DISTRICT COURT OF QUEENSLAND

CITATION:	*R v McDonald* [2020] QDC 171.
PARTIES:	THE QUEEN v LACHLAN JOHN MCDONALD
FILE NO/S:	Sout-DIS 717/19
DIVISION:	Criminal
PROCEEDING:	Trial
ORIGINATING COURT:	District Court of Queensland at Southport
DELIVERED ON:	24 July 2020
DELIVERED AT:	Southport
HEARING DATES:	13, 14, & 15 July 2020.
JUDGE:	Muir DCJ
VERDICT:	**Count 1: Guilty**
CATCHWORDS:	CRIMINAL LAW – TRIAL HAD BEFORE JUDGE WITHOUT JURY – VERDICT – where defendant is charged with 1 count of attempted child stealing – whether the defendant is guilty or not guilty of the charge CRIMINAL LAW – TRIAL HAD BEFORE JUDGE WITHOUT JURY – ATTEMPTS – whether the defendant's actions amounted to an attempt to commit the relevant offence CRIMINAL LAW – TRIAL HAD BEFORE JUDGE WITHOUT JURY – EVIDENCE – INTENT – where evidence of defendant's intent is largely circumstantial – whether defendant's intent is made out by the crown beyond reasonable doubt CRIMINAL LAW – TRIAL HAD BEFORE JUDGE WITHOUT JURY – EVIDENCE – where defendant's record of interview was played – where evidence of the complainant

was pre-recorded in accordance with the Evidence Act – where the complainant gave reports of events to others immediately after the alleged offending – where those reports cannot be used for impermissible hearsay purpose – where the credibility and reliability of the complainant is key – whether there is no other rational explanation for the defendant's conduct other than he intended to steal the complainant.

LEGISLATION: *Criminal Code* 1899 (Qld) ss 4, 363, 535, 615B, 615.
Evidence Act 1977 (Qld) ss 93A, 21A, 21AW.

CASES CITED: *R v Mulcahy* [2010] ACTSC 98.
Nguyen v R [2012] ACTCA 24.
R v MMH [2020] QDC 70.
R v Baille (1859) 8 Cox CC 238.
R v Timmins (1860) Bell CC 27.
R v De Silva [2007] QCA 301.

COUNSEL: Ms J Guy for the Crown
Mr JA McNabb for the Accused

SOLICITORS: Director of Public Prosecutions for the Crown
Brooke Winters Solicitors for the Accused

Overview

[1] On the morning of 1 April 2019, Lachlan John McDonald, the 36 year old male defendant[1], offered a 13 year school boy – who was unknown to him – a lift up the road to a nearby bus stop.[2] This offer was rejected by the boy. But as a result of this incident, the defendant was charged on indictment with one count of attempted child stealing pursuant to s 363(1)(a) and 535(1) of the *Criminal Code* (Qld) 1899. More particularly, the allegation is that on 1 April 2019 he attempted to fraudulently entice away the boy (the complainant child who was under 16 years) by offering him a lift up to the bus stop, with intent to deprive the complainant's mother of possession of her child.

[2] On 30 April 2020, the prerecording of the complainant's evidence was conducted before me.

[3] On 5 May 2020, the defendant applied for and another judge of this court granted, an order that his trial for this charge proceed as a judge only trial.[3]

[4] On 13 July 2020, the defendant was arraigned before me and pleaded not guilty to the charge. Over the ensuing two days I heard and received evidence. On the third day, after I received written submissions and heard final addresses, I reserved my judgment.

[5] My role is to determine on this evidence whether the defendant is guilty or not guilty of this charge.

[6] In undertaking this task, I must apply the same principles of law and procedure as would be applied in a trial before a jury.[4] The Crown and Defence generally agree as to the appropriate directions that apply in this case.[5] A summary of how I have used these directions is set out below where necessary.

[7] As a judge of the facts, as well as a judge of the law, I must bring an open and unbiased mind to the evidence. I must view the evidence dispassionately without emotion. I must take into account all of the necessary warnings or instructions that arise on the facts of the case.

[8] The defendant is presumed to be innocent. In determining whether the Crown has proved each and every element of this offence beyond reasonable doubt, three critical issues fall to be determined:

(a) First: Do I accept the complainant as a credible and reliable witness?

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1 The defendant was born on 22 February 1983 – so he was 36 at the time of the alleged offence and 37 at the time of the trial.

2 The complainant was 13 at the time of the alleged offence and 14 at the time of the trial.

3 Per Judge Kent QC; Pursuant to s 615 (1) *Criminal Code* (Qld) 1899.

4 Section 615B(1) of the *Criminal Code* 1899.

5 As submitted in oral submissions and as set out in their written outlines marked for identification "H" (Crown) and "I" (Defence).

(b) Secondly: Is the defendant's version that he "simply" offered the complainant a lift so that he would not miss the bus, credible and reliable?

(c) Thirdly: On a critical examination of all of the evidence, has the Crown satisfied me beyond reasonable doubt that there is no other rational explanation for the defendant's conduct as I find it to be other than he intended to steal the complainant?

[9] In the context outlined above and upon the analysis below, the answers to the questions posed in paragraph 7 above are "yes", "no" and "yes'. It follows that I do not have a reasonable doubt as to the defendant's guilt in relation to this charge and I find the defendant guilty.

The charge, particulars and elements

The charge

[10] The Crown case is one of attempted child stealing.

[11] Section 363 of the *Criminal Code Act* 1899 (Qld) provides for an offence of child-stealing as follows:

> **363 Child-Stealing**
>
> (1) Any person who, with intent to deprive any parent, guardian, or other person who has the lawful care or charge, of a child under the age of 16 years, of the possession of such child, or with intent to steal any article upon or about the person of any such child—
>
> (a) forcibly or fraudulently takes or entices away, or detains, the child; or
>
> (b) receives or harbours the child, knowing it to have been so taken or enticed away or detained; is guilty of a crime, and is liable to imprisonment for 7 years.

Particulars

[12] The Crown case is that the defendant attempted to entice away the complainant by fraudulent means, namely offering him a lift to the bus stop, with intent to deprive the complainant's mother of possession of him.[6]

Elements

[13] The onus is on the Crown to prove the following elements beyond a reasonable doubt:[7]

1. The defendant attempted to entice away the complainant.
2. The attempted enticing of the complainant was fraudulent.

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6 Marked for identification "A".

7 Bench Book Direction 121.1.

3. The complainant was under 16 years.
4. At the time, the defendant intended to deprive the complainant's mother of lawful care or possession of her son.

[14] It is not in issue that: the complainant was under 16 years of age at the time[8] and that he was under the lawful care of his mother. The identification of the defendant as the driver of the car who asked the complainant if he wanted a lift to the bus stop is also not contentious. But the factual circumstances in which this occurred are in issue and are crucial to my determination of the issues in this case.

Attempt[9]

[15] For the defendant to have attempted to steal the complainant, he must have been acting with the purpose of stealing the complainant. Someone who is attempting to bring about a certain result must be meaning to do so at the time of engaging in the conduct which the prosecution says was an attempt to commit the offence. This intention on the part of the defendant must be proved by the prosecution, beyond reasonable doubt.

[16] It is necessary for me to consider what the defendant did, when, it is alleged, he was attempting to steal the complainant. A mere intention to commit an offence does not matter, if the defendant had not started to put his intention into effect, by conduct, i.e. some acts or acts by him which were directed to achieving the defendant's purpose. Further, the defendant's conduct must have been something which, if anyone had been watching it, would have made the defendant's purpose clear. The prosecution must prove, beyond reasonable doubt, that there was something done by the defendant which was conduct of the kind which I have just described.

[17] Therefore I must consider the evidence of what the defendant was doing when, the prosecution argues, he was attempting to steal the complainant. And I must be satisfied, beyond reasonable doubt that he was doing what the prosecution alleges he was doing. I then have to consider whether, by that conduct, the defendant had begun to put his intention into effect, and whether the conduct would make it clear to someone watching it that the defendant had the purpose which the prosecution alleges.

[18] It is unnecessary for the prosecution to prove that the defendant did everything which he could have done to bring about the intended result.

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8 This concession was made orally at the commencement of the trial.

9 Bench book Direction 71.1. It is not the defence case that what was done was at the most merely preparation ahead of any attempt (so it is been unnecessary for me to direct myself with the additional part of Bench book direction that deals with such a case – although I have touched on this issue briefly at paragraph [73] of these Reasons).

Intention[10]

[19] "Intent" and "intention" are familiar words. In this legal context, I understand that they carry their ordinary meaning. In ascertaining the defendant's intention, I must draw an inference from facts which I find established by the evidence concerning his state of mind.

[20] Intention may be inferred or deduced from the circumstances in which attempt to steal the complainant was made, and from the conduct of the defendant before, at the time of, or after he did the specific act after the alleged attempt to steal the complainant. And, of course, whatever a person has said about his intention may be looked at for the purpose of deciding what that intention was at the relevant time. It is crucial that I take into account the submissions on behalf of the defendant about the lack of intent in this case.

[21] In respect of the offence of attempted child stealing, proof of intention to produce a particular result, to deprive the complainant's mother of lawful possession of her son (the complainant) is an element of the offence. Accordingly, the prosecution must prove beyond reasonable doubt that the defendant meant to produce that result by his conduct.

The Defence case

[22] The defence case is that the defendant was only offering a lift to the complainant.[11]

[23] The defendant did not give or call evidence at trial.[12] That is his right. He is not bound to give, or to call, evidence. He is entitled to insist that the prosecution prove the case against him, if it can. The prosecution bears the burden of proving the guilt of the defendant beyond a reasonable doubt, and the fact that the defendant did not give sworn evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill any gaps in the evidence led by the prosecution. It proves nothing at all, and I have not assumed that because he did not give evidence at trial, that adds in some way to the case against him. I have not considered that fact at all when deciding whether the prosecution has proved its case beyond a reasonable doubt. It does not change the fact that the prosecution retains the responsibility to prove guilt of the defendant beyond reasonable doubt.

[24] Whilst the defendant did not give evidence at trial, he did take part in a record of interview with police on 2 April 2019 and the recording of this interview was tendered by the Crown at trial.[13]

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10 Benchbook direction 59.1.

11 MFI I - Submissions on behalf of the accused at [13].

12 Benchbook direction 27.1.

13 Exhibit 12 – I viewed this interview once again in my chambers during the course of my deliberations; the transcript of the interview was marked for identification "G". I have directed myself in accordance with Benchbook directions 26 and 36.3, modified to reflect that the defendant did not give evidence at trial but his interview with police was tendered at trial.

[25] At this juncture is necessary to observe that I have taken into account that by the admission of the record of interview, the defendant has not somehow assumed any onus of proving his innocence. The version given by the defendant in the record of interview is simply added to the evidence called for the prosecution. The prosecution has the burden of proving the guilt of the defendant beyond reasonable doubt, and it is upon the whole of the evidence that I must be satisfied beyond reasonable doubt that the prosecution has proved its case before the defendant can be convicted. If I reject the defendant's denial in the record of interview that he said the words "get in the fucking car" it does not automatically follow that the Crown has proved those words were said.

[26] The issue for my determination is not resolved by comparing the complainant's evidence and the defendant's version to the police about what happened and deciding which the preferable version is. Where, as in this case, there is evidence of the defendant's version, usually one of three possible results will follow. First, if this evidence is credible and reliable and provides a satisfying answer to the prosecution case, the verdict would of course be 'not guilty.' Secondly, even if this evidence is unconvincing, it may nevertheless create a state of reasonable doubt as to what the true position is, in which case the verdict would be 'not guilty.' Thirdly, if the evidence is not accepted, that does not lead to an automatic conclusion of guilt. If the defendant's evidence is unconvincing, I must put it to one side and go back to the rest of the evidence and consider whether, on a consideration of such evidence as I do accept, I am satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence in question.

General legal principles

Onus and standard of proof[14]

[27] The defendant is presumed to be innocent. I must be satisfied that the Crown, which bears the onus of proof, has established the defendant's guilt of the charge beyond reasonable doubt. In order to convict I must be satisfied beyond reasonable doubt of every element that goes to make up the offence charged. If I am left with a reasonable doubt about guilt, my duty is to acquit, that is to find the defendant not guilty. If I am not left with any such doubt, my duty is to convict, that is to find the defendant guilty. It is incumbent upon the prosecution to prove the essential elements of the charge beyond reasonable doubt. But the Crown does not have to prove everything about which evidence has been given beyond reasonable doubt.

Assessment of evidence

[28] My verdict must be based on the evidence and only on the evidence.

[29] The evidence in this case included a number of aerial photographs and other photographs of the location where the incident was said to have taken place together

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14 Benchbook direction 23.

with rainfall reports of the day. The bus driver, Mark Rudolph Pols, the complainant's mother, and the arresting officer, Plain Clothes Senior Constable Adrian Bisa gave evidence before me in the courtroom. And the Dean of students at the complainant's school gave evidence by way of audio visual link remotely from her home.

[30] I also received evidence from the complainant. He first spoke to the police on 1 April 2019 (the day of the incident). As is the usual practice with child witnesses, this conversation was recorded and this recording was played at the trial.[15] Prior to the trial (but before me), on 30 April 2020, the complainant gave further evidence about what happened and he was cross examined by counsel for the defendant about his version. Pursuant to an order of this court,[16] he gave this evidence remotely from another room at the courthouse with a support person present in that room. The courtroom was closed and all essential persons were excluded from the courtroom on that day. The taking of the complainant's evidence in this way is routine practice of the court and I have not drawn any inference as to the defendant's guilt from the fact that such measures were taken.[17]

[31] Both of these recordings were played in open court during the trial.[18] And I have had access to the recordings during my deliberations. I was also provided with transcripts of both recordings which were marked for identification and which I have used as an aid – but with the knowledge that it is what I hear on the recording that matters, not what is in the transcript. I have been careful to ensure that I have not placed undue weight on the complainant's evidence because I have been able to hear and read this evidence again.[19]

[32] In determining whether a witness has an accurate memory of the event about which that witness has given evidence, I must determine the relevant facts according to the evidence considered logically and rationally without acting capriciously or irrationally.[20] In determining the facts I have used my common sense, individual experience and wisdom in assessing the evidence given.[21] It follows that I am not required to accept a witness wholly or reject a witness wholly. I can accept all that a witness has said, or I can reject everything that a witness has said, or I can accept part of what a witness said.

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15 Pursuant to s 93A of the *Evidence Act* 1977 (Qld).

16 Made by McGinness DCJ on 12 March 2020.

17 The probative value of the evidence is not increased or decreased because these measures were used, and I've not given the evidence any greater or lesser weight because of the measures. Benchbook directions 10 and 11; see also s 21AW of the *Evidence Act* 1977 (Qld).

18 An application by the Crown to close the court which was supported by defence counsel was heard by me at the outset of the trial. This application was dismissed by me in the circumstances of this case.

19 I viewed these discs once again in chambers. And I also read over the transcripts again in chambers and extracted the relevant parts for the purpose of referring to them where necessary in these Reasons.

20 See the observations of Nield AJ in *R v Mulcahy* [2010] ACTSC 98 at [13]-[24] applied in *Nguyen v R* [2012] ACTCA 24; see also the useful observations from *R v Mulcahy* set out by Smith DCJA in *R v MMH* [2020] QDC 70 at [10].

21 Ibid.

[33] Whilst I am not to indulge in intuition or in guessing, in addition to facts directly proved by the evidence, I may also draw inferences, that is, deductions or conclusions from facts that I have found to be established by the evidence. These reasonable inferences must follow from a logical and rational connection between the facts I have found and my deductions or conclusions.

[34] The Crown case is largely a circumstantial one.[22] Circumstantial evidence is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. Both direct and circumstantial evidence are to be considered in this case. It is not necessary that facts in dispute be proved by direct evidence. They may be proved by circumstantial evidence alone, by direct evidence alone, or by a combination of direct and circumstantial: that is, both direct and circumstantial evidence are acceptable proof of facts. I have taken into account that I must consider all the evidence, including circumstantial evidence in this case. But in doing so I have taken into account that to bring in a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be a rational inference but also that it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is my duty to find the defendant not guilty.

The Evidence

Complainant's evidence

[35] The complainant [who was born on 5 December 2005] was about 13 and a half years old when he spoke to the police later on the day of the incident. He presented as a calm and thoughtful boy. His initial and general overview of the incident as told to the police, was that he was walking to the bus stop [to catch the bus to school] when he saw the bus stop in sight. Then, a car [being driven by the defendant] travelling in the opposite direction, did a U-turn, pulled over near him; and the man behind the wheel asked him if he wanted a lift to the bus stop. The complainant said "nah" and then the driver got "more aggressive" and said "get in the fuckin' car." The complainant said "nah" and just ran.

[36] When asked by police to 'start at the beginning,' the complainant said that he was walking along a particular street (hereinafter "The Street") at around 7.10am to 7.15 am when the incident happened. The complainant was not asked many specific questions about distances and the layout of the street and the positioning on the road when he spoke to the police. Oral evidence about some of these matters, with reference to an aerial map and photographs was adduced at the pre-recording conducted before me on 30 April 2020. But the unchallenged evidence which I accept is that the complainant was walking on the left hand side of The Street (on the side where the houses are) towards the bus stop. The complainant accepted that

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22 Benchbook direction 48.

he was carrying his school back pack and that "there is a bit of a slope on the road, an incline or a hill" on the way to the bus stop.[23]

[37] The complainant described the driver as being a 30 to 40 year old man who was smoking when the car first drove past him but that the driver had put the cigarette out by the time the car has stopped. The complainant later described the driver as being skinny and looking like a surfer dude with short facial hair and that the side of his hair was a grey/brownish colour. He could not tell if the driver was tall or if he was just sitting up straight. He recalled the driver to be wearing a black shirt and board shirts from a store like City Beach.

[38] The car pulled over near him and the driver spoke to him from inside the car. The complainant said that the defendant was at the gutter and that the car was approximately a metre away from him,[24] although under cross examination the complainant accepted that he was about two metres from the car.[25] Mr Pols estimated that the distance between the complainant and the car was about a metre to a metre-and-a-half.[26]

[39] When asked by police to repeat what was said the complainant said that the following exchange took place:

> "do you want a lift to the bus stop and I said no so he got quite aggressive and said just get in the car and I'll take you to the bus stop get in the fucking car so I can take you to the bus stop [unintelligible] so I just ran yeah."

[40] The complainant said that he reported the incident to the bus driver and then at the morning break to a number of the teachers at the school.

[41] Defence submitted that there were a number of matters that would give me concern as to the reliability of the complainant's account. I reject that submissions for the various reasons stated below. As would be expected, given the passage of time and the frailties of human recall there were a couple of aspects of the complainant's evidence that I consider he may be mistaken about. But none of those matters are central to the issues for my determination and do not derogate from my view of the complainant as an honest, credible witness and reliable witness who listened carefully to the questions asked of him and who made reasonable and appropriate concessions. For example:

(a) During questioning by the Crown prosecutor, the complainant said that at the time he was not sure how long he had been catching the bus – but that it was not that long. The Crown prosecutor suggested to the complainant that it was possible that it had been for a couple of months and the complainant

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23 Transcript of Pre-recording MFI "F" T 1-10, ll 39-42
24 Transcript of 93A MFI "E", page 6.
25 Transcript of Pre-recording MFI "F" T 1-11, l 33.
26 Transcript of proceedings 1-31, lines 10 – 11.

said "No, not really. I couldn't really give you anything."[27] The complainant's mother's evidence was that the family had moved to the area in August 2018 and that the complainant and his older brother had been walking the 5 minute walk from their home to the bus stop since August 2018.[28] This is example of what I found to be the complainant's careful consideration of the questions asked of him and his attempt to answer truthfully. The fact that the complainant could not recall this fact does not cause me to have any real concern about the reliability of his evidence overall.

(b) Under cross examination it was suggested to the complainant that the driver of the car said "hey. Do you want a run up to the bus stop?"[29] The complainant disagreed with this proposition but he accepted that he did say "no, thanks." It was then suggested to the complainant that the driver said "are you sure" or "you're right mate" before doing a three point turn and driving away. The complainant disagreed with this proposition but accepted that they went their separate ways. The complainant maintained that the car drove away slowly and headed in the direction of the bus stop – and not in the direction of the roundabout, where the car had been originally heading. I prefer the evidence of Mr Pols over that of the complainant on this issue. Mr Pols' evidence is also consistent with the defendant's version of what happened – which I accept on this point. That is, after offering the lift, the car did a U-turn (or three point turn) and went towards the roundabout.[30] But more relevantly, the evidence is consistent and I accept that complainant ran to the bus stop. Mr Pols described the complainant to be "shaken and wide eyed."[31] This is a reasonable explanation for the discrepancy in the complainant's evidence. And does not cause me to have any concern about the reliability of his account of the conversation with the defendant.

(c) Under cross examination the complainant was asked to estimate the distance from where the car had stopped and the bus stop. He said it was "probably" 100 to 300 metres away. I accept this evidence. At trial, Mr Pols estimated the distance to have been 200 to 250 metres.[32] Although in his incident report he estimated the distance to be about 300 metres.[33] The defendant estimated a distance of 250 metres in his record of interview.[34] But under cross examination it was suggested to the complainant that the distance was one of 400 metres.[35] Nothing turns on the discrepancies in the

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27 Transcript of Pre-recording MFI "F" T1-6, ll 12-13.
28 Transcript of Proceedings T1-50, ll 35-41.
29 Transcript of Pre-recording MFI "F" T 1-13, l 6.
30 Transcript of the proceeding T1-30, l 37 and T1-41 ll 37-39.
31 Transcript of the proceeding T1-33, l 13.
32 Transcript of the proceeding T1-26, ll 16 to 18.
33 Transcript of the proceeding T1-39, l 34.
34 Transcript of the defendant's record of interview MFI "G" at p 15, l 50.
35 Transcript of Pre-recording MFI "F" T1-11, l 5.

distances. Overall, I am satisfied that the distance was a relatively short one of around 250 to 300 metres.

(d) It was also suggested to the complainant during cross-examination: that he was about 75 metres out in terms of where the defendant's car did the original a U-turn before the lift was offered (and the complainant said he could not remember); and that the position of where the car was stopped was further up the road (and the complainant quite frankly accepted that this proposition would be right). Again nothing turns of either of these matters. But I accept that the car performed the U-turn and was stopped in the position suggested by the Defence.

(e) During his police interview the complainant said he was only able to see the lower part of the defendant's face (around the mouth) and that the driver was wearing hat and sunnies. Later he described that hat as black – maybe with a Nike tick and that the sunglasses were like his Dads – with black frames and red and yellow lenses.[36] It was not suggested to the complainant that the defendant was not wearing a hat and sunglasses. But defence counsel suggested he was mistaken about the defendant wearing a dark cap with a white Nike tick in the centre. The complainant accepted he was mistaken about that fact.[37] But it is relevant in that a dark hat was located in the defendant's car bearing an embroidered "NY" emblem in the middle panel, which may explain the mistaken description.

(f) The defendant told police that the left window does not go down so he put the left back window down and that the conversation took place through the back left window. The workings of the windows on the defendant's car were not checked by the police. The complainant denied that the defendant spoke to him through the rear passenger window and that the front passenger window was up. I accept the complainant's evidence that the conversation occurred through the front window of the car. It is corroborated by the evidence of Mr Pols who drove past the scene very slowly.[38]

(g) The complainant said he did not get a really good look inside the car but he recalled a lot of dead cigarettes and a blue fitted bed sheet covering the back seat with a brown suitcase with a handle on it sitting on top of the sheet.[39] Dead cigarettes were found in the car but none of the other items identified by the complainant were found in the defendant's car or the house when the police searched for it the next day. A reasonable inference for these items not being found is that they were not listed on the search warrant. The complainant was quite specific about what he saw - down to

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36 Transcript of 93A MFI "E" page 4.
37 Transcript of Pre-recording MFI "F" T1-16, ll 10-25
38 Transcript of the proceeding T1-41, ll 26-35.
39 Transcript of 93A MFI "E", page 6.

the colour of the sheet being blue and there being a handle on the bag. I accept his evidence.

(h) The complainant initially described the car as white Ford Falcon with a red P plate on the top right back window and a "little smelly thing" in the shape on a green tree on the mirror.[40] He recalled that one of the wheels on the passenger side had no "rim thing" on it. When pressed, the complainant could not recall all the details of the wheels.[41] Later again when asked if there was anything else he could tell the police about the car, the complaint said it had "weird black lines" – like a bumper sticker or a tattoo on the side.[42] Again there was some inconsistency in the evidence about whether the car had P plates on it[43] (none were found on the car) and the wheels of the car where not exactly as described by the complainant. Such discrepancies are to be expected and do not give me concern about the complainant's overall reliability as a witness. This is particularly so given that it is not in issue that the car driven by the defendant was as a matter of fact the car in question.

(i) The complainant also conceded that the defendant might not have been wearing a red G shock watch during cross-examination.[44] This is somewhat consistent with his statement to the police as the complainant clarified with PCSC Bisa after saying it was a G shock watch that he only saw the S on it.[45] The complainant's evidence at the pre-recording was that he thought the male was wearing a red watch.[46] It was never put to him that the defendant was not wearing a red watch. While a watch of that colour was not located during the search it could have simply been overlooked by police or in an area of the house that was not searched. But this relates to a peripheral issue and does not give me concern about the complainant's overall reliability as a witness.

(j) Under cross examination it was suggested to the complainant that the defendant "never told you to get in the car."[47] The complainant thoughtfully accepted this proposition as correct. But shortly afterwards and indeed throughout his cross examination he maintained (as he always had) that he was told by the defendant to "get into the 'effing' car." The Defence submitted that the propositions are inconsistent with each other and pointed to this aspect of the complainant's evidence not being subject to clarification through re-examination. I reject this submission. There was no

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40 Transcript of 93A MFI "E", page 4.
41 Transcript of 93A MFI "E", page 7.
42 Transcript of 93A MFI "E", page 8.
43 Transcript of 93A MFI "E", page 3.
44 Transcript of Pre-recording MFI "F" T1-16, ll 30-31.
45 Transcript of 93A MFI "E", page 5 – the transcript denotes this part as unintelligible however, this is what the Crown alleges can be heard if the recording is listened to.
46 Transcript of Pre-recording MFI "F" T1-16, ll 30-31.
47 Transcript of Pre-recording MFI "F" T1-15, l 13.

inconsistency or need for clarification. The complainant was a witness who took great care to listen to the questions asked of him and to answer them as truthfully and accurately as he could. That was exactly what he was doing when he denied being asked to "get into the car" – on his account, the statement suggested to him was not literally accurate because he was asked to get into the "*fucking*" car.[48] I accept the complainant's evidence that the defendant told him to "get into the fucking car."

(k) The Defence submitted that the fact the defendant accepted he "thanks anyways"[49] is inconsistent with the defendant acting aggressively and saying "get in the fucking car." I reject this submission. It overlooks that the complainant's evidence which I accept was that he was asked twice by the defendant to get into the car – the first time politely and the second time aggressively. The complainant evidence under cross examination was that he said thank you twice; the first time he said "no thanks' and then later "thanks anyway." The complainant was a young boy who was being offered a lift by a stranger. It is entirely plausible and consistent with his manner that he might respond politely and in a way that might diffuse the defendant's aggression.

(l) Mr Pols was asked in cross-examination about the conversation he had with the complainant on the bus. The evidence about what the complainant told others including Mr Pols was not led by the Crown at trial – this is unsurprising as such evidence is inadmissible hearsay. But Mr Pol's evidence, which emerged during cross examination was that the complainant told him that the driver of the vehicle had used the expression "get into the fucking car" on the day. Mr Pols did not write those exact words in his subsequent incident reports (at trial he said he thought he had written that down).[50] This evidence does not prove that fact of what was said itself, but it is relevant to the reliability of Mr Pols' evidence.

Mr Pols

[42] Mr Pols was the bus driver on 1 April 2019. He had been driving the route for the last 4 years. He saw the complainant and a person in a car talking about 200 to 250 metres from the bus stop. He drove past them slowly and then went up the roundabout to come back up to the bus stop. He stated that after the conversation had finished the car performed a U-turn and headed back in the opposite direction. There was no screeching of tyres. He stated that he then saw the complainant running up to the hill and he continued to drive up to the bus stop. He did not stop the bus prior to reaching the bus stop for the complainant because it is against company policy to do so.

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48 See the exchange at Transcript of Pre-recording MFI "F" T1-15, ll 6-37.
49 Transcript of Pre-recording MFI "F" T1-13, l 47.
50 Transcript of proceedings T1-40, l 10.

[43] Mr Pols reported the incident around 9am on 1 April 2019 and he gave a statement to the police statement on 2 April 2019. Generally speaking these statements summarised his conversation with the complainant as being told that the driver of the white car was a stranger who stopped and asked the complainant if he wanted a lift to the bus stop. But during cross-examination at trial he stated that the complainant had told him at the time that the defendant has said words to the effect "get in the fucking car." I accept that later statement is different to the 2 contemporaneous statements Mr Pols had made previously. Although it was not put to him that as a matter of fact the complainant did not say these words to him at the time. But the Defence submitted that the previous statements made at the time cast doubt over Mr Pols reliability as a witness and that his previous statements corroborate the defendant's version in his record of interview.

[44] The reliability of a witness who says one thing one moment and something different the next about the same matter is called into question.[51] In weighing the effect of such an inconsistency or discrepancy, I have considered whether there is satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. I have considered the discrepancy or inconsistency in Mr Pols' evidence and I do not consider there was a deliberate falsehood or that I ought to have a concern about the overall reliability of his evidence. I accept his evidence at trial about what he was told by the complainant. The fact he did not use a swear word in either of his reports is understandable in my view.

[45] Mr Pols' evidence which I accept was that the next day [2 April 2019], after he had left the depot to carry out his usual route, he noticed, during his travels, the same car he had seen the day before. This time he took the number plate down which he gave to the police.[52] He also recognised the driver as being the same person he had seen speaking to the complainant.[53]

Summary of my finding of the relevant facts

[46] It follows from the above analysis that the relevant facts as I find them to be are that:

(a) At approximately 7.20am on the morning of 1 April 2019, the complainant was walking along The Street to the school bus stop located along that road with his brother. His brother stopped in to see a friend on the way so the complainant continued on alone. It was a fine day and the complainant was not running late for this bus. The complainant had been catching the same bus since around August 2018;

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51 Taking into account Benchbook direction 23 (footnote 17). The parties submitted I ought to consider Bench Book direction 46, and whilst I have considered the contents of Direction 46, I consider that Direction 23 is the more appropriate direction on the facts of this case.

52 The evidence of PCSC Bisa addressed the subsequent identification of the defendant at an address linked to this registration and the conduct of a search at this address.

53 Transcript of Proceedings T1-34, ll 33-36.

(b) The walk to the bus stop was not a long one – around 5 minutes if walked quickly;

(c) The bus usually left the bus stop at 7.40am. The bus driver Mr Pols usually arrived at the stop 10 minutes early each day;

(d) The complainant was walking and was about 250 to 300 metres from the bus stop when a car being driven by the defendant (who lived locally) went past him travelling in the opposite direction;

(e) The defendant's car did a U-turn over double lines[54] and stopped about 1.5 to 2 metres from the complainant;

(f) The complainant and defendant were unknown to each other;

(g) The driver of the car [who was the defendant] rolled down the front passenger side window and said words to the effect of offering the complainant a lift to the bus stop. The complainant said, "no thanks," or "thanks anyway," and then the defendant said in an aggressive tone, "get in the fucking car." And the complaint said words to the effect of, "nah – thanks anyway.";

(h) The conversation was a short conversation of about 5 to 10 seconds;

(i) The bus driven by Mr Pols was travelling along The Street toward the roundabout (in the opposite direction) to where the defendant's car was then facing and he observed the complainant and the defendant speaking; and

(j) The bus then drove past the running complainant and stopped at the bus stop at which point the complainant ran up to the bus stop.

(k) The driver then performed a second U-turn across the double lines to continue back in the direction he had been originally travelling.

[47] I also find that: there was no threat made to the complainant; the defendant was in the driver's seat of the vehicle at all times; he never got out of the vehicle; the car door was never opened; and that there was no offer of anything for him to the complainant to get into the car – except the offer of a lift to the bus stop.

Defendant's record of interview

[48] It is necessary at this point to make some findings in relation to defendant's evidence bearing in mind the direction set out in paragraphs [23] to [26] above.

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54 Exhibit 14.

[49] The defendant voluntarily participated in a record of interview with the Police on 2 April 2019 after a search of the car and his residence was conducted.[55]

[50] The defendant told the police (and I accept) that he resided at an address in very close proximity to the bus stop. The effect of what the defendant told the police was that he was on his way back from shopping at around 8.10 to 8.15 am on 1 April 2019 and was driving back along The Street (towards the roundabout) when he saw a boy [the complainant] wearing a school uniform and carrying his school bag "running his guts out" up the street.[56] He did not know the complainant. But he saw the bus was nearly at the bus stop – so he did a "U-ey" and then the following exchange allegedly took place between the defendant and the complainant:[57]

> "mate, do you want a lift up to the bus? He said no thanks. And I said, righto mate. And he said thank you anyway and I said no worries, seeya. Turned it, turned it, and drove home. And that was it."

[51] The defendant told the police that "there's probably twenty kids that walk past there to the bus stop every morning." He also said "[j]ust every day, I drive three or four times down that road, man. I see kids all the time. I've lived there for seven years." At another time the defendant said it was the first time, that he could remember, that he had offered a child a lift.[58]

[52] During his interview, the repeated theme of the defendant's explanation was that he was offering the complainant a lift to the bus stop because he thought the complainant might miss the bus.

[53] I did not form a favourable impression of the defendant as a credible and reliable witness from the Police Interview, both by the content and context of his account and by his demeanour. Overall I found the defendant's version of events to the extent it differed from that of the complainant and Mr Pols was not credible, reliable or plausible, for five main reasons.

[54] First: in the Police Interview, the defendant purported to give a complete account of what had happened - for example, he said "and that's all I, that was it, and that's all I can tell ya;"[59]and during the course of the Police Interview he profusely and animatedly denied that he had at any point said to the complainant "get in the fucking car;" indeed, he appeared (as the Defence submitted) shocked by such a suggestion. But it was put to the complainant during cross examination that the defendant said "fuck" when he was leaving where he had stopped.[60] This inconsistency between what the defendant said in the Police Interview and what was

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55 Exhibit 12.
56 Transcript of the defendant's record of interview MFI "G", page 7, l 54.
57 Transcript of the defendant's record of interview MFI "G" page 5, ll 1-to 5.
58 Transcript of the defendant's record of interview MFI "G" page 16, l 57 to page 17, l 1.
59 Transcript of the defendant's record of interview MFI "G" page 9, ll 29 – 30.
60 Transcript of Pre-recording MFI "F" T1-19, ll 1-2 and 17-18.

put to the complainant in cross examination (which I assume was on instructions), is yet another reason I have doubts about the honesty of the defendant's account.

[55] Secondly: the defendant's case evolved in other ways. During the course of cross examination of the complainant, a new detail emerged, specifically, that it was "drizzling with rain" that morning. And in the cross examination of Mr Pols it was put to him that it was "spitting rain a little bit." The inference being that the presence of the rain contributed to the defendant's reasons for offering the complainant a ride to the bus stop or for the complainant to be running to the bus stop prior to the car stopping. I accept the Crown submission that the addition of this detail in itself creates doubt with respect to the defendant's version. Relevantly, too, the defendant's account is directly contradicted by other evidence which I accept from both the complainant and Mr Pols that it was a "normal sunny day"[61] and "a nice clear day"[62] respectively. The documents from the Bureau of Meteorology also tend to disprove the defendant's account.[63]

[56] Thirdly: in the Police Interview the defendant told police that he left his house on 1 April 2019 at around 7:45am to 8:00am and went to the shops where he was for about 20 – 30 minutes and then returned home. Evidence from Mr Pols with respect to the bus route contradicts the defendant's evidence on this point [i.e. that the bus usually left the stop at around 7.40am]. It is also instructive that the defendant could not recall what he purchased at the shops only the day before. These matters also give me come concern about the defendant's reliability.

[57] Fourthly: the defendant's account is implausible when viewed in the context of other evidence which I accept. The evidence with respect to the bus was that the defendant was in front of it at the time he stopped. Specifically, the bus still had to go down part of The Street, around the street roundabout (as described by the complainant) and back up The Street before getting to the bus stop.[64] The defendant had specific knowledge about the bus's route.[65] Further, the defendant stopped in the context where he was travelling in the opposite direction to the complainant, was travelling to a specific destination (his home) and had to do a U-turn over double lines to speak to the complainant.

[58] Fifthly: Whilst I am cognisant of the difficulty for judges to be able to assess with any real precision, the credibility of witnesses by virtue of their demeanour,[66] I accept for the reasons submitted the Crown, that the defendant's general demeanour during the Police Interview was not indicative of a genuine account. The

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61 Transcript of Pre-recording MFI "F" T1-8, l 21.

62 Transcript of Proceedings T1-25, l 14.

63 Exhibit 15. Significantly, there was zero rainfall recorded in the area. While the observation points were at the Gold Coast Seaway and Coolangatta and not Burleigh Heads, the evidence still has probative value.

64 Transcript of the defendant's record of interview MFI "G", page 23, ll 37-58; page 24, ll 1 – 9; Pols' evidence regarding when he saw the bus and how much of his route he had left which was unchallenged by defence (Transcript of Proceedings T1-26, l 34 to 1-30, l 14).

65 Transcript of the defendant's record of interview MFI "G", page 16, ll 12 – 21.

66 See, for e.g. the observations of Chesterman J in *Dew v Richardson* [1999] QSC 192 at [28].

defendant's unconvincing demeanour was demonstrated in a myriad of ways. Examples include:

(a) the way the defendant responded to PCSC Bisa's question about why he thought the complainant needed a lift in circumstances where he was so close to the bus stop and when PCSC Bisa asked the defendant why he thought it was ridiculous that he was being spoken to by police; and

(b) when the defendant was asked about the positioning of the conversation with the complainant, he provided an explanation that he was talking through his rear passenger side window. The tone of the defendant's voice and his exaggerated gestures revealed a person trying too hard to be believed.

[59] The fact that I do not accept the defendant's denials or much of his evidence does not of course lead to an automatic conclusion of guilt. If the defendant's version is unconvincing (as it is here), I must put it to one side and go back to the rest of the evidence and consider whether, on a consideration of such evidence as I do accept, I am satisfied beyond reasonable doubt that the Crown has proved each of the elements of the offence in question.

Analysis of evidence relevant to the elements of the offence

Did the defendant have an intention to commit the offence of child stealing?

[60] The Defence submitted that there is insufficient evidence to show that the defendant intended to deprive the complainant's mother of the possession of the complainant. And that all the defendant did was to "offer the complainant a lift up to the bus stop. Nothing more."[67] And that this offer was declined by the complainant. Defence submitted that this submission is supported by the evidence that:[68]

(a) The defendant did not get out of the vehicle;

(b) There were no threats made by the defendant;

(c) The defendant did not use violence or did he make any threats of violence; and

(d) There was not attempt by the defendant to conceal his identity, the identity of his car or his residence, (the latter being clearly visible from The Street).

[61] Defence also submitted the complainant was never offered anything to get into the car. But this submission overlooks that the complainant was offered a lift to the bus stop as an enticement to get into the car. I otherwise accept the matters set out in the

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67 Submissions on behalf of the defendant, MFI "I" at [14].

68 Defence also relied on the fact the defendant denied any such intention but as discussed earlier in these Reasons I do not accept this denial.

preceding paragraph as being relevant but I reject the Defence submission on this point.

[62] The evidence when viewed as a whole demonstrates that the only rational inference open is that the defendant intended to commit the offence of child stealing. The relevant evidence includes:

(a) The defendant was driving in the opposite direction to the complainant and to a specific destination. The destination being his home;

(b) The defendant did a U–turn across double lines[69] to stop next to the complainant;

(c) The short distance of 250 to 300 metres between the complainant and the bus stop.[70] (a circumstance that was known[71] to the defendant);

(d) The defendant was in front of the bus at the time he stopped. Specifically, the bus still had to go down part of The Street, around the street roundabout (as described by the complainant) and back up The Street before getting to the bus stop. The defendant knew about this at the relevant time;[72]

(e) The defendant described the bus route to the police. He also had been living nearby for 7 years and saw kids going to the stop all the time;[73]

(f) The defendant pulled over to the side of the road close (around 1.5 to 2 metres) from the complainant;

(g) The defendant was attempting to entice by fraudulent means, that is, to coax and not physically force the complainant into the car. Therefore, the fact that the defendant was not immediately next to the complainant does not matter. Defence submitted that the defendant did not offer the complainant anything to get in the car. But that is not correct. He offered him a lift to the bus stop. That was the enticement to get into the car;

(h) The defendant approached the complainant when he was walking alone;[74]

(i) The complainant was unknown to the defendant;[75]

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69 See photographs in Exhibit 14.

70 The complainant estimated that the car stopped 100 – 300 m from the bus stop (Transcript of Pre-Recording "MFI F", 1-11, ll 1-3). Pols' estimated that the car stopped about 200 to 250 m from the bus stop (Transcript of proceedings 1-26, ll 16 – 18).

71 Transcript of the defendant's record of interview MFI "G", page 15, l 50 and page 16, ll 29 – 41.

72 Transcript of the defendant's record of interview MFI "G", page 23, ll 37 – 58 and page 24, ll 1 – 9.

73 Transcript of the defendant's record of interview MFI "G", page 16, ll 12 – 21.

74 Transcript of Pre-recording MFI "F" 1-6, ll 30 – 33.

75 Generally the complainant's evidence and Transcript of the defendant's record of interview MFI "G", page 16, ll 34 – 36.

(j) The defendant said to the complainant "get into the fucking car" in an aggressive way.[76]

(k) The complainant's evidence that it was the tone of the defendant's voice that made him think he was aggressive. The complainant also described it as loud.[77]

(l) The defendant attempted to get the complainant into the car after his offer was declined. This shows that the defendant wanted the complainant to get into his car. These matters tend to prove the defendant had an intention to commit the offence of child stealing as opposed to simply offering him a lift to the bus stop;

(m) The defendant's demeanour when speaking to the complainant, specifically the complainant's evidence that "it's hard to explain cause like his facial expressions was just like … nice but you could tell he wasn't being nice;"[78]

(n) After the complainant ran away from the car the defendant did another U-turn across double lines to leave the area.[79]

[63] The Crown also relied on the fact that the defendant was wearing a hat and sunglasses that covered a lot of his face and the presence of a fitted sheet over the back seat and a suitcase on the back seat of the car as relevant. But I have not given these factors any weight in determining the conclusion I have reached.

[64] In terms of the element of fraud or deception the Defence submitted that there are a number of factors with demonstrate the lack of indicia of fraud/deception including:

(a) No threats were made;

(b) The car, on the complainant's evidence in cross examination, was 1.5 to 2 metres away from him;

(c) The car door was never opened;

(d) When the defendant left, it was not at speed and no screeching of tyres;

(e) The was no disguising of number plates;

(f) The defendant was not disguised, at the highest he had sunglasses and a baseball cap; and

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76 Transcript of 93A MFI "E", pages 1 and 7; Transcript of Pre-recording MFI "F" 1-15, ll 3 – 37 and 1-19, l 45 to 1-20, l 10.

77 Transcript of Pre-recording MFI "F" 1-8, ll 33 – 41.

78 Transcript of 93A MFI "E", page 2.

79 Transcript of Proceedings 1-31, ll 29 – 32; 1-32, ll 1 – 27.

(g) The defendant drove home immediately and there was no attempt to conceal the vehicle at all

[65] I accept the matters in the preceding paragraph are relevant but I reject the Defence submission on this point.

[66] I am satisfied beyond a reasonable doubt upon all of the evidence including the evidence identified at paragraph [62] of these Reasons that the defendant attempted to entice away the complainant by fraudulent means and with an intention to deprive the complainant's mother of possession of him. With respect to the latter, the complainant's mother gave evidence that she did not know the defendant and did not give him consent to pick up her son.[80] Further, the intention to deprive need not be an intention to permanently deprive. It is sufficient to intend to only temporarily deprive.[81]

[67] In the present case, the Defence submitted that there was a hypothesis consistent with innocence reasonably open on the evidence namely that the defendant was simply offering the complainant a lift to the bus stop. Not only does the evidence identified above demonstrate the defendant's intention but it operates to exclude beyond reasonable doubt that or any other innocent hypothesis. This is particularly so in the present circumstances where there was absolutely no need to offer the complainant a lift and the defendant said "get in the fucking car" after his offer was declined.

Attempt

[68] The defendant manifested his intention to steal the complainant by: doing a U-turn; stopping close to the complainant; talking to the complainant through an open front passenger window; asking if the complainant wanted a lift to the bus stop; and then saying "get in the fucking car."

[69] Defence submitted and I accept that these matters cannot be looked at isolation from other evidence such as:

(a) The complainant was approximately 1.5 to 2 metres away from the defendant when talking to him;

(b) The defendant made no threats;

(c) The defendant did not get out of the vehicle;

(d) The defendant made no attempt to conceal his identity;

(e) There was no attempt by the defendant to conceal the identity of the car;

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80 Transcript of Proceedings T1-55, ll 3 – 7.

81 *R v Baille* (1859) 8 Cox CC 238; *R v Timmins* (1860) Bell CC 27; Benchbook direction 121.

(f) There was no attempt by the defendant to conceal the identity of his residence;

(g) The defendant was always in the driver's seat;

(h) The defendant did not get out of the car; and

(i) The defendant never offered the complainant anything to get in the car. [82]

[70] I accept the matters set out in the preceding paragraph are relevant but I otherwise reject the Defence submission on this point. The acts identified by the Crown were not only directed at achieving the defendant's purpose but they had the ability to achieve this purpose. It was only because of the independent actions of the complainant, by not getting into car, that the defendant's intention was thwarted. It is immaterial to proving the offence whether the complete fulfilment of the defendant's intention is prevented by circumstances independent of his will (as it was in this case).[83]

[71] Further, the defendant's conduct was such, that if anyone had been watching it, the purpose was clear. Particularly in the context of all of the circumstances of this case. The defendant all but conceded the point in his interview with police. PCSC Bisa asked the defendant if he had a child, what would think if someone did that, to which the defendant replied "exactly the same. That's why I said shit, I maybe shouldn't of done that to my mate when I got home."[84]

[72] The defendant does not submit that his actions were merely preparation ahead of an attempt to steal the complainant. This type of argument is I accept inconsistent with the defendant's case that his actions were completely innocent. In any event the defendant's actions clearly go beyond mere preparation, they are specific acts undertaken to achieve a result, immediately connected to the offence and had the potential to achieve that result. While the defendant could have done more i.e. tried to physically take the complainant it is not necessary to establish that the last act possible was done before the completed offence would occur.[85]

Conclusion

[73] I find the defendant guilty of the offence of attempted child stealing.

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82 As discussed above I do not accept this is a correct articulation of the evidence.
83 Section 4(2) *Criminal Code.*
84 Transcript of the defendant's record of interview MFI "G", page 24, ll 22 – 26.
85 *R v De Silva* [2007] QCA 301, [27].