DISTRICT COURT OF QUEENSLAND

CITATION:	*Leach v Commissioner of Police* [2009] QDC 66
PARTIES:	**JEFFREY FRANCIS LEACH** (Appellant) v **THE COMMISSIONER OF POLICE** (Respondent)
FILE NO/S:	Cairns 28 of 2009
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court Cairns
DELIVERED ON:	27 March 2009
DELIVERED AT:	Cairns
HEARING DATE:	17 March 2009
JUDGE:	Robin QC DCJ
ORDER:	**Appeal allowed to limited extent of setting aside the conviction under s 79(1) of the *Transport Operations (Road Use Management) Act* 1995**
CATCHWORDS:	*Justices Act* 1886 s 222, s 223 – *Transport Operations (Road Use Management) Act* 1995 s 79(1), s 80(15G), s 83 – conviction for driving under the influence of liquor set aside where indicia evidence which persuaded the Magistrate was not found persuasive on appeal – appeal court required to form and act on its own view as appeal a rehearing – test resulting in "conclusive" blood alcohol concentration reading taken after considerable further ingestion of alcohol
COUNSEL:	J Crawfoot for the Respondent
SOLICITORS:	The Appellant was self-represented Office of the Director of Public Prosecutions for the Respondent

[1] Mr Leach was self represented at his trial before a Magistrate in Cairns on two charges arising out of the same incident at the intersection of Spence Street and Lake Street on the evening of 28 February 2002. The trial took place on 11 October that year following pleas of not guilty to charges of driving under the influence of liquor, contrary to s 79(1) of the *Transport Operations (Road Management) Act*

1995 ("TORUM") and driving without due care and attention, contrary to s 83. At the outset, Mr Leach indicated a guilty plea to the latter but he was allowed to change that plea. He was convicted of both charges on 14 October 2002 and suffered a single penalty of an $800 fine and disqualification from holding or obtaining a driver's licence for six months. For reasons that will be explained below, I have reviewed the whole of the evidence, rather than rely on the Magistrate's complete (and I think accurate) summary of it, being of the view that I am obliged to form my own findings rather than merely examine her Honour's and reach a view as to whether those were justified.

[2] One would wish for clearer evidence of the detail of the relevant incident than the evidence her Honour had. I have concluded that Mr Leach was driving his vehicle along Spence Street, wishing to execute a left hand turn into Lake Street. He needed a green light. When it came, it was accompanied by a green "walk" sign, permitting pedestrian movement across the mouth of Lake Street and in Mr Leach's intended path. The two groups of pedestrians about were both described as Japanese tourists, one heading from Mr Leach's side of Lake Street to the far side, the other proceeding from the far side to Mr Leach's side. The former group he let cross; the latter group he says he expected would stop on the traffic island half way across Lake Street as a red "don't walk" sign had started flashing. They did not stop. Mr Leach's vehicle, entering Lake Street, came into collision with the rear wheel of the bicycle being wheeled across his path by a male among the "latter" group of pedestrians. The young gentleman was brought into contact with (Mr Leach said "lent on") the bonnet of the vehicle. Whatever may be the technical rules regulating movement of pedestrians, I will say immediately that I think it totally unreasonable for a driver to assume that pedestrians half way across a street such as we are concerned with here, will stop once the "don't walk" signal begins flashing, whether or not they enjoy the safety offered by some traffic island or dividing strip in the middle. A reasonable driver would anticipate that pedestrians who have commenced a crossing will complete it. Mr Leach's evidence as to his intentions or deliberate actions is unsatisfactory. There is some suggestion that his foot (which he claimed was "aggravated", possibly because of some foreign body in it) slipped on the clutch, so that the fateful forward motion of his vehicle may not have been his willed act. Mr Leach told the Magistrate that he had seen the Japanese people on his own side "waiting to walk across the road, so I sort of foresaw that and – so I allowed them to walk across and I realised I was paranoid – I had a vehicle behind me and I was congesting traffic – and I noticed that there were people walking from the other side of the road…I noticed they proceeded to keep coming whilst I had been waiting for these people on my side of the road – they were coming from the other side – and I was sort of somewhat paranoid that the lights were going to change 'cause I'd been there for some time and I'd sort well touched my horn, you know, to imply that…this is roadway and I realise how the legislation and the law works, and I wanted to proceed forward." This bespeaks some impatience. He went on (p 55) to describe the "don't walk" sign beginning to flash: "the people from the other side ….still proceeded and I was observing them. I mean I thought they were going to stop." I am not prepared to accept that the moving forward of Mr Leach's vehicle at this stage was involuntary in such a way that he is absolved from responsibility for its movements.

[3] Fortunately, the young Japanese gentleman was not hurt, although there may have been some damage to the bicycle. It is common ground that Mr Leach moved his vehicle to a vacant parking space a few spaces away, in order to clear the road, from

where he walked back to the corner to find out what had happened. He then left the scene after conversation with the young Japanese gentleman who (I am satisfied) gave an assurance that he was alright and after some heated discussion with Ms Craig, the prosecution's principal witness. She was insistent that he wait until police (apparently called by someone else) arrived. He told the Court he resented her interference in the circumstances; he concedes that he used offensive, insulting language to her. In the course of the appeal he suggested that the unpleasantness played its part in his wishing to leave the scene once he had established that no-one was hurt. He expressed concern that his offensive behaviour may have led Ms Craig to colour her evidence adversely to him, importantly evidence of indicia of his being under the influence of liquor at the relevant time, and a further concern that disapproval of his conduct may have inflamed the Magistrate against him. There were other things (not raised on the appeal by Mr Leach) revealed by the transcript that might have raised concerns about inappropriate prejudice. One was his blurting out, when cross-examined about the statements he had made to police relating to the current and another matter, that he was on probation (the police prosecutor, Senior Sergeant Wyatt moved with alacrity to prevent any more being said); that might have raised more concern. The Magistrate presumably did not know, as I do, from access to the traffic history tendered on sentence, that Mr Leach had a conviction for leaving the scene of an accident in about 1989. He is an intelligent man, not one to repeat such an offence when he was bound to be caught. It seems Ms Craig was not the only one telling him he ought to await arrival of the police; there were several people about potentially interested and able to take details of Mr Leach's vehicle. In documents filed in the appeal, Mr Leach with surprising frankness volunteered that a number of these "witnesses" asked whether he was drunk. The incident happened at 8.38 pm on the best evidence; police attended about 8.50 pm (ascertaining that the person, the "front wheel" of whose bicycle had been damaged, – another version being "back wheel" was Masukishi Bashi).

[4] The registration details of Mr Leach's Suzuki 390 CXS were given to a police officer by Ms Craig; the officer attended Mr Leach's residence and administered to Mr Leach the usual roadside breath test which revealed a reading in excess of .05% (no more precise reading being revealed). By 10.05 pm Mr Leach had been taken back to the Police Station. Sergeant Stanley had administered a more precise test using a breath analysing instrument. Exhibit 1 before the Magistrate is the pink certificate establishing analysis of the specimen of breath taken at 10.10 that night showing a blood alcohol concentration of 0.152%.

[5] Mr Leach was adamant at the trial (and corroborated in this by his friend Mr Hartley who was at his place for dinner after the two had spent much of the day together) that before the incident he had consumed only one "glass" (size never specified) of sparkling wine so that the high reading must be attributable to his finishing the bottle and starting on another after his return home. The Court should not speculate against Mr Leach that the glass was of unusually large capacity, given that this aspect was not pursued in any way at the trial. There is nothing to support a finding that before the incident (and relevant driving) Mr Leach had consumed any more liquor than he said.

[6] The Magistrate was given helpful assistance by Senior Sergeant Wyatt regarding the complication flowing from the certified reading occurring after considerable post-incident ingestion of alcohol. From *Davies v Dorfler* [1988] 2 Qd R 490 her

Honour quoted, apropos s 16A(15)(e)(i) of the *Traffic Act* 1949-1984 whose equivalent is now TORUM s 80 (15G)":

> "That does nothing to change the requirements in s 16(1) that the prosecution must prove that a person drove a motor vehicle and that he was then under the influence of liquor. It has the effect of establishing conclusively that at any material time within a period of two hours prior to the time when the breath was analysed the blood alcohol concentration was the same as when the specimen was provided. If the material time is the time when the alleged offence of driving under the influence of liquor occurred it operates to establish conclusively the blood alcohol concentration at that time if it is within two hours of the time when the specimen was provided. But if the evidence before a Stipendiary Magistrate in hearing a charge under s 16(1)(a) of the Act establishes that no offence was committed at the time alleged, that time will not be a "material time" for the purpose of s 16A(15)(e)(i). That subsection does nothing to convert lawful into unlawful conduct.

The judgment went on:

> "Accordingly, since it was accepted in this case that there was no evidence that the accused was under the influence of liquor while she was driving the motor vehicle, she should have been acquitted of the charge."

[7] There was some such evidence here, it being supplied by Ms Craig. She was a young university student who had worked (mostly bar work) at Playpen Nightclub whose duties at the time of the incident required her to be distributing literature to potential patrons at the intersection. The Magistrate's summary of Ms Craig's evidence is unexceptionable:

> "Ms Craig said that she heard a screech of tyres, she saw a Suzuki motor vehicle come round the corner and clip the rear wheel of the bicycle being wheeled across the street by the Japanese male person [who] fell to the ground then [after the vehicle stopped] walked over to the median strip and sat down on the grass there. [After the driver of the Suzuki had parked it] she saw him walk up to the Japanese male and as he was walking, he was not walking straight. She also indicated that when he was still, he could not keep his balance, that his words were slurred and that he was very hard to understand… The driver's words also were not making sense [apparently in relation to when police should be called to an accident scene]… She did not give evidence about the smell of liquor coming from the breath of the defendant."

In this last respect, Senior Constable Harding gave his account of "indicia" which, unsurprisingly, after the ingestion of more alcohol, included glazed and bloodshot eyes and "smell of liquor from the defendant". That police evidence justified the making of a requirement under s 80(2)(a) of TORUM, also what followed at the

Police Station leading to the certificate referred in s 80(15G) with its "conclusive" effect.

[8] The defendant set considerable store by the absence of reference to smell of alcohol in Ms Craig's evidence. She professed some expertise in assessing the intoxication of patrons in her work, which her Honour appeared to accept (p 17). As to lack of olfactory evidence, her Honour said that while there was "dialogue between Ms Craig and the defendant, there was, however, no evidence that Ms Craig was sufficiently proximate to the defendant to be able to smell his breath". It was then noted that there was no evidence that Ms Craig was familiar with the defendant's normal physical appearance or his speech or behaviour, something which I am inclined to think is potentially important in Mr Leach's case. *Grayson v Cawley* [1965] Qd R 315 is authority for her Honour's following observation that there is no burden on the prosecution in every case to prove what is the normal condition of the defendant motorist.

[9] I think that the Magistrate was of the view that the defendant's state of inebriation or otherwise would have been more or less the same at 8.38 pm and at 10.10 pm, that post-incident drinking of the order referred to could not have occurred. She accepted evidence of Sergeant Stanley that the defendant told him at the Police Station his last drink was at 8.55 pm. This would have been said after 10.00 pm; her Honour treated the time she found to have been reported as accurate. At p 16 of her reasons, one reads:

> "…one might reasonably estimate that the defendant was at home by about 8.50 pm
>
> The effect of his evidence would be that he then consumed the alcohol, that is the bottle of champagne save the glass earlier consumed, and was then somewhere through the second with the last drink being at 8.55 pm, and that this was the intake of a person said not to consume liquor on a regular basis
>
> I also note that the traffic incident with the Japanese man was not a particularly serious one. The damage was to the rear wheel of the bicycle. There did not appear to be any evidence of personal injury and the defendant himself had checked to ascertain that he was okay and had satisfied himself about that matter.
>
> If the accident had been a serious or traumatic one where serious personal injury or the like occurred, one might be more ready to accept a reaction where the driver is shaken and consumes an unusually large quantity of liquor in a very short period of time. This was not such a case, and I am not particularly persuaded, nor inclined to accept the veracity of the defendant's version about the large consumption of alcohol after the traffic incident as he alleges."

[10] The evidence was that police arrived at Mr Leach's place at 9.25 pm. There seems to have been no drinking after that time. However, given the defendant's general concession that he was not confident about times, I would not have accepted 8.55 pm as the cut off of Mr Leach's opportunity to get himself more intoxicated.

[11] Mr Leach was critical of the prosecution's not calling the injured tourist – one could add others of the witnesses. The impracticality of presenting at a trial in October the evidence of a tourist visiting Cairns the preceding February is obvious. However, the consequence is that the prosecution would sink or swim by Ms Craig's evidence. It supplies some evidence that Mr Leach was under the influence of liquor at 8.38 pm or thereabouts. It is convenient to note authorities, some of which her Honour mentioned by name, which establish principles relevant in applying s 79(1). It is not necessary for the prosecution to prove that the defendant was so influenced by liquor that his driving capacity was impaired – it merely has to prove that he was at the relevant time in fact in some observable degree influenced by liquor, as set out in the headnote to the report of *O'Connor v Shaw* [1958] Qd R 384; evidence of erratic driving is not necessary to establish the offence nor does affirmative evidence of competent driving establish that a driver was not under the influence: *Powell v Battle* [1963] WAR 32. There is no justification for adding to the elements of the offence in s 79(1) the demonstration that a defendant is incapable of properly driving. As to erratic driving here, I would not be prepared to attribute the screech of tyres to Mr Leach's vehicle, as the Magistrate apparently did.

[12] Her Honour was justified on the evidence before her in finding the elements of the charge proved beyond a reasonable doubt, those elements being the defendant's being the driver and at the time of the driving being under the influence of liquor or a drug. That it was open to the Magistrate, correctly instructing herself, to find the elements of the offence charged proved beyond reasonable doubt (which I am satisfied is the case) does not, as appears from the discussion elsewhere in these reasons, protect the conviction from being set aside on appeal. A Judge's or Magistrate's decisions do not enjoy the sanctity of a jury's, given without reasons. Now High Court and Court of Appeal decisions establish clearly that the appeal court's view that the primary decision maker was justified in making the decision under appeal does mean that it should not be set aside. This is because by s 223 of the *Justices Act* in the present context, the appeal is by way of rehearing. It is the appeal court's review of the evidence that matters. At the end of the day, I find myself in the same position as was Judge Wylie in *Treloar v McDonald* DC 89/235, Townsville, 19 June 1989 of having to declare that, from my review of the evidence, the evidence before the Magistrate did not establish beyond reasonable doubt in my mind that Mr Leach, at the time of the driving "was then under the influence of liquor. To that extent, his conduct was lawful. There was no material time which could be called in aid to give rise to the two presumptions… mentioned (being those in s 16A(15)(e)(i) and s 16(3) of the Act)".

[13] While not prepared to say, as the majority did in *Noonan v Elson* [1950] St R Qd 215, that the Magistrate should have had a reasonable doubt, I find that I have one. I have misgivings about Ms Craig's ability to assess that Mr Leach, in particular, was, by consumption of liquor, so affected as to be no longer in a normal condition (*Noonan v Elson*) or in some observable degree influenced by liquor (*O'Connor v Shaw*).

[14] The opportunity I had to observe and interact with Mr Leach over half a day in Court produced some relevant impressions. I appreciate that it is now seven years after the event, more than six years after the trial. Mr Leach presents as a person of unusual affect, which I would call "flat"; he appeared to me somewhat unsteady when standing to address the Court (which may have had something to do with a back problem suffered in the interim); I observed a tendency to sway, and a jerky

gait; he struck me as obsessional about some things, particularly in relation to the charge, but as honest in what he is saying about it. I am sure he is convinced of his innocence in his own mind. Ms Craig distinguished between Mr Leach's performance (presumably uninfluenced by ingestion of liquor) when cross-examining her and the difficulty she had in understanding him on 28 February. I would not put that down to the effects of liquor on the earlier occasion, as she genuinely appears to have done. Even with the addition of her observations regarding his steadiness when walking from his vehicle or "standing still", I would not draw the link which she did with ingestion of liquor. Some problem with a foot may or may not have contributed to unsteadiness of gait. I may well have confidence in Ms Craig's ability to diagnose the influence of liquor in patrons she knew or had had under observation for some time. I would not rely on her assessments of Mr Leach, whom she encountered only in a fraught situation, when he was clearly agitated, and perhaps because of the incident alone, without any influence of liquor. Whether or not I can use it, I have the advantage of knowing that, while he has a significant traffic history, there is nothing in it related to liquor.

[15] In reaching a different view from her Honour, I have sought to identify some reasons for our differences. I include my lesser confidence in Ms Craig's assessment, my having fewer reservations than her Honour did about the subsequent ingestion of alcohol (which I am inclined to accept occurred as alleged) and my unwillingness to draw the inference which I think her Honour did of a guilty conscience (presumably relevant to the liquor aspect) from Mr Leach's leaving the scene. Her Honour said at p 20:

> "I also note that the defendant was informed that the police had been called and that he was not to leave the scene of the incident. One might be rather suspicious about the defendant leaving the scene in the circumstances that he did and that when he did so, his personal particulars were not provided to any witness to pass onto police in the course of any investigation."

As indicated elsewhere, the circumstances were such that Mr Leach would have known he had little hope of avoiding the early attention of the police if they became interested in him.

[16] Here there is the ingestion of liquor before the relevant incident. In his outline of argument provided to satisfy the relevant practice direction, Mr Leach says it was beer he was drinking ("one full strength bottle…whilst cooking dinner"), that he went to get some ingredients for which he had to get money from an ATM in the Cairns City Mall; the outline says he drank more beer and wine afterwards. This is at variance with the sworn evidence and I disregard it. I do not think he was drinking beer. I think Mr Leach has somehow got confused, now 7 years on from the incident. He had no transcript. The reason assigned at the trial for leaving Mr Hartley alone at his home for a period was that a reference for a job application had to be collected.

[17] Mr Leach in argument volunteered that, having drunk some alcohol, he was necessarily influenced by it. My view of the evidence is it does not establish that he was influenced by liquor "to some observable degree" as required for there to be an offence under s 79(1). I regard *Davies v Dorfler* as applicable in the circumstances. The blood alcohol concentration certificate, ex 1, may potentially in the

circumstances have the effect described in *Evans v Morris* Appeal 18 of 1997, Southport, 18 November 1998 (DC 98/313). His Honour differed from Judge Wylie, continuing at 14:

> "Even if *Davies v Dorfler* (supra) did apply in the present case, so that there was no "material time" in respect of which the certificate was conclusive evidence of the blood alcohol concentration, it was still conclusive evidence of the blood alcohol concentration at the time of analysis. It was therefore available as a foundation for expert evidence from which a back calculation could be made, making appropriate allowance for any alcohol consumed in the intervening period. It would, in my opinion, have been open therefore for the prosecution to rely on the breathalyser certificate and the expert evidence as establishing that, accepting that the appellant had consumed the bottle of sherry at the time he said he consumed it, he still committed the offence charged. It follows therefore that there is no point in considering whether the Magistrate erred in failing to accept that the accused consumed the bottle of sherry at the time he claimed, or in failing to apply the decision in *Davies v Dorfler* (supra)."

This was a very different case. Not long before the alleged driving the unsuccessful appellant had been tested by police, achieving a .155% reading. He conceded in evidence that he had had four glasses of wine earlier and suggested that he only drove when he estimated his BAC was within the legal limit. Mr Leach's certificate in his particular circumstances, should not be treated as establishing that he drove under the influence at 8.38 pm.

[18] The standard procedure in s 222 appeals whereby an aggrieved convicted appellant goes first may be inappropriate if the appeal is by way of rehearing. In *Wright v Nettle* [1919] St R Qd 300, 306, the Full Court noted a Victorian decision of 1872 to the effect that "generally what is called an appeal must be *practically a rehearing* and the complainant below should begin". The reasons make it clear that the parties may agree to a different mode or procedure: ibid 307. It may even be problematic to consider the reasons of the Magistrate at all in the first instance, lest they have some undue influence on the appeal judge's approach. In practice those reasons will have to be consulted – for what they offer regarding the aspects the Magistrate was better placed to evaluate, or for the recitation of facts or other relevant matters not contentious in the appeal.

[19] Here, the adoption of the approach that the District Court must form its own view of the facts makes all the difference. The Magistrate prepared a careful judgment of some length, fairly summarising the evidence. She accepted the evidence of Ms Craig as to indicia that Mr Leach immediately after the incident might have been under the influence of liquor. The witness was assessed as having some helpful experience from her year or so of (presumably, since she was a student) part-time bar work. Her Honour declared herself satisfied there was driving under the influence. The prosecution case was assisted by Mr Leach's admitting he was the driver of the motor vehicle. The Magistrate correctly stated the onus of proof. There was enough to justify a finding of guilt under s 79(1) if the defence evidence was rejected, as it was. Her Honour went further (p 24 of the reasons) regarding her decision as confirmed by the blood alcohol concentration of 0.152% established by

a test at 10.10 pm on the relevant day, which was available for consideration because the driving and the incident occurred at 8.38 pm, comfortably within the relevant two hour period. See s 80(15G) of TORUM. The time was contentious, Mr Leach in his evidence estimating an hour or so earlier – he embroidered on that from the bar table in arguing his appeal, asserting (for the first time so far as appears) he had done some shopping before driving the 10 minutes to his home after the incident. He said he got home at a quarter to nine. Ms Craig was working (distributing promotional literature on the street) and had to be back at her employer's premises at 9.00 pm. She had good reason to be conscious of the time. She was anxious that police (apparently summoned by someone else) not take too long to get to the scene. What she says is corroborated by police evidence of the times logged by police on the night under standard procedures.

[20] I have no hesitation in accepting 8.30 pm or within a minute or so of 8.38 pm as the time of the incident. Faced with the claim that the blood alcohol concentration reading was effected by post-accident consumption of wine, her Honour adopted the approach taken in this court in similar circumstances in *R A Evans v I J Morris* DC 98/313, Appeal 18 of 1997, McGill SC DCJ 19.10.98. She held that the relevant certificate was conclusive evidence that the blood alcohol concentration was 0.152% at the time of the incident. There, as in Mr Leach's case, there was some ingestion of alcohol before the relevant driving. His Honour's approach differed from that of Judge Wylie QC in similar circumstances in *Treloar v McDonald* (Townsville Appeal 19 Jan 1989) which disregarded the certificate in the light of the "subsequent" drinking in reliance on *Davies v Dorfler* [1988] 2 Qd R 490, where the defendant denied (and the prosecution could not prove) antecedent drinking.

[21] Whether *Davies* applies where there has been antecedent drinking, but on no view enough to put a driver "under the influence" for the purposes of s 79(1), is yet to be authoritatively determined. It would be a strange thing if ingestion of a single drop of alcohol made all the difference and required a certificate as to blood alcohol concentration known to be wildly wrong to be treated as conclusive evidence.

[22] It is appropriate to explain the process by which I conclude that I am bound to act upon my view of the evidence, rather than the learned Magistrate's, although I have accepted that the conclusion she reached on the s 79(1) charge adverse to Mr Leach was open to her on that same evidence.

[23] Mr Crawfoot's helpful "Respondent's Outline of Argument" contains the following:

> "5.0 **Nature of Appeal**
>
> 11. Pursuant to s 223 of the *Justices Act* an appeal under s 222 is by way of rehearing of the evidence.
>
> 12. The judge hearing the appeal should afford respect to the decision of the magistrate and bear in mind any advantage the magistrate had in seeing and hearing the witnesses give evidence, but the judge is required to review the evidence, to weigh the conflicting evidence, and to draw his or her own conclusions. *Fox v Percy* (2003) 214 CLR at [25]; *Rowe v Kemper* [2008] QCA 175 at [5]; *Mbuzi v Torcetti* [2003] QCA 231 at [17].

6.0 **Respondent Submissions**

13. It is submitted that the decision reached by her Honour was open on the evidence adduced during the proceedings."

[24] The conclusion expressed in that Outline, following the review of the evidence of the witnesses is:

"22. It is submitted that the decision arrived at by Her Honour was open on the evidence and that the decision is neither unsafe nor unsatisfactory.

23. The decision of the learned Magistrate ought to be confirmed.

24. The respondent submits that the appeal ought to be dismissed."

[25] There is some tension between the approaches described in paragraph 12 and what follows, which I suspect typifies the s 222 appeals. Not having had to come to grips with the implications of forming my own view of the merits in s 222 appeals, as opposed to respecting the decision under appeal appropriately, at least for some years, I confess to a new appreciation of how onerous are the appeal court's responsibilities, as clarified by recent binding authorities. These are likely to necessitate a comprehensive review of the evidence especially in a case (like the present) where the appellant is self-represented and without a transcript. In *Mbuzi v Torcetti* [2003] QCA 231, Fraser JA (Keane JA and Muir JA concurring) said at paras 17-19:

"[17] The appeal proceeded under s 223(1) on the evidence given in the Magistrates Court. On such an appeal the judge should afford respect to the decision of the magistrate and bear in mind any advantage the magistrate had in seeing and hearing the witnesses give evidence, but the judge is required to review the evidence, to weigh the conflicting evidence, and to draw his or her own conclusions: *Fox v Percy* (2003) 214 CLR 118 at [25]; *Rowe v Kemper* [2008] QCA 175 at [5].

[18] The applicant complains that the judge erred in observing that the magistrate's conclusion that there was a continuous white line around the traffic island was an inference that was "open to him". It was submitted that the judge should have decided for himself whether that conclusion was correct. It is, however, apparent from the transcript of the argument and the judge's reasons that his Honour conducted a detailed review of the evidence and concluded that there was no error in the magistrate's conclusion. Furthermore, the respondent gave evidence that double white lines "actually go either side of the island".

[19] In my respectful opinion the judge did err by acceding to a submission made for the respondent that his Honour should apply the principles expressed in *House v The King* (1936) 55 CLR 499 at 504-

> 505 to determine whether the magistrate had erred in rejecting the application's defences under the *Criminal Code*. His Honour held that the "magistrate's discretion as to the alleged threat … and the defences" had not miscarried. *House v The King* concerned the principles that applied in a particular form of appeal from the exercise of a judicial discretion to impose a particular sentence. Of course the same principles apply in other contexts, but the question whether any of ss 24, 25 and 31 of the *Criminal Code* applied did not involve a judicial discretion of the character to which the principles in *House v The King* were applicable: cf *Dwyer v Calco Timbers Pty Ltd* (2008) 244 ALR 257; [2008] HCA 13 at [37]-[40]. Rather, it involved the finding of facts and the application of the *Code* to those facts. In that respect the appeal was governed by the principles identified in paragraph 17 above."

[26] I respectfully agree with the implicit criticism of submissions using *House* which, over the years, have found their way into respondents outlines of argument almost as a matter of course, often inappropriately. (Mr Crawfoot does not refer to *House*).

[27] In *Fox v Percy* [2003] HCA 22; 214 CLR 118, Gleeson CJ, Gummow J and Kirby J said:

> "22. The nature of the "rehearing" provided in these and like provisions has been described in many cases. To some extent, its character is indicated by the provisions of the sub-sections quoted. The "rehearing" does not involve a completely fresh hearing by the appellate court of all the evidence. That court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits. No such fresh evidence was admitted in the present appeal.
>
> 23. The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance". On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole.
>
> 24. Nevertheless, mistakes, including serious mistakes, can occur at trial in the comprehension, recollection and evaluation of evidence. In part, it was to prevent and cure the miscarriages of justice that can arise from such mistakes that, in the nineteenth century, the general facility of appeal was introduced in England, and later in its colonies.

Some time after this development came the gradual reduction in the number, and even the elimination, of civil trials by jury and the increase in trials by judge alone at the end of which the judge, who is subject to appeal, is obliged to give reasons for the decision. Such reasons are, at once, necessitated by the right of appeal and enhance its utility. Care must be exercised in applying to appellate review of the reasoned decisions of judges, sitting without juries, all of the judicial remarks made concerning the proper approach of appellate courts to appeals against judgments giving effect to jury verdicts. A jury gives no reasons and this necessitates assumptions that are not appropriate to, and need modification for, appellate review of a judge's detailed reasons.

25. Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect". In *Warren v Coombes*, the majority of this Court reiterated the rule that:

> "[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it."

As this Court there said, that approach was "not only sound in law, but beneficial in ... operation".

26. After *Warren v Coombes*, a series of cases was decided in which this Court reiterated its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not. Three important decisions in this regard were *Jones v Hyde*, *Abalos v Australian Postal Commission* and *Devries v Australian National Railways Commission*. This trilogy of cases did not constitute a departure from established doctrine. The decisions were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges.

27. The continuing application of the corrective expressed in the trilogy of cases was not questioned in this appeal. The cases mentioned remain the instruction of this Court to appellate decision-

making throughout Australia. However, that instruction did not, and could not, derogate from the obligation of courts of appeal, in accordance with legislation such as the *Supreme Court Act* applicable in this case, to perform the appellate function as established by Parliament. Such courts must conduct the appeal by way of rehearing. If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute.

28. Over more than a century, this Court, and courts like it, have given instruction on how to resolve the dichotomy between the foregoing appellate obligations and appellate restraint. From time to time, by reference to considerations particular to each case, different emphasis appears in such reasons. However, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.

29. That this is so is demonstrated in several recent decisions of this Court. In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must "not shrink from giving effect to" its own conclusion. Finality in litigation is highly desirable. Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process.

30. It is true, as McHugh J has pointed out, that for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses. Thus, in 1924 Atkin LJ observed in *Société d'Avances*

Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (*The "Palitana"*):

> "... I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour."

31. Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical."

[28] *Fox v Percy* was referred to in the Court of Appeal in (inter alia) *Parsons v Raby* [2007] QCA 98 where one reads in the leading judgment:

> "[22] On the appeal to the District Court, the learned District Court judge considered the various grounds of appeal argued before that judge, and concluded, inter alia, that the Magistrate had not accepted Mr Parsons' version of events, namely that he had no intention of engaging in a fight with Williams in the car park. The learned judge did not recite the evidence given, but did refer to some significant parts of it, when concluding that there was sufficient evidence to sustain the Magistrate's findings about the fight with Mr Williams. The judge did not refer to the further remarks the Magistrate made when passing sentence.
>
> [23] The argument on this appeal was that the Magistrate had overlooked that the appeal under s 222 of the *Justices Act 1886* (Qld) was by way of re-hearing, and that the task of a judge hearing one of those appeals was described by the President, in *Stevenson v Yasso* (2006) QCA 40 in the following terms:
>
> > "His Honour was required to make his own determination of the issues on the evidence, giving due deference and attaching a good deal of weight to the Magistrate's view." (Citations omitted)
>
> Mr Callaghan SC referred to the joint judgment in *Fox v Percy* [2003] HCA 22*;* (2003) 214 CLR 118 at [25], where their Honours wrote that an appellate court is obliged to conduct a real review of the trial, while bearing in mind the appellate court has neither seen nor heard the witnesses, and should make due allowance in that respect. He did not press a suggestion that there might be some

> inconsistency between that part of the joint judgment in *Fox v Percy* and the description of the task confronting the District Court judge given by the President in *Stevenson v Yasso*.
>
> [24] I do not consider there is any inconsistency; the obligation to give due deference and weight to the Magistrate's views are because the Magistrate has seen the witnesses. That advantage adds strength to findings of fact based on the evidence of the witnesses. On a re-hearing, a court would normally examine the evidence and the findings made on it, giving weight to findings which that evidence could support, including ones which reflected opinions on credibility and the like. The learned judge hearing this appeal did not descend to that detailed an approach.
>
> [25] The learned District Court judge would have been less vulnerable to criticism in this matter if the judge had considered more of the evidence, when conducting the judge's own determination of it. The judge did give appropriate deference and a good deal of weight to what the judge considered were the Magistrate's express and implicit findings about Mr Parsons' credibility, but was required to do more. This was not an appeal against the exercise of a discretion, and the learned judge was required to examine both the evidence and the Magistrate's reasons, not simply the latter. That was particularly so where there was an apparent inconsistency between the reasons for conviction and the sentencing remarks."

[29] A judge of this Court expressly setting out to apply that decision and *Fox v Percy* (*Rowe v Kemper* [2007] QDC 187 at [19]) did not, in the Court of Appeal's assessment, achieve the goal. Their recent reasons begin by quoting him (*Rowe v Kemper* [2008] QCA 175 [4]):

> … "In my opinion, it was open to the learned Magistrate to conclude beyond reasonable doubt it was reasonable to give the direction."
>
> [5] In taking this approach on the hearing of the appeal under s 222 Justices Act, his Honour did not conduct a real review of the evidence drawing his own inferences and conclusions as he was required to do: Fox v Percy; Warren v Coombes. This amounted to an error of law requiring this Court's intervention to correct an injustice, namely, Mr Rowe's appeal to the District Court was not conducted according to law. His application for leave to appeal to this Court should be granted. In determining that appeal, s 119(1) does not prevent this Court from now doing what the District Court judge should have done on the hearing of the appeal under s 222 Justices Act. We should make our own determination of relevant facts in issue from the evidence, giving proper deference to the magistrate's view: cf Dwyer v Calco Timbers Pty Ltd. This is particularly appropriate in this case because most of the events

surrounding the charged offences were recorded on audio and video tape."

[30] In *Dwyer v Calco Timbers Pty Ltd* [2008] HCA 13 the Victorian Court of Appeal succumbed to a like error. Five High Court Judges said:

> "48. Maxwell P remarked:
>
> > "We are deciding for ourselves, as on any appeal, but subject to the principles governing such an appeal which *Barwon Spinners* so clearly spelt out.
> >
> > As Eames JA pointed out in argument and as is clear from the propositions from *Barwon Spinners* which are set out in his judgment, we must be satisfied that the trial judge [*sic*] was wrong in coming to the conclusion she did. Like his Honour, I am not persuaded that her Honour was wrong."
>
> 49. The appellant correctly submits that this passage, and those in the reasons of Eames JA, with both of which Neave JA agreed, misstated the statutory power and duty that the Victorian Parliament reposed in the Court of Appeal. The consequence is that the Court of Appeal failed to exercise the jurisdiction which it was called upon to exercise."

They had earlier written:

> "[21] The general nature of an appeal to the Court of Appeal from the County Court is identified in s 74(3) of the County Court Act. In particular this states that:
>
> > "The Court of Appeal shall decide the matter of such appeal and shall have power to draw any inference of fact and shall on the hearing of such appeal make such order as is just, and may either dismiss such appeal or reverse or vary the judgment or order appealed from, and may direct the civil proceeding to be reheard before ... the County Court ..."
>
> [22] A statutory provision of this nature generally has been regarded as providing for that species of appeal in which the appellate court proceeds on the basis of the record before the court from which the appeal is taken, together with any fresh evidence which may be admitted pursuant to such powers to admit such evidence as may be conferred upon the appellate court.
>
> [23] In *State Rivers and Water Supply Commission v McIntyre*, Adam J described the appeal for which s 74 provides as "a rehearing *de novo* upon the material before the learned judge", and as requiring

the appellate court "to consider for itself what was the proper order to have been made".

[24] Subsequently, in *Humphries v Poljak* the Appeal Division of the Supreme Court considered the nature of appeals from County Court determinations respecting injuries allegedly "serious" within the meaning of the Transport Act. Of the reading which Adam J had given to s 74(3) of the County Court Act, Crockett and Southwell JJ said:

> "The fact that the appellate court is empowered 'to decide the matter of such appeal' and 'to draw any inference of fact' and to 'make such order as is just' suggests that that court must (as Adam J said) 'consider for itself what was the proper order to have been made'. But to do so is to 'rehear' the matter in a more limited manner than would be undertaken on a rehearing *de novo*. For instance, in the latter case the witnesses could be led again in chief and cross-examined. We do not think that Adam J had in contemplation a rehearing of that nature. The conclusion that our power should not amount to such a rehearing is supported by the provision in s 74(3) that the Supreme Court may direct that the matter 'be reheard before the Supreme Court or [a judge of] the County Court'. This provision of this power suggests that it was not intended that the Supreme Court sitting in banc should conduct a rehearing *de novo* as properly so called."

In developing the proposition that the appellate court was to decide "for itself" the proper order which should have been made by the County Court, Crockett and Southwell JJ repeated the statement by Gibbs ACJ, Jacobs and Murphy JJ in *Warren v Coombes*:

> "The duty of the appellate court is to decide the case - the facts as well as the law - for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial."

[25] However, matters did not rest there. In *Mobilio v Balliotis*, a five member bench of the Court of Appeal held that, in the absence of specific error, it should not interfere with a decision of the County Court on an application for leave under s 93(4) of the Transport Act to bring common law proceedings for damages unless it was satisfied that the decision was plainly wrong or wholly erroneous. Brooking JA said:

> "[W]e should treat the ultimate finding - that 'serious injury' had not been shown - as, or as akin to, a discretionary determination. By this I mean no more and no less than that the nature of the determination is

> such that it should be held to be subject to the principles in [*House v The King*]: I simply apply to it the convenient label 'discretionary' - or, if you will, 'quasi-discretionary' - to show that it is of such a nature as to be governed by *House*."

[31] The plethora of published reasons in which an appeal under s 222 (say) fails because the decision under appeal is said not shown to have been wrong may in many instances illustrate an erroneous approach because the appeal court has not reached its own decision. Both the original decision and that of the appeal court may be right or defensible; the appeal court prevails because of its place in the hierarchy.

[32] It would have been noted that this appeal comes very late.

[33] Notwithstanding his clear understanding expressed at p 26 and p 30 of the transcript for 14 October 2002, when the Magistrate handed down her decision, of his appeal rights and the applicable time limit of 30 days, Mr Leach did nothing until 2009. His motivation then was said to be that he could not obtain or renew a driver's authorisation entitling him to drive public passenger vehicles while the conviction for an offence under s 79(1) of TORUM stands – no doubt the authorisation referred to in Chapter 4 (s 23ff) of the *Transport Operations (Passenger Transport) Act* 1994. The Category A, B and C driver disqualifying offences identified in the Schedule appear not to go beyond the *Criminal Code* and certain offences under the *Drugs Misuse Act* 1986 and the *Weapons Act* 1990. As one might expect, for "drink driving" and the like, a would-be driver may be embarrassed and face a waiting period of a couple of years from the end of the licence's suspension or cancellation. See www.transport.qld.gov.au/Home/Licensing/Authorisations/Driver-authorisation. Mr Leach is well past that stage; he recovered his driving licence after the six month disqualification ordered by the Magistrate. There are other matters in his history that may stand in the way of his obtaining a driver authorisation now; those are alluded to in his affidavit in support of his application for an extension of time (more than six years) to bring this appeal under s 222 of the *Justices Act* 1886 and in his outline of argument. Mr Leach presented Judge Everson with a sufficiently sympathetic case relating to his ability to return to work driving buses or taxis (which he told me he has not done since 28 February 2002) to result in the requisite extension of time being granted. The respondent had conceded that no prejudice in resisting the appeal would flow from the delay. Mr Leach indicated to me that he did not particularly care about the $800 fine.

[34] The aforementioned unusual features are irrelevant to the determination of the appeal, now that his Honour has granted leave for its institution out of time.

[35] As indicated above, while I am not satisfied beyond reasonable doubt of the commission of the offence charged under s 79(1) I am comfortably satisfied to the requisite standard that the s 83 offence occurred. In my opinion, the single fine imposed by her Honour was an appropriate punishment for the s 83 offence considered alone.

[36] The outcome is that the appeal is allowed, but to the limited extent of setting aside the conviction of Mr Leach for the offence of driving under the influence of liquor on 28 February 2002.