evidence was unconvincing and that it could not be accepted in the absence of independent verification of it.[48]

[46] On the basis of the available evidence, the learned magistrate was ultimately satisfied beyond reasonable doubt that the applicant unlawfully entered the underground car park at Coronation Towers with intent to commit the indictable offence of stealing therein and that he entered Ms May's garage premises at Coronation Towers and committed the indictable offence of stealing in these premises.[49]

The appeal to the District Court

[47] The applicant then appealed his convictions to the District Court, pursuant to s 222 of the *Justices Act* 1886 (Qld). The appeal was heard and dismissed on 28 March 2018.

[48] In her reasons, which although delivered ex tempore were comprehensive, the learned District Court judge noted that an appeal to the District Court was one by way of re-hearing and that that required her to conduct a real review of the evidence, make up her own mind about the case and consider each of the grounds of appeal.[50] It is apparent from these reasons that her Honour conducted such a review of the available evidence as it related to each of the charges against the applicant.

[49] With regard to the first charge, her Honour carefully considered the applicant's contention that he did not intend to steal property when he entered the Coronation Towers premises and that he instead entered for an innocent reason to purchase property from a person named John.[51] Her conclusion as to that was as follows:[52]

> "Indeed, on my review of the available evidence, I am satisfied that the evidence available demonstrates that Mr Millar had entered with intent to commit an indictable offence in the premises. As I have indicated, the missing CCT footage at the point where it does, in fact, not appear on the recording on the back rear door of tower B, does not, in fact, sit with Mr Millar's own memory of the so-called exchange of money with John was at the point when the last item was placed outside, at which point he says John has come up to the door and has given him the cash while the furniture was still situated outside the doorway. In any event, there was other evidence, as I have said, that was available which was the timing of the actual entry by Mr Millar at the time and in the manner which he did that and,

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47 AB 235 l39 – AB 238 l39.
48 AB 348 l30 – AB 349 l9.
49 AB 350 ll36-43.
50 AB 474 ll30-44.
51 AB 476 l13 – AB 483 l7.
52 AB 483 ll9-21.

> ultimately, the matter of minutes later he is seen removing furniture from the internal garage area where furniture identified subsequently by Ms May at the lower hearing was identified to actually be her property."

[50] As to the second charge, the learned District Court judge rejected the applicant's submission that Ms May was not a credible witness and found that he did steal her property. Her Honour reasoned towards her conclusion on the second charge in the following way:[53]

> "… Ms May has, in fact, in any event identified two items that were being removed without her consent by Mr Millar out the fire door, namely her table and her piano stool. It's is only required that an item be removed without an owner's consent in order to prove the element of stealing. As the magistrate noted, the asportation of the relevant items – namely, the table and the piano stool – had taken place once it was removed from Ms May's internal garage, a fact which I agree with the learned magistrate is relevant insofar as when considering whether stealing has, in fact, taken place, where a physical act of actually removing an item must take place without an owner's consent.
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> That is also a relevant point. Namely, asportation, because the video CCTV footage of the missing portions that has been referred to me by Mr Millar are subsequent to any asportation that has taken place earlier in time in any event relating to the property in question. Ms May, as I've said, viewed the CCTV footage during the course of the hearing. She identified both of the items as [hers] after viewing the CCTV footage (T 1-87, T 1-119). There was, in any event, as I'm about to indicate, other available evidence for consideration.
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> This included the fact that these pieces of furniture were seen being placed by Mr Millar outside the fire door on 4 July 2016, approximately six minutes after he had entered into the underground carpark area under the relevant roller door in the manner described, and has then traversed inside to walk in the direction of her internal garage by taking a right-hand turn subsequently down the ramp to that location. Ms May's evidence is that she'd last seen those particular items herself in her garage on or about the 4th of July, and only noticed that her table was first missing around the 6th of July.
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> As I've said before, and I'll repeat, the element of committing an indictable offence relied on for count 2 here is one of stealing that requires only that an item be taken without the owner's consent. In this case, the evidence available shows which I accept, that Ms May has identified those items as being hers.
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> If I can turn again to the missing portions of the CCTV footage for the purpose of points 5 and 9 in Mr Millar's outline of submissions. Mr Millar submits that this would be fatal to the prosecution case as it would have exculpated him. He said presumably it should have been excluded. That is, the CCTV footage as I've indicated, he

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53 AB 486 l18 – AB 488 l15.

referred to Bercolli and another authority for my consideration. Just for the purpose of completeness, I have read the case authorities referred to by Mr Millar and I find them to be of little utility here.

Bercolli involved conversations recorded as being distinct or missing. 25 per cent to be correct. Those conversations were noted by the Court of Appeal to be so deficient as to make the true meaning and effect of the whole of the conversations recorded impossible to allow a jury to find beyond reasonable doubt the existence of an agreement to procure or attempt to procure one person to murder another. At page 12 of that decision, the Court of Appeal helpfully noted that the unintelligible portions may well have contained something tending to exculpate the defendant.

This was the precise point that was being made by Mr Millar here at point 5 in his submissions. That is to say, the portion that is missing to which I've already referred in these reasons for decision and won't repeat, which he says were deliberately deleted either by the police or someone else - contained exculpatory evidence, particularly as he always maintained initially, at least, in his evidence in respect of the first 20 second portion that were missing. I've already pointed out the differences in his evidence and why I find it unreliable and how it, in fact, belies when the actual exchange is later said to have taken place at a point where there is no missing portion. But as I've already indicated, there was simply no evidence to support that these missing portions were as a deliberate act by police or otherwise. Irrespective, as I've said, of the missing portions, at the points that I've already stated, that fact, as I've already indicated, is in my mind of little moment here.

Mr Millar also says that the missing portions would have shown the rocking chair, which has been deliberately cut out in order that it would fit the fact that Ms (May) says no chair of hers was ever taken, or at least that's how he understood her evidence to be. In my mind, when looking at the footage, there is a rocking chair depicted on the tape in any event. But as I've said, the actual recording and the evidence that the defendant gave at hearing belies what it is that he says would have been the exculpatory exchange between him and John of money at the initial point that was missing. Which, as I've indicated, did not fall at the point that the defendant subsequently then himself says the exchange took place. Namely, when the last item of furniture was placed directly outside the doorway, at which point he said John has apparently come out, or at least gone to the doorway and exchanged money at that stage while the furniture was still there outside.

A defendant doesn't have to prove anything, obviously. And I'm cognisant of the fact that simply because I've rejected Mr Millar's account insofar as what he says was some exchange with John, that that in some way proves his guilt. He doesn't have to prove any fact, let alone his innocence. Accordingly, I must place his account to one side if I reject it, which was namely that John existed and an exchange took place, and go back to the evidence available to see

> whether or not the Crown has proved its case beyond a reasonable doubt.
>
> Going back then to the available evidence which I've accepted, I am satisfied beyond a reasonable doubt that Mr Millar entered the premises with an intention to commit an indictable offence. I find also that upon entering those premises, he did, in fact, commit an indictable offence, namely the stealing of Ms May's property as a consequence of being there and removing property within six minutes of having initially entered into the subject complex premises. I find that there is no reasonable hypothesis available consistent with innocence which is open on the available evidence. And I find that the guilt of the defendant is the only rational inference that I can draw in all the circumstances of this case."

[51] Her Honour also considered a submission by the applicant which challenged the learned magistrate's finding that the applicant was "opportunistic and cunning". Beyond acknowledging the opportunity of the magistrate to observe and assess the applicant during the trial, her Honour independently found the applicant's evidence to be unreliable after a careful review of his version of events compared with the CCTV footage tendered at trial.[54]

[52] For completeness, her Honour dealt with all of the grounds of appeal and other matters raised by the applicant in his written and oral submissions. Each of these were rejected.[55]

Application for leave to appeal to the Court of Appeal

[53] The applicant filed a Form 27 Notice of Application for Leave to Appeal pursuant to s 118(3) of the *District Court of Queensland Act* on 26 June 2018. By order made on 24 October 2018, the time for filing the notice was extended to the filing date.

[54] In his application for leave to appeal, the applicant relies upon the following grounds which he says justify the grant of leave:

> "1. The court erred by allowing the cctv footage of rear of tower b to be admitted as an exhibit (exhibit 3) as footage crucial to the defence was cut from the exhibit. The principals contained in Bercolli and ruled by the Court of Appeal in said judgement was raised by the defence at appeal and incorrectly dismissed by Her Honour.
>
> 2. The court erred by finding that police did offer a record of interview to the defendant in July 2016. When evidence and submission was made to show that a offer of interview was not made ie absence of the offer record as per Police Powers and Responsibilities Act the [relevant] sections of which were submitted in argument to the Court.

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54 AB 489 ll11-39.

55 AB 488 l17 – AB 491 l7.

> 3. The defendant was denied procedural fairness in not being able to make timely preparations for any defences and or witnesses as a result of being refused a record of interview and has led to said defences being lost.
>
> 4. The defendant has being (sic) denied procedural fairness by being misled by police as to the date/s and nature of accusation by purposefully producing a misleading Notice to Appear. ln that police stated the offences took place over a period of 5 days when evidence is in place that [they] knew the accusation to have only occurred over a approximate 30 minute period of a particular. Further the offence is not particularised. This misleading continued for apprx 4 to 5 months until provision of brief. With the document being exhibit 9 (policelink audio) not being provided for a further 7 months later."

[55] I note that these grounds are substantially similar to the grounds of appeal raised by the applicant, and rejected by the learned District Court judge, in the proceedings below.

[56] Consistently with the principles to which I have referred,[56] I propose to consider whether, having regard to the submissions in respect of them, any of these grounds has reasonable prospects of success.

[57] **Ground 1:** The applicant supplemented his first ground during the hearing of his application with the submission that the CCTV footage should have been omitted because it was "incomplete", there was "too much missing" and it cannot be said that "what would have been there wouldn't have helped [the applicant because] you don't know what was in there".[57]

[58] This ground is without any foundation for two reasons.

[59] The first is that it is incorrect to say, as the applicant does, that the supposed crucial footage was "cut from the exhibit". This allegation is not supported by the evidence.

[60] The learned District Court judge acknowledged in her reasons that there were missing portions of the footage, those being periods of approximately 20 seconds and 46 seconds.[58] Her Honour also considered the applicant's submission that the footage had been doctored by the police to remove evidence exculpatory to the defence that would have been contained in the missing footage. However, this argument was explicitly and correctly rejected multiple times in her Honour's reasons on the basis that there was no evidence, and no reasonable inference could be made, that the police or anyone else had altered the footage in order to delete from it, for example, particular footage showing a cash exchange between the applicant and John.[59]

[61] The applicant has not otherwise made any submission to the effect that her Honour erred in fact, nor has he provided anything to doubt her conclusion.

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56 [18]-[20].
57 AT 1-31 ll7-27.
58 AB 480 ll20-23.
59 AB 480 ll8-12; AB 482 ll26-32; AB 487 ll20-31.

[62] Secondly, the learned District Court judge correctly decided the CCTV footage was admissible. As was conceded in her reasons, her Honour would have excluded the CCTV footage if satisfied, in the sense of there being reason to suspect that exculpatory footage depicting an exchange between the applicant and "John" had been omitted.[60] However, her Honour was not satisfied. After a detailed analysis of the applicant's evidence and the chronology of events actually depicted in the footage,[61] she was quite unpersuaded that there could have been such exculpatory evidence. Her Honour concluded that the chronology of events as they were revealed on the footage "(was) not at all consistent" with what the applicant had said occurred.[62] Her reasoning towards that conclusion is disclosed in the passages from her reasons which I have set out above. To my mind, her Honour did not err in this conclusion.

[63] Nor did the learned District Court judge misapply principle in coming to this conclusion. Rather, it was correct for her to say that what was depicted in the CCTV footage was sufficient "to justify the conclusion that the [missing] portions might safely be ignored as containing nothing tending to exculpate the [applicant]".[63]

[64] **Ground 2:** This ground should also be dismissed because it is not supported by the evidence accepted in the proceedings below. It is not correct to say that the applicant was refused a record of interview when the learned District Court judge, as well as the magistrate at first instance,[64] accepted evidence that the applicant was offered the opportunity to participate in a record of interview, but declined to do so.[65]

[65] Her Honour was also correct in finding that the fact that the applicant declined to take part in an interview was of little consequence and was "not evidence of anything at all". This was irrelevant to the issues at trial.[66]

[66] **Ground 3:** The applicant's complaint in this ground is premised upon his having been refused to a record of interview. That is contrary to the unimpeached finding that he was.

[67] Further, the applicant did not elaborate upon what further defences and/or witnesses were "lost", in consequence of his not having been interviewed. That he did not is not unsurprising. After all, the applicant has always maintained that he transacted a purchase of the furniture at Coronation Towers with a person, John, whose identity was known to him. There was no denial of procedural fairness.

[68] **Ground 4:** For similar reasons, the applicant's fourth ground cannot be accepted. It was not misleading to have formulated the offences charged as having been committed over the range of dates as they appear in the Bench Charge sheet. If the applicant had a complaint about a lack of specificity in the Notice to Appear and the consequent embarrassment to him, the appropriate time to have raised it was prior to or at the hearing in the Magistrates Court.

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60 AB 491 ll28-33.
61 See AB 480 l19 – AB 483 l7.
62 AB 491 ll35-46.
63 *R v Bercolli & Ioannou* [1990] QSCCCA 96.
64 AB 347 ll22-28.
65 AB 475 ll32-34; AB 488 ll17-25.
66 *Petty v The Queen* (1991) 173 CLR 95; *R v Armstrong* [2015] QCA 189 at [36].

[69] In any event, once the applicant was provided the brief of evidence and the matter proceeded to trial, he accepted he was the person depicted in the CCTV footage on the relevant date. I am not persuaded the applicant was denied procedural fairness in the way alleged.

[70] I would add that after the hearing of these applications, the applicant corresponded with the Court of Appeal Registry suggesting that he had been misled with respect to the issuing of a subpoena to Ms May's insurer seeking production of documents relating to a claim by her concerning the furniture. Additionally, the applicant contended that a ruling made on 29 April 2019 that such a subpoena not issue was beyond the jurisdiction of a single judge of appeal. These issues cannot avail the applicant on this application. That ruling was not a decision that the applicant could appeal under s 118(3). In any event, such documents would not be received by this Court as new evidence in circumstances where the applicant could have obtained access to them by subpoena and, if relevant, tendered them either at the Magistrates Court trial or in the District Court appeal.

Disposition

[71] The applicant has failed to identify any arguable error on the part of the learned District Court judge. Nor has he demonstrated a substantial injustice to him. This application must also be refused.

Orders

[72] I would propose the following order in each application:

1. Application for leave to appeal refused.

[73] **PHILIPPIDES JA:** I agree with the orders proposed by Gotterson JA for the reasons given by his Honour.

[74] **McMURDO JA:** I agree with Gotterson JA.