DISTRICT COURT OF QUEENSLAND

CITATION:	*Cleret v Commissioner of Police* [2019] QDC 20
PARTIES:	**Daniel Michael Cleret** (Appellant) **v** **The Commissioner of Police** (Respondent)
FILE NO/S:	D107/18
DIVISION:	Criminal
PROCEEDING:	Appeal
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	28 February 2019
DELIVERED AT:	Maroochydore
HEARING DATE:	30 November 2018
JUDGE:	Cash QC DCJ

ORDER:

1. **The appeal is allowed**
2. **Orders of the Magistrate of 20 July 2018 concerning the charges of trespass and breaching bail said to have occurred on 19 May 2018 be set aside**
3. **Appellant is acquitted of the charges**
4. **Respondent pay the appellant's costs, limited to filing fees and other court fees actually paid by the appellant**

CATCHWORDS:	CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION – APPEAL BY CONVICTED PERSON – Where the appellant was convicted of trespass and breaching bail by a Magistrate – Nature of appeal against conviction by way of rehearing – Sufficiency of evidence – Primary facts and inferences – Whether there was sufficient evidence to conclude beyond reasonable doubt that the appellant acted without lawful excuse.
LEGISLATION:	*Bail Act 1980* *Justices Act 1886* *Summary Offences Act 2005*

CASES:	*Allesch v Maunz* (2000) 203 CLR 172 *Branir v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424 *Cachia v Hanes* (1994) 179 CLR 403; [1994] HCA 14; *Commissioner of Police v Al Shakarji* [2013] QCA 319 *Costa v Public Trustee (NSW)* [2008] NSWCA 223; (2008) 1 ASTLR 56 *Hillier v The Queen* (2007) 228 CLR 618 *Lindsay v McGrath* [2015] QCA 206; [2016] 2 Qd R 160 *Merrin v Commissioner of Police* [2012] QCA 181 *R v McBride* [2008] QCA 412 *Warren v Coombes* (1979) 142 CLR 531
COUNSEL:	The appellant appeared on his own behalf G Cummings for the Respondent
SOLICITORS:	The appellant appeared on his own behalf Office of the Director of Public Prosecutions (Queensland) for the Respondent

Introduction

[1] Sometime around August 2014 the appellant, Daniel Michael Cleret, needed a place to live. His then friend, Anthony Thirnbeck, allowed the appellant to stay on Mr Thirnbeck's rural property at Kenilworth. The appellant stayed, though not continuously, in a kind of bush camp on the property. By the end of 2017 the relationship between the two men had soured and by early 2018 Mr Thirnbeck wanted the appellant to leave the property. This was communicated to the appellant, though precisely how and when this was communicated was in some dispute. In any event, the appellant was found by police on the property on 12 April 2018. He was charged with trespass[1] and released on bail. It was a condition of the appellant's bail that he could only attend the property "for the purposes of removing his goods and chattels from the property". On 19 May 2018 police again found the appellant at the property. He was charged with a second offence of trespass and with breaching the condition of his bail mandating that he only attend the property for the purposes of removing his goods and chattels.[2]

[1] Contrary to section 11 of the *Summary Offences Act 2005*.
[2] Contrary to section 29 of the *Bail Act 1980*.

[2] In July 2018 the appellant stood trial on these three charges in the Magistrates Court at Maroochydore. He was acquitted of the first charge of trespass, alleged to have been committed on 12 April 2018, but convicted of the remaining charges committed on 19 May 2018. He appeals against these convictions pursuant to section 222 of the *Justices Act 1886*. The central issue at trial was whether the appellant was at the property "for the purposes of removing his goods and chattels from the property". The Magistrate found that the appellant was, "there to remain and, in fact, potter around and possibly stay." In this way the Magistrate expressed satisfaction that the prosecution had proved that the appellant was at the property for a reason other than "for the purposes of removing his goods and chattels". Thus, his presence at the property was unlawful and in breach of his bail conditions.

[3] For the reasons that follow I am satisfied that the evidence at the trial was not sufficient to prove beyond reasonable doubt that the appellant was at the property unlawfully and in breach of the bail condition. The decision of the Magistrate must be set aside and the appellant acquitted.

Charges faced by the defendant and issues at the trial

[4] It is necessary to set out the two charges the subject of this appeal in full.

[5] The trespass charge alleged:

> *"That on the 19th day of May 2018 at Kenilworth ... in the State of Queensland one Daniel Michael Cleret unlawfully remained in a dwelling situated at 3258 Maleny Kenilworth Road, Kenilworth."*

[6] The charge of breaching a bail condition (as it had been amended) alleged:

> *"That on the 19th day of May 2018 at Kenilworth ... in the State of Queensland one Daniel Michael Cleret being a defendant within the meaning of the Bail Act 1980 broke a condition of an undertaking into which he had entered on the 13th of May 2018*[3] *at the Maroochydore Magistrates Court namely not to attend at 3258 Maleny Kenilworth Road, Kenilworth on which Daniel Michael Cleret was*

[3] In fact, the bail undertaking (exhibit 3 in the proceedings before the Magistrate) was entered into on 13 April 2018. But it was not in dispute that the appellant was the subject of a relevant undertaking and condition and if this were the only error in the proceedings it would be appropriate to amend the charge.

granted bail requiring his appearance before a court namely Maroochydore Magistrates Court."[4]

[7] The relevant condition of bail was condition four. It provided:

"The defendant may only attend 3258 Maleny Kenilworth Road, Kenilworth QLD 4574 for the purposes of removing his goods and chattels from the property."

[8] The charge on which the appellant was acquitted alleged trespass on 12 April 2018. The Magistrate was not persuaded that the appellant was unlawfully at the property on that day.[5] The only relevance of this charge is that it explains why the appellant was on bail and why he was subject to the condition set out above.

[9] Under the terms of the trespassing charge of which the appellant was convicted it was necessary for the prosecution to prove, beyond reasonable doubt, that the appellant:

(a) remained;

(b) in a "dwelling";

(c) at 3258 Maleny Kenilworth Road; and

(d) did so "unlawfully".

[10] It should be noted that at the request of this Court, the parties made submissions on the appeal in relation to section 634 of the *Police Powers and Responsibilities Act 2000*. This section was not mentioned before the Magistrate. The section set outs the obligations of a police officer before they can commence proceedings for an offence of trespass contrary to section 11 of the *Summary Offences Act 2005*. For reasons that I will come to, I do not consider this section of critical relevance in the appeal.

[11] At trial there was no dispute that the appellant was at the Kenilworth property. There was no real dispute that he "remained" there, at least for long enough to satisfy this element. There was no discussion about whether he remained in a "dwelling", as that term is defined. The only matter that was in issue before the Magistrate was whether the appellant's conduct was unlawful. In practical terms this turned upon whether his remaining at the property was authorised by the bail undertaking. That is, could the

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[4] The effect of the charge was to put in issue whether the appellant attended for some purpose other than to collect his good and chattels (T.2-6.13-17).

[5] Magistrate's reasons, 20 July 2018, T.6.30-40. The fact that the Magistrate referred to being satisfied on the balance of probabilities that the appellant held an honest and reasonable but mistaken belief he was allowed to be on the property suggests an erroneous approach to the burden and standard of proof. Given the appellant was acquitted on this charge it does not matter if this was in error.

prosecution prove that the appellant was not there "for the purposes of removing his goods and chattels from the property"?

[12] Under the terms of the charge of breaching bail it was necessary for the prosecution to prove, beyond reasonable doubt, that the appellant:

(a) was granted bail;

(b) requiring him to appear before a court; and

(c) he broke a condition of the undertaking.

[13] Again, the only issue in dispute was whether the prosecution could prove the appellant was not at the property to remove his goods and chattels.

Evidence at the trial

[14] Mr Thirnbeck owned the property on which the appellant was alleged to have trespassed. He described it as a 33 acre bush block. Mr Thirnbeck resided in a donga about 800 metres down an "agricultural" track from the front boundary.[6] The front boundary was heavily treed. There was a visible gate and a fence hidden by the bush and lantana. It was such that, "you can hardly tell the [front] boundary."[7] Mr Thirnbeck had known the appellant for twenty years. Around August 2014 he was aware the appellant needed somewhere to stay and so Mr Thirnbeck invited him to stay on the property at Kenilworth. The appellant had two vans and stayed at the front of the property.[8] After about a year Mr Thirnbeck asked the appellant to move further back onto the property, away from the road. The appellant moved to a ridge about 200 metres from the boundary.[9]

[15] The appellant moved out for a time but returned in August 2016.[10] Over time the appellant accumulated a large amount of material on the property. This led to tension between the appellant and Mr Thirnbeck which appeared to wax and wane in late 2016.[11] In August 2017 Mr Thirnbeck learned that litigation in which the appellant had been involved, and which was said to be the reason the appellant needed somewhere to stay, had in fact concluded some time earlier.[12] As a result Mr Thirnbeck advised the

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[6] T.1-16.5-20.
[7] T.1-16.29-32.
[8] T.1-17.8-40.
[9] T.1-17.46-T.1-18.5.
[10] T.1-18.36-T.1-19.17.
[11] T.1-19.28-T.1-20.26.
[12] T.1-20.40-45.

appellant he was to pay rent and bond, in the absence of which he was to leave the property with all of his goods and chattels by late October 2017.[13] On 6 October 2017 and 7 February 2018 Mr Thirnback gave the appellant further notice that he was to leave the property.[14] Matters came to a head on 21 March 2018 when both Mr Thirnbeck and the appellant were at the front gate of the property. Senior Constable Senekal happened to be driving by. He stopped and spoke to both men, effectively mediating an agreement that the appellant would leave with his property within two months.[15]

[16] This arrangement broke down almost immediately.[16] Mr Thirnbeck testified that on 7 April 2018 he told the appellant he could not stay at the property[17] and on 10 April 2018 he complained to Constable Senekal that the appellant would not leave.[18] On 12 April 2018 Constable Senekal found the appellant at the property. The appellant was arrested, charged with trespass and released on bail on the condition set out above.[19] Mr Thirnbeck suspected the appellant was still attending the property in breach of his bail and told the police.[20] As noted, the appellant was subsequently acquitted of this charge of trespass from 12 April 2018. The Magistrate concluded that the agreement of 21 March 2018 allowing him to stay for two months caused the appellant to hold an honest and reasonable, but mistaken, belief that he was allowed to be there on 12 April 2018.[21]

[17] Mr Thirnbeck was not present on 19 May 2018 when the appellant was arrested by Constable Senekal. The critical evidence concerning this event comes from Constable Senekal, the appellant himself who testified at the trial, and to some extent from photographs taken at the time and tendered at the trial.

[18] On the morning of 19 May 2018 Constable Senekal was driving towards Maleny when he saw the appellant standing next to his car outside the gates to the property. Constable Senekal stopped and spoke to the appellant who said he was picking up some property and leaving. Constable Senekal accepted this and continued on his

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[13] T.1-21.20-40.
[14] T.1-23.6-11; T.1-24.20-33.
[15] T.1-25; T.1-52.1-10; T.1-54-20; Exhibit 2.
[16] T.1-26.1-5.
[17] T.1-27.25.
[18] T.1-30.25.
[19] T.1-55.19-31; Exhibit 3.
[20] T.1-31.1-25; T.1-56.28-30.
[21] Magistrate's reasons, 20 July 2018, T.6.30-40.

way.[22] About two hours later he drove past the property again and did not see the appellant or his car.[23] At approximately 4 pm Constable Senekal returned to the property. He climbed over the front gates and walked some distance into the property where he came across the appellant. The appellant was wearing a head torch and was near some pot plants that appeared to Constable Senekal to have been watered.[24] Constable Senekal took photographs of the appellant and the plants.[25] He questioned the appellant about the plants and why he was on the property. Constable Senekal testified that the appellant said he had watered the plants and that he was on the property to collect some of his things. Constable Senekal told the appellant he could not be on the property, escorted him to the front gate and issued a notice to appear in relation to trespass.[26] The appellant's car was found approximately 1.4 kilometres away parked at a campsite.[27]

[19] In cross-examination the appellant challenged Constable Senekal's evidence that the appellant stated he had watered the plants. It was put to Constable Senekal that the appellant told Senekal he emptied an overflowing sink and the water went onto the plants. The police officer denied this conversation occurred.[28] Constable Senekal agreed there was conversation to the effect that the appellant was only at the property to collect items. The officer could not recall if he looked at the contents of the backpack the appellant can be seen wearing in a photograph taken that afternoon.[29]

[20] The appellant testified at the trial. Relevantly, he said that on the evening of 18 May 2018 he had been at hospital for a time in relation to a urinary blockage. On the morning of 19 May 2018 he went to the Kenilworth property to collect some water damaged items which he stored in bags before returning to his car parked at the front gate. Constable Senekal pulled up soon after.[30] After Constable Senekal left the appellant drove to a nearby campsite where his car was later found. He was tired and

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[22] T.1-56.33-38.
[23] T.1-56.38-39.
[24] T.1-56.40-46. In evidence-in-chief Constable Senekal said he walked some 600 metres into the property but in cross-examination accepted that it could have been 200 metres (T.1-62.15).
[25] T.1-57.15-46. The photographs became exhibit four in the trial. The first photograph, which depicts the appellant wearing his head torch, also shows in the background something of the bush camp he had established. This bears upon the issue of whether the prosecution had established – as the charge alleged – that the appellant remained in a "dwelling".
[26] T.1-58.1-13.
[27] T.1-58.15-19; Exhibit 5.
[28] T.1-64.38-T.1-65.15.
[29] T.1-63.1-13.
[30] T.2-8.45-T.2-9.44

slept in the car for a time.[31] When he woke the appellant realised he needed drain bags for his catheter as he had not been given spare bags at the hospital. He left the car at the campsite so he would not lose his parking spot and walked onto the property. He looked for spare drain bags inside a van, wearing a head torch as it was dark. While doing so he located a book which he was packing into a polystyrene box as Constable Senekal located him. Constable Senekal asked the appellant what he was doing at the property. The appellant replied he was collecting goods and chattels. Constable Senekal said he was trespassing and took some photographs.[32] The appellant explained the water on the plants came from a sink filled with rainwater that he had emptied.[33]

[21] In cross-examination the appellant was shown the photographs of his car at the campsite. The campsite appeared relatively empty. It was suggested to the appellant that he had no reason to leave his car behind when he returned to the property on the afternoon of 19 May 2018. The appellant explained that in the evenings the campsite became crowded.[34] He was asked why he would walk when he had been in hospital the night before and responded that walking was good for the urinary blockage.[35] The appellant maintained his explanation for the wet plants and denied a specific suggestion that he had watered them.[36]

[22] The photographs tendered through the trial show the appellant at the property wearing a head torch, his driver's licence, the plants, the appellant at the front gate, and his car at the campsite. Something of the bush camp the appellant had established at the property can be seen in the background of the first photograph. No permanent structures are visible. There are a large number of crates and boxes stacked under awnings. On the far right appears to be a white van and behind the appellant what might be a sink or a basin. The photographs of the plants show that the appellant had some seedlings in Styrofoam boxes and a vegetable patch screened with mesh. Photos of the leaves of some plants showed fairly large and discreet drops of water. The plants were not entirely wet and the soil seemed neither especially dry nor particularly wet. The photographs of the appellant's car showed it parked on grass in an empty, or practically empty, campground.

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[31] T.2-10.30-T.2-11.17.
[32] T.2-11.24-40.
[33] T.2-12.12-18.
[34] T.2-18.14-40.
[35] T.2-19.1-8.
[36] T.2-23.20-25.

Conclusions of the Magistrate

[23] The Magistrate fairly and accurately summarised the evidence she had heard. Her Honour identified the critical issue for the present charges being whether the appellant was at the property other than to collect his goods and chattels.[37] The Magistrate rejected the evidence of the appellant.[38] Her Honour concluded that the appellant was wearing a head torch in preparation for the night, indicating he intended to stay on the property.[39] Her Honour also found it more credible that the appellant parked his car at the campsite to reduce the chance he would be detected once he returned to the property.[40] The Magistrate rejected the contention that the appellant was only collecting goods, finding that the small backpack he had with him was insufficient for that purpose and that he was tending to the plants and preparing for the night.[41] This led to the conclusion that the appellant was, "there to remain and, in fact, potter around and possibly stay."[42]

Appellant's submissions

[24] The appellant's notice of appeal advances a number of grounds of appeal. While the notice is reasonably articulate it is not easy to discern the precise nature of the appellant's complaints, at least in terms of a cognisable ground of appeal. The notice of appeal does raise what has been identified as the central issue in these proceedings: was the evidence sufficient to prove the appellant was at the property for some purpose other than collecting his goods and chattels?

Respondent's submissions

[25] The respondent, fairly and appropriately, identified an issue with the pleading of the trespass charge. The charge, as set out above, alleged that the appellant "remained in a dwelling". The definition of dwelling in the *Summary Offences Act 2005* is that it, "includes, when used as a dwelling, a boat or part of a boat, a caravan and a tent." The more familiar definition found in the Criminal Code provides that a dwelling:

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[37] Magistrate's reasons, 20 July 2018, T.2.22-30.
[38] Magistrate's reasons, 20 July 2018, T.6.10; T.7.6-7; T.7.20.
[39] Magistrate's reasons, 20 July 2018, T.5.40-42; T.7.20-21.
[40] Magistrate's reasons, 20 July 2018, T.7.8-9.
[41] Magistrate's reasons, 20 July 2018, T.7.20-25.
[42] Magistrate's reasons, 20 July 2018, T.7.30.

"includes any building or structure, or part of a building or structure, which is for the time being kept by the owner or occupier for the residence therein of himself or herself, his or her family, or servants, or any of them, and it is immaterial that it is from time to time uninhabited.

A building or structure adjacent to, and occupied with, a dwelling is deemed to be part of the dwelling if there is a communication between such building or structure and the dwelling, either immediate or by means of a covered and enclosed passage leading from the one to the other, but not otherwise."

[26] There was scant evidence in the proceedings as to the setup of the appellant's camp at the property. To address what might be thought to be considerable doubt that the appellant "remained in a dwelling" the respondent proposed that the charge should be amended to allege the appellant "remained in the yard for a dwelling". The respondent further submitted that the Magistrate was entitled to reject the evidence of the appellant and act upon the evidence of the police officer and Mr Thirnbeck. Based upon this the Magistrate was entitled to conclude that on 19 May 2018 the appellant had resumed staying at the property and was therefore not at the property for the purpose of removing goods and chattels.

Applicable legal principles

[27] An appeal to this court pursuant to section 222 of the Justices Act is to be determined in accordance with section 223 of that Act. That is, the appeal is by way of rehearing on the evidence before the Magistrate rather than a hearing de novo. It is for the appellant to demonstrate that the decisions the subject of the appeal are the result of some legal, factual or discretionary error.[43] In this context the word "error" has no precise meaning and refers broadly to satisfaction by an appellate judge that the decision below was wrong and should be corrected.[44] In considering the appeal I am required to make my "own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight to the Magistrate's view".[45] Bearing this in mind, I am entitled to draw my own inferences from the evidence and,

[43] *Allesch v Maunz* (2000) 203 CLR 172 at [22]-[23].
[44] *Costa v Public Trustee (NSW)* [2008] NSWCA 223; (2008) 1 ASTLR 56 at [15]-[19]; *Branir v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424 at [21]–[32].
[45] *Commissioner of Police v Al Shakarji* [2013] QCA 319 at [7].

where this differs from the conclusions of the Magistrate, should not "shrink from giving effect to it".[46]

Consideration

[28] Aspects of the appellant's evidence were not convincing. It was suspicious that he was wearing a head torch. His explanation for leaving his car behind to avoid losing his park was implausible, given the photographs of an empty campsite. But his testimony that he went to the property to collect drain bags was not contradicted by evidence and is not inherently implausible. Aspects of the appellant's testimony were unsatisfactory and, on the whole, I cannot accept his evidence as providing a satisfactory answer to the prosecution case. But it does not automatically follow that he is guilty. That is, it is not enough simply to reject the evidence of the appellant. Regard must then be had to the evidence led by the prosecution to determine if, having regard to the appellant's testimony, I am left in a state of reasonable doubt about the critical issue.[47] To conclude that the appellant was at the property for a purpose other than collecting his goods and chattels required a determination of his intention. It was a conclusion that could only be reached by inference; that is, it was a secondary fact, to be determined by inference from the primary facts as found. There can be only one unique answer to the question whether a particular intention is to be inferred from the proved primary facts. If an appellate court comes to a different conclusion to the primary judge on such a question, the appellate court may intervene.[48]

[29] What, then, is the evidence from which it might be inferred, beyond reasonable doubt, that the appellant was not collecting goods and chattels?

[30] There is no evidence from which it can be determined for how long the appellant was at the property before being located by Constable Senekal around 4 pm on 19 May 2018. The evidence relied upon by the prosecution was that the appellant was wearing a head torch, there was water on the plants, and the fact of the defendant leaving his car behind at the campsite. The strength of a circumstantial case is to be found in the unlikelihood of coincidence. Matters that individually are explicable may in

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[46] *Warren v Coombes* (1979) 142 CLR 531 at 537-541.
[47] *R v McBride* [2008] QCA 412.
[48] *Costa v Public Trustee (NSW)* [2008] NSWCA 223; (2008) 1 ASTLR 56 at [51]; *Lindsay v McGrath* [2015] QCA 206; [2016] 2 Qd R 160 at [63].

combination be such that an innocent explanation is no longer a rational conclusion.[49] But here, the three matters upon which reliance is placed are not collectively so unlikely as to compel, as the only rational conclusion, that the appellant was not collecting items from the property. The wearing of a head torch at 4 pm in May, when it might be expected there was still quite some light in the day, does not immediately suggest that the appellant was preparing to stay for the night. Leaving the car behind was suspicious. But it was capable of an innocent, though perhaps unlikely, explanation, even seen in the context of the other two circumstances. The water on the plants might be seen as the best point for the prosecution. The water on the plant shown in the photographs taken by Constable Senekal does not seem consistent with the evidence of the appellant; that he had emptied a tub in the morning. But neither does it appear to me to be the product of watering in the context of tending to the garden. Even if it was, it is not necessarily inconsistent with the appellant attending for the purpose of collecting goods. It would require extreme pedantry to suggest the appellant was guilty of trespass because he happened to put some water on the plants while at the property retrieving some of his goods.

[31] The three matters relied on by the prosecution, considered together, raise suspicion that the appellant was doing more than just collecting items. But having considered all of the evidence I am not satisfied that they are capable of proving, beyond reasonable doubt, that the appellant remained at the property unlawfully or that he attended other than for the purposes of removing his goods and chattels from the property. That is, having considered all of the evidence, and giving weight to the conclusions of the Magistrate, I am of the clear view that the evidence was insufficient to prove the guilt of the appellant. It follows that in my view the convictions must be set aside and instead the appellant be acquitted of the charges of trespass and breaching bail.

[32] As noted earlier in these reasons the Court requested submissions on the relevance of section 634 of the *Police Powers and Responsibilities Act*. This provision requires a police officer who suspects a person has committed an offence of trespass give the suspect a reasonable opportunity to explain why they were a the place. A police officer may only commence proceedings for an offence if the person does not give an explanation, if the officer considers the explanation is not a reasonable one, or if it is not reasonably practical to allow the person the opportunity to give an explanation.

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[49] *Hillier v The Queen* (2007) 228 CLR 618.

Here the appellant gave an explanation. Constable Senekal was not asked if he considered the explanation reasonable, no doubt because the section was not raised at all in the proceedings before the Magistrate. However, I agree with the submission of the respondent that it is to be inferred that Constable Senekal concluded the explanation was not reasonable. Constable Senekal had been informed the day before by Mr Thirnbeck that the appellant was living at the property.[50] On the morning of 19 May 2018 he saw the appellant at the entrance to the property. Later that day he found the appellant at the camp in the circumstances already described. And it is a fact that the police officer charged the appellant with trespass. From this it can safely be inferred that Constable Senekal considered, and found inadequate, the explanation offered by the appellant.

[33] The last matter to consider is the application by the respondent to amend the charge of trespass. Because of the decision I have reached on the adequacy of the evidence it is strictly unnecessary to determine this issue. It is sufficient to observe, as was implicitly acknowledged by the application for amendment by the respondent, that a serious question lingers as to whether the appellant remained in a "dwelling" as that word is defined. The campsite, so far as the evidence went, consisted of one or two vans (as in commercial vehicles rather than caravans), some awnings and assorted boxes and chairs. To overcome the problem that the assortment of items at the campsite may not amount to a dwelling the respondent sought to amend the charge to allege the appellant remained in the "yard to a dwelling". A yard, for the purposes of the *Summary Offences Act*, is "the parcel of land related to the dwelling that appears to be within identifiable boundaries".[51] There was an absence of clear evidence that Mr Thirnbeck's property had identifiable boundaries such that it was a "yard". More significantly, the issue was not one raised by the charge at first instance and therefore was not litigated by the parties. To allow the prosecution to amend the charge at this stage, even if such were possible,[52] would be unfair to the appellant as it would present a substantially different case to the one the appellant faced at trial.

Costs

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[50] Whether or not this was true, the fact Senekal was given this information goes to his state of mind and actions on 19 May 2018.

[51] *Summary Offences Act 2005* section 3 and schedule 2.

[52] Section 48 of the *Justices Act 1886* allows for amendment "at the hearing of a complaint". Section 225(3) may be sufficient to grant this court power to amend the charge. I need not decide this issue.

[34] The appellant seeks the costs of the appeal. Having succeeded in the appeal it is appropriate that he have an order for costs. Given the appellant represented himself both at trial and at the appeal those costs must be limited to his actual disbursements, being filing fees or other court fees paid by him.[53]

Conclusion and orders

[35] For the reasons given, the evidence was not sufficient to permit the conclusion, beyond reasonable doubt, that the appellant was at the property for reasons other than collecting his goods and chattels. It follows that the verdicts of guilty must be set aside and instead the appellant acquitted.

[36] The following orders are made:

(1) The appeal is allowed;

(2) The orders of the Magistrate of 20 July 2018 concerning the charges of trespass and breaching bail said to have occurred on 19 May 2018 are set aside;

(3) Instead the appellant is acquitted of the charges; and

(4) The respondent is to pay the appellant's costs limited to filing fees and other court fees actually paid by the appellant.

[53] *Cachia v Hanes* (1994) 179 CLR 403; [1994] HCA 14; *Merrin v Commissioner of Police* [2012] QCA 181.