SUPREME COURT OF QUEENSLAND

CITATION:	*Burke v State of Queensland & Ors* [2014] QCA 200
PARTIES:	**DOMINIC BURKE** (applicant) **v** **STATE OF QUEENSLAND** (first respondent) **GEORGE PRICE** (second respondent) **CUBETT HARRIS** (third respondent)
FILE NO/S:	Appeal No 9947 of 2013 DC No 25 of 2013 DC No 109 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	22 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2014
JUDGES:	Fraser and Gotterson JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applications for leave to adduce further evidence are refused.** **2. The application for an extension of time within which to appeal is refused.** **3. The applicant is to pay the respondents' costs of the application on the standard basis.**
CATCHWORDS:	TORTS – TRESPASS – TRESPASS TO THE PERSON – ACTION FOR DAMAGES – where the intoxicated applicant was arrested but ran away from police – where the applicant was re-apprehended through force – where the applicant sustained injuries – whether the first respondent assaulted the applicant TORTS – MALICIOUS PROCEDURE & FALSE IMPRISONMENT – FALSE IMPRISONMENT – JUSTIFICATION AND OTHER MATTERS – ARREST AND IMPRISONMENT IN CRIMINAL PROCEEDINGS – where the applicant served court documents on the first respondent at a police station – where the applicant was wanted for further questioning regarding a separate assault

incident – where the second respondent, who was investigating the assault, was informed that the applicant would be attending the police station – where the applicant attempted to leave the police station – where the applicant was arrested – whether the arrest was lawful

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE – IN GENERAL – where the applicant sought to adduce multiple pieces of further evidence – whether there were special grounds for accepting the evidence

APPEAL AND NEW TRIAL – POINTS AND OBJECTIONS NOT TAKEN BELOW – WHEN NOT ALLOWED TO BE RAISED ON APPEAL – COURSE OF CONDUCT AT TRIAL – GENERALLY – where the grounds of appeal raised new matters not raised at trial – whether there are exceptional circumstances to allow the new matters on appeal

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – GENERALLY – where the trial judge favoured the evidence of the respondents over the applicant – whether the trial judge was in error for favouring the evidence of the respondents

Civil Liability Act 2003 (Qld), s 24, s 45, s 47
Police Powers and Responsibilities Act 2000 (Qld), s 365(1), s 365(2), s 382(2)
Uniform Civil Procedure Rules 1999 (Qld), r 741, r 766

British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283, [2011] HCA 2, followed
Browne v Dunn (1894) 6 R 67, followed
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, followed
Devries v Australian National Railways Commission (1993) 177 CLR 472, [1993] HCA 78, followed
Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344, [1984] FCA 176, followed
Osachy v O'Sachy [2013] QCA 212, followed
University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481; (1985) 60 ALR 68, [1985] HCA 28, followed

COUNSEL: The applicant appeared on his own behalf
E S Wilson QC, with J M Sorbello, for the respondents

SOLICITORS: The applicant appeared on his own behalf
Crown Law for the respondents

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Gotterson JA. I agree with those reasons and with the orders proposed by his Honour.

[2] **GOTTERSON JA:** On 16 August 2013, after a trial over six days at the District Court at Ipswich, two claims for damages brought by the applicant, Dominic Burke, in two separate proceedings were dismissed. Although they were heard together, the claims related to two separate incidents. By an application filed on 21 October 2013, the applicant seeks an extension of time within which to file a notice of appeal against an order dismissing his claims with costs. The proposed notice of appeal is exhibited to an affidavit sworn by the applicant also filed on 21 October 2013. The application also seeks leave to appeal; however it is common ground that leave is not required.

[3] Some time later, on 27 November 2013, the applicant filed an affidavit sworn by him on 18 October 2013 to which a number of exhibits were attached. The affidavit canvasses factual matters of which evidence was not given at trial. Nor were the exhibited documents evidence in the trial. The applicant has not filed an application for leave to adduce any of this evidence on appeal. On 16 December 2013 and again on 14 April 2014, the applicant filed further applications in this Court for what might compendiously be described as orders for the production of disciplinary records in one case and CCTV footage in the other, all of which also was not evidence at the trial.

The 2007 incident

[4] The first claim related to an incident on 16 September 2007. On this day, at about 4 am, the second respondent, Senior Constable George Price ("Price"), was on shift with Senior Constable Lana Sommers ("Sommers"). As they were walking along Ann Street in Fortitude Valley they observed the appellant urinating. By his own admission, the applicant had been drinking and was intoxicated. Price subsequently arrested the applicant for public nuisance; however, soon after, the applicant ran off. With the aid of a member of the public the applicant was re-apprehended and handcuffs applied. As Price and Sommers were waiting for additional support, the applicant again ran away, this time across four lanes of Ann Street traffic and into an alleyway. Price, Sommers and other police officers pursued the applicant into the alleyway.

[5] Brisbane City Council CCTV footage was operating on Ann Street, but did not cover the alleyway. According to the applicant, once he realised that the alleyway was a dead end, he stopped running and dropped to his knees. Price then caught up with him and "king-hit" him in the face,[1] fracturing the applicant's nose and causing him to fall on his face.

[6] Price denied assaulting or deliberately injuring the applicant and instead contended that he had push-tackled the applicant to the ground and into the side of a parked car. Price's evidence was generally supported by the evidence of Senior Constable Richard Rankin ("Rankin").

The 2010 incident

[7] As a result of his injuries from the 2007 incident, the applicant commenced proceedings against the first respondent and Price. The second incident arose when

---

[1] Reasons [4], AB 944.

he was serving Price with court papers at the Charlotte Street Police Station, in the Brisbane CBD, on 17 September 2010.

[8] The applicant had previously informed Price of his intentions. Knowing that the third respondent, Senior Constable Cubett Harris ("Harris"), wanted to speak to the applicant with regard to his involvement in a suspected unlawful assault at Paddington in November 2009, Price informed Harris that the applicant was attending the station.

[9] Having served the documents on Price and spoken with Harris, the applicant then sought to leave the station. He was arrested by Harris. According to Harris, the arrest was in accordance with s 365 of the *Police Powers and Responsibilities Act* 2000 (Queensland) ("*PPRA*") as it was for the purposes of investigating, and further questioning the applicant with respect to, an indictable offence.

The trial judge's reasons

[10] The proceedings with respect of the 2007 incident (D109 of 2010) were commenced on 16 September 2010 against Price and the State of Queensland. Damages for personal injury occasioned by "assault and battery and/or negligence" were sought. The applicant commenced proceedings in respect of the 2010 incident (D25 of 2013) in early 2013 against Price, Harris and the State of Queensland. In this instance, damages for "wrongful assault and/or deprivation of liberty" were sought. The applicant, who represents himself in this application, was legally represented by counsel at the trial. The learned trial judge's reasons for dismissing both claims are concisely and comprehensively expressed.

[11] With respect to the 2007 incident his Honour preferred the evidence of Price and Rankin. In particular he did not accept the evidence of the applicant because "(h)aving regard to the speed at which the men were running, it was impossible, in [his] opinion, for Burke to have come to a complete stop and then dropped to his knees before Price caught up with him."[2] He rejected the applicant's evidence that Price punched him.[3] Furthermore, the learned trial judge rejected the hypothesis underlying the applicant's alternative case in negligence, namely that it was unnecessarily risky to tackle the applicant in order to seize him.

[12] Having heard evidence from Senior Sergeant Damien Hayden, an instructor from the Queensland Police Academy, his Honour accepted that Price's response in tackling the applicant was the most appropriate and reasonable action that could have been taken in the circumstances where he had twice run away from police, notwithstanding that some risk of injury to him was involved. He also concluded that had a breach of duty by Price been established, s 45(1) of the *Civil Liability Act* 2003 (Qld) ("*CLA*") would have excluded civil liability for it and that the circumstances would not have warranted an award of damages under s 45(2).

[13] With respect to the 2010 incident, the trial judge found that Harris' arrest of the applicant was lawful on the footing that pursuant to s 365(2) *PPRA*, a police officer may arrest without a warrant a person who is reasonably suspected of having committed an indictable offence for investigative purposes. The learned trial judge accepted that the reasons for Harris' decision to arrest the applicant were twofold:

---

2 Reasons [6], AB 944.

3 *Ibid*.

namely, to question the applicant about the Paddington assault and to further the investigation of it.[4] Harris also said that he was prompted to make the decision by his suspicion that the applicant was the Paddington offender and that the applicant had declined to accompany him to be given a notice to appear.[5] His Honour also noted that Harris was not cross-examined about his reasons for arrest and that there was no basis to doubt his evidence.[6]

[14] The learned trial judge also considered the allegation of contributory negligence pleaded in the alternative in D109 of 2010. He acknowledged that pursuant to s 47(2) and (4) *CLA*, an intoxicated person, as the applicant was, is presumed to be at least 25 per cent contributorily negligent. However, he concluded that "… by fleeing, handcuffed, from Price in circumstances where he knew or ought to have known that it was likely that he would be pursued and re-apprehended with the use of reasonable force,"[7] circumstances existed for reducing by 100 per cent pursuant to s 24 *CLA*, damages that might have been awarded had the applicant established a cause of action in negligence.

Application to adduce further evidence

[15] At the hearing of the application for an extension of time, the Court heard argument with respect to the matters and documents referred to in the affidavit filed on 27 November 2013 and the applications filed on 16 December 2013 and 14 April 2014 respectively. The argument was on the footing that the applicant was seeking leave to adduce them as further evidence for the purposes of advancing argument on the merits of his proposed grounds of appeal. Leave for that purpose was opposed.

[16] The matters and documents may be summarised as follows:

(i) overheard comment allegedly made by the defendant's trial counsel as to the potentially adverse impact of Sommers' evidence on the defendant's case had she testified;
(ii) extracts from Harris' Facebook page;
(iii) telephone records which allegedly corroborate the applicant's version of the 2010 incident;
(iv) a Queensland Police Service court brief, QP9, prepared by Sommers following the 2007 incident;
(v) a still photograph from exhibit 16;
(vi) Queensland Police Service disciplinary records of the police officers involved; and
(vii) full and continuous CCTV footage of the 2010 incident at the Charlotte St Police Station.

The affidavit concerns items (i) to (v), while (vi) and (vii) are addressed in the two subsequent applications.

[17] This Court may receive further evidence as to questions of fact if there are "special grounds".[8] I am unpersuaded that there are "special grounds" for the reception of

---

4 Tr 5-39, LL 30-35, AB 372. These purposes were re-stated by Harris in re-examination in terms which indicate that the questioning did not proceed because of the applicant's unco-operative conduct on arrest: Tr 5-44, LL 28-31, AB 377.
5 *Ibid*, LL 37-40.
6 Reasons [20], AB 946.
7 Reasons [23], AB 946.
8 r 766(1)(c) *Uniform Civil Procedure Rules* 1999 (Qld).

any of this evidence. Moreover, in some instances, the evidence would not have been admissible at trial. I propose to state briefly why I consider each item is not to be received.

[18] As to item (i), such comment would not have been admissible at trial. Even if proved to have been made, it would, at best, be opinion evidence, hence irrelevant and of no evidential value. For item (ii), the applicant has not deposed that the extracts were not in his possession at the trial, or if they were not, that they were not obtainable with reasonable diligence. The test in *Clarke v Japan Machines (Australia) Pty Ltd*[9] is not satisfied. Besides, the only potential use that could have been made of these exhibits was in cross-examination of Harris as to credit. The telephone records, item (iii), were obviously available to the applicant being records of his own telephone calls. As well, they contain no record of any conversation during the calls.

[19] The QP9 document (item (iv)) was available to the applicant at trial. His counsel sought to tender it through Price. After objection, he conceded that it was hearsay and did not press the tender further.[10] In any event, the document would not have had an important impact on the result of the case. It is not a sworn statement; it does not purport to be Sommers' account of all that occurred as seen by her; it is not inconsistent with Price's evidence that the applicant's injuries were caused when he fell; and it does not support the applicant's version that he was assaulted. Item (v), the still photograph, is redundant, the footage from which it has been extracted having been admitted.[11] It is of no additional evidentiary value.

[20] As to item (vi), the disciplinary records, the applicant has not deposed to why such records could not have been obtained for the trial with the use of reasonable diligence. On the face of it, they could have been accessed prior to the trial under the provisions of the *Right to Information Act* 2009 (Qld) or their presence at trial could have been secured by subpoena. Here, too, the test in *Clarke* has not been satisfied. It is noteworthy that the topic of formal complaints was raised by the applicant's counsel in cross-examination. Price was cross-examined in some detail about a complaint made by the applicant concerning the 2007 incident.[12] Rankin denied having been the subject of a formal complaint for anything serious.[13] Harris was not cross-examined on the issue.

[21] Lastly, with respect to item (vii), the applicant has not deposed to why the continuing CCTV footage sought could not have been obtained for the trial with reasonable diligence. Again, the test in *Clarke* is not satisfied. In any event at the trial, the applicant's counsel tendered a DVD, exhibit 16, which contains visual images and audio recording of the 2010 incident taken from a vantage point at the Charlotte Street Police Station. This recording was played during the trial, at times frame by frame. No complaint was made by the applicant's counsel about its accuracy or adequacy.[14]

[22] For these reasons, the application for leave to adduce further evidence must be refused.

---

9 [1984] 1 Qd R 404 at 408.
10 Tr 5-9, L 45, AB 342 – Tr 5-10, L 20, AB 343.
11 Exhibit 16.
12 Tr 4-58, L 35, AB 302.
13 Tr 5-28, LL 34-36, AB 361.
14 Tr 2-11, L 25, AB 57 – Tr 2-12, L 26, AB 58.

Extension of time

[23] The applicant failed to file a notice of appeal by 16 September 2013. Hence an extension of time pursuant to r 748 *UCPR* is required in order to file a competent notice of appeal. It is well settled that in considering applications of this kind, factors such as the explanation for the failure to file within time; action taken by the applicant, such as informal notice to the respondent of the intention to appeal; prejudice to the respondent; potential for unsettling other people or established practices; the merits of the appeal which it is sought to institute and general considerations of fairness are all relevant to the exercise of the discretion under the rule.[15]

[24] The applicant has sworn that he attempted to file a notice of appeal on 13 September 2013 but that it was rejected by the registry as it was not in proper form. He then tried to obtain legal advice, apparently unsuccessfully. In the end, he prepared the notice of appeal which is exhibited to his affidavit and is dated 21 October 2013. Whilst the applicant's explanation for his delay is arguably less than satisfactory, I would not exercise the discretion against him solely on account of that. The respondents to the application have not sworn to any prejudice to them occasioned by the delay or to any other factor relevant to the exercise of the discretion.

[25] To my mind, for this application, the merits of the appeal is the decisive factor. Unless the appeal has some prospects of success an extension of time to institute it would not be warranted. I turn now to consider the grounds of appeal and their merits.

The grounds of appeal

[26] The applicant's grounds of appeal as detailed by him are set out over some eight pages in single-spaced small type. The grounds recount matters of fact, often with contentious comment, and contain submissions about them frequently expressed in argumentative style. The grounds relate to discernibly different topics. They are:

(i) "contempt of court";
(ii) Police/CMC/Ethical standards investigation;
(iii) deprivation of liberty;
(iv) Harris' "monotonous" failures in ethics training led him to act in bad faith;
(v) the trial judge's "clear mistakes in law and judgment" concerning the dismissal of an obstruction complaint against him; and
(vi) breach of privacy by defence counsel at trial in gaining information to which she was not entitled and using it in cross-examination.

[27] Counsel for the respondent assisted the Court by identifying five additional topics in the applicant's outline of argument. They are:

(vii) Price was not fit for duty;
(viii) Rankin was a "paid, bought" man;
(ix) judicial bias in favour of the respondents;
(x) alleged inappropriate dealings at the watch house; and
(xi) "a quick decision is not a good decision".

For convenience, I shall refer to these topics as Grounds (i) to (xi) respectively.

---

15 *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 349; *Osachy v O'Sachy* [2013] QCA 212 at [8].

[28] There are two common themes which run through these grounds and which are well-established hallmarks of an absence of prospects of success. In every case, the other attributes of the ground serve only to confirm that prospects are negligible.

[29] The first theme is that many of the topics agitate new matters that could have been addressed during the course of the trial but were not, whether by forensic decision or inadvertence on his counsel's part. As a matter of general principle, the applicant is bound by his counsel's conduct in not addressing them. In *Metwally v University of Wollongong*[16] a full court of the High Court stated:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

In my view, the applicant has not raised anything of the nature of a most exceptional circumstance as might allow him to argue on appeal a new matter which could have been, but was not, addressed at trial.

[30] Secondly, for both incidents, the conclusion as to liability depended upon findings of fact which in turn were informed by findings as to the credibility of witnesses. The findings of fact very much depended upon whose version of events was preferred as the more credible. The learned trial judge had the benefit of hearing and observing the witnesses as they testified. He proceeded to make credit findings on what he heard and observed and submissions with respect to that. His Honour stated that he preferred the evidence of Price and Harris over that of the applicant.[17]

[31] The approach that an appellate court is to take to findings dependant upon credibility has been well settled by the High Court. In *Devries v Australian National Railways Commission*,[18] Brennan, Gaudron and McHugh JJ observed:

> If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his advantage" or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable."

[32] The applicant has neither shown nor attempted to show that factual findings based upon acceptance of the evidence of Price as to the 2007 incident and Harris as to the 2010 incident are coloured by any deficiencies of the type which their Honours identified in *Devries*. Moreover, a review of the transcript of the trial reveals examples of conduct on the applicant's part in giving evidence which may well have adversely affected the learned trial judge's impression of his credibility. For example, during the cross-examination of the applicant about the nexus between the incidents and his injuries, the trial judge directed the applicant that "There's no need to be coy".[19] Another example is the applicant's concession regarding an interview between him and another police officer. The applicant initially claimed that the

---

16 (1985) 60 ALR 68 at 71; [1985] HCA 28 at [7] ("*Metwally*").

17 E.g. Reasons [7] and [21], AB 944 and 946.

18 (1993) 177 CLR 472 at 479, and further endorsed in *Fox v Percy* (2003) 214 CLR 118 at [26].

19 Tr 2-23, LL 25-27, AB 69.

audio recording of it was incomplete as it did not record the officer saying "Fuck off or I'll lock you up." Later, the applicant's trial counsel said "The plaintiff concedes that at no stage during the conversation referred to… did [the officer] use language such as "fuck" or any other similar expletive."[20]

Ground (i): "Contempt of court"

[33] Although the applicant uses the term "contempt of court", the topic addressed by him is not contempt of court in legal parlance. It is of the nature of prosecutorial unfairness. The applicant contends that the QP9 prepared by Sommers after the 2007 incident was inconsistent with the oral evidence presented at trial, and therefore, through the respondent's failure to call Sommers, he was unfairly prejudiced.

[34] It need be said at once that the role of a prosecutor in a criminal trial is distinctly, and relevantly, different from that of counsel for the defendant in a civil trial. The prosecutorial duty with respect to calling witnesses to ensure fairness has no analogy for the civil trial even when the defendants are police officers. The premise underlying this ground of appeal is entirely misplaced.

Ground (ii): Police/CMC/Ethical Enquiries

[35] The nub of the applicant's first contention under this ground is an accusation of "maliciously tampering" by police officers with evidence. While the applicant did refer during his cross-examination to "gaps in the video"[21] and to instances where audio recordings seemed incomplete,[22] it was not put directly to the defence witnesses that there had been deliberate tampering. There was no submission at trial to that effect. Furthermore, the applicant's submissions here rely on factors which could not possibly ground a finding of evidence tampering. For example, in his written outline, the applicant attempts to give a sinister connotation to the appearance of the word "unintelligible" in police transcripts of interview[23] and in oral submissions referred to a supposed tapping of a ruler by a police officer in order to muffle parts of a recorded conversation. However, no evidentiary basis for concluding that the supposition is accurate and that any muffling was not caused by concurrent background noise, was identified.

[36] The second contention under this ground is an accusation of failure on the part of the learned trial judge to have "glaring concerns for the integrity of police investigations." It is referable to the police internal Ethical Standards Committee ("ESC") investigation by Senior Sergeant O'Shea ("O'Shea"), which was instigated in response to the applicant's complaint concerning the 2007 incident. O'Shea's report concluded that the applicant's allegations of being threatened and assaulted by police officers were unsubstantiated.[24] This document was tendered by consent during the opening of the defence case.[25] O'Shea did not testify. It was not put to him that his investigation lacked integrity. The applicant's attempt to draw tendentious inferences of a "cover up" from the transcripts of interviews undertaken during the investigation is conspicuously unpersuasive, as it was also at trial during the cross-examination of Rankin.[26]

---

20 Tr 5-19, LL 25-30, AB 352.
21 Tr 2-13, LL 20-30, AB 59.
22 Tr 2-19, L 18, AB 65.
23 Applicant's Outline, Ground (ii), paragraph 7.
24 Exhibit 49, AB 724-AB 736.
25 Tr 4-29, LL 26-46, AB 273.
26 Tr 5-30, LL 38-41, AB 363. See also Reasons [7], AB 944.

[37] Further, the applicant places much reliance in his submissions on his reading of the Keelty Review of 2013. His reliance is misplaced. The document is irrelevant. The applicant cannot argue by inference from a wide-ranging review of policing practices that his complaint was the subject of a corrupt investigation.

Ground (iii): Deprivation of liberty

[38] By this ground the applicant challenges the trial judge's finding that he was lawfully arrested, describing the trial judge as having used "… terrible judgment and making massive errors at law."[27] His Honour accepted Harris' evidence that the arrest was in accordance with s 365(2) of the *PPRA*. Specifically, he accepted Harris' reasons for the arrest. As explained earlier in these reasons, Harris was prompted to act because he "… was also concerned about the accuracy of the address that [the applicant] gave him and that [the applicant] would not accompany him for the notice to appear."[28]

[39] In view of this evidence, the challenged finding is uncontroversial. Other evidence also supports it. In cross-examination, the applicant confirmed his transient habits. Despite his registered address, the applicant was constantly moving between addresses in Brisbane, western Queensland and Darwin.[29] The most practical method of investigating further the Paddington assault would have been by way of interview at the Charlotte Street police station when the applicant called there that day. He submits that arrest was unnecessary: a notice to appear would have secured his attendance at court and it could have been issued and served elsewhere in Queensland by another police officer on behalf of Harris.[30] However, the utility of that alternative was undermined from a practical perspective by the fact that the applicant really had no fixed address.

Ground (iv): Harris' "monotonous" failures in ethics training led him to act in bad faith

[40] The applicant contends that Harris' failures in practical and written ethics training resulted in his arrest in bad faith. No evidence was tendered of Harris' record in ethics training. He was not cross-examined on it. The finding based on evidence which was accepted is that the arrest was lawful. This contention is therefore without any evidential foundation and must be rejected.

Ground (v): The trial judge's "clear mistakes in law and judgment" concerning the dismissal of an obstruct complaint against the applicant

[41] The applicant also submits that the learned trial judge was in error by reaching a different conclusion from a related Magistrates Court proceeding. Following the 2010 incident, the applicant was charged with obstructing a police officer. At the conclusion of the applicant's defence submissions, the police prosecutor conceded that there was no case to answer and the charge was dismissed.[31]

[42] A transcript of the proceedings in the Magistrates Court was tendered.[32] The learned trial judge did not refer to it in his reasons. No mistake by him concerning

---

27 Applicant's Outline, Ground (iii), paragraph 33.
28 Reasons [18], AB 946.
29 Tr 2-21, AB 67 and Tr 3-72, AB 195.
30 s 382(2)(b) *PPRA*.
31 AB 847.
32 Exhibit 64; AB 810-857.

it is apparent from the reasons. Moreover, there is no apparent inconsistency between the two decisions. Towards the end of his reasons the Magistrate stated that he "was never satisfied that… it was reasonably necessary for Mr Burke to be arrested …- for any of the purposes set out in section 365(1)."[33] The magistrate did not refer to, and presumably did not consider, s 365(2) *PPRA*. It was that provision which the learned trial judge found authorized the arrest.

Ground (vi): Breach of privacy by defence counsel at trial in gaining information she was not entitled to and using it in cross-examination

[43] The final ground stated in the notice of appeal takes issue with the conduct of the defence counsel at trial, particularly "… in putting what she knew as false evidence in cross-examination and accessing information protected by the Privacy Act illegally."[34]

[44] Firstly, the appellation "false evidence" is a quite inappropriate description of the accounts of defence witnesses subsequently sworn to by them in evidence in chief. Just because a version of relevant events put to the applicant in cross-examination differed from his own version of them did not, of course, characterize the former as untrue. The applicant sought to illustrate his point by reference to questions put to him about whether he was avoiding being interviewed about the Paddington assault. His version of those events was to be keenly challenged by the defence version of them. The rule in *Browne v Dunn*[35] obliged defence counsel to put the defence version to him. The applicant's criticism is misguided. Not only did counsel's questioning in doing that not mislead, but also the applicant was being offered a fair opportunity to reject or comment on the version to which the defence witnesses would testify.

Ground (vii): Price was not fit for duty

[45] The applicant submitted that Price's evidence that he kept up with and tackled the applicant ought to be rejected because he was not physically fit for duty. The applicant relies on Price's evidence that he "… could barely [breathe] after running 100 metres,"[36] and that his service record indicated that he had failed his physical assessments in order to contend that this version was improbable if not deceitful.

[46] As the respondents point out in written submissions, the applicant's counsel did not raise the "100 metre argument", however the issue of Price's fitness was traversed in his cross-examination. Although the evidence was arguably unflattering of Price's physical condition, it established but one of the myriad of factual issues for the trial judge's consideration in his assessment of credit and then in making credit-based factual findings. The fitness issue had some relevance to an assessment of evidential reliability in that it bore upon the likelihood that the defence version was accurate. On the other hand, it did not in any way compel a rejection of that version. It was plainly open to the learned trial judge to have accepted, as he did, the "… clear account that [Rankin] gave of seeing Price tackle Burke."[37]

Ground (viii): Rankin was a "paid, bought" man

[47] This ground overlaps with Ground (ii). It is referable to the alleged "coaching" of Rankin by O'Shea during the ESC investigation. The inference of coaching that the

---

33 Magistrates Court Transcript 1-47, AB 856.
34 Applicant's Outline, Ground (vi), paragraph 1.
35 (1894) 6 Co Rep 67.
36 Tr 4-84, LL 45, AB 328.
37 Reasons [7], AB 944.

applicant sought to draw from the transcript of the interview was rejected by Rankin. Moreover, Rankin repeated several times that the alleyway dog-legged to the left after what probably was a suggestion to him by O'Shea that it dog-legged to the right. Whatever O'Shea may have said did not change the description given by Rankin.

Ground (ix): Judicial bias

[48] As the respondents note "throughout the applicant's submissions the applicant [continually] refers to favour shown by the trial judge towards police (and by inference bias towards him)."[38] In particular, the respondents identify a submission that the trial judge "… had his mind made up after day one, where he stated to Mr Burke's counsel that he felt they should pull out."[39]

[49] In this context, the following observations of French CJ in *British American Tobacco v Laurie*[40] are appropriate:

> "The fact that a judge has expressed a strongly worded view at the outset of a hearing does not prevent characterisation of that view as provisional. In such a case the reasonable apprehension of bias must be "firmly established" before prohibition will issue…
>
> The requirement that an apprehension of bias, based on judicial conduct, be "firmly established" is consistent with the most recent decisions of this Court, and gives content to the requirement that an apprehension of bias, in that class of case, be reasonable."

[50] The applicant's allusions to shows of favour are not illustrated by references to instances of accommodations favourably given to defence witnesses. Instead the complaint is one of bias based upon a deduction he seeks to draw from the fact that the learned trial judge preferred the evidence of those witnesses. There is no validity in reasoning that way. A preference for one witness over another does not bespeak bias in favour of the witness or the party by whom he or she is called.

[51] So far as exchanges with the applicant's counsel are concerned, at the conclusion of the second day of the trial his Honour said:

> "… Mr Stobie, I have no view about this case. You might want to think about what happened today."[41]

At the end of the third day, he said:

> "All right, well I won't repeat, Mr Stobie, what I said last night."[42]

To the extent that these statements may have implied that his Honour had then revealed some view about the evidence and the applicant's case, that view was provisional. That that was so is revealed by his later statement to the applicant's counsel made after the evidence had closed and before addresses. He said:

---

38 Respondent's Outline [103].
39 Applicant's Outline, Ground (i), paragraph 40.
40 [2011] HCA 2; (2011) 242 CLR 283, at [44] and [45].
41 Tr 2-77, LL 30-35, AB 123.
42 Tr 3-121, L 30, AB 244.

> Because obviously, I can't form a view until I've heard all of the submissions based on the evidence. But there were aspects of the plaintiff's evidence that did concern, as you would be aware.[43]

[52] For these reasons, the matters to which the applicant has referred do not give rise to a firmly established apprehension of bias.

Ground (x): Alleged inappropriate dealings at the watchhouse

[53] By this ground the applicant seeks to reagitate some of his allegations concerning the 2010 incident. Specifically, there was a significant inconsistency between the applicant's pleaded case and his evidence on a certain factual matter. The inconsistency concerned whether he was left naked for a protracted period of time at the watchhouse after his arrest (as pleaded) or not (as his oral evidence suggested). That resulted in an application by the applicant's counsel for leave to amend his statement of claim. Leave was refused.[44] No error is shown in the refusal of leave.

Ground (xi): A quick decision is not a good decision

[54] The applicant submitted in writing that the delivery of the judgment four days after closing submissions meant that the learned trial judge "… was not interested in this case whatsoever as he just wants to make a quick rash decision without considering any exhibits."[45] This was repeated in oral submissions when the applicant made mention that "… [the trial judge] made a decision in a very quick time."[46]

[55] In this case, the evidence and oral submissions were heard over six days. There were detailed written submissions from both parties which the oral submissions addressed. As noted, the reasons for judgment are concise and comprehensive. They were written when the evidence and submissions were fresh in mind. There is no basis for inferring from the four day turnaround that his Honour reached a rushed and unconsidered decision.

Disposition

[56] In summary, none of the grounds of appeal ventured by the applicant has any prospects of success. It follows that the application for extension of time must be refused and the applicant ought pay the respondents' costs.

Orders

[57] I would propose the following orders:

1. The applications for leave to adduce further evidence are refused.
2. The application for an extension of time within which to appeal is refused.
3. The applicant is to pay the respondents' costs of the application on the standard basis.

[58] **JACKSON J:** With one exception, I also agree with the reasons for judgment of Gotterson JA. That exception relates to the learned primary judge's finding that Harris's arrest of the applicant on 17 September 2010 was lawful. Since my view is the minority view, I will try to express my reasons briefly.

---

43 Tr 5-51, LL 30-32, AB 384.
44 Tr 5-24, LL 35-38, AB 357.
45 Applicant's Outline, Ground (vi), paragraph 13.
46 Tr 1-11.

[59] The circumstances of the arrest, the primary judge's findings and their bases are set out in Gotterson JA's reasons. There is a transcript of a tape of those events, which is substantial, if incomplete in parts. Before the arrest, Harris asked the applicant whether he was the person appearing in a photograph, which apparently related to the assault that Harris was investigating. They discussed whether the applicant wished to be interviewed further. The applicant appeared to give inconsistent answers about whether he did. Some of the answers suggested he would be prepared to come back later to do so. After that, Harris informed the applicant that he wished the applicant to accompany him upstairs so he could give the applicant a notice to appear. The applicant declined to do so. His position was that he would return later to be given the notice. Harris was not satisfied with that. The evidence Harris gave of the moment of arrest was follows:

> "I put my hand on his forearm, on his right forearm, your Honour, and I said **you're under arrest for the purpose of - for the assault, for the purpose of the investigation and further questioning**.
>
> …
>
> And why did you make the decision at that stage to place Mr Burke under arrest? -- Given I'd seen – or two things: (1) he declined the notice to appear. (2) I reasonably suspected that he was the person who had committed the assault at the Iceworks bar on Melbourne Cup Day 2009." (emphasis added)

[60] In the evidence which followed, Harris said that he had a concern as to the applicant's address. Another point of context already mentioned was that the arrest immediately followed a request by Harris to the applicant: "…to come upstairs where I can write that notice to appear and give it to him". Harris continued that: "I was hoping that he would come upstairs so I [could] do that and then he would be free to go. Mr Burke declined."

[61] The arrest was effected by Harris with the assistance of Price. The applicant resisted and protested verbally in foul language which did him no credit and attracts no sympathy, but those are not relevant factors. Nor is the belief that the applicant had that the arrest was an act of retaliation for the claim he was making against Price. In any event, Harris and Price twice "transitioned" the applicant to the ground in different locations. Following that, the applicant was transported whilst under arrest to the watch house. Harris, but not Price, accompanied the applicant. Harris placed the applicant in a cell and later returned. He then informed the applicant he was going to charge him with obstructing police, which he did. That was the charge later dropped at hearing, after Harris had given evidence of the events.

[62] For present purposes, an important piece of evidence was that after recounting what had been said and done leading to the applicant's arrest and the applicant being placed in custody in the watch house, Harris was asked and responded as follows:

> "And did you have any further dealings with Mr Burke on that day after that? – Not on – no."

[63] There was no suggestion of any further investigation by Harris or of any further questioning of the applicant by Harris about the Iceworks Bar assault offence.

[64] The primary judge's findings were as follows:

> "Harris gave evidence that he 'had hoped to be able to interview Mr Burke in regards to the assault' and that he 'didn't expect that

> that was the reaction that I was going to get'" (T 5-44: L 29-31). That strongly suggests that Burke's responses and behaviour at the police station caused Harris to conclude that he was lawfully authorised to arrest Burke for the purposes of further investigating and questioning him about the 2009 assault – which Harris intended to do. Burke's submissions disputed whether Harris really did effect the arrest for the stated reasons. But Harris was not cross-examined about that and I do not see any basis upon which Burke's submission could be upheld or Harris's evidence doubted.
>
> I accept Harris's evidence and find that his arrest of Burke was lawful."

[65] Section 365(2) of the *Police Powers and Responsibilities Act* 2000 (Qld) ("*PP&RA"*) provides:

> "(2) Also, it is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an indictable offence, for questioning the person about the offence, or investigating the offence, under chapter 15."

[66] In the evidence set out above, Harris stated that his purpose was to question the applicant or investigate the Iceworks assault offence at the time of the arrest. If that was Harris's purpose, it engaged s 365(2). I note that in other jurisdictions it has been held that a police officer is obliged to inform a person of the reason for arrest, at least where that reason does not appear from the circumstances,[47] but that question was not argued in the present case and I make no finding about it. In Queensland, s 391(1) of the *PP&RA* provides that:

> **"**(1) A police officer who arrests a person, whether or not under a warrant, must, as soon as is reasonably practicable after the arrest, inform the person that the person is under arrest and of the nature of the offence for which the person is arrested."

[67] Noticeably, that sub-section does not require that a person be informed that a purpose of the arrest is for questioning the person about the offence, or investigating the offence. By informing the applicant that the arrest was "for the assault", in the context where Harris had been discussing the Iceworks Bar assault with the applicant, in my view, Harris complied with s 391(1).

[68] It is also noticeable that Harris's evidence at the trial at least arguably differed from the evidence he gave on 16 December 2010 in the Magistrates Court at the hearing of the charge of obstructing a police officer in the performance of the officer's duties[48] relating to the same incident. There he said that he "arrested [the applicant] to prevent him from fleeing from the police", which is a ground for arrest without warrant under s 365(1)(h), not s 365(2), as well as "ensuring that he appeared before the Court", which is a ground for arrest under s 365(1)(c). However, at the time of the arrest Harris did not say that his purpose was either of those things. In any event, s 365(1) was not the basis of the primary Judge's findings, as set out above. As Gotterson JA's reasons make clear, the primary Judge must have relied on s 365(2).

---

47 *Adams v Kennedy* (2000) 49 NSWLR 78, 82-85 [16]-[26]; *State of New South Wales v Delly* (2007) 70 NSWLR 125, 126-130 [3]-[17].

48 *PP&RA*, s 790(1).

[69] But what is more concerning is that no other evidence supported the finding that Harris's purpose in making the arrest was for questioning the applicant or investigating the offence. Towards the contrary conclusion, Harris's evidence was consistent with having already decided to charge the applicant, by giving him a notice to appear.[49] And Harris had at that point already asked the applicant questions about his involvement in the Iceworks Bar assault. Secondly, if Harris had the intention to question the applicant or investigate the offence and was arresting him for that purpose, why did he not do so? There is no suggestion that he did so. No evidence was given that Harris complied with s 418 of the *PP&RA*, by informing the applicant that he may telephone a friend, relative or lawyer, before he started to question the applicant for the Iceworks Bar assault, or that he asked him any further questions about that offence. Towards the contrary conclusion, Harris's purpose on some of the evidence seems to have been to detain the applicant so that he could give him the notice to appear and then, as Harris said, "unarrest"[50] him.

[70] Given those circumstances, the only evidence which supported the finding that Harris intended to further investigate or question the applicant at the time of the arrest was Harris's statement at the time of the arrest that he was arresting the applicant for those purposes. The evidence which pointed in the contrary direction, which came from Harris's own testimony, was not considered by the primary judge in his reasons. Although the primary judge noted that Harris was not cross-examined, that does not form a basis for failing to consider the whole of Harris's own evidence.

[71] The scope of the power of arrest contained in s 365(2) depends on its proper construction in accordance with the principles of statutory interpretation which apply.

[72] The context which informs that construction includes the state of the law as to the power of arrest before s 365(2) was enacted. Section 546(a) of the *Criminal Code* immediately before then[51] provided in effect, *inter alia*, that when an offence was such that the offender may be arrested without warrant, generally it was lawful for a police officer who believes on reasonable grounds that the offence has been committed and that any person that has committed it to arrest that person without a warrant. Other sections provided further for arrest without warrant in particular circumstances. Section 552 provided that it was the duty of a person who had arrested another upon a charge of an offence to take the other person forthwith before a justice to be dealt with according to law.[52]

[73] Where at common law or under statute it is provided that, upon an arrest without warrant, based on the reasonable suspicion of a police officer that a person has committed an offence, an arrested person is to be taken before a court or justices as soon as practicable, it was held by the High Court that a police officer does not have the power to arrest a person merely for the purpose of questioning or investigation into a suspected offence. Dealing with comparable Tasmanian provisions to the now repealed s 546(a) and s 552, Gibbs CJ said in *Williams v The Queen*:

> "These provisions are not inconsistent. They require the person making the arrest to bring the arrested person before a justice in as

---

49 See *PP&RA*, s 382. A notice to appear must be personally served.

50 Presumably, by discontinuing the arrest by release under *PP&RA*, Ch 14 Pt 4 – see eg s 377(2)(b).

51 Section 546(a) was omitted by the *PP&RA* s 2(3) and Sch 3 (note that the subparagraphs appear to have been renumbered so that the previous s 546(b) now appears in the Criminal Code as 546(a)).

52 Section 552 still provides this in part but no longer applies to police officers (s 545A).

> short a time as is reasonably practicable. That, in effect, is the same as the common law as discussed in *John Lewis & Co Ltd v Tims*. Many cases in Australia have established that there is no power to detain a citizen merely for the purpose of questioning him and that the desire to question an arrested person does not in itself justify a delay in bringing him before a justice … There is a decision in this Court to the same effect: *Reg v Iorlano*".[53] (citations omitted)

[74] The second of those points was reiterated in a joint judgment in the High Court in *Michaels v The Queen*[54] as follows:

> "On one aspect the law is quite clear. It is unlawful for a police officer to delay taking an arrested person before a justice in order to question the person or to make further inquires relating to the offence for which the person has been arrested, or to some other offence."[55]

[75] That state of the law attracted statutory intervention to differing degrees in a number of Australian jurisdictions, including s 365(2). But those developments are informed by an appreciation of the pre-existing law, which was analysed in detail in 1990 by the New South Wales Law Reform Commission in its report entitled "Criminal Procedure: Police Powers of Detention and Investigation After Arrest".[56] The New South Wales Law Reform Commission in 1990 thought it apt to reprise a passage from a judgment delivered by Jordan CJ in 1946 as follows:

> "It appears, from recent cases that have come before this and other Courts of this State, that this rule of law with respect to arrests is being disregarded, and that arrested persons are being taken, not to a magistrate to be charged, but to a police station, where they are questioned by the police, sometimes for many hours, in the hope of extracting from them something that can be used in evidence against them … Indeed, there seems to be a growing impression in police circles that so long as a constable, after making an arrest, gives the usual caution, there are no limits to the extent to which he may go, short of violence, threats, promises, or lies, in endeavouring to extract admissions from his prisoner. If these methods are tolerated, it is a short step to the moral, if not physical, tactics of the Gestapo and the Ogpu."[57]

[76] Against that background, s 365(2) may be seen to possess two relevant features. First, it was intended to alter the pre-existing law. Secondly, it operates in derogation of one of the fundamental rights or liberties which attracts the principle of statutory interpretation now described as the "principle of legality".[58]

[77] As additional context to the meaning of s 365(2) in the present case, s 40 of the *PP&RA* expressly deals with a police officer's power to ascertain a person's current address. It provides:

---

53 (1986) 161 CLR 278, 283.
54 (1995) 184 CLR 117.
55 Ibid, 124.
56 1990 NSWLRC 66.
57 *R v Jefferies* (1946) 47 SR (NSW) 284, 288 cited in Report 66 (1990) – "Criminal Procedure: Police Powers of Detention and Investigation After Arrest", par 1.22.
58 *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082, 1098 [29], 1125-6 [171]-[173] and 1151-2 [307]-[312].

"**40 Person may be required to state name and address**

(1) A police officer may require a person to state the person's correct name and address in prescribed circumstances.

(2) Also, the police officer may require the person to give evidence of the correctness of the stated name and address if, in the circumstances, it would be reasonable to expect the person to be in possession of evidence of the correctness of the stated name or address or to otherwise be able to give the evidence.

(2A) If—

(a) a police officer reasonably suspects the person is a person mentioned in section 41(ba)(i) or is a person mentioned in section 41(ba)(ii); and

(b) the person can not provide evidence of the correctness of the stated name or address when the requirement is made;

the person may be detained for a reasonable time to confirm the correctness of the stated name and address.

(2B) If the police officer reasonably suspects it is necessary to do so to confirm the correctness of the stated name given by a person mentioned in subsection (2A), the police officer may take or photograph all or any of the person's identifying particulars.

(2C) If the person is not proceeded against for an identifying particulars offence within 12 months, the identifying particulars must be destroyed within a reasonable time in the presence of a justice.

(3) A person does not commit an offence against section 791 if the person was required by a police officer to state the person's name and address and the person is not proved—

(a) for section 41(a) or (b)—to have committed the offence; or

(b) for section 41(f)—to be the person named in the warrant, summons, order or court document; or

(c) for section 41(h)—to have been involved or to be about to be involved in domestic violence or associated domestic violence; or

(d) for section 41(i) or (j)—to have been able to help in the investigation

(4) Also, a person does not commit an offence against section 791 if—

(a) the person was required by a police officer to state the person's name and address for enforcing the *Tobacco and Other Smoking Products Act 1998* in relation to the supply of a smoking product to a child; and

(b) no-one is proved to have committed an offence against that Act.

(5) In this section–

address means current place of residence."

[78] If Harris was concerned about the applicant's current address, s 40 gave him power, without arrest, to require the applicant to state it, and contravention of that requirement

would have been an offence under s 791(2). Indeed, Harris exercised that power after he had arrested the applicant. The applicant appears to have given the same address, both before and after that formal requirement was made, and there is no suggestion in the evidence that he contravened s 791(2).

[79] If Harris wanted to make enquires of others to confirm the applicant's address, so as to give the applicant a notice to appear, could that have amounted to "investigating the offence" for the purpose of s 365(2)? In my view, it is not an ordinary use of language to say so.

[80] If Harris wanted to question the applicant further about his address, could that have amounted to "questioning the person about the offence"? In my view, it is not an ordinary use of language to say so.

[81] It would be an error, in my view, to interpret or construe s 365(2) more widely than the ordinary meaning of "investigating the offence" or "questioning the person about the offence" conveys. There may well be cases where making inquiries about a person's address or questioning a person about their address is appropriate in investigating an offence or in questioning a person about the offence. But this case does not seem to me to be one.

[82] Section 365(2) should not be seen as a general detention power which can be engaged simply by stating the grounds under that sub-section if they do not in fact exist. It operates in accordance with its terms, which restrict the power of arrest to circumstances where, as a jurisdictional fact, the police officer reasonably suspects that the person to be arrested has committed or is committing an indictable offence, and to those cases where the purpose of the arrest is for questioning about the offence or investigating the offence under Ch 15 of the *PP&RA*. Nothing less will do.

[83] Under s 393(1) of the *PP&RA*, if a police officer arrests a person without warrant for an offence, they "must, as soon as reasonably practicable, take the person before a court to be dealt with according to law". The extraordinary nature of the power under s 365(2) is illustrated by the fact that s 393(1) does not apply to a person arrested under that section who is later released without having been charged (s 393(2)(f)) and is further recognised by the statutory constraints applying to the detention for investigation or questioning contained in Ch 15 of the *PP&RA*. They include the time limits upon detention for investigation or questioning imposed under ss 403 and 404.

[84] Almost 70 years after Sir Frederick Jordan's statement was made, as set out above, statute recognises the need to trench upon the liberty at common law of persons suspected of having committed an offence in some circumstances. The Ogpu[59] may now be forgotten and even the Gestapo's misdeeds may have faded from the consciousness of contemporary Australia. But our tolerance of methods of arrest for the purpose of investigation or questioning, to the extent that they are authorised by statute, requires that the limits of the proper exercise of such power are not lost in hollow lip service to or rote incantation of the purposes for which an arrest without warrant may be made under s 365(2). The dismissal of the application in the present case should not be seen as any endorsement of such practices.

[85] In my view, if Harris wanted to ask the applicant further questions about his address, that purpose was not "questioning the person about the offence" or "investigating the

---

59 The secret police of the USSR from 1922 to 1934.

offence" within the meaning of s 365(2). In other words, s 365(2) did not justify arrest without warrant for that purpose alone. Equally, if Harris's concern was that the applicant would not accompany him on the spot to receive the notice to appear, in my view an arrest to secure his presence to enable that to be done is not an arrest "for questioning the person about the offence" or "investigating the offence". I offer no opinion about whether that purpose might have been sufficient to engage s 365(1)(c) or s 365(1)(h), since those questions were not the basis of the decision below, or debated on the applications before this Court.