DISTRICT COURT OF QUEENSLAND

CITATION:	*Woolston v Commissioner of Police* [2022] QDC 70
PARTIES:	**LORETTA DALE WOOLSTON** (appellant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO:	BD 2228/21
DIVISION:	Criminal
PROCEEDING:	Appeal – *Justices Act 1886* (Qld) s 222
ORIGINATING COURT:	Magistrates Court of Queensland at Brisbane
DELIVERED ON:	1 April 2022
DELIVERED AT:	Brisbane
HEARING DATE:	18 February 2022
JUDGE:	Loury QC DCJ
ORDER:	**1. Extend time within which to appeal to 1 September 2021;** **2. Leave to adduce new evidence granted;** **3. Dismiss the appeal against conviction and sentence.**
CATCHWORDS:	APPEAL – s 222 of the Justices Act 1886 – where the appellant was convicted of offences pursuant to ss 80(5A) and 80(11) of the *Transport Operations (Road Use Management) Act* 1995 – whether the verdict was unsafe – whether the Magistrate erred in ruling an affidavit which exhibited a medical certificate, sworn by the appellant, inadmissible – whether the conduct of police and the legislation offends the *Human Rights Act 2019* – whether the Magistrate erred in stating that the appellant raised the transmission of COVID-19 for the first time during her evidence at trial
LEGISLATION	*Transport Operations (Road Use Management) Act* 1995 (Qld) s 80(5A), s 80(5B), s 80(6)(c), s 80(8)(c), s 80(11), s 86 s 91I, s 91M, s 91N, s 239

	Police Powers and Responsibilities Act 2000 (Qld) s 60
	Human Rights Act 2019 (Qld) s 3, s 37
CASES:	*Allesch v Maunz* (2000) 203 CLR 172
	Fox v Percy (2003) 214 CLR 118
	Lee v Lee (2019) 266 CLR 129
	McDonald v Queensland Police Service [2017] QCA 255
APPEARANCES	The appellant appeared on her own behalf N Hopper (solicitor) for the respondent

Background

[1] The appellant was convicted on 7 July 2020 after a trial in the Magistrates Court of one offence of failing to provide a specimen of breath as required (roadside) in a manner directed by police pursuant to s 80(5A) of the *Transport Operations (Road Use Management) Act 1995* (Qld) (‘*TORUM’*) and one offence of failing to provide a specimen of breath for analysis pursuant to s 80(11) of the *TORUM.*

[2] The appellant filed a Notice of Appeal and application for an extension of time within which to appeal on 1 September 2021. The respondent does not oppose the granting of an extension of time.

[3] The Notice of Appeal indicates that the appeal is against the conviction for the offence under s 80(11) of the *TORUM,* although the appellant’s outline appears to indicate that she intended to appeal against both convictions. Whilst I do not consider that I have power to make any orders in relation to the appellant’s conviction for the offence under s 80(5A) of the *TORUM,* as she has not appealed against it, a consideration of the merits of the appeal necessarily requires a consideration of the evidence in relation to the offence under s 80(5A) of the *TORUM*.

[4] The grounds upon which the appellant appeals her conviction can be described as follows:

1. The verdict was unsafe;
2. The Magistrate erred in ruling an affidavit which exhibited a medical certificate, sworn by the appellant, inadmissible;
3. The conduct of police and the legislation offends the *Human Rights Act 2019* (Qld) (‘*HRA’)*; and
4. The learned Magistrate erred in stating that the appellant raised the transmission of COVID-19 for the first time during her evidence at trial.

The appeal

[5] An appeal pursuant to s 222 of the *Justices Act 1886* (Qld) requires this court to conduct a real review of the evidence led before the learned Magistrate and his reasons, together with any new evidence that I give the appellant leave to adduce, and form my

own conclusions.[1] The powers of an appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error.[2]

[6] Pursuant to s 225 of the *Justices Act 1886* (Qld), this court can confirm, set aside or vary the order appealed against or make any other order that the learned Magistrate could have made if considered just.

The evidence at trial

[7] The prosecution called two witnesses who were both police officers at trial. Senior Constable Matthew Strudwick gave evidence that during the evening of 7 July 2020, he and Constable Zachary Schembri were driving an unmarked police vehicle, performing patrols looking to identify stolen vehicles. At 10pm, they attended the carpark at the Nudgee Beach boat ramp. They checked the registration numbers of the cars parked in the carpark which included a Ford Transit being driven by the appellant. As they drove away, the appellant began to follow them. The police stopped their vehicle. Senior Constable Strudwick approached the driver, the appellant, and had a conversation with her. The conversation was captured on his body-camera. Senior Constable Strudwick gave the appellant multiple directions to provide a specimen of breath. Senior Constable Strudwick described the appellant's attitude towards them as "hostile, aggressive, abusive". He said that the appellant was yelling and did not appear to struggle for breath.

[8] As the officer attempted to administer the roadside breath test, the appellant took a "very short breath [in]" and a "very short exhale of breath". She then stopped blowing into the tube. The appellant did not produce a medical certificate to the police, so she was transported to the Fortitude Valley Police Station to provide a specimen of breath.

[9] At the station, Senior Constable Strudwick gave a direction to the appellant to provide a specimen of breath. A certificate was tendered pursuant to s 80(15B) of the *TORUM*, which indicated that at 11:35pm, the appellant was required by Senior Constable Strudwick to provide a specimen of breath for analysis by a breath analysing instrument. The certificate indicates that all applicable regulations made pursuant to s 80 of the *TORUM* were complied with and the instrument was in proper working order. The appellant failed to provide a specimen of breath.

[10] Pursuant to s 80(15B) of the *TORUM,* the certificate is conclusive evidence (until the contrary is proven) that a requisition to provide a specimen of breath for analysis was made to the appellant by Matthew Strudwick; that the appellant failed to provide a specimen of breath when required; and that an approved breath analysing instrument was available at the place where, and at the time when, the requisition was made for the purpose of analysing a specimen in accordance with the requisition.

[11] In cross-examination, the appellant challenged the lawfulness of the conduct of the police in pulling her over. She suggested in effect that, because the officer had no

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[1] *Justices Act 1886* (Qld) s 223; *Fox v Percy* (2003) 214 CLR 118, 126-7 [25]; *McDonald v Queensland Police Service* [2017] QCA 255 [47].
[2] *Allesch v Maunz* (2000) 203 CLR 172, 180-1 [23].

belief that she was intoxicated, he had no lawful reason to stop her and require her to undertake a roadside breath test. The officer responded that he had a power to pull the appellant over for a roadside breath test.

[12] The body-camera footage shows, as the officer described, that the appellant was hostile, aggressive and abusive towards police. She made comments that she did not like police and that they did a good job of "impersonating Nazis". The appellant denied that she had consumed any alcohol. When it was indicated to her that the police were going to obtain the breath testing device, she said "good". After two failed attempts at providing a sample, the officer said to her that she was stopping blowing too early. The appellant responded that he was talking rubbish and that she blew what she was able to blow. She suggested to the officer that the device did not work correctly. After a third failed attempt, the appellant was advised that failing to provide a breath sample was an offence and she could be arrested. She responded in loud, clear terms, "what a rubbish system".

[13] During the course of her interactions with police at the roadside, which took place over half an hour, the appellant made a phone call making a complaint about the two police officers. After a fourth failed attempt at providing a breath sample, she yelled that she was doing the best that she could do. She was asked by police if she had a medical certificate indicating that she could not provide a specimen. She responded, "do you have one for your brain damage?". She was warned that she would be arrested if she failed to provide the sample. She continued to yell at the police officers that she had tried to do the test but that it was not working. The appellant said that she was not refusing to provide a sample and that she was trying to provide a sample. The officer responded by stating that all he was saying was that she had failed to provide a specimen. The appellant responded, "you are a lying piece of crap". She then said, "I'll go up to the hospital then." She continued to yell at the police telling them she was making a complaint to the Commissioner. She accused the officers of having no common sense, of not having any idea. She referred to one or other of them variously as an "arsehole", a "wanker", a "complete idiot" and a "dick". Again, she was asked if she had a medical certificate and responded, "do you have one for your brain damage?". For a fifth time, she was given a direction to give a sample of her breath. She accused the officer of pulling the device away from her mouth. She was provided with an opportunity to provide a sample for a sixth time and again she did not provide a sufficient specimen of her breath. When told she had failed to supply a sample again, she said that she was unable to do it for the satisfaction of the machine and the "arseholes" who were holding it. She was asked if she had asthma or some medical condition that prevented her from giving the sample. She yelled at the police in response about a "scope of practice of medical". At no time did she provide any explanation as to why she was unable to provide a sample of her breath. She continued to yell at the police calling them "arseholes" and "pieces of crap".

[14] The appellant was, in my view, hostile to the police from the moment she was stopped. She was belligerent and abusive towards them. The two officers remained composed throughout the abuse. They were polite and respectful towards the appellant throughout their dealings with her. The appellant called 000 and made a complaint that the police had stolen her licence and car keys and that they were using excessive force towards her. There is nothing in the footage that suggests that the police stole any of her property or used force of any kind against her. She further accused them of yelling at

her when they did not. She referred to them as "dirtbags" and "wankers". She was abusive to the 000 operator. She continued to abuse Senior Constables Strudwick and Schembri, accusing them of brutalising her.

[15] The appellant was given a final direction (the seventh) to provide a sample of breath. She continued to yell at police referring to them as "dumbos" and "pieces of shit". She again failed to provide a specimen of breath. She was then arrested. She refused to get out of the car. She called one of the officers an "egotistical brute", a "Nazi", a "turd" and a "piece of shit".

[16] The appellant expressed concern about some of her property which she had left at the boat ramp. The officers waited with the appellant in the vicinity of the carpark until she called her son and until he arrived, before transporting her to the Fortitude Valley Police Station.

[17] The police initially indicated that they would take the appellant to a hospital for a blood test when she failed to provide the roadside specimen of breath, but upon taking advice from a more senior officer, they transported the appellant to the Fortitude Valley Police Station for a further breath test.

[18] Senior Constable Zachary Schembri's evidence as to the events at the roadside was to a similar effect. He said that when the appellant's car approached the police car from behind that she flashed her headlights on high beam. He stopped the car because it appeared the appellant wanted his attention. He said that the appellant was given seven requirements to provide a specimen of breath. He said that he queried whether she had a medical certificate to which the appellant responded, "do you have a medical certificate for your brain damage?".

[19] Senior Constable Schembri said that once at the Fortitude Valley Police Station, the appellant was placed in an area where there were two seats. She failed to provide a specimen of her breath again. She refused to even attempt to blow into the device.

[20] The body-camera footage shows that upon arrival at the Fortitude Valley Police Station, the appellant's unnecessary abuse of the police continued. The footage shows that there is a man seated in a corridor outside the room where the breathalyser machine is housed who is wearing a mask. The appellant walks past that man without speaking to him. She appears to pay no attention to him at all. She is repeatedly asking the police "where is the toilet?". She is directed to a cell where she is able to use the toilet. She is then removed from the cell and seated nearby a desk which is quite some distance from where the man wearing the mask was seated.

[21] The evidence in the trial is difficult to follow due to the appellant's constant interruptions of each officer and indeed of the learned Magistrate. At times, she made abusive remarks about the evidence or about the officers. Some of the appellant's cross-examination focused on the man who appears in the body-camera footage at the police station, wearing a mask. The appellant asked Senior Constable Schembri who the man with the mask was and he answered that he did not know. He said that he could not remember if there was someone waiting to use the breathalyser when they arrived at the station. He confirmed that the appellant was kept away from anyone who might have been seated at the station and that the appellant was seated on a chair down the hallway. The body-camera footage confirms his evidence in that regard.

[22] Senior Constable Schembri was cross-examined about the COVID-19 health directives that were in place at the time. He said that whatever the directives were at the time, he was following them. He could not recall precisely what they were. In all of the body-camera footage, no police officers can be seen wearing masks. Nor is the appellant wearing a mask or did she ask to wear a mask. I would infer from that, that at the time of the offences, the public health directives did not mandate the wearing of masks.

[23] Senior Constable Schembri confirmed there is only one breathalyser machine at the Fortitude Valley Police Station and that all persons are expected to provide a breath test on that same machine.

[24] The body-camera footage demonstrates that when the appellant was brought into the room where she was to provide a sample on the breathalyser machine, all officers remained socially distant from her. The police officer operating the machine can be seen in the footage holding what she refers to as a "sealed mouthpiece". She opens it, removes the plastic wrapping and places it, that is, the mouthpiece, on the machine. The appellant can be heard to say, "I'm refusing to do anything other than a blood test". She provides her name, date of birth and address. She is given a direction to provide a breath sample. She repeatedly says, "It is my legal right to have a blood test". She refuses to provide a specimen of breath. She does not even step towards the machine, but rather yells at police about their useless procedures.

[25] The footage demonstrates that the appellant is told that it is an offence if she does not provide the specimen of breath. She continues to yell at the police. She is given one further opportunity to provide the specimen and again she refuses. She continues to yell and speak over the top of police. She repeatedly says, "I'm going to provide a blood sample".

[26] The appellant gave evidence in her defence. She said that she had complex medical problems and that she believed she was at high risk of contracting the COVID-19 virus. She said that when she entered the breathalyser room, there was a young man, in about his twenties, sitting on a chair wearing a mask. She said that she walked past him and was not able to be socially distant from him. He was waiting to give a breath sample. The appellant gave evidence that man told her that he was sick. When it was her turn to provide a sample of breath, she said that she was seated in the same chair. There was no sanitising that occurred of the chair. She was not offered any personal protective equipment and she was expected to use the same breathalyser machine. She said that she exercised her "right to life" pursuant to the *HRA*. She said that she believed her life was at risk and that she was not safe in the care of police. She said that she considered that she had been entrapped by police as they were driving an unmarked vehicle. She said that the police obstructed the taking of her blood specimen.

[27] In cross-examination, the appellant said that she was unable to provide the breath sample at the roadside and agreed that there were at least seven requirements given to her to provide a breath test. She said that she kept on trying to give the specimen but was unable to. She said that she did not go to the hospital herself to get a blood test because there was no time, and she did not have a police kit for a blood test. At the police station, she said that she exercised her right to life and did not give a specimen. She said that there would have been some face masks in her car. She did not ask to wear one as "the police do not listen when they are arresting you". She agreed that she did not produce a medical certificate to the police. She said that she had a medical

certificate but that it was not available at the time. She agreed that she did not have an endorsement on her licence that she was exempt from providing a roadside breath test. She said that there was an endorsement on her licence at the time of the trial, but not one at the time of the offences.

[28] The appellant referred to some character witnesses who had provided references. She exhibited them to an affidavit which the learned Magistrate refused to accept.

The Magistrate's decision

[29] The learned Magistrate referred to s 63E of the *Police Powers and Responsibilities Act 2000* (Qld) which empowers the police to stop a person in control of a vehicle for a prescribed purpose which includes to conduct a breath test. The learned Magistrate said that s 80(11)(AA) did not oblige the police to conduct a blood test or provide for an election by the appellant. Exhibit 2, the certificate, was conclusive evidence that the appellant failed to provide a specimen of breath as required. The appellant did not raise any issues related to COVID-19 at the time of the requisitions being made of her. He referred to the seven directions made at the roadside for a breath test. The learned Magistrate considered the appellant to be a dishonest witness and did not accept her evidence where it conflicted with that of the police. He considered that the prosecution had proved each of the elements of the offences beyond reasonable doubt.

The new evidence

[30] The appellant filed with her outline of submissions, a copy of the affidavit she swore on 26 February 2021. This is the affidavit which the learned Magistrate refused to accept. In the affidavit, the appellant refers to s 80(5A) of the *TORUM*. Section 80(5A) provides defences to the requirement to provide a roadside breath test. Section 80(11A) is in similar terms and provides defences to the requirement to provide a sample of breath on a breathalyser machine.

[31] Much of the content of the affidavit is entirely irrelevant to the matters in issue in the trial. It otherwise repeats the evidence that the appellant did in fact give in respect of the masked man outside the breathalyser room and the references to the *HRA*.

[32] The appellant has exhibited a number of documents to the affidavit including:

1. A medical certificate dated 24 August 2020 in which it is stated that the appellant has a fluid overload which results in her experiencing significant shortness of breath regularly. Due to this, she would struggle to complete a breathalyser test or any related test which required her to control her inhalation and exhalation.

2. A form referred to as "Medical Certificate for Motor Vehicle drivers" signed by the appellant's treating doctor on 1 September 2020 which indicates that the appellant meets the medical criteria for a conditional licence.

3. An affidavit sworn by her son in which he states that he told the police after having arrested his mother that she was not able to provide the breath sample probably because of her deteriorating health as he had seen her breathless multiple times.

4. An affidavit from Tanya Hunt who swears that she has never known the appellant to drink alcohol. She states that the appellant gets short of breath after walking short distances.

5. A number of other documents which are irrelevant to the issues raised in this appeal including: the executive summary and recommendations of an Investigation (by Victoria Police) into the falsification of preliminary breath tests with Victoria Police; some emails between the appellant and Police Prosecutions and the appellant and the Department of Transport and Main Roads; Google images of the Nudgee boat ramp and carpark; a Facebook post; a page from a Coroner's finding at an inquest; a screenshot of a webpage from healthdirect.gov.au; a photograph of the appellant's leg; a copy of the discharge medication record of the appellant dated 30 December 2020; a screenshot from the webpage parliament.qld.gov.au.

Grounds of appeal

Ground 1 - Unsafe verdict

[33] The appellant did not dispute at trial that she attempted a number of times (at least seven) to provide a roadside specimen of breath. She also did not dispute at trial that she refused to provide a breath sample at the police station on the breathalyser machine.

[34] Pursuant to s 60 of the *Police Powers and Responsibilities Act 2000* (Qld), a police officer may require the person in control of a vehicle to stop the vehicle for a prescribed purpose. The prescribed purposes include to conduct a breath test or saliva test.[3] Section 80(2) of the *TORUM* also gives a police officer the power to require a person who is found driving a motor vehicle to provide a specimen of breath for a breath test by the person.

[35] Section 80(5B) of the *TORUM* provides the defences to the offence under section 80(5A) (the requirement for a roadside breath test). It reads:

> A person referred to in subsection (5A) is not guilty of an offence under that subsection if
>
> (a) immediately after the requirement is made, the person produces to the police officer a certificate in the approved form from a doctor stating that—
>
> (i) because of a stated illness or disability, the person is incapable of providing a specimen of breath, a specimen of saliva or both a specimen of breath and of saliva; or
>
> (ii) the provision of a specimen of breath, a specimen of saliva or both a specimen of breath and of saliva could adversely affect the person's health; or
>
> (b) the person satisfies the justices that the requisition to provide a specimen of breath, a specimen of saliva or both a specimen of breath and of saliva was not lawfully made or that the person was, by reason of the events that occurred, incapable of providing the specimen as required or that there was some other

[3] *Transport Operations (Road Use Management) Act 1995* (Qld) s 60(3)(e) ('*TORUM'*).

> reason of a substantial character for the person's failure to provide the specimen as required other than a desire to avoid providing information that might be used in evidence

[36] Whilst the learned Magistrate did not specifically refer to this provision, it is clear to me that he considered the factors which give rise to a defence. The appellant was asked by police if she had a medical certificate she could produce, which she indicated, by way of an offensive answer, that she did not. The medical certificate that the appellant has exhibited to her affidavit does not provide evidence that on 7 July 2020 (when the offence was committed) that she was incapable of providing the specimen of breath. There is nothing in her presentation to police to suggest that she was incapable of providing the specimen. Having viewed the body-camera footage, there is no suggestion at all that the appellant was, at any time, breathless during her engagement with police which took place over half an hour at the roadside.

[37] Even if the medical certificate was tendered at the appellant's trial, there is no error of fact or law in the findings that the learned Magistrate has made. I am satisfied that the police had a power to stop the appellant and make a requisition for a roadside breath test. That power came from the fact the appellant was driving a car. There is no requirement in the legislation for the police to have formed a suspicion that a driver was intoxicated before they can make a lawful requisition for a breath sample. I am satisfied a lawful requisition was given by the police to the appellant to provide a breath sample. Having viewed the body-camera footage, I too am also satisfied that the appellant failed to provide a specimen of her breath and did so deliberately. It is clear to me that the appellant was not in the least bit breathless during the half hour of time that the police made the requisitions of her. There is nothing in her presentation to suggest that she was not incapable of providing the sample.

[38] The appellant's son, in his affidavit, provided a potential explanation for the appellant's failure to provide a specimen of breath. The affidavit sworn by Mr James Bassett indicates that, whilst he was not present during the course of the making of the requisitions, he told police the appellant's inability to provide the breath sample "was probabl[y] due to her deteriorating health as I have viewed her multiple times breathless..".

[39] The learned Magistrate (as do I) had the benefit of seeing and hearing the appellant during her engagement with police. He had the benefit of seeing her from the very position of the police officers as she blew into the device. I am satisfied on that evidence that the appellant deliberately stopped breathing into the device such that she did not provide an adequate specimen of breath. Nothing in her presentation demonstrates at all that she was incapable of providing the sample due to some health issues. The medical certificate annexed to the appellant's affidavit does not provide the appellant with a defence that on 7 July 2020, when the offence was committed, she was incapable of providing the specimen. It establishes only that, as of 24 August 2020 (the date of the certificate), the appellant would struggle to provide a specimen of breath. Even taking into account this new evidence, I am satisfied beyond reasonable doubt that the appellant was guilty of the offence under s 80(5A) of the *TORUM*.

[40] As noted above, the appellant has not appealed against her conviction for the offence arising from the roadside breath test. Accordingly, I have no power to make any order in respect of that conviction.

[41] In relation to the offence under s 80(11) at the police station, once the appellant failed to provide a roadside breath test, s 80(6)(c) of the *TORUM* empowered the police to take the appellant to a police station, hospital or other place authorised under the section, for the purposes of analysis by a breath analysing instrument.

[42] Section 80(8)(c) of the *TORUM* empowered the police, once the appellant was taken to a police station pursuant to s 80(6)(c), to require the appellant to provide a specimen of breath or saliva or blood "as the police officer requires". Section 80(8)(c) provides:

> Any person who—
>
> (a) …
>
> (b) …
>
> (ba) …
>
> (c) is, for the purposes of subsections (8) to (8L), detained at or taken to a police station, or detained at or taken to a vehicle or vessel where facilities are available for the analysis by a breath analysing instrument of a specimen of breath or by a saliva analysing instrument of a specimen of saliva, or taken to a hospital or other place authorised under this section;
>
> may, while at a police station, vehicle, vessel, hospital or other place authorised under this section as aforesaid, be required by any police officer to provide 1 or more of the following as any police officer requires—
>
> (d) a specimen of the person's breath for analysis by a breath analysing instrument;
>
> (e) a specimen of the person's saliva for saliva analysis;
>
> (f) a specimen of the person's blood for a laboratory test.

[43] As the police were empowered to take the appellant to a police station, they were empowered to require her to provide a specimen of breath or saliva or blood. Had the appellant provided a medical certificate to the police at the roadside, s 80(8E) would have mandated the police requiring a specimen of the appellant's blood. As she did not produce a medical certificate at the roadside, it was for the police to elect what sort of sample they would require.

[44] There is no error in the learned Magistrate's finding that the police had a power to require the appellant to provide a sample of her breath at the station and that the alternatives available under s 80(8) of the *TORUM* are alternatives available to police officers and not available upon the election of the appellant.

[45] The defences available to the offence under s 80(11) are found in s 80(11A). It reads:

> A person referred to in subsection (11) or (11AA) is not guilty of an offence under that subsection if the person satisfies the justices that the requisition to provide the specimen was not lawfully made or that the person was, because of the events that occurred, incapable of providing the specimen or that there was some other reason of a substantial character for the person's failure to provide the specimen other than a desire to avoid providing information that might be used in evidence.

[46] The appellant accepted at trial that she did not provide the specimen of breath. The body-camera footage clearly demonstrates her refusal. The appellant relies upon the defence that there was some other reason of a substantial character for her failing to provide the specimen. That reason, she contends, was her concern over contracting the COVID-19 virus. At no stage during the course of the appellant's engagement with police at the police station did she make mention of any concerns regarding the transmission of COVID-19 by either another person in the station or via any equipment. It is apparent from the footage that a new mouthpiece was fitted to the machine prior to the direction being given to the appellant. She was simply obstinate in her refusal to provide the specimen.

[47] The learned Magistrate considered the appellant to be a dishonest witness. He had the advantage of seeing her give evidence and I am required to give weight to his views. In *Lee v Lee,*[4] it was said that:

> "A court of appeal is bound to conduct a 'real review' of the evidence given at first instance and of the judge's reasons for judgement to determine whether the trial judge has erred in fact or law. Appellate restraint with respect to interference with a trial judge's findings unless they are 'glaringly improbable' or 'contrary to compelling inferences' is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts. Thereafter "in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by findings of the trial judge"." (citations omitted)

[48] There is nothing in the material the appellant has filed or in the evidence before the learned Magistrate to suggest that such a finding was not open, that it was "glaringly improbable" or "contrary to compelling inferences". The appellant's evidence as it relates to her concerns about the transmission of the COVID-19 virus is not supported by the body-camera footage. The appellant cannot be heard and is not seen to speak to the man in the mask. She does not express any concerns as she passed by him to the police about the possible transmission of COVID-19. She did not raise any concerns with the operator of the breathalyser machine as to how possible transmission was prevented or what sort of cleaning procedures were undertaken. The factual findings of the learned Magistrate were open on the evidence and indeed supported by the body-camera footage.

[49] I am satisfied on the evidence before the learned Magistrate and the new evidence adduced before me (which is to the same effect) that the appellant was guilty of the offence under s 80(11) of the *TORUM*.

Ground 2 - affidavit and medical evidence

[50] The appellant argues that the learned Magistrate erred in refusing to permit the appellant to tender an affidavit prepared by her to which she exhibited a number of items including those referred to at paragraph [32] of this judgment.

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[4] (2019) 266 CLR 129, 148 [55] (Bell, Gageler, Nettle and Edelmann JJ).

[51] The learned Magistrate explained to the appellant that she would have the opportunity to give evidence and that such evidence must be given orally. The appellant did in fact give evidence and was able to give the account referred to above at paragraphs [26] and [27]. The evidence she gave is similar to that which is set out in her affidavit. Much of the affidavit sets out the appellant's arguments as to why she is not guilty. The medical certificate she has exhibited to the affidavit does not establish that, on the date of the offences, she was incapable of giving a breath specimen, only that at some time after the offences, she was incapable of supplying a specimen of breath. Whilst the learned Magistrate did not consider specifically the admissibility of the certificate, it did not afford the appellant a defence against either of the offences.

[52] The references exhibited to the affidavit also do not provide the appellant with any defence. There was no suggestion in the evidence of either police officer that the appellant was intoxicated. That she does not drink alcohol is not relevant to a consideration of her guilt of the two charges.

[53] The appellant has not established that the learned Magistrate was in error in refusing to admit the affidavit or in failing to consider the admissibility of the medical certificate.

Ground 3 - *Human Rights Act 2019* (Qld)

[54] The appellant argues that the police obstructed themselves from taking a blood specimen from her. At the roadside and at the police station, the appellant made clear that she would provide a sample of blood to the police. As explained above, the police had a power to require the appellant to supply a sample of breath. There is nothing in the *TORUM* which indicates that a person given a requirement to provide a breath sample can elect themselves to provide a blood sample instead. The appellant was at liberty to attend a hospital and obtain her own blood test. It was not incumbent on the police to do so.

[55] The appellant argues the failure of police to provide a blood kit to her is inconsistent with South Australian legislation and with s 37 of the *HRA*. The consistency or otherwise with South Australian legislation is irrelevant. The appellant was charged under Queensland legislation with offences committed in Queensland.

[56] With respect to the appellant's contentions about the *HRA,* the main objects of that Act are:[5]

(a) To protect and promote human rights;
(b) To help build a culture in the Queensland public sector that respects and promotes human rights; and
(c) To help promote a dialogue about the nature, meaning and scope of human rights.

[57] Section 4 prescribes the means by which the main objects are to be achieved.

[58] The power of the Supreme Court, where a question of interpretation of a statutory provision in accordance with the *HRA* arises, is limited to a declaration of invalidity. Such a declaration does not affect the validity of a statutory provision for which the declaration is made. No declaration of invalidity has been made in relation to the

[5] *Human Rights Act 2019* (Qld) s 3.

relevant provisions of the *TORUM*. Even if inconsistent with the *HRA,* that does not affect the validity of the provision.

[59] Section 37 of the *HRA* relates to a right to access health services without discrimination and a right to not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person. The appellant was not refused access to health services or medical treatment for any life threatening or other impairment.

[60] There is nothing in this ground of appeal.

Ground 4 - COVID-19

[61] The appellant argues that the learned Magistrate erred in stating that the first he became aware of anything related to COVID-19 was when the appellant gave her evidence. The appellant has relied on statements she made to another Magistrate at a mention of the matter to argue that the learned Magistrate who found her guilty was in error. The trial was conducted before the learned Magistrate. The first he became aware of the appellant's reliance upon the possible transmission of COVID-19 as being a reason why she refused to provide the specimen of breath, was when she gave evidence of it. His statement is not an error. Indeed, at the commencement of the hearing, the learned Magistrate explained the procedure to the appellant and advised her that if she wanted to give evidence she would need to do so orally and subject herself to cross-examination. The learned Magistrate told the appellant that he had not seen her affidavit.

[62] The significance of this evidence to the issues in the trial is as already considered above. The appellant argues that she exercised her right to life by refusing to undertake the breathalyser test because a sick man had just used it. The learned Magistrate considered this evidence. He found the appellant's evidence to be dishonest on this point. If, as the appellant argues she was genuinely concerned about her health and the possible transmission of COVID-19, I would have expected her to raise that issue with police at the time of the requirement to supply the specimen of breath being made. The body-camera footage clearly demonstrates that the appellant simply continued with her belligerent conduct towards police refusing to provide the specimen and demanding that they take a blood sample from her.

[63] The appellant has not established that the learned Magistrate was in error.

Sentence

[64] It is unclear to me whether the appellant has appealed against her sentence, although she has directed arguments to that end in her outline of submissions and before me. The respondent has also addressed arguments directed towards the sentence. Accordingly I will consider the sentence imposed. The appellant has argued that the delay in the trial proceeding occurred because of the conduct of police prosecutors and the consequence of that delay is that she is now subject to the alcohol ignition interlock legislation as it currently stands. This is a matter, she argues, that compounds her penalty.

[65] The appellant's trial was initially listed to be heard on 7 December 2020. The endorsements on the bench charge sheets indicate that the trial was not reached, but that an argument took place which resulted in a summons being set aside. The trial was adjourned to 17 March 2021. On that date, the endorsement on the court file indicates that the appellant was refused entry into the court building because she had not produced a negative COVID-19 test result and the hearing was delisted. The hearing was relisted for 15 July 2021 with a "show cause" notice being issued to the appellant informing her that unless she produced a negative COVID-19 test result not more than 48 hours old, in the form of a signed medical certificate or a text message, she would not be permitted entry to the court building in the interests of public safety.

[66] The appellant has provided the transcript of proceedings on 30 November 2020 and 7 December 2020. The prosecution did, on 30 November 2020, apply for an adjournment of the trial as one of the officers was due to have "non-elective surgery". The appellant informed the presiding Magistrate that she was content for the trial to proceed without the necessity of calling that officer to give evidence. She indicated that she was not disputing much of what was in his statement and it was largely the same as the other officer's statement. The trial remained as listed to be heard on 7 December 2020.

[67] On 7 December 2020, the presiding Magistrate indicated at 11:33am that she thought it unlikely that she would reach the appellant's trial that day as the trial that she was currently hearing was taking much longer than indicated. She proposed adjourning the appellant's trial to another date for that reason. The presiding Magistrate then heard an application to set aside summons served on the Commissioner of Police requiring her personal attendance at court and for the production of documents. Some of the documents were produced to the appellant and otherwise the summons were set aside. The matter was then adjourned at 12:10pm to 17 March 2021 as the trial was not likely to be reached.

[68] On 17 March 2021 as indicated, the appellant was refused entry to the courthouse assumedly because she had failed to comply with COVID-19 directives in place at that time. The trial was adjourned to 15 July 2021. The trial proceeded on 15 July 2021.

[69] The delay in the trial proceeding can therefore be seen to have been caused by the trial not being reached on 7 December 2020. The trial on 17 March 2021 was adjourned because the appellant was refused entry to the courthouse. The police were not at fault nor responsible for the adjournment of the trial on either date.

[70] The consequence of the trial proceeding on 15 July 2021 is that the appellant is now subject to legislation which commenced on 10 September 2021 relating to alcohol ignition interlocks.

[71] Section 80(11) of the *TORUM* provides that upon conviction for the offence of failing to provide a specimen of breath for analysis by a breath analysing instrument, the appellant was liable to the same punishment in all respects including disqualification of her licence as if the appellant had actually committed an offence against s 79 of the *TORUM*. That provision relates to a person who, while under the influence of liquor, drives a motor vehicle, attempts to put in motion a motor vehicle or is in charge of a motor vehicle. The penalty that such a person is liable to, and which therefore the appellant was liable to, was a maximum of 28 penalty units or imprisonment for a term not exceeding nine months.

[72] Section 86 of the *TORUM* provides for the disqualification periods that apply to a person convicted of an offence under s 79. The provision provides for the automatic disqualification of a driver licence for a period of six months.

[73] The learned Magistrate specifically took into account that the appellant's licence has been suspended since 7 July 2020 by reducing the level of the fine that he intended to impose. He was unable, by virtue of the legislation, to reduce the mandatory disqualification period. However, he imposed only the minimum mandatory period. For failing to provide the roadside breath test, the appellant was fined $200 and for failing to provide the breath specimen on the breath analysis machine, she was fined $1050.

[74] As the appellant was convicted of a "drink driving offence", which is defined in s 91I of the *TORUM* as including an offence under s 80(11) of failing to provide a specimen of breath for analysis, and because the appellant was disqualified from holding or obtaining a licence for a period of six months; upon a licence being granted at the conclusion of the disqualification period, the appellant became subject to an interlock period where she can only drive a nominated vehicle fitted with a prescribed interlock.

[75] Section 91M of the *TORUM* provides for the duration of the interlock period. For the appellant,[6] the interlock period ends when whichever of the following happens first:

(i) A period of 5 years elapses after the order is made;

(ii) The person's prescribed period ends;

(iii) The person's Queensland driver licence is cancelled under section 127 because of a further disqualification for a drink driving offence.

[76] The prescribed period for a person is the period of 12 months during which the person holds a valid Queensland driver licence and has a nominated vehicle fitted with a prescribed interlock.[7] Accordingly, if the appellant was able to nominate a vehicle and afford to fit it with a prescribed interlock, her interlock period would be 12 months. As she does not own her own car, because she cannot afford to purchase her own car, she is liable to a five year interlock period.

[77] Whilst there is some unfairness to the appellant as a consequence of her inability to purchase a car, nonetheless these are mandatory consequences of the appellant's conviction for the offence of failing to provide a specimen of breath.

[78] The introduction of a five year interlock period commenced on 10 September 2021 and was inserted into the legislation by virtue of the *Transport Legislation (Road Safety and Other Matters) Amendment Act 2019*. Prior to that amending Act, the interlock period was 12 months.

[79] Section 239 of the *TORUM*, a transitional provision, provides that the existing provisions in Chapter 5, part 3B (relating to alcohol ignition interlock provisions) that were in force before the commencement apply to persons whose interlock period started before commencement. The appellant's interlock period commenced after the

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[6] *TORUM* (n 3) s 91M(1).
[7] Ibid s 91N(a)(i).

disqualification period ended which was on 14 January 2022. The appellant, by virtue of the legislation, is captured by the current legislation as it relates to interlock periods.

[80] Whilst there does appear to be some unfairness to the appellant as a result of the delaying of the trial, that delay was not caused by the conduct of the police but rather by the court itself and by the appellant's own conduct. These provisions are now mandatory and apply to the appellant. That does not make the sentence that the learned Magistrate imposed excessive nor suggest any error in his reasoning.

[81] My orders are:

1. Extend time within which to appeal to 1 September 2021;

2. Leave to adduce new evidence granted;

3. Dismiss the appeal against conviction and sentence.