

DISTRICT COURT OF QUEENSLAND

CITATION: *Lee v Commissioner of Police* [2021] QDC 296

PARTIES: **CHOONHWA LEE**
(appellant)
v
COMMISSIONER OF POLICE
(respondent)

FILE NO: 2384 of 2019

DIVISION: Appellate

PROCEEDING: Appeal

ORIGINATING COURT: Brisbane Magistrates Court

DELIVERED ON: 15 December 2021

DELIVERED AT: Brisbane District Court

HEARING DATE: 19 November 2020

JUDGE: Sheridan DCJ

ORDER: **1. The appeal against conviction is dismissed.**
2. The appeal against sentence in relation to count 1 is upheld with the term of six months substituted for the term imposed of twelve months. The term is wholly suspended with an operational period of two and a half years.

CATCHWORDS: MAGISTRATES – APPEAL AND REVIEW – QUEENSLAND – APPEAL – where the appeal was brought pursuant to s 222 of the *Justices Act* 1886 (Qld) – where the appellant was charged with one charge of knowingly carrying on the business of providing unlawful prostitution, contrary to s 229HB of the *Criminal Code Act* 1899 (Qld), two charges of dealing with property reasonably suspected of being proceeds of crime contrary to s 400.9 of the *Criminal Code Act* 1995 (Cth), and one charge of unlawful possession of a dangerous drug, namely cannabis, contrary to s 9(1) of the *Drugs Misuse Act* 1976 (Qld) – where appellant appeals conviction and sentence – whether there was sufficient evidence for Magistrate to find appellant carried on business of providing unlawful prostitution – whether sentences manifestly excessive

LEGISLATION: *Crimes Act* 1914 (Cth)
Criminal Code Act 1899 (Qld), s 229F, s 229HB, s 229M
Criminal Code Act 1995 (Cth), s 400.9
Drugs Misuse Act 1986 (Qld), s 9
Evidence Act 1977 (Qld), s 93

Justices Act 1886 (Qld), s 40(1), s 222, s 223, 226, s 232A, s 232
Penalties and Sentences Act 1992 (Qld)
Telecommunications (Interception and Access) Act 1979 (Cth)

CASES:

Allesch v Maunz [2000] HCA 40; (2000) 203 CLR 172, cited
Barbaro v The Queen [2014] HCA 2; (2014) 253 CLR 58, cited
Barnes v Commissioner of Police [2014] QDC 184, cited
Clark v Ryan [1960] HCA 42; (1960) 103 CLR 486, cited
Farrell v The Queen [1998] HCA 50; (1998) 194 CLR 286, cited
Forrest v Commissioner of Police [2017] QCA 132, cited
Fox v Percy [2003] HCA 22; (2003) 214 CLR 118, cited
Hili v The Queen [2010] HCA 45; (2010) 242 CLR 520, cited
Lai v Commissioner of Police [2012] QDC 10, cited
Loweke v Queensland Police Service [2005] QDC 187, cited
McDonald v Queensland Police Service [2017] QCA 255; [2018] 2 Qd R 612, cited
Murphy v The Queen [1989] HCA 28; (1989) 167 CLR 94, cited
Osland v The Queen [1998] HCA 75; (1998) 197 CLR 316, cited
R v Bonython (1984) 38 SASR 45, cited
R v Christie [1914] AC 545, cited
R v Dwyer and Restaino (unreported, Judge Muir, Southport, 11 September 2017), cited
R v Filippetti (1978) 13 A Crim R 335, cited
R v Kalli (unreported, Judge Dearden, Beenleigh, 3 August 2011), cited
R v Pham [2015] HCA 39; (2015) 256 CLR 550, cited
R v Turner [1975] QB 834, cited
R v Wing Cheong Li, Wing Cheong Li v R [2010] NSWCCA 125; (2010) 202 A Crim R 195, cited
Rowe v Kemper [2008] QCA 175; [2009] 1 Qd R 247, cited
Teelow v Commissioner of Police [2009] QCA 84; [2009] 2 Qd R 489, cited
White v Commissioner of Police [2014] QCA 121, cited
Williams v R [1978] HCA 49; [1978] 140 CLR 591, cited
Wong v The Queen [2001] HCA 64; (2001) 207 CLR 584, cited

COUNSEL:

D Honchin for the appellant
 EAG McGregor for the respondent

SOLICITORS:

Keller Nall and Brown for the appellant
 Office of the Director of Public Prosecutions for the respondent

The Charges

- [1] Ms Lee appeals against the conviction for one offence of knowingly carrying on the business of providing unlawful prostitution (contrary to s 229HB of the *Criminal Code Act* 1899 (Qld) (the **Qld Code**)), two offences of dealing with property reasonably suspected of being proceeds of crime (contrary to s 400.9 of the *Criminal Code Act* 1995 (Cth) (the **Cth Code**)), and one offence of unlawful possession of a dangerous drug, namely cannabis (contrary to s 9(1) of the *Drugs Misuse Act* 1986 (Qld)).
- [2] The particulars of charges 1, 2 and 3 read as follows:
- “That between the 22nd November 2015 and the 7th December 2017 at Stanley Street, East Brisbane and elsewhere in the State of Queensland the defendant maintained premises at East Brisbane where she conducted unlawful prostitution involving monetary gain for the defendant. The business involved the defendant having other women on the premises who provided prostitution for visiting clients.
- That on the 18 December 2015 at East Brisbane police located \$51,400 which is suspected of being the proceeds of a crime, namely unlawful prostitution, and that unlawful prostitution relates to the carrying on of the business of unlawful prostitution.
- That on the 7 December 2017 at East Brisbane police located \$18,860 in cash which is suspected of being the proceeds of a crime namely unlawful prostitution and in particular, from the business of unlawfully carrying on prostitution.”
- [3] Section 229HB(1) of the Qld Code provides:
- “A person who knowingly carries on the business of providing unlawful prostitution commits a crime.”
- [4] Section 229F of the Qld Code defines the meaning of “carry on a business” as follows:
- “To carry on a business, a person must at least—
- (a) provide finance for the business; and
- (b) either—
- (i) take part in the management of the business; or
- (ii) control the business.”
- [5] Section 229M of the Qld Code specifies evidence that may be considered in determining whether a business of prostitution is being carried on. It provides that “the fact that a business of prostitution is being carried on may be inferred from employment records, business records, telephone records, advertisements and other relevant factors and circumstances.” However, pursuant to s 229M(2) “evidence of

condoms and other material for safe sex practices are not admissible against a defendant.”

[6] Section 400.9 (1A) of the Cth Code provides:

“A person commits an offence if:

- (a) the person deals with money or other property; and
- (b) it is reasonable to suspect that the money or property is proceeds of indictable crime; and
- (c) at the time of the dealing, the value of the money and other property is less than \$100,000.”

[7] Section 400.9(4) provides that absolute liability applies to paragraphs (b) and (c).
Section 400.9(5) provides:

“This section does not apply if the defendant proves that he or she had no reasonable grounds for suspecting that the money or property was derived or realised, directly or indirectly, from some form of unlawful activity.”

Mode of Appeal

[8] The appeal is brought by the appellant pursuant to s 222 of the *Justices Act* 1886 (Qld).

[9] Pursuant to s 223 of that Act, an appeal under s 222 is by way of rehearing on the original evidence, with any new evidence adduced only by leave.

[10] The rehearing requires this court to make its “own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight to the magistrate’s view.”¹

[11] The process involves a “real review”² of the record of proceedings below, rather than a “completely fresh hearing.”³

[12] In such an appeal, the appellant must establish some “legal, factual or discretionary error.”⁴

¹ *White v Commissioner of Police* [2014] QCA 121 at [6]; *McDonald v Queensland Police Service* [2018] 2 Qd R 612 at [47]; *Rowe v Kemper* [2009] 1 Qd R 247 at [3].

² *Forrest v Commissioner of Police* [2017] QCA 132, 5; *McDonald v Queensland Police Service* [2018] 2 Qd R 612 at [47]; *Rowe v Kemper* [2009] 1 Qd R 247 at [5]; *Fox v Percy* (2003) 214 CLR 118 at [25].

³ *White v Commissioner of Police* [2014] QCA 121 at [8].

⁴ *Allesch v Maunz* (2000) 203 CLR 172 at [23]; *Teelow v Commissioner of Police* [2009] 2 Qd R 489 at [4].

- [13] The appellate court ought to pay due regard to the advantage that the magistrate had in observing a witness' tone and demeanour.⁵

Grounds of Appeal

- [14] The grounds of appeal can be summarised as follows:

- (1) The verdicts are unreasonable and not supported by the evidence;
- (2) The learned Magistrate failed to apply the required standard of proof to her reasoning;
- (3) The learned Magistrate erred when she gave too much weight to the limited evidence at trial in respect of and relating to the issue that the defendant provided finance for the business of providing unlawful prostitution from the subject premises namely the rates notice and the unspecified payment of bills by the defendant;
- (4) The learned Magistrate was wrong in law in admitting and then accepting the evidence of police officer Wild as an expert in respect of his knowledge of common words in respect of prostitution on premises as there was no proper basis established for such admissibility.
- (5) [Not pursued]
- (6) [Not pursued]
- (7) The learned Magistrate did not give proper weight to the evidence of the sister of Ms Lee, Ms Hyeong Jeong Lee;
- (8) The learned Magistrate could not have been satisfied on the evidence that the defendant carried on the business for the whole of the period, that is, between 21 November 2015 and 18 December 2018, or any of the period at all;
- (9) The learned Magistrate gave too much weight to possession of what has been called large sums of money in determining its relationship to the alleged offending, the knowledge required was not given proper consideration.

⁵ *White v Commissioner of Police* [2014] QCA 121 at [22]; *Forrest v Commissioner of Police* [2017] QCA 132, 5.

- (10) The learned Magistrate was wrong in law in finding that the cannabis was possessed by the appellant and further the Magistrate erred in finding that the cannabis was of a useable quantity and in distinguishing the authorities.
- [15] The Magistrate accepted the evidence of the police officers and the lay witnesses who were called by the prosecution. Apart from one witness, the evidence was not contested. Ms Lee did not give evidence but did call one witness being her sister.
- [16] The principal issue on appeal was whether there was sufficient evidence to prove beyond reasonable doubt that Ms Lee was guilty of the first charge of carrying on the business; and accordingly the following two charges.

The Evidence

- [17] Evidence was given by Detective Senior Constable (**DSC**) Hansson of having conducted an undercover operation at Cloud Nine Massage on two occasions. On each occasion he made an audio recording of his attendance which was tendered in evidence. On each occasion, he paid \$50 for the massage. The money was paid in the room to the girl performing the massage, who would immediately exit the room with the money and then return to perform the massage.
- [18] The first attendance was on 22 November 2015. DSC Hansson received a massage from “Clara” who told DSC Hansson she was from South Korea. In the recording tendered, “Clara” is heard to ask DSC Hansson if he wanted “extra” or “special” services which she told him were, a handjob for \$30, a topless massage with a handjob for \$70 and everything for \$100.00.
- [19] On 10 December 2015, DSC Hansson conducted another undercover operation at the premises. He said that when he entered the premises there was a person behind the counter whom he identified as Ms Lee. He said he was led from the reception area up to a massage room by Ms Lee. The massage was performed by “Sharon”, who said she was from Thailand. In the recording tendered, at the end of the massage, “Sharon” is heard to ask DSC Hansson if he wanted anything “extra” which she told him meant “happy ending and hand job.” In the recording tendered, the amounts stated for the “extras” are unclear; though there was reference to 70, 20 and 100.

- [20] On 18 December 2015 at around 6.20 pm, DSC Meads executed a search warrant at the premises. He was accompanied by numerous other detectives. They gained entry through the front door of the premises where there was a foyer type area, a counter with EFTPOS facilities, a couch and a waiting area with chairs. There were a number of small rooms off a corridor with massage tables in each room. Upon entering the premises, DSC Meads activated his digital voice recorder, DSC Hansson took footage with a GoPro, and other officers took video recordings on their phones. The recordings of DSC Meads and DSC Hansson were tendered into evidence.
- [21] At the premises were a number of young females of south-east Asian appearance and a number of males. Ms Lee was present.
- [22] Everyone within the premises was assembled into the foyer area. All occupants of the premises were detained and DSC Meads advised them of their rights and gave them a caution, and they were told that police were investigating the offence of illegal prostitution.
- [23] During the course of the search, Ms Lee was asked, "Where do you live? You stay here don't you?" Ms Lee answered, "Yes" and then when asked "Where is it?", she took the officers to a locked room at the far end of the premises. Access to that room could be gained from the garage of the premises as well as from inside the premises. The room contained what appeared to be a bedroom with an office adjoining the bedroom.
- [24] In the course of the search, Ms Lee was asked "Where do you keep the money?" Ms Lee responded, "most of client they pay card." When asked again, with DSC Meads stating, "We know some pay cash", Ms Lee responded with the "bank." When Ms Lee was challenged on the basis that there was not a bank at the premises, she responded, "with the drawer, ah in my room."
- [25] In the room, police located \$1,500 in cash in a drawer and another \$49,900 in cash in a brown bag. The money was in denominations of \$100 and \$50 notes. A sum of \$105 was found in Ms Lee's purse in the room in denominations of two \$50 notes and a \$5 note.

- [26] Ms Lee in discussing the amount of \$1,500 with police, made reference to that being money people pay when they come here. In relation to the \$49,900, Ms Lee told police it wasn't her money. Ms Lee said that she had taken it out of a safety deposit box at the National Australia Bank at Stones Corner earlier that day. Ms Lee also told police that she had asked her parents to send her money so that she could loan it out to people for high interest.
- [27] Later during this same search, Ms Lee complained about the time the search was taking and asked to be allowed to turn the air conditioning off. The police agreed that it could be turned off, to which Ms Lee responded, "I know you are not paying bills...but I have to.... I'm the one who has to pay...you know...yesterday, I pay the 10,000 for the bills."
- [28] Police subsequently executed a search warrant of the National Australia Bank Stones Corner branch and obtained documentary confirmation that Ms Lee had a safety deposit box and that the safety deposit box of Ms Lee had been accessed on a number of occasions between 8 August 2012 and when it was finally closed on 30 May 2018, including access on 18 December 2015, the day of the search warrant.
- [29] Police obtained statements from several males who were present as customers when the police searched on 18 December 2015, and each of Bailey, Nguyen, Chandley and Tse gave evidence at the hearing.
- [30] On 7 December 2017, at 5.00 pm, DSC Meads executed a second search warrant at the premises. A number of other police officers were present for that search, together with officers from Australian Border Force and the Crimes and Corruption Commission. DSC Meads activated his digital voice recorder upon entering the premises and Constable Koh recorded footage using a GoPro. Both recordings were tendered in evidence.
- [31] All occupants were detained and given warnings by DSC Meads, which were translated into Korean by Constable Koh for the benefit of the three Asian looking females who had identified themselves as being Korean. There were two other females; one who had identified herself as being Japanese and the other who identified herself as Thai. There was one Caucasian male.

- [32] Ms Lee was not present at the time of the police arrival on that occasion but did attend a short time later after DSC Meads rang Ms Lee on the mobile number, 0421 113 068. Ms Lee was at the dentist. DSC Meads gave evidence of having that number saved in his mobile phone, under the name Choonhwa Lee, from the previous search. The mobile phone number was the same number as that accessed during the execution of the telephone interception warrants.
- [33] Ms Lee subsequently arrived at the premises. A male person who identified himself as a barrister also arrived and remained until the end of the search. Throughout the search, Ms Lee's legal representative referred to Ms Lee as Pam, and Ms Lee answered to that name.
- [34] When Ms Lee arrived, DSC Meads gave Ms Lee a warning in relation to her right to silence, which Constable Koh repeated it to her in Korean. Ms Lee stated that she understood.
- [35] On that occasion, police located \$18,860 in a manhole in the ceiling of Ms Lee's bedroom, \$2,050 located inside a black case lying on the bed in Ms Lee's bedroom, \$460 in a black book in her bedroom and \$110 in an old mug on a shelf near Ms Lee's bedroom. An amount of \$330 was found in a drawer at the reception desk.
- [36] Located during the search was a bag found in Ms Lee's bedroom mixed in with a "jumbled pile of clothes and other items." Inside the bag was what can be described as sex toys and aids; a midnight wand, a Ovo vibrator in a white box, two penis extenders, two tubes of Astroglide lubricant gel and three unopened packets of Ovo vibrators. When asked about them, Ms Lee made no comment.
- [37] Senior Constable (SC) Barnes gave evidence that, after Ms Lee arrived at the premises, she came with DSC Meads to the back room. He said that when he had initially gone to the back room and tried to open the door, the door was locked. He said they had been unable to access the room until Ms Lee arrived at the property. Acting Sergeant Skaines also gave evidence of the door being locked. Each said they believed that Ms Lee produced the key to the room.
- [38] SC Bairne's evidence was that the room appeared to be a bedroom and an office; though he later described the second room as a living area or lounge room. The bedroom had a double bed. He said there were clothes strewn over the room and

that the bed was unmade. The bedroom adjoined a second room which went down some stairs and at the end of the stairs there was another room with a bookshelf and he found green leafy materials in a clip seal bag located on the shelf, right beside Ms Lee's passport.

[39] Police seized the leafy material, which was subsequently analysed as being approximately one gram of cannabis. In cross examination, DSC Meads accepted that the drug found looked "very, very old."

[40] In cross examining SC Barnes and DSC Meads, Mr Walsh representing Ms Lee, referred to the room as "my client's bedroom" or "my client's room". In questioning DSC Meads, Mr Walsh in discussing the layout of the premises said, "Now, her bedroom is at the back of the premises, isn't it?" In answer to questions at the conclusion of the search warrant, Ms Lee said she was the only person who lived in the room, and said that when she left the room she had to lock the doors.

[41] DSC Meads, SC Barnes and Acting Sergeant Skaines were not challenged in their evidence that the door to the bedroom was originally locked and unlocked by Ms Lee.

Telecommunication service warrants

[42] Police obtained telecommunication service warrants issued pursuant to the *Telecommunications (Interception and Access) Act 1979* (Cth) authorising interceptions of communications made to or from the mobile phone number 0421 113 068. Audio recordings of three telephone intercepts of that mobile telephone number on 24 November 2017, and two on 12 December 2017 were tendered.

[43] On 24 November 2017 at 12.37 pm, an audio recording of a telephone conversation which occurred involves a male speaking with a woman he refers to as Pammy. The male requests "Hey um, so I finally convinced by friend to come back in tonight so umm give me your hottest girl, the dirtiest girl there so he can have a bit of fun with her, who can I book in for him tonight? Who have you got for me?" The female asks what time and how many and the male responds:

"Just the two of us.... but you got to get my Bru... you gotta get Brucey the hottest, I mean, just the, the dirtiest girl, the one that will do fucking anything, he will pay he doesn't care...the one who will do fucking anything, so just get me not a shy girl, not a new girl and ... book [Charming] for me as well at 7 o'clock or 6:30."

- [44] On 12 December 2017 at 11.43 am, an audio recording of a telephone conversation occurred, neither the male or female in the call refers to the other by name. During the call there is the following exchange:

MALE: "How are you going"

FEMALE: "not too bad"

MALE: "oh no no with her, I think look after she does the first one she will be okay she just needs a good experience, you know what I mean, because she wants money and look she is very pleasant girl... You there?"

FEMALE: "Yeah"

MALE: "did you get her that customer yet or not yet"

FEMALE: "yes"

MALE: "Ahh yeah. And is she doing him?"

FEMALE: "Yes!" [raised voice].

MALE: "Oh good good I'm happy. What do you think of her? Looks?"

FEMALE: "Oh she's pretty"

MALE: "Yeah yeah she just needs time. Don't scare her off, give her time...you know she is just all new, you said you like someone new in the industry, so she is new, she is brand new, never done it before"

FEMALE: "just what I want"

MALE: "yeah well you have to train her, you know, good things don't come easy you have to work fucking hard...so don't scare her off"

The male then says he will get some lunch for the girl the subject of the discussion and will give her a lift home when she finishes.

- [45] Later the same day at 2.28 pm, an audio recording of a telephone conversation occurred as follows with the same male and female voices as were heard on the 11.43 am call. The female addresses the male as George, but the female is not named.

GEORGE: "yes how did she work out...was the customer happy?"

FEMALE: "George? I have to meet with the lawyer today...I just finished meeting the lawyer"

GEORGE: "Oh you don't know...must be okay then..."

FEMALE: "Where are you?"

GEORGE: "at home doing some work"

FEMALE: "well...after I have another client for her...but she think...she's not going do much...or she's not good at that..."

GEORGE: "How did she go with the first client?"

FEMALE: "this is what....I'm telling you...he said to me after because he dropped me off [indistinct] and then I asked him how it was and he said ahh she's not really his sort of type or whatever you know...we need some naughty girl not good girl right?"

GEORGE: "Yeah well maybe give her time and she'll be okay...no good?"

FEMALE: "that your opinion and his opinion totally different"

GEORGE: "oh okay"

FEMALE: "you....you only want to see...just a little bit of [indistinct]...but he can see the umm truth...but he don't want to see the truth he just wants to tell him he's a [indistinct]"

GEORGE: "well you gotta when you got like a new racehorse or new dog you have to train em you know nothing good... nothings perfect straight away"

FEMALE: “some people we can train...you can’t... you can tell what sort of girl she is... I can tell...”

The female then asked the male for a mobile phone, to which he responds, “You want a cheap mobile phone for \$30 just to talk?” And the female says, “Yes.”

- [46] During the searches a number of documents were obtained. Two documents were originally admitted but the Magistrate ultimately only relied upon one; a Brisbane City Council rates notice for the period of 1 October 2015 to 31 December 2015 addressed to Ms Lee, as the owner of the subject premises.
- [47] During the course of the hearing, evidence was called from a number of men who were detained in the course of the execution of the search warrants. The Magistrate found in relation to the credit of the witnesses “none of the witnesses for the prosecution were so challenged under cross-examination as to render their evidence unreliable or untruthful.”
- [48] Mr Bailey gave evidence that he had been offered “extra” after he had received a massage a number of times by a number of young Asian girls who worked there and was told that a hand job costs \$30. He says he always declined. The witness referred to Ms Lee as “the boss lady” or “Pam.”
- [49] Mr Chandley gave evidence of having been to Cloud Nine over a five year period. He walked into the premises in the middle of the execution of one of the search warrants. He said he had taken advantage of a few things offered as extras at the end of the massage, depending on his mood. He says he was offered a hand job for \$50 and/or the girl to remove all their clothes for \$20. Mr Chandley described Ms Lee as “the boss lady” but said that she never offered him extras.
- [50] Mr Tse said that the December 2015 search was the second time he had gone to the premises for a massage. He says that the first time he had been asked after the massage whether he wanted a “happy ending” but that he had declined because he was married at the time.
- [51] Mr Mudalige gave evidence of having attended the premises during the entire charge period. He was not on the premises during either of the searches. He had known Ms Lee, who he referred to as Pam, for approximately seven years and had attended the premises once a month during that period. He was told a hand job was

\$50, a naked service \$100, a blow job \$50 and \$50 for other sex things, which he understood was sexual intercourse. He gave evidence that he liked the premises as it gave extra sexual services and that he utilised this on every occasion he went there.

- [52] Mr Mudalige states he had sexual intercourse once with Pam when Pam provided a naked massage, blow job or a hand job for which he paid her. He says that Pam provided a bad service, “she was a bit out of mood.” He says that when he complained to her, she made racist comments which pissed him off. He says he had previously complained to Pam about paying the girls for a service which he did not receive, he says Ms Lee simply replied, “she’s a new girl...Don’t worry much.” Mr Mudalige says that as a result of the bad service he contacted the police to complain that he had not got what he paid for.

- [53] Mr Mudalige denied receiving any text message from Ms Lee asking him not to return as he was harassing the girls. He says he does not have Ms Lee’s phone number and that she does not have his.

- [54] Mr Mudalige has convictions for minor dishonesty, including for shop stealing offences in 2008 and for stealing in 2013. The Magistrate found that Mr Mudalige “had nothing to gain from reporting the defendant to police” and commented that “itself so surprising a response as to be credible, with the potential to also lose access to the services and be charged by police.”

- [55] Against objection, the Magistrate accepted the evidence of Detective Sergeant (**DS**) Wild as to the meanings of a number of terms used throughout the evidence by various witnesses. DS Wild was held to have “been involved in covert and overt investigations in the enforcement of prostitution laws for a total of seven years and says the industry has its own vocabulary.” DS Wild said that extras are a common term meaning additional sexual services, a full service is a massage with oral sex and vaginal penile penetration, a hand job is masturbation, and a blow job is oral sex.

- [56] Ms Lee did not give evidence, as is her right, but she did call her sister, Hyeong Jeong Lee, to give evidence. This was the only evidence rejected by the learned Magistrate.

- [57] Her sister gave evidence of having come to Australia in December, four years ago, with her two children, her younger sister and her mother. She said that she brought to Australia an amount of \$50,000 in Australian currency to lend to her elder sister. She said she arrived in Australia at the airport with the \$50,000 in her bag. She says the bag was searched at the airport and she was asked questions as to why she had come to Australia. The money was taken but later returned.
- [58] She said it was family money. She said that she gave the \$50,000 to her sister so that she could purchase a house so she could send her children to Australia to her sister.
- [59] In cross-examination, Ms Hyeong Lee said that she did not know if the money was used to buy a house. She said that she purchased the Australian currency in South Korea because she heard it would be cheaper there. She says this money was purchased privately so there was no receipt. She says there is no evidence of the purchase or of a loan having been given, that she had never seen the house the money was for or any proof that her sister had bought a house. When it was put to the witness that she had no idea of the location of the money she said she heard that the money was deposited into a bank.

The Magistrate's decision

- [60] The Magistrate found that she was satisfied beyond reasonable doubt that Ms Lee provided finance for the business of providing unlawful prostitution from the premises. The Magistrate referred to the rates notice addressed to Ms Lee at the premises, Ms Lee having told the police she paid the bills including an amount of \$10,000 on 17 December 2015, of Ms Lee accessing her safety deposit on a number of occasions during the charge period and of large sums of cash being found at the premises, specifically in her locked room and hidden in the manhole in the roof of her bedroom.
- [61] The Magistrate stated that all sexual services referred to in the evidence fell within the definition of prostitution, with the provision of such services being commercial in nature given the evidence of witnesses as to payment. Her Honour noted that all the payments were in denominations of money which comprised the majority of denominations found on the premises.

- [62] Her Honour was satisfied beyond reasonable doubt that the female in the audio recordings was Ms Lee and stated that these intercepts demonstrated “a level of management, control and intention by the defendant in responding to requests to provide girls for what is clearly indicated as and intended to be sexual activity with men.”
- [63] In reference to the first intercept where the female speaker was identified by the male speaker as Pammy, the Magistrate was satisfied that Ms Lee was the same Pam as the person identified in the conversation. The Magistrate referred to a number of intercepts of Ms Lee’s mobile number where she was referred to as Pammy and the fact that a number of witnesses, as well as her legal representative present at the second search, referred to her as Pam.
- [64] In reference to the second and third intercept, the Magistrate stated the male and female are the same in both calls by reason of their voice and the subject matter common to both calls. She stated that given the mobile phone number is Ms Lee’s, she was satisfied that the female in both intercepts was the appellant.
- [65] The Magistrate referred to Ms Lee’s possession of large sums of money in her bedroom and the concealment of sums in the manhole in her bedroom as sufficient to satisfy the Court that she dealt with the money referred to in charges 2 and 3.
- [66] The Magistrate was satisfied beyond reasonable doubt that Ms Lee possessed the cannabis found in her bedroom, stating that it was located in her room and was not hidden but in plain view.
- [67] Her Honour distinguished the quantity of drugs located from the case put forward by defence of *Gary John Lowaki v QPS*,⁶ stating that unlike that case, the quantity of drug located was able to be weighed and seen with the naked eye. As said in the decision in *Williams v R*,⁷ possession of such a quantity makes it reasonable to say as a matter of common sense and reality that it is a prohibited plant or drug of which the person is presently in possession.

Grounds of Appeal

Ground 1, 3 and 8 – Insufficient evidence to support charge 1

⁶ [2005] QDC 187.

⁷ [1978] 140 CLR 591, 599 (*Williams*).

[68] The main focus of the appeal was the submission that there was insufficient evidence that the appellant was carrying on a business.

[69] Counsel for the respondent relied upon the following evidence to sustain the second element of carrying on a business (either taking part in the management or controlling the business):

- (a) “on 22 November 2015, Plain Clothes Senior Constable Christopher Hansson (“PCSC Hansson”) conducted a controlled activity on the premises. Mr Hansson gave evidence that the appellant was behind the counter at the cash register when he arrived;
- (b) on 10 December 2015, when PCSC Hansson conducted further controlled activity, the appellant met him and took him upstairs, another woman “Sharon” came along, and the appellant then left the room;
- (c) at the first search the appellant was located in one of the massage rooms at the premises, kneeling atop a nude man’s buttocks, giving him a massage;
- (d) there was a locked door at the back of the premises to the left of the garage area;
- (e) at the first search, the appellant accepted she was the owner at the commencement and accepted the statement to occupier, she advised police when a customer arrived during the search that he was there for a haircut, after cautioning, she spoke to police about the CCTV cameras on the premises, she admitted to police the whole building belonged to her, and said that she had paid \$10,000 in bills the day earlier;
- (f) at the first search, the appellant admitted she lived at the premises (at one stage she offered to show police her living quarters), she later showed PCSC Hansson the room and took him through the establishment and otherwise cooperated with him;
- (g) she admitted to police her computer was at the premises, she affirmed items of property including an appointments book and client loyalty cards, she told police she stored money in the bedroom/office space, which she referred to as her “room”’, and that most of her clients paid by card;
- (h) at the first search, police seized a number of items from the premises and returned the items to appellant sometime later;
- (i) sometime in early 2016, the first time Christopher Patrick Bailey attended Cloud 9, Mr Bailey received a back wax from the appellant, who was “*the boss lady*”, and was otherwise known as “*Pam*”]
- (j) witness Attapattu Mudalige Anjana Niranjana Perera Wijeratne (referred to as Mr Mudalige) had been to the premises a number of times and knew the owner as “*Pam*”, “*Pam Lee something*”, from Korea. Mr Mudalige had known “*Pam*” for seven years;
- (k) witness Dean Victor Chandley had attended the premises a number of times in the last five years before he gave his evidence on 7 December 2018, he recalled sometimes the “*boss lady*” was there. He had met the “*boss lady*” the first time he attended Cloud 9 but could not recall her name;
- (l) there was telephone intercept evidence that revealed the appellant was taking calls from prospective clients regarding prostitution services and discussing the management of new employees in respect of prostitution services;
- (m) the appellant arrived at Cloud 9 during the second search. Multiple officers gave evidence the appellant unlocked a door to the bedroom/office area attached to Cloud 9 with a set of keys for the police;
- (n) the bedroom/office space area was filled with personal effects (including the appellant’s clothes and passport); and
- (o) each time DSC Meads had been to the premises, the appellant’s room had been locked.”

- [70] On their own neither of the first four facts (a) to (d) prove that Ms Lee carried on the business. The first two are consistent with the actions of a receptionist and the third is consistent with the actions of an employee or contractor.
- [71] The evidence of the locked room (paragraphs (d) and probably (o)), of Ms Lee living on the premises (paragraph (f)) and of personal items being in the room (paragraph (n)) by themselves do not demonstrate that Ms Lee carried on a business. The fact that Ms Lee had a key to the room which doubled as her bedroom and office (paragraph (m)) and that she had an appointment book and client loyalty cards (paragraph (g)) might be regarded as equivocal.
- [72] It is unclear what use is to be made of the evidence referred to in paragraph (h): the taking and returning of seized items cannot add to the proof of the charges.
- [73] The other facts relied upon by the respondent bear closer examination (paragraphs (e), (i), (j), (k) and (l)).
- [74] Counsel for Ms Lee challenged the contentions that she had accepted that she was the owner and occupier of the premises; referred to in paragraphs (e). Counsel for Ms Lee went in detail through the transcripts of the audio recording of the search. Counsel pointed out the limitations in the usefulness of the conversations.
- [75] The first question to which the appellant apparently responded, yes, was “Where is the lady who runs this place? Choonhwa Lee. Where is she?” The affirmative reply is not a distinct answer to the first statement.
- [76] The next directly relevant part of the conversation was in similar terms. The question asked was “I believe you are the person who owns this place... Can you just state your full name?” Her response was to give her name.
- [77] The third part of the conversation, after it had been established that Ms Lee lived there, was “Because I am executing this search warrant on the person who occupies this place, I am going to execute the search warrant on you. Okay?” The response of the appellant was, “okay”.
- [78] Finally, there is the question “This whole building yours, yes?” The response was, “Yes”.

- [79] The last response was a distinct admission, and one would have thought that if it were not true that Ms Lee occupied the place, another response would have been given to the statement about her occupying the place, particularly given that the statement was followed by the explanation that as she was the occupier a search warrant was going to be executed on her. To that extent, the response and the absence of a denial might properly be regarded as an admission.⁸ Similar considerations apply to the other responses about her owning the building.
- [80] These admissions, and the other evidence relating to Ms Lee living on the premises, only take the prosecution case so far. They are relevant in a circumstantial case, but they do not, of themselves show that Ms Lee took part in the management of the business or controlled it; let alone financed it.
- [81] Ms Lee's own statement, however, after being told that the police were seizing more than \$50,000 in cash from the premises and complaining about the cost of running the air conditioner and asking if she could turn off the air-conditioner, and saying, "yesterday I paid the 10,000 for the bills" is more telling. It is true, as submitted by her counsel, that she does not identify what bills she paid and in what context, but the inference is inescapable that she was paying for such things as the electricity to the premises. The evidence is relevant to both parts of the definition of carrying on a business.
- [82] No document was tendered as part of the prosecution case; apart perhaps from the rates notice, a matter which I will deal with later. There are no invoices suggesting that any expenses were paid or were payable, nor were there any bank statements showing the payment of any expenses. This is despite a host of documents being seized pursuant to the warrant, as well as the computer, and being returned to Ms Lee. As against that aspect of the case, of course, is the presence of large amounts of cash; suggesting that records were not kept of transactions involving the business.
- [83] As to the rates notice, it was held below and submitted on appeal that the notice was admissible under s 93 of the *Evidence Act 1977* (Qld) as it was a document forming part of a business record from information by persons who may reasonably be supposed to have personal knowledge and that person cannot with reasonable

⁸ *R v Christie* [1914] AC 545, 554, 560, and 565 - 566 cited in *R v MBV* [2013] QCA 17 at [18].

diligence be identified. It was submitted that the Brisbane City Council was a business for the purposes of the section.

- [84] The purpose of the admission below was said to be that it was evidence as to who owned the business. Counsel for Ms Lee submits that the document was incapable of establishing ownership of the property; it being only evidence under the legislation of the liability of the person who is identified to pay rates when the notice was issued.
- [85] Confining the use to which the rates notice might be put makes no difference to the result, however. There was, as previously mentioned, a distinct admission by Ms Lee that she owned the building. The rates notice, as counsel for the respondent pointed out on appeal, is relevant to the fact of Ms Lee paying bills on or with respect to the land at least. It is consistent with her statement that she had paid bills recently.
- [86] The other aspect of the evidence relating to Ms Lee carrying on the business were references by two witnesses to Ms Lee being the “boss lady”. There was no objection to the evidence or submissions, in this court or below, that this evidence could not be acted upon. The possibility is that the expression is only derived from the way other people who worked at the premises had referred to Ms Lee to those witnesses, but the inference is also that it reflected the way the witnesses viewed her when they attended the premises.
- [87] The final aspect of the evidence are the intercepts on Ms Lee’s mobile phone.
- [88] The female on the line appears to be, in the call on 24 November 2017, arranging a particular girl for the caller, and, in the other calls, discussing with another person a particular girl, a new girl to the industry and getting that girl customers and training. The inference is inescapable that the subject of the calls was prostitution services.
- [89] No submissions were made in this court or below that these intercepts were not admissible. The submission was that there was no evidence that the female voice was that of Ms Lee. There was no voice recognition evidence; even from the police officers who gave evidence.

- [90] There are a couple of facts which link the calls to Ms Lee, however. The first is that the phone intercepts were made on the same number as Ms Lee's mobile phone; which the police had obtained on the first visit and called on the second. The inference from the latter is that Ms Lee has and had it in her possession all of the time. There is no suggestion that the phone had been stolen or used by people who were not authorised to use it. The second fact is that the person in the first call refers to the other participant as "Pammy," a name to whom Ms Lee answers.
- [91] The Magistrate was prepared to find that it was Ms Lee who was one of the participants in the phone call given that the mobile number was the same as Ms Lee's. Before me, counsel for Ms Lee accepted that this was an inference that the Magistrate was entitled to draw.
- [92] The evidence as to the role the appellant played at the premises is not contradicted by the evidence of Ms Lee's sister, Hyeong Jeong Lee, who was called by Ms Lee. Her evidence was primarily directed towards explaining the large sums of money located on the premises. The presence of the large sums of cash on the premises, as is apparent from the respondent's submissions dealing with the circumstantial case against Ms Lee set out earlier, is not relied upon by the respondent for this charge. The evidence of the sister was rejected by the Magistrate, but the realities are that the evidence did not in any event show the contrary of the prosecution case; namely that Ms Lee was not carrying on the business.
- [93] Ms Lee's sister gave evidence that apart from some minutes in the reception area, she had stayed outside the premises the rest of the time to look after her two children; despite her visit occurring at night. Ms Lee's sister claimed ignorance of anyone who worked there, saying she did not see very well. She said there were no men on the premises; though, as the Magistrate noted, this statement was made without prompting or being asked a question about the presence of men. Despite saying she never asked Ms Lee if she did sex work, she was able to positively assert that her sister needs to work lawfully or otherwise a person could be arrested. In summary this evidence did not assist Ms Lee's case on charge 1 in any event.
- [94] Finally, the Magistrate specifically identified various matters which her Honour considered enabled her to judge whether or not Ms Lee's sister was telling the truth. Her Honour also had the advantage of the sister being called as a witness before her.

Nothing has been submitted which would entitle this court to supplant the Magistrate's view of the evidence with another view.

[95] There was an acceptance by counsel for Ms Lee that the evidence showed that prostitution services were being carried on at the premises.

[96] Although the admission that Ms Lee was paying bills for the business occurred shortly after the date it was alleged Ms Lee carried on the business and the invoice for payment of the rates showed it was payable shortly before that first date (namely 1 October 2015) the other evidence relating to the business being carried out clearly showed the same business being carried out on and between the two dates alleged and with Ms Lee in charge of it. There was no change in circumstances. The Magistrate was entitled to conclude beyond a reasonable doubt therefore that Ms Lee was providing finance for the entire period; not just the confined dates of the admission and the rates notice.

[97] There was sufficient evidence that Ms Lee carried on that business at the premises and the verdicts, in my view, are supported by the evidence. Grounds 1, 3 and 8 fail.

Ground 2 – Apply required standard of proof

[98] Although the second ground of appeal alleged that the Magistrate had failed to apply the required standard of proof to her reasoning, nowhere was it particularised how that was so; other than to the extent it was encompassed by the insufficiency of evidence ground already discussed.

[99] There is no error apparent from her Honour's approach and this ground fails.

Ground 4 – admitting evidence of Police Officer as expert

[100] No written or oral submission were made in support of the ground that the Magistrate was wrong in law in admitting and then accepting the evidence of DS Wild as an expert in respect of his knowledge of common words in respect of prostitution on premises.

- [101] The respondent submitted, relying on *Osland v The Queen*,⁹ that expert evidence was admissible about which ordinary persons are not able to form a sound judgment without the assistance of those possessing specialist knowledge or experience in an area and which is the subject of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.¹⁰
- [102] It is unclear whether the ground of appeal related to whether the evidence was simply not admissible (being something of common knowledge) or whether DS Wild was not qualified to give it.
- [103] DS Wild gave evidence on 2 April 2019 that he works, and has worked for a period of seven years, in the Prostitution Enforcement Task Force in overt and covert operations into organised prostitution businesses. In this Task Force, DS Wild has been a law enforcement participant in covert operations where he has purported to be a client and engage individuals or organisers as that client. He said that the prostitution industry has its own language or vocabulary and that he is familiar with the terms of the industry.
- [104] The Magistrate in response to defence counsel's initial objection at trial, accepted that DS Wild was qualified to give the evidence. The Magistrate also accepted the evidence of DS Wild as to the meanings of a number of terms used in the evidence. No error is apparent from either conclusion.
- [105] Importantly, in the end, the Magistrate accepted that the sexual services referenced in the evidence fall within the definition of prostitution.
- [106] It is not clear that the Magistrate needed the evidence of DS Wild as to the meanings of the words used by the various witnesses, or whether the information would fall within ordinary experience and knowledge.
- [107] In any event the evidence would and does not make any difference to the result. Ground 4 fails.

⁹ (1998) 197 CLR 316.

¹⁰ *Osland v The Queen* (1998) 197 CLR 316 at [53], citing *R v Bonython* (1984) 38 SASR 45, 46-47, *Clark v Ryan* (1960) 103 CLR 486, 491, *R v Turner* [1975] QB 834, 841; *Murphy v The Queen* (1989) 167 CLR 94, 111; *Farrell v The Queen* (1998) 194 CLR 286, 293.

Ground 7 and 9 - Evidence of Hyeong Jeong Lee and weight to evidence of the large sums of money

- [108] In the submissions, counsel for Ms Lee alleges that the learned Magistrate did not give proper weight to the evidence of Hyeong Jeong Lee, the sister of Ms Lee. It is submitted that in the circumstances of her giving evidence, Ms Lee was a disadvantaged witness having regard to the fact that English was not her first language and an interpreter was required for translation of her evidence. It is submitted that the Magistrate in her reasons failed to consider or address that the witness' evidence was supported/corroborated by the Australian Customs' documents and refund, and as a result a miscarriage of justice has occurred, depriving Ms Lee of a chance of acquittal.
- [109] The Magistrate found the witness to not be credible, stating she was "hesitant and vague." The Magistrate expressly stated that this was "even taking into account that she required the service of an interpreter, who was not physically present in court but assisting by way of telephone."
- [110] In considering the Magistrate's finding as to a witness' credibility, the appellate court ought to pay due regard to the advantage that the Magistrate had in observing a witness' tone and demeanor.¹¹
- [111] The evidence of DS Edwards from the Crime and Misconduct Commission lends some support to the evidence of Ms Hyeong Lee.
- [112] Although the evidence was hearsay, he was informed by someone from the Australian Border Forces that on 16 December 2014, five members of Ms Lee's family arrived in Australia with currency, none of which was declared. The inference from what he was told is that \$40,000, maybe \$50,000, Australian was brought in by Ms Hyeong Lee.
- [113] On behalf of Ms Lee it was also said that the evidence was also supported by an exhibit which reveals that Ms Lee attended the safety deposit box at the NAB on 18 December 2015.

¹¹ *White v Commissioner of Police* [2014] QCA 121 at [22]; *Forrest v Commissioner of Police* [2017] QCA 132, 5.

- [114] On the first search warrant of 18 December 2015, approximately \$53,005 was located at the premises. The police located \$49,900 in cash in a brown bag in Ms Lee's bedroom in denominations of \$100 and \$50 notes. In relation to that sum of money, Ms Lee told police it was not her money and that she had taken it that day from her safety deposit box at the National Australia Bank Stones Corner branch. Ms Lee also told police that she had asked her parents to send her money so that she can loan it out to people for high interest.
- [115] On the second search warrant of 7 December 2017, approximately \$24,690 was located. The police located \$18,860 in a manhole in the ceiling of Ms Lee's bedroom, of that amount \$17,850 was in \$50 notes and \$860 was in \$20 notes.
- [116] It was submitted that the Magistrate ignored the fact that the clients of the business paid for genuine and legal massages and there is no evidence that the money found in the police raids came from illegal activities and that it was consistent with being sourced from clients paying for the legal services of massages. It was submitted that there was no way of showing that the money found during the raids was reasonably suspected as being proceeds of crime apart from circumstantial evidence of the large sums found in the bedroom and the location of the money. It was submitted that the Magistrate did not in her reasons state whether she considered or applied the circumstantial evidence requirements.
- [117] The evidence of Ms Hyeong Lee, at its highest, establishes only that she brought in \$50,000 in cash a year prior to the alleged offence. There is no evidence as to what happened with the money, and, in particular, whether it was deposited into the safety deposit box. The excuse offered for bringing the cash into Australia, namely for the benefit of Ms Hyeong Lee's children and the purchase of a home, is inconsistent with it being left to lie around these premises and inconsistent with the statement by Ms Lee to police that she asked her parents to send her money so she can lend it out to people at high interest.
- [118] There are no records supporting any transactions of this type. The bank safety deposit box is accessed from time to time, including the day of the first visit by the police, but there is no evidence as to what occurred each time it was accessed. At no stage did Ms Lee say that she had taken the money out of the deposit box to engage in any sort of immediate money-lending or, indeed, any other form of

activity. On the first visit police found the money in a brown bag. On the second visit the bulk of the money was hidden in a manhole in the ceiling. The money was located in the bedroom or room used by Ms Lee which was usually locked, but to which she had a key. From her responses to the police, clearly she knew about the money. Ms Lee told police most people paid by credit card. That is inconsistent with the evidence of Mr Chandley and Mr Tse that they paid cash.

[119] The evidence establishes that a prostitution business, being carried on at the premises, was being carried on by Ms Lee.

[120] It is accordingly reasonable to suspect that the money was proceeds of a crime, namely prostitution; as particularised.

[121] In short, even if the Magistrate had accepted the evidence of Ms Lee's sister, Hyeong Jeong Lee, it would not have changed the result on charges 2 and 3.

[122] The evidence as a whole, in my view, establishes the charges under the Cth Code.

[123] These grounds fail.

Ground 10 – finding the cannabis was possessed by the appellant

[124] Cannabis was located in Ms Lee's room during a search in December 2017.

[125] Counsel for Ms Lee submits that there was no formal proof as to the ownership of the premises, no evidence of exclusive occupation of the room, or admission of possession and the charge was not particularised whether it was on the basis of actual possession or occupier's liability. It was submitted that because of the failure to particularise, Ms Lee was at a disadvantage as she was unable to call evidence if she desired or to effectively cross-examine witnesses.

[126] The submissions relied on the case of *R v Filippetti*,¹² that the mere presence of the dangerous drug did not equal possession without further evidence of exclusive physical control by any particular occupant of the premises at the time.

[127] The current case is clearly distinguishable from *Filippetti*. In *Filippetti*, the dangerous drug was concealed in the spring compartment of a chair in the lounge

¹² (1978) 13 A Crim R 335 (*Filippetti*).

room of a home. The home comprised of three bedrooms, a bathroom, a kitchen and a lounge room and was apparently owned by Filippetti's father, who did not live at the residence. There were six occupants of the home at the time of the offence and all six occupants had access to the lounge room. It was the large number of occupants in a comparatively small space and the drug being found in the public space that Street CJ, as he then was, noted as the difficulty in the Crown's case.

[128] Here, the evidence was that the drugs had been found in the locked room, and that room was Ms Lee's bedroom and office. The bag containing the cannabis had been found next to Ms Lee's passport. The evidence was that other personal property of Ms Lee had also been found in the room.

[129] There was other evidence establishing that Ms Lee was the occupier and concerned in the management or control of the place in which the cannabis was found. This evidence includes the evidence of the recordings of DSC Meads and DSC Hansson where the appellant accepted she was the owner, the building belonged to her and she had paid \$10,000 in bills the day earlier.

[130] At the first search, Ms Lee admitted she lived at the premises and showed the police her living quarters, unlocking the door to the room, and in a subsequent search the drugs were found in room adjoining that room.

[131] The inescapable inference is that Ms Lee had possession and control of the cannabis. Ms Lee has not demonstrated that she "neither knew nor had reason to suspect" the cannabis was there.

[132] The Magistrate, in giving her judgment, stated she was "satisfied beyond reasonable doubt that the defendant possessed the cannabis," stating her reasons as, "it was located in her room. It was not hidden. It was in plain view."

[133] No error in this reasoning has been demonstrated.

[134] It was further submitted that the Magistrate erred in finding that the cannabis was of a useable quantity.

[135] The Magistrate stated:

“The amount found in the defendant’s bedroom was able to be weighed. It was able to be seen with the naked eye. In relation to such circumstances, as it has been said in the decision in *Wilhem [Sic] v R* [1978] 140 CLR at page 59, possession of such a quantity makes it reasonable to say as a matter of common sense and reality that it is a prohibited plant or drug of which the person is presently in possession.”

- [136] This case is again clearly distinguishable from the decision of *Williams*. In *Williams* a policeman found fragments of green leaf material in the pockets of two coats owned by the appellant which were hanging in the wardrobe of a room of which he was the sole occupant. A botanist examined the coats and found a minute quantity of material which he identified as cannabis, mixed with the dust. He found that it would not have been practicable to extract a useable quantity of the plant and it could not be separated from the dust with the microscope. As was the practice with small quantities, the botanist did not bother to weigh the plant. The judgment also noted that the cannabis was green which implied it was not more than six to 12 months old. The High Court held that the conviction should be quashed, stating:

“In creating the offence of having possession of a dangerous drug or a prohibited plant, s. 130 (1) contemplated the possession of such a quantity as made it reasonable to say as a matter of common sense and reality that it was the substance of which the accused person was presently in possession.”

- [137] In this case, the drug was observable with the naked eye. In the evidence of DSC Mead, he described the contents found in a clip seal bag, the size of a thumbnail and able to be weighed. This evidence clearly demonstrates, in accordance with common sense and reality, that it was a substance of which the accused was personally in possession. That the cannabis was brown and not green does not negate it being a substance in possession. *Williams* was in a factually distinguishable matrix.

- [138] The ground of appeal in relation to charge 4 fails.

Grounds 11 and 12 - Sentence

- [139] Apart from the appeal against conviction, Ms Lee also appealed against her sentences on the grounds that they, except for the sentence in respect of the drug charge, were manifestly excessive.
- [140] In relation to the drug charge, Ms Lee originally appealed on the ground that the recording of a conviction was manifestly excessive, but in fact Ms Lee was not

punished in respect of that offence and no conviction was recorded, and the appeal was not pursued in relation to that charge.

Proceedings before Magistrate

- [141] Before the Magistrate, the prosecution did not make any submissions about Ms Lee other than she had no previous convictions. The prosecution submitted, however, that unlike the one comparable it relied upon,¹³ there was no remorse in this case; with instead some twenty-one appearances and a five-day trial. It also submitted that Ms Lee had been put on notice about the police interest when they executed a warrant in 2015, but that she continued offending undeterred.
- [142] In relation to sentence, the prosecution submitted that for charge 1, a term of imprisonment was called for, namely a period of two years, though conceding that an immediate parole release was within range; for charge 2, three months imprisonment with all proceeds forfeited to the Crown; for charge 3, two months imprisonment with all proceeds forfeited to the Crown; and for charge 4, a \$200 fine. Convictions were sought in relation to all charges.
- [143] In his submissions before the Magistrate, counsel for Ms Lee informed the court that his client was 45 years old and had come out to Australia in excess of twelve years previously. He said that she initially came to study English literature but decided to stay and eventually got a permanent visa. He said she was single and never married. Her mother and father were still living and working in Korea, as was her brother and sister. After leaving school in Korea, Ms Lee, he said, had studied fashion. After studying English for six months when she arrived in Australia, he said Ms Lee obtained a diploma in hairdressing, and later a waxing and eyebrow tint certificate. He then said she did a massage course. Her counsel said she worked as a hairdresser and had a variety of other jobs before being involved in the Cloud Nine massage establishment. He said she had managed the establishment for the previous five to six years and worked there seven days a week, 8:00 am to 10:00 pm.

¹³ *Lai v Commissioner of Police* [2012] QDC 10 (*Lai*)

- [144] Counsel for Ms Lee submitted that no conviction be recorded in respect of the state offences as that might interfere with her citizenship application. He conceded that a conviction had to be recorded for the Commonwealth offences.
- [145] Counsel for Ms Lee submitted that fines should be imposed and said that his client had the capacity to pay fines.
- [146] In relation to the prostitution offence, it was submitted that there was no element of sexual servitude and that the prostitution services offered were at the lower end of the scale. He also said that his client had suffered extra-curial punishment in the form of newspaper reports.
- [147] There was considerable discussion by counsel for Ms Lee of the decisions of Samios DCJ in *Lai*, Dearden DCJ in *Barnes v Commissioner of Police*¹⁴ and Dearden DCJ in *R v Kalli*.¹⁵
- [148] In terms of the money laundering offences, counsel relied on the decisions of Muir DCJ involving *Graeme Dwyer* and *Anthony Restaino* in September 2017,¹⁶ and a decision of the NSW Court of Appeal in *R v Wing Cheong Li*.¹⁷
- [149] In giving her decision, the Magistrate made reference to the various sentencing principles set out in the *Penalties and Sentences Act* 1992 (Qld) and the *Crimes Act* 1914 (Cth).
- [150] In terms of the nature and circumstances of the offence, the Magistrate referred to the fact that Ms Lee had warning of the police interest, but still continued, and the telephone intercepts showed that the girl the subject of the conversation was scared and said that the manner in which the girl was discussed was of an extremely concerning kind.
- [151] In passing sentence, the Magistrate referred to the fact that Ms Lee did not have any criminal history and had received adverse publicity as a result of these offences. Her Honour said she took into account that the sentences may impact Ms Lee's citizenship.

¹⁴ [2014] QDC 184.

¹⁵ (unreported, Judge Dearden, Beenleigh, 3 August 2011).

¹⁶ *R v Dwyer and Restaino* (unreported, Judge Muir, Southport, 11 September 2017).

¹⁷ (2010) 202 A Crim R 195.

[152] The Magistrate said that Ms Lee may be in part a victim in all this, but that the Court did not know if this was the case as Ms Lee has provided no cooperation to police and, in fact, Ms Lee has, quite to the contrary, shown no remorse and put the Crown to proof. The Magistrate referred to the submission that Ms Lee was entitled to put the Crown to proof, but continued, stating, “the reality of the matters is that the charges were first before the Court on the 10th of January 2018, and there have been 21 mentions of this matter before a lengthy hearing.”

[153] Her Honour discussed at length the various decisions which were provided to her by the prosecution and counsel for Ms Lee.

[154] The Magistrate sentenced Ms Lee on charge 1 to 12 months imprisonment, wholly suspended for a period of three years; for charge 2, two months imprisonment, released forthwith upon entering a recognisance of \$1,000 and to be of good behaviour for 12 months; charge 3, three months imprisonment, released forthwith upon entering a recognisance of \$1,000 and to be of good behaviour for 15 months; and charge 4, convicted and not further punished with no conviction recorded. The money, the subject of charges 2 and 3 as particularised by the Crown, was forfeited to the Crown.

Appellate Court Intervention

[155] Appellate Court intervention on the basis of manifest excessiveness or inadequacy:

“is not warranted unless, having regard to all the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.”¹⁸

[156] However, as the plurality stated in *Hili v The Queen*,¹⁹ quoting the plurality in *Wong v The Queen*.²⁰

“[A]ppellate intervention on the ground that a sentence is manifestly excessive or manifestly inadequate ‘is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases.’”

Submissions on Appeal

¹⁸ *R v Pham* (2015) 256 CLR 550 at [28] citing *Wong v The Queen* (2001) 207 CLR 584 at [58]; *Barbaro v The Queen* (2014) 253 CLR 58 at [61].

¹⁹ (2010) 242 CLR 520 at [59].

²⁰ *Wong v The Queen* (2001) 207 CLR 584 at [58].

- [157] In written submissions on behalf of Ms Lee, it was submitted that a fine for the prostitution offence was within range. In written and oral submissions, it was conceded that a term of actual imprisonment was within range, but that any term of imprisonment beyond six months was manifestly excessive having regard to the absence of a need for rehabilitation, the lack of prior criminal history, and the impact of the sentence on her remaining in Australia.
- [158] No submissions were made in relation to the sentence imposed for the Commonwealth offences.
- [159] The respondent's position is that a term of imprisonment is within range; having regard to the absence of remorse, the commercial motivations involved, the poor attitude or callousness shown to employees, that Ms Lee was a mature age offender, that the offence took place over a lengthy period, and that the offence continued despite police intervention.

Consideration

- [160] The maximum penalty that may be imposed by a Magistrate's court for the offence of carrying on prostitution is 100 penalty units or three years imprisonment.²¹ The cases referred to by counsel all involved fines, but each of them involved pleas of guilty. In *Lai*, the defendant was proven to have engaged in advertising in newspapers for sexual services and there was a high volume of traffic and SMS calls on the mobile phone seized. She was found with a suitcase containing \$12,000. She similarly had no prior criminal history, and her residency status was at risk by reason of any conviction. On the other hand, not only did she plead guilty, but was 23 years at the time of the offending. The fine of \$10,000 was not disturbed on appeal.
- [161] The defendant in *Barnes*²² was a much older person (60 years), but it would seem that he was a reluctant participant in the prostitution business run by his wife. His fine was reduced to \$3,000 on appeal. Dearden DCJ imposed a fine in *Kalli*²³ of \$2,000 for each of the three counts of knowingly participating in the provision of

²¹ s 229HB, 552B and 552H Qld Code.

²² *Barnes v Commissioner of Police* [2014] QDC 184.

²³ *R v Kalli* (unreported, Judge Dearden, Beenleigh, 3 August 2011).

prostitution and each of the two counts of having an interest in premises used for prostitution; a total of \$10,000. The sentencing remarks do not indicate much about the offences or the defendant's circumstances.

[162] An appellate court intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed.²⁴ In any event, not only did the other decisions involve pleas of guilty, but there is no evidence in any of them of such wanton disregard of the fact that they might be prosecuted for the illegal activity or of the interests of the girls who worked there.

[163] A sentence of imprisonment was clearly called for in this case. Only by such a sentence would there be the general and personal deterrence required for this offending. No personal mitigating facts were present as regards the offending. Apart from the possible effect on her application for citizenship by reason of the recording of a conviction and her not having any previous convictions, nothing was offered on behalf of Ms Lee as a reason for not imposing such a sentence. Suspending the sentence achieves the object of allowing Ms Lee to stay in the community if she does not commit any further offences.

[164] No particular error in the sentencing discretion by the Magistrate has been identified. On the other hand, the head sentence of twelve months is a long one and one in excess of what appears to be prevailing sentencing patterns. In my view, a more appropriate sentence is one of six months, wholly suspended with an operational period of two and a half years.

[165] This ground of appeal succeeds insofar as the sentence on charge 1 is reduced in the terms indicated.

Costs

[166] The hearing of this matter was adjourned on 13 August 2020. At the time of granting the adjournment, an application was made on behalf of Ms Lee for an order for the payment by the respondent of the costs thrown away by the adjournment fixed in an amount of \$1,200. The respondent requested time to respond. Given that the matter was being adjourned to be heard by me at a later time, I agreed to the

²⁴ *Hili v The Queen* (2010) 242 CLR 520 at [59].

making of an order that costs of the adjournment be reserved for determination on the appeal.

[167] The respondent in their outline dated 25 September 2020 did not oppose the award of the sum of \$1,200 but sought a set-off of costs in the ultimate appeal, if appropriate.

[168] In the submissions filed on behalf of Ms Lee, that submission was not opposed, if the costs of the ultimate appeal were not awarded in favour of Ms Lee. On behalf of Ms Lee, it was submitted that a further application for costs pursuant to s 226 and s 232A of the *Justices Act* 1886 (Qld) would be made by Ms Lee, if she was successful in the appeal.

[169] The respondent's ultimate submission, however, was that as the outcome of the appeal was uncertain, the issue of costs should be adjourned until the date the Court delivered its decision in respect of the appeal.

[170] Subsequent to the making of those submissions, and prior to the finalisation of these reasons, in an email from my associate I expressed the view that, having considered s 232(4) of the *Justices Act* 1886 (Qld), no order as to costs may be made on the hearing of the appeal, and that extends to the making of any order as to costs in relation to the adjournment. The email stated that if either party wished to submit that s 232(4) should be interpreted otherwise, then they must file and serve written submissions of no more than two pages in length by 10.00 am on Wednesday 8 December 2021. No submissions have been received.

[171] In accordance with the terms of s 232(4), no order as to costs will be made.

Orders

[172] The appeal against conviction is dismissed.

[173] The appeal against sentence in relation to count 1 is upheld with the term of six months substituted for the term imposed of twelve months. Like the original sentence, the term is wholly suspended. The operational period will be two and a half years.