DISTRICT COURT OF QUEENSLAND

CITATION:	*Harrington v Commissioner of Police* [2019] QDC 206
PARTIES:	**REECE WILLIAM HARRINGTON** (appellant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	D48/19
DIVISION:	Criminal
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrate's Court, Mackay
DELIVERED ON:	18 October 2019
DELIVERED AT:	Mackay
HEARING DATE:	17 October 2019
JUDGE:	Farr SC, DCJ
ORDER:	**The appeal is dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR UNSUPPORTABLE HAVING REGARD TO EVIDENCE – where the evidence of the parties was entirely separate and conflicting – where the learned magistrate rejected the defendant's version of events - where the appellant claims that there was insufficient evidence to support the learned magistrate's finding of guilt – where there was objective evidence directly contradicting the account of the appellant – whether the learned magistrate's finding of guilt was unsafe or unsatisfactory. CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – where a prosecution witness was called without prior notice – where that witness had never provided a witness statement – whether the appellant was denied procedural fairness not having advance notice or proof of evidence from the witness.
COUNSEL:	S McLennan for the appellant E Coker for the respondent
SOLICITORS:	Aboriginal and Torres Strait Islander Legal Service for the appellant Director of Public Prosecutions for the respondent

Background

[1] On 6 June 2019, after a summary trial in the Mackay Magistrates Court, the appellant was convicted of one count of receiving tainted property (a debit card), and two counts of fraud (for using the debit card to dishonestly apply bank credits to his own use).

[2] He was sentenced to 12 months' probation and 60 hours community service to be completed within six months.

[3] He has appealed against his conviction in respect of each charge pursuant to s 222 of the *Justices Act* 1886.

Grounds of appeal

[4] The appellant's grounds of appeal are summarised as follows:

1. That there was insufficient evidence to support the magistrate's finding of guilt.
2. That the appellant was denied procedural fairness, as the prosecutor called evidence from a witness without advance notice or a proof of evidence, and the magistrate refused the appellant's application for an adjournment.

Standard to be met on appeal

[5] An appeal pursuant to s 222 of the *Justices Act* is an appeal by way of rehearing.[1] The judge hearing such an appeal is required to review the evidence which was before the magistrate, weigh any conflicting evidence and draw his or her own conclusions.[2]

[6] Respect should be afforded to the decision of the magistrate.[3] The appellate court should bear in mind any advantage the magistrate had in seeing and hearing witnesses give evidence.[4]

[7] In order to succeed in his appeal the appellant must demonstrate that his conviction arose from a legal, factual, or discretionary error.[5] Where an error is identified, the appeal judge may set aside or vary the order, or make any order considered just.[6]

[8] The court is required to conduct a real review of the trial and of the learned magistrate's reasons. In doing so the court should give due deference and attach a good deal of weight to the views of the learned magistrate, but it remains for the appellate court to draw its own conclusions of the evidence.[7]

Summary of evidence

[9] The complainant, Mr Darren Gauci gave evidence that about 1.00am[8] on 26 December 2018 he saw his wife lock their car and then the front door to the house

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1 Section 223, *Justices Act* 1886.
2 *Charrington v Korac* [2008] QDC 328; *Fox v Percy* (2003) 214 CLR 118.
3 *Mbuzi v Torcetti* [2008] QCA 231.
4 *Mbuzi v Torcetti* [2008] QCA 231.
5 *White v Commissioner of Police* [2014] QCA 121, [8].
6 *Justices Act* 1886 (Qld), s 225(1).
7 *Stevenson v Yasso* [2006] 2 Qd R 150 at 162; *Crossing v Commissioner of Police* [2015] QDC 94.
8 Transcript pp 1-5, lines 5-6.

before they went to bed.[9] Mr Gauci awoke the next morning with a message on his phone to the effect that his visa debit card had been found at Mount Pleasant. He walked out to his car at about 10.30 am[10] to find the driver's door open and his wife's handbag as well as his wallet missing. It appeared that the car had been ransacked.[11] The car was undamaged.[12] He immediately checked his bank account on his phone and noticed that money was missing. Mr Gauci then rang the bank and cancelled all of his cards and then rang the police.[13] The car keys were unmoved from the hook where they had been put when the car was locked earlier that evening.[14]

[10] The debit card in question was in the complainant's wife's name but linked to the complainant's bank account.[15] Mr Gauci produced a bank statement for the relevant account.[16] It showed a "Bal Enq" at a CBA ATM at 5.23am on 26 December 2018 and then at a WBC ATM at 6.50am. It then showed three withdrawals from a CBA ATM of $200, $800 and $1,000 at 5.23am, 5.24am and 5.25am respectively. There was also a transaction made for $1,708.85 from the TJ Mini Mart.

[11] Mr Gauci gave hearsay evidence without objection that he was told by the bank that the two balance enquiry entries in fact indicated that the PIN for the card had been incorrectly entered twice.[17] Mr Gauci's evidence was that his wife told him that the PIN was "one digit off her birthday, and her licence was in her wallet with the debit card".[18] Mr Gauci gave evidence that the PIN was not kept with the card and no-one else knew the PIN, except his wife.[19]

[12] A police officer, Constable Wood gave evidence that he obtained CCTV images from two locations at which the money was withdrawn from the account in question – the Mount Pleasant Shopping Centre and TJ's Mini Mart. These images were tendered.[20] He offered identification evidence to the effect that the images "resembled Mr Harrington", and that "he believes" the male figure "resembles Mr Harrington" and that "the male person I believe is Mr Harrington (was) contained within … those images.[21] Constable Wood conducted an electronically recorded interview with the appellant. The recording was tendered[22] and played. CCTV video footage from the Mount Pleasant Shopping Centre was tendered[23] and the relevant parts were played.

[13] The appellant's version was as follows:

(i) on the morning of 26 December 2018, he gatecrashed a party in Andergrove somewhere near the High School;

(ii) he denied burgling a house in Bucasia;

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9 Transcript pp 1-6, lines 30-35.
10 Transcript pp 1-5, lines 9-10.
11 Transcript pp 1-4, lines 42-47.
12 Transcript pp 1-6, line 47.
13 Transcript pp 1-5, lines 1-5.
14 Transcript pp 1-7, lines 1-3.
15 Transcript pp 1-5, lines 10-15.
16 Exhibit 1.
17 Transcript pp 1-5, lines 30-33.
18 Transcript pp 1-6, lines 1-5.
19 Transcript pp 1-6, lines 37-40.
20 Exhibit 2.
21 Transcript pp 1-8.
22 Exhibit 3.
23 Exhibit 5.

(iii) he met a woman at the party he thought he was named "Ellen";
(iv) Ellen asked if he knew where she could get drugs from;
(v) Ellen didn't want "no little bit of drugs - she wanted a heap";
(vi) Ellen and the appellant went to a dealer's house and they were told he wanted "a bit of cash, … and some phones and that";
(vii) Ellen gave him her keycard;
(viii) Ellen gave him her PIN;
(ix) he "went and got what she wanted – she got what she wanted, person got what he wanted";
(x) "I know she told me to buy those phones at the Mini Mart there – she was with me she was outside";
(xi) he bought two or three phones at the Mini Mart;
(xii) he initially said that the Mini Mart was the "only time I've used it";
(xiii) after being asked about the Mount Pleasant Shopping Centre the appellant said "it was all the same day – to do with the same person and that person was there";
(xiv) that Ellen paid for the taxi over there;
(xv) the appellant said that Ellen withdrew an unknown amount of money from the bank; and
(xvi) Ellen was "white", "brunette", "a little bit chubby" and was shorter than the appellant (between his armpit and neck) and was "may be a few years younger".

[14] Another police officer, Constable Broad-McGregor gave evidence that he was called to the complainant's address on 26 December 2018 to investigate a "break and enter". He noticed security cameras at the house across the road and procured a copy of the footage. He tasked another police officer to retrieve CCTV footage from TJ's Mini Mart, which he received on 28 December 2018. He set out, a "suspect identification folio" and "received an email from another police officer, identifying the suspect as Reece Harrington". On 10 January 2019, he flagged the appellant as wanted for questioning.[24]

[15] The CCTV footage from TJ's Mini Mart showed the inside of the store, and there was no female present with the appellant at the time of the purchase in question.

[16] The CCTV footage from the Mount Pleasant Shopping Centre showed the general vicinity of the ATM in question. There was no female present with the male who made the withdrawals.

[17] The appellant was arrested on 21 January 2019.

[18] Mrs Gauci gave evidence that she was at home throughout the morning of 26 December 2018. She and her husband awoke at 10.00 am. She had had "a bit of a big Christmas".[25] Her husband received a message through Facebook saying somebody had his card and asked whether it had been lost. When she got up, the front door was ajar. Once outside, the car door was open on the driver's side and all their belongings, including her purse which was in her handbag, were gone.[26] Mrs Gauci denied ever having met the appellant or giving him her keycard. She

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24 Transcript pp 1-12, lines 20-41.
25 Meaning it was a busy day because they have four children. She didn't consume alcohol as she is diabetic and doesn't drink. (Transcript pp 1-18, line 36).
26 Transcript pp 1-16, line 45 to Transcript p 1-17, line 15.

identified that her purse contained her licence, another Commonwealth Bank keycard, her mother's credit card and other irrelevant items. Mrs Gauci stated that there was nothing to identify the PIN associated with that keycard.[27]

[19] Under cross-examination, Mrs Gauci agreed that her name was on the keycard and that only she knew the PIN. She also said that she locked both the house and the car before retiring on the night in question and that there was nothing in the purse to identify the PIN. She denied questions put to her based on the appellant's version of events in his interview.

Ground 1: unsafe and unsatisfactory

[20] The appellant has submitted that the chances of correctly guessing a PIN, based on a known date of birth, are so slim as to be inherently improbable. It is further submitted that when that feature of the evidence is considered together with the inferred behaviour of the offender who broke into the complainant's car, being:

(a) gaining entry to the locked house without causing damage;
(b) taking the car key from a hook;
(c) opening the car and stealing contents from it;
(d) returning the key to the hook; and
(e) leaving the front door ajar after exiting the house;

is so remarkable as to be unbelievable.

[21] Of course, this submission assumes that the offender was lacking the skills required to open a locked car without a key. It also assumes that the offender left the front door ajar, rather than some other person, such as the person that the complainant said had slept over that evening at their house but from whom no evidence was called. I also note that the complainant and his wife slept in that morning until 10.00 to 10.30am. Given that they have four children it is not difficult to imagine that the door was opened that morning, prior to the complainant's waking up, by another occupant of that house.

[22] Furthermore, the complainant gave hearsay evidence that when he contacted his bank that morning to cancel his cards, he was told that bank records showed that the first two attempts to use that card that morning were unsuccessful because an incorrect PIN had been entered.

[23] The appellant now objects to any reliance being placed on that evidence because of its hearsay nature. However no objection was raised when the evidence was given.

[24] The respondent submits that the failure of the appellant's representative to object to the hearsay evidence, amounts to a waiver of his right to object to its admissibility. As a consequence, the hearsay evidence was admitted into evidence as proof of the issue to which it is relevant.[28]

[25] The application of the "doctrine of waiver" to hearsay evidence was discussed by Justice Muir in the case of *R v Dunrobin*.[29] His Honour cited a number of interstate cases, in which the consequence of waiving an objection, was that hearsay evidence was admitted and treated as evidence of the facts asserted.

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27 Transcript pp 1-17, lines 25-35.
28 *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206-219.
29 *R v Dunrobin* [2008] QCA 116, [59]-[63].

[26] In particular, his Honour cited a passage from *Jones v Sutherland Shire Council* in which Justice Samuels explained:

> "*... If ... evidence admitted without objection is not legally admissible in proof of any issue, it may, once in, be used "as proof to the extent of whatever rational persuasive power it may have*."

[27] If follows that the learned magistrate was entitled to conclude that the offender twice attempted to use the card before entering the correct PIN on the third attempt. That is entirely inconsistent with the appellant's version of events.

[28] It was uncontested at trial that the handbag containing the debit card and Mrs Gauci's driver's licence were stolen from the couple's car on the evening in question. It was not disputed that the appellant had made the purchase at the TJ Mini Mart, and was present at the time the cash was withdrawn from the ATM.[30] The main fact in issue was whether the appellant had acted dishonestly, and whether he had reason to believe that a debit card was tainted property.

[29] In essence, the magistrate was confronted with two entirely separate and conflicting versions of events. A version provided by the appellant and a version provided by the complainant and his wife.

[30] The learned magistrate was correct to reject the defendant's version of events. The defendant's version was shown to be false by objective evidence.

[31] After reviewing all of the evidence, the learned magistrate concluded that the explanations provided by the appellant in his interview were pure fabrication.[31] He rejected the explanations, in total, as being completely dishonest. The magistrate noted that the appellant was unable to advise police of the whereabouts of "Ellen" who had permitted him to use the debit card, and that although the defendant claimed he had attended the ATM with "Ellen" to make the withdrawals, he was clearly seen walking alone on the CCTV footage.[32]

[32] After rejecting the appellant's version of events, the learned magistrate was left to consider the evidence of the prosecution witnesses, in particular the complainant and his wife.

[33] The prosecution witnesses gave evidence establishing the elements of each of the charges. There is no dispute that if the evidence of the complainant and his wife was accepted, the offences were proven.

[34] The learned magistrate was entitled to rely on the evidence of the prosecution witnesses. They gave evidence establishing the elements of the offences. It was clear evidence and no ground was gained during the course of cross-examination. There were no inconsistencies which would or could cast doubt on their version of events.

[35] The learned magistrate accepted that each one of the prosecution witnesses had given honest evidence to the best of their recollection without any attempt to

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30 Transcript pp 1-26, line 35.
31 Transcript of decision p 3, line 35.
32 Transcript of decision p 3, line 15.

mislead the court.[33] He accepted that neither of the two card holders had authorised anyone to use the card.[34]

Ground 2 – denial of procedural fairness

[36] Mrs Gauci was called as a witness without notice being given before the day of the hearing, and in circumstances where she had never provided a witness statement.

[37] The appellant has failed to identify however any unfair prejudice to his case as a consequence of the late decision to call Mrs Gauci. Her evidence, by large, mirrored that of her husband and therefore could not have taken the appellant by surprise.

[38] I note also that the appellant's legal representative did not seek an adjournment of the hearing upon learning that the prosecution was intending to call Mrs Gauci.

[39] The decision to call Mrs Gauci was only made after Mr Gauci's evidence that the debit card was in his wife's name notwithstanding that it was attached to his account. Quite obviously, at that point, Mrs Gauci became a material witness.

[40] In my opinion the trial was conducted fairly and there is no merit to this ground of appeal.

Conclusion

[41] The learned magistrate had objective evidence which directly contradicted the account of the appellant. His finding in rejecting the appellant's account was open on the evidence and plainly justified.

[42] The learned magistrate was entitled to accept the evidence of the complainant and his wife. They each gave clear evidence, and nothing arose during the course of cross-examination which would cast any doubt on their account. Emphasis must be given to the fact that the learned magistrate also had the benefit of seeing the witnesses give their evidence.

[43] I am unable to discern any legal, factual or discretionary error on the part of the learned magistrate.

Order

[44] The appeal is dismissed.

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33 Transcript of decision p 2, line 10.

34 Transcript of decision p 3, line 35.