DISTRICT COURT OF QUEENSLAND

CITATION:	*Hainaut v Queensland Police Service* [2019] QDC 223
PARTIES:	**JEAN-BAPTISTE DOMINIQ HAINAUT** (appellant) **v** **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	APPEAL NO: 81/19
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Mareeba
DELIVERED ON:	8 November 2019
DELIVERED AT:	Cairns
HEARING DATE:	11 October 2019
JUDGE:	Morzone QC DCJ
ORDER:	**1. Appeal allowed;** **2. The conviction, sentence and orders made by the Magistrates Court at Mareeba on the 18 April 2019, are set aside.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – procedural fairness - opportunity to be heard - appeal pursuant to s 222 *Justices Act 1886* - conviction - where defendant initially appeared at hearing but refused to acknowledge the conventional use of his surname and uppercase format– the defendant failed to identify as the defendant as named in the proceeding – the defendant sought compensation to "surrender" his surname on trusteeship - where magistrate invited the defendant to stay or leave and proceeded in the defendant's absence – whether the court had power to proceed *ex parte* in absence of defendant/appellant pursuant to s 142 of the Act – convicted and sentenced the defendant – discretion to remit proceeding for retrial. **Legislation**

Transport Operations (Road Use Management) Act 1995, s 78(1), (3)(f)
Practice Direction number 8 of 2006
District Court of Queensland Act 1976 (Qld), s113

Cases
Allesch v Maunz (2000) 203 CLR 172
Dwyer v Calco Timbers (2008) 234 CLR 124
Dyers v The Queen (2002) 210 CLR 285
Forrest v Commissioner of Police [2017] QCA 132.
Fox v Percy (2003) 214 CLR 118
Gallo v Dawson (1990) 93 ALR 479
Hainaut v Department of Transport and Main Roads [2017] QDC 207
Hainaut v Queensland Police Service [2017] QDC 208
Kioa v West (1985) 159 CLR 550, 582
McDonald v Queensland Police Service [2017] QCA 255
Neil v Nott (1994) 121 ALR 148
SZTQL v Minister for Immigration and Border Protection and Another (No 2) (2015) 150 ALD 456, [3] per Allsop CJ
Warren v Coombes (1979) 142 CLR 531
White v Commissioner of Police [2014] QCA 121

SOLICITORS: Self-represented Appellant
The Office of Director of Public Prosecutions for the Respondent

[1] On 18 April 2019, the appellant was convicted after a summary hearing in his absence of driving without a licence with the circumstance of aggravation that he did so whilst his driver licence was suspended. He was then sentenced to a fine of $450, disqualified from driving for one month, and convictions were recorded.

[2] The appellant now appeals his conviction and sentence.

[3] The appellant set out his detailed argument in the Notice of Appeal and handwritten submissions in the form of letter to the respondent. The respondent filed outlines of argument, and each party made further submissions on the hearing of the appeal.

Background

[4] The appellant was charged that on 12 September 2018, he was driving without a licence with the circumstance of aggravation that his license was suspended under the *State Penalties Enforcement Act* 1999 (Qld). That offence carries a maximum penalty of 40 penalty units or one year imprisonment, and a mandatory driver licence disqualification of a minimum one month but not more than six months.[1]

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1 *Transport Operations (Road Use Management) Act* 1995, s 78(1) & (3) (f).

[5] The appellant appeared at each pre-trial mention on 5 November 2018, 17 December 2018, 21 January 2019, and again at the commencement of the trial hearing on 18 April 2019.

[6] On the day of the hearing the appellant appeared in person, however, he refused to acknowledge his conventional surname and that he was that 'defendant' named in uppercase in the proceeding. He instead stated he knew a person with that "identity" but he was not that person as he was alive.[2] The learned magistrate told the appellant that he could leave if he was not the person named as the defendant. The appellant responded that he required $5,000,000.00 compensation if he was to "*accept that surname*". He maintained that the person named in the charge was a "*dead entity*" and inferentially he was not that person.

[7] After further exchanges, the appellant apparently departed the courtroom, and the learned magistrate proceeded to deal with the matter in his absence.

[8] The prosecution cased relied upon the evidence from Senior Constable Derek Hicks who intercepted the appellant on 12 September 2018, and conducted a licence check on him. He produced a certificate of the registrar of the State Penalties and Enforcement Registry purporting to show that the Registry had suspended the appellant's licence at the relevant time. He testified that the notice to appear was served personally upon the appellant in purported compliance with s 56 of the *Justices Act* 1886 (Qld). The officer also identified the appellant who appeared in the Court earlier as the person charged.

[9] The learned Magistrate gave oral reasons, convicted the appellant and sentenced him with a $450 fine, the minimum driver licence disqualification of one month, and convictions recorded.[3]

Ground of Appeal

[10] The determinative issue in the appeal is whether the magistrate erred by not affording the appellant a reasonable opportunity to be heard, and whether the court had power to proceed in his absence to conviction and sentence.

Mode of Appeal

[11] The appeal is brought pursuant to s 222 of the *Justices Act* 1886 (Qld). Section 222(1) relevantly provides:

> "If a person feels aggrieved as complainant, defendant or otherwise by an order made by justices or a justice in a summary way on a complaint for an offence or breach of duty, the person may appeal within 1 month after the date of the order to a District Court judge."

[12] Pursuant to s 223 of the appeal is by way of rehearing on the original evidence, and any new evidence adduced by leave. Section 223 provides:

> "(1) An appeal under section 222 is by way of rehearing on the evidence (original evidence) given in the proceeding before the justices.

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2 T.1 – 4.
3 T.4.

(2) However, the District Court may give leave to adduce fresh, additional or substituted evidence (new evidence) if the court is satisfied there are special grounds for giving leave.

(3) If the court gives leave under subsection (2), the appeal is—

(a) by way of rehearing on the original evidence; and

(b) on the new evidence adduced."

[13] For an appeal by way of rehearing "the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error,"[4] and thereby resulting in a manifestly excessive sentence.

[14] The rehearing requires this court to conduct a real review of the evidence before it (rather than a complete fresh hearing), and make up its own mind about the case.[5] Its function is to consider each of the grounds of appeal having regard to the evidence and determine for itself the facts of the case and the legal consequences that follow from such findings. In doing so it ought pay due regard to the advantage that the magistrate had in seeing the witnesses give evidence, and attach a good deal of weight to the magistrate's view.[6]

[15] In the disposal of the appeal, this court has the same powers as the Court of Appeal on an appeal.[7] Further, s 225 *Justices Act* 1886 (Qld) provides that:

"(1) On the hearing of an appeal, the judge may confirm, set aside or vary the appealed order or make any other order in the matter the judge considers just.

(2) If the judge sets aside an order, the judge may send the proceeding back to whoever made the order or to any Magistrates Court with directions of any kind for the further conduct of the proceedings including, for example, directions for rehearing or reconsideration.

(3) For subsection (1), the judge may exercise any power that could have been exercised by whoever made the order appealed against.

(4) An order made under subsection (1) has effect, and may be enforced in the same way, as if it had been made by whoever made the appealed order."

Opportunity to be heard

[16] The appellant practices an unconventional usage of his name which distinguishes his given name from a family or surname, and he hold an apparently genuine belief that the use of

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4 *Allesch v Maunz* (2000) 203 CLR 172, [22] – [23] followed in *Teelow v Commissioner of Police* [2009] QCA 84, [4]; *White v Commissioner of Police* [2014] QCA 121, [8]*, McDonald v Queensland Police Service* [2017] QCA 255, [47]; contrast *Forrest v Commissioner of Police* [2017] QCA 132, 5.

5 *Fox v Percy* (2003) 214 CLR 118; *Warren v Coombes* (1979) 142 CLR 531; *Dwyer v Calco Timbers* (2008) 234 CLR 124; applied in *Forrest v Commissioner of Police* [2017] QCA 132, 5 and *McDonald v Queensland Police Service* [2017] QCA 255, [47].

6 *White v Commissioner of Police* [2014] QCA 12, [5]-[8]; *Forrest v Commissioner of Police* [2017] QCA 132, 5 & 6; *McDonald v Queensland Police Service* [2017] QCA 255, [47].

7 *District Court of Queensland Act* 1976 (Qld), s.113.

upper case lettering is for a dead entity or corporation. He argues that he wanted to explain himself to the court, "*as a living man, not a CORPORATION*" but he was not afforded this opportunity, and instead told he could leave the court, and the hearing continued in his absence.

[17] At the start of the summary trial on 18 April 2019, after the prosecutor presented the case and announced his appearance, the following exchanges occurred between the acting Magistrate and the appellant (defendant):[8]

> "*BENCH:* *I have a charge against Jean-Baptiste Dominiq Hainaut. Do you acknowledge that person?*
>
> *DEFENDANT:* *I suppose I know a person with the identity and I am not that, I'm alive.*
>
> *BENCH:* *Let me cut you off there.*
>
> *DEFENDANT:* *The - - -*
>
> *BENCH:* *If you are not the defendant, Jean, J-e-a-n, Baptiste, B-a-p-t-i-s-t-e, Dominiq, D-o-m-i-n-i-q, Hainaut, H-a-i-n-a-u-t. If you are no that person, you may sit down, move to the back of the court room or leave and I will deal with the matter in the absence of that person. So you are or you are not that person, which is it? If you are that person, we will proceed. If you are not that person, then you may as well leave and I'll deal with it in the absence of that person.*
>
> *DEFENDANT:* *Well, all these documents concerning these things are fraudulent.*
>
> *BENCH:* *Are you that person or not? Do you acknowledge you are the defendant in these proceedings? Do - - -*
>
> *DEFENDANT:* *First, I am here [indistinct] and unconstrained. I need to come here because I don't want to be arrested in front of my family or whatever [indistinct] so I'm here just because of that. But from what I understand, the person is a dead entity and I know the law and none of the papers talk like that, but that shows the incompetence of the lawmakers and the illegal laws. So I can't accept trusteeship of the estate of that person. But if you want me to accept that surname, I want $5,000,000 compensation. So if you are willing to give me $5.00 compensation and if you keep on talking to me, that means you agree to this contract, so it means you are bound to eventually give me five million dollar compensation.*
>
> *BENCH:* *Okay. Everything you've said is complete nonsense - - -*
>
> *DEFENDANT:* *Please just - - -*
>
> *BENCH:* *- - - and irrelevant, so if - - -*

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8 T1-2/8 – T1-4/43.

DEFENDANT: *I heard the same story before. I've been through Family Court before. I've got the same comment from different Magistrate before.*

BENCH: *Yep.*

DEFENDANT: *But come lunch time, they adjourned the whole thing and would you believe, I got off every one. Three of them.*

BENCH: *Okay.*

DEFENDANT: *This one, they got me back [indistinct] appeal with a [indistinct]*

BENCH: *So let me understand - - -*

DEFENDANT: *Which it's completely unjustified.*

BENCH: *- - - what you are saying.*

DEFENDANT: *Well, I'm still talking, as far as I know. [indistinct]*

BENCH: *What you are saying is that firstly, the defendant, or – sorry, a person is a dead entity and you cannot accept being the trustee of deceased person's estate and if I continue to talk to you that I will have accepted something, perhaps that you are the trustee of some deceased estate, but I will have to pay you compensation. All of which is completely utter rubbish and nonsense.*

DEFENDANT: *[indistinct]*

BENCH: *Now, I'll just ask you one more time. Do you acknowledge that you are the defendant, the name of which I spelt out previously and is endorsed here on the bench charge sheet? Are you that person or not? Yes or no?*

DEFENDANT: *Are you aware of the fraudulent - - -*

BENCH: *Yes - - -*

DEFENDANT: *nature of the text?*

BENCH: *Yes or no. Are you that person? Yes, you are, or no, you are not. Which is it?*

DEFENDANT: *Well, since I'm alive, I cannot be that person.*

BENCH: *You're not that person? Thank you. Sergeant – or Senior Constable, as the defendant has failed to appear today, do you wish to deal with the matter in his absence?*

SNR CONST O'BRIEN: *Yes, your Honour.*

BENCH: *Thank you.*

DEFENDANT: *And I know what's going to happen now, but I'm going to appeal the decision.*

BENCH: *That's the system we have. If you're not prepared to acknowledge that you are the defendant, there is no defendant before me. I'm not prepared to proceed otherwise, unless you acknowledge that you are the person charged with the offence. If you are not, that's fine. You can sit in the back of the court and watch the proceedings - - -*

DEFENDANT: *Well, can I - - -*

BENCH: *as any other member of the - - -*

DEFENDANT: *Can I go or do I have to stay?*

BENCH: *You can go if you wish. If you're not going to acknowledge that you're the defendant here for the trial today, you may as well leave and I'll deal with it in the absence of the defendant. If you want to have a trial today, as the defendant, you should acknowledge that you are the defendant named in the charge.*

DEFENDANT: *Well, the charge are fraudulent. The drivers licence is a fraudulent. I'm sure if I ask the name of this police man, he would be giving a fraudulent answer. But you guys don't know about it, so have to be educated. This lady here knows me, she's seen me before. She can tell you something about what happened last time I was in court, when the magistrate did the same thing as you did. But if you want to go ahead with this, go ahead and waste more time and money and resources and - - -*

BENCH: *Yes, thank you.*

DEFENDANT: *I've retired, so I can have plenty of time to come hassle you guys.*

BENCH: *Thank you. The comments made by the person who was at court may not have been recorded by the recording, but essentially, he would not admit that he was the person named in the charge. He made allegations of fraudulent behaviour against the – whom I assume is the officer giving evidence in these proceedings and almost, amongst other things, said that the drivers licence was a fraudulent document. He also said, as indicated previously, that person's a dead entity and something about he cannot accept being a trustee of the deceased person and something else about if I continued a conversation with him, then I would be required to pay him compensation. Ultimately, he, not being prepared to accept that he is the person named in the charge, he's left the courtroom. If you wish to deal with the ex parte – the matter ex parte, I'll take some evidence on the matter.*"

[18] Notwithstanding the learned magistrate's summation, it seems to me that the appellant was well known to the court to sufficiently enable the learned magistrate to acknowledge and confidently identify him as the proper defendant in the proceeding, in particular:

(a) The appellant had expressed similar proclivities in the same court constituted by different magistrates in Cairns on 12 September 2016 and Mareeba on 14 November 2016; both subject of appeal to this court.[9]

(b) At each pre-trial mention of the present case on 5 November 2018, 17 December 2018, and 21 January 2019, when the trial was set for 18 April 2019, the presiding magistrate acknowledged the appellant as the defendant, and so endorsed the file with the acronym "*DIP NRL*" being a shorthand way of saying - defendant in person with no legal presentation.

(c) On 5 November 2018, the court accepted the appellant plea of not guilty to the charge. In his notice disputing the charge the appellant described himself as *"Jean-Baptiste Dominiq"* in handwriting.

(d) During the course of announcing his appearance, the police prosecutor alerted the court to the appellant's unusual approach to his name, saying: "*If you can take the matter of – I'm not quite sure how to say his surname – Hainaut? H-a-i-n-a-u-t. .... I did – the first conversation I had with the defendant, your Honour, was for how to pronounce his name. He's stated that he doesn't identify that, so I'll leave that with you*."

(e) Even during the case itself, the prosecution witness readily identified the appellant in answer to the prosecutors questions:

> "*Can I just confirm – clarify for the court, you were present in the back of the Mareeba Magistrates Court at the commencement of this trial - - -?---That's right.*
>
> *- - - of this – yeah, trial. There was a gentleman standing next to me at the bar table. Was that the gentleman that you intercepted that night?---Yes, it was.*
>
> *And is that the person that you identified through the driver licence?---Yes, it was.*"

[19] It seems to me that both the prosecutor and the learned magistrate in fact knew the appellant was the relevant defendant in the proceeding. So much is also clear from the learned magistrates endorsement of his appearance "*Defendant says a person is a dead entity"*", and also his Honour's remarks in the reasons explaining the early stages of the proceeding that: "*Comments made by the **defendant** may or may not have been recorded, and I have to an extent made some comment about those comments on the record already.*"[10]

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9 *Hainaut v Department of Transport and Main Roads* [2017] QDC 207 at [24] – [28], and contrast *Hainaut v Queensland Police Service* [2017] QDC 208 at [16], [20]-[28].

10 Decision T.2/20-23.

[20] The common law recognises a fundamental duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.[11] A reasonable opportunity to be heard "*requires that a decision-maker provide a claimant with an opportunity to be heard and an opportunity for the claimant to advance the entirety of his factual material and submissions before a conclusion is reached*."[12]

[21] In *Kioa v West*,[13] Mason J said:

> "*It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.*"

[22] It is often difficult for judicial officers to ensure the integrity of proceedings, which involve a litigant appearing in person. The High Court in *Neil v Nott*[14] said:

> "*A frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of the parties which are obstructed by their own advocacy*."

[23] In these circumstances, the lack of legal knowledge is undoubtedly a misfortune for any lay litigant appearing in person, but it should not be seen as a privilege.[15] This is all the more challenging when ignorance of the law and procedural matters are overlayed with unconventional beliefs. For reasons which remain unclear to me, the appellant has a deep rooted but apparently genuine belief of historically proper usage of given names for living beings, and attributing the use of upper case lettering for a dead entity or person (as on a tombstone) or a corporation. Conventionally, the courts formalities rely upon a person's full name emanating from birth records, and the use of upper case is merely a matter of standardised forms of court, and more broadly, mere expression in the wider community. In that light, the appellant's assertions could be considered a nonsense in conventional society, foreign to Australian law and verging on the bizarre.

[24] In any event, it is also a standard requirement for parties to announce their appearance at the start of every hearing to identify the proper parties and facilitate accurate transcription in proceedings. The procedure is common to all courts and prescribed by practice direction.[16] For the Magistrates Court of Queensland, *Practice Direction number 8 of* 2006, prescribes that: *"anyone appearing in a proceeding including a person who appears without legal representation will at the outset clearly state:*

> "*(a) his or her surname and initials (spelling the surname, save where the spelling is obvious);*

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11 *Kioa v West* (1985) 159 CLR 550, 582.

12 *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, [35] per Flick J cited in *SZTQL v Minister for Immigration and Border Protection and Another (No 2)* (2015) 150 ALD 456, [3] per Allsop CJ.

13 *Kioa v West* (1985) 159 CLR 550, 582.

14 *Neil v Nott* (1994) 121 ALR 148 at [150] per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

15 *Gallo v Dawson* (1990) 93 ALR 479, [481] per McHugh J.

16 Practice Direction number 8 of 2006 of the Magistrate Court of Queensland; Amended Practice Direction Number 12 of 2014 District Court of Queensland; and Practice Direction Number 3 of 2006 (Amended) Supreme Court of Queensland.

(b) the capacity, including the professional capacity, if any, in which he or she appears;

(c) the party or parties whom he or she represents, if that be the case;

(d) the name of the instructing solicitor, or the solicitor with whom, the person is connected (including the name of any legal firm) as the case may be;

(e) the name of any solicitor (including the name of any legal firm) for whom the legal representative is acting as town agent; and

(f) when the legal representative is a barrister and paragraph (d) does not apply, whether he or she has accepted a direct access brief."[17]

[25] Perhaps the court followed the practice direction on the court sufficiently identified the appellant even with his unusual proclivities, to be satisfied that he was the proper defendant at the earlier mentions on 5 November 2018, 17 December 2018 and 21 January 2019. However, the practice direction was not followed at the summary trial, which lead to the learned magistrate becoming understandably exasperated by the appellant's attempts to explain his unconventional usage of his name.

[26] In my respectful opinion, the appellant was clearly identifiable, was the proper defendant and did appear when called, and therefore, the learned magistrate incorrectly concluded that the appellant failed to appear.

Hearing in defendant's absence

[27] The learned magistrate relied upon s 142(1)(a) of the *Justices Act* 1886 (Qld), to proceed with the case, and convict and sentence the appellant in his absence. Section 142 relevantly provides:

"**142 Proceedings in absence of defendant**

(1) If at the time and place so appointed the defendant does not appear when called and the justices are satisfied, on oath or by deposition as provided in section 56, that the summons was properly served on the defendant a reasonable time before the time appointed for the defendant's appearance, the justices may—

(a) proceed ex parte to hear and determine the case as fully and effectually to all intents and purposes as if the defendant had personally appeared before them in obedience to the said summons;

…

(2) When the justices proceed as prescribed by subsection (1)(a) or (c) they shall not—

(a) order that the defendant be disqualified either absolutely or for any period from holding or obtaining any licence, registration, certificate, permit or other authority under any Act or order that any licence, registration,

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17 *Practice Direction number 8 of 2006*, at [3].

certificate, permit or other authority held by the defendant under any Act be cancelled or suspended;

….

unless the justices have first adjourned or further adjourned the hearing of the complaint to a time and place appointed by the justices to enable the defendant to appear for the purpose of making submissions on the question of such disqualification, cancellation or suspension or penalty, as the case may be.

(3) The clerk of the court shall forthwith after any adjournment under subsection (2) give notice in writing to the defendant informing the defendant of—

(a) the time and place to which the hearing is adjourned; and

(b) the purpose of the adjournment; and

(c) the defendant's right to be heard at the adjourned hearing.

(3A) Such notice may be given by service thereof upon the defendant personally or by post at the address of the defendant last known to the clerk of the court.

…

(4) If at any time and place to which the hearing is adjourned pursuant to subsection (2)—

(a) the defendant does not appear; and

(b) it is proved that the notice in writing prescribed by subsection (3) was given to the defendant a reasonable time before the adjourned hearing; the justices then present may proceed as prescribed by subsection (1)(a) or (c) as if subsection (2) had not been enacted.

(5) A document purporting to be a duplicate original or a copy of a notice given to the defendant under this section and endorsed with a certificate purporting to be signed by the person by whom the document was served upon the defendant personally or, where the document was served by post, by the clerk of the court to the effect that—

(a) the document is a duplicate original or copy of the notice given to the defendant named therein; and

(b) the document was served upon the defendant personally, or, as the case may be, was posted to the address appearing therein which was the address of the defendant last known to the clerk; and

(c) where the document was served by post—in the ordinary course of post the notice would be delivered on the date specified in such endorsement;

> shall be evidence that the notice was given to the defendant named therein according to the certificate so endorsed and, where the document was served by post, that the address appearing therein is the address of the defendant last known to the clerk.
>
> …
>
> (6) Where a case is, at any place, heard and determined ex parte under subsection (1)(a), any Magistrates Court at that place, upon application made in that behalf by the clerk of the court or the complainant or by the defendant or the defendant's lawyer within 2 months after such determination, may, for such reason as it thinks proper, grant a rehearing of the complaint upon such terms and subject to the payment of such costs as it thinks fit. …"

[28] It seems to me that the proceedings of 18 April 2019, were fundamentally flawed in two respects. Firstly, the defendant did appear when called and in the absence of any further call and non-appearance s 142 was not engaged. Secondly, even if the hearing was properly constituted (as respondent properly concedes) there was no notice given to the appellant before imposing the licence disqualification in accordance with ss 142(2)(a) and (3).

[29] In the result, the appellant was not afforded an opportunity to be heard, the magistrate had no power to hear and determine the matter in his absence, and I am bound to allow the appeal and set aside the conviction and sentencing orders.

Disposition

[30] Having come to that view, I should consider the utility of sending the proceeding back to the Magistrates Court with guidance directions for rehearing or reconsideration according to law.

[31] In *Dyers v The Queen*,[18] Gaudron and Hayne JJ said of the discretion to remit:

> "22. In these circumstances, it would ordinarily follow that a new trial should be ordered, leaving it to the prosecuting authorities to decide whether to proceed with a new trial. In this case, however, the sentence imposed on the appellant has expired. The decision whether to continue a prosecution is ordinarily a decision for the executive, not the courts. There have, however, been cases where this Court has quashed a conviction, without either ordering a new trial or directing entry of a verdict of acquittal (See, eg, *Callaghan v The Queen* (1952) 87 CLR 115). To make an order that would preclude a new trial would constitute a judicial determination of the proceedings against the appellant otherwise than on trial by jury and in circumstances where it is not held that the evidence adduced at trial required the jury to acquit the appellant."

[32] Kirby J identified considerations relevant to ordering a retrial:[19]

> "88. Where an appellate court has not accepted an argument that a verdict is unreasonable, but has found a material error of law, the proper order is

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18 *Dyers v The Queen* (2002) 210 CLR 285 at [23].

19 *Dyers v The Queen* (2002) 210 CLR 285 at [88]-[90] (omitting references).

> normally to provide for a retrial. Where the prosecutor's discretion is exercised in favour of a retrial, such an order permits a verdict to be taken from a jury accepted as representing the community. This is why, normally, it is left to the Director of Public Prosecutions to evaluate the competing considerations for and against a retrial.
>
> 89. This said, an order for a new trial remains 'within limits, a discretionary remedy'. It is no less so in criminal appeals, although the considerations of the public interest involved in criminal proceedings are somewhat different to those in civil cases. It is a judicial act and therefore not an automatic or unthinking one.
>
> 90. In the special circumstances of this case, I have concluded that a new trial of the appellant should not be ordered. The most telling circumstances are: (1) the age of the appellant and his proved medical condition that moved the Court of Criminal Appeal to substitute a non-custodial sentence; (2) the absence of any challenge by the prosecutor to that substituted sentence; (3) the fact that the appellant has fully served that sentence and that principles of double jeopardy would restrain any increase in the sentence following conviction after a retrial; (4) the absence of any reason to require a retrial in the appellant's case and the fact that the appellant does not ask for a retrial; (5) the relatively confined nature of the assault alleged; (6) the undesirability of subjecting the complainant and her mother to the ordeal of giving evidence on a further trial; (7) the fact that a further trial would be the third occasion on which the appellant had been put on trial for the offence; and (8) the public costs and inconvenience of a further trial so many years after the alleged events and the likelihood that the prosecution might, on a new trial, be obliged to call the witnesses upon whose absence it commented in the second trial, thereby presenting its case in a different way."

[33] In addition to my remarks above about the conduct and errors in the original trial, I need to say something about the merit of the case.

[34] The nature of the alleged offending conduct is at the lower end seriousness. The charge was for driving without a licence having being suspended under the *State Penalties Enforcement Act* 1999 (Qld). That offence carries a maximum penalty of 40 penalty units or 1 year's imprisonment, and mandatory driver licence disqualification of at least 1 month but not more than 6 months.[20]

[35] It became apparent on the appeal that the appellant disputes that he was not the holder of a driver's license by suspension under the *State Penalties Enforcement Act* 1999 (Qld) or at all. His argument goes to the heart of the offending.

[36] The onus was on the prosecution to prove beyond reasonable doubt that the appellant did not hold a driver licence authorising him to drive the vehicle on the road when intercepted on 12 September 2018. The learned magistrate found "*that the Defendant – one Jean Baptiste Dominic Hainaut – did drive a motor vehicle, as was alleged, on that date whilst his driver's*

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[20] *Transport Operations (Road Use Management) Act* 1995, s 78(1) & (3)(f).

licence was suspended under the State Penalties Enforcement Registry legislation. Therefore, I am satisfied beyond reasonable doubt and I find the Defendant guilty as charged."

[37] The only admissible evidence of the appellant's licencing status was in the form of a certificate of the register of the State Penalties Enforcement Registry. The only prosecution witness, Senior Constable Derek Hicks, produced the certificate and supporting delegated authority. The officer testified that: "*It's a certificate of [the] registrar from the registrar of SPER, detailing – or confirming that the defendant was in fact suspended at the time of being intercepted and it outlines the contact made with the defendant.*" The tendered certificate was in these terms:

> "During the period from 27 November 2000 until 17 September 2018, SPER used a computer for the keeping of the register required to be kept under section 153 (1) of the SPE Act 1999. During the said period, the computer was used regularly to accurately store and process records required to be kept under section 153(2) of the SPE Act 1999 and all other information contained in this certificate. On 17 September 2018, the following information was obtained from the computer records in accordance with section 95(3) of the *Evidence Act 1977*.
>
> On 30 January 2018 court order number O012736813 issued to Jean Baptiste Dominiq Hainaut (Date of birth 14 January 1950) by Cairns Magistrates Court was registered with SPER for enforcement.
>
> On 26 April 2018 a Reminder Notice was issued to 37 Terebra St Palm Cove Qld 4879, being at that time the address of Jean Baptiste Dominiq Hainaut recorded with SPER. The notice has not been returned unclaimed.
>
> On 17 May 2018 in accordance with section 105, 145, and 158 of the SPE Act 1999, a Notice of Intention to Suspend Driver License was issued to Jean Baptiste Dominiq. The notice was posted by ordinary mail to 37 Terebra St Palm Cove Qld 4879 being at the time the current correspondent address recorded with SPER. The notice has not been returned unclaimed.'

[38] Contrary to the officer's assertion, it seems to me that the certificate contains no proof of evidence that the appellant's license was suspended as at 12 September 2018. It does not prove the state of the register but merely documents a narrative of action taken to enforce an unpaid amount and contact with the appellant. There was no other admissible evidence proving that the appellant did not hold a driver's license at the relevant time. Consequently, on my review of the evidence, the prosecution case well short of proving that critical element and there was no other admissible evidence which could have supported a conviction.

[39] In the circumstances of the present case, it seems to me that the following matters are relevant to the exercise of the discretion to order a retrial:

1. The relatively minor nature and seriousness of the offending conduct;
2. The conduct of the original trial subject of the appeal;
3. The extent that the material errors found on appeal were attributable to the conduct of the prosecution, and/or the appellant;
4. The defects in the evidence at the original hearing such that, taken at its highest, it will not sustain a conviction;

5. The likelihood that the prosecution might, on a new trial, exploit a forensic advantage, present its case with fresh evidence and in a different way;
6. The time and effort of the appellant prosecuting the appeal; and
7. The cost, delay and inconvenience of another trial.

[40] In these special circumstances, I have concluded that a retrial should not be ordered.

Order

[41] For these reasons, I allow the appeal, set aside the conviction, sentence and orders made by the Magistrates Court at Mareeba on the 18 April 2019 and decline to remit matter for rehearing.