03/12; [2012] NSWSC 21

SUPREME COURT OF NEW SOUTH WALES

DPP (NSW) v ELSKAF

Garling J

5 December 2011; 3 February 2012

CRIMINAL LAW – PROCEDURAL FAIRNESS – PENALTY NOTICE FOR RED TRAFFIC SIGNAL OFFENCE – PROCEEDINGS DISMISSED IN LOCAL COURT AS NO *PRIMA FACIE* CASE ESTABLISHED – DENIAL OF PROCEDURAL FAIRNESS – MAGISTRATE PEREMPTORILY REFUSED TO PERMIT PROSECUTION TO CALL TWO POLICE WITNESSES – ERROR OF LAW IN RULING PROSECUTION HAD NOT ESTABLISHED *PRIMA FACIE* CASE – WHETHER STATEMENTS THAT WITNESSES' EVIDENCE WAS UNRELIABLE WITHOUT ANALYSIS AS TO WHY DID NOT DISCHARGE JUDICIAL OBLIGATION TO GIVE REASONS – ORDER DISMISSING PROCEEDINGS SET ASIDE AND NEW HEARING BEFORE NEW MAGISTRATE ORDERED.

E. was observed by two police officers driving his motor car. They continued to follow this vehicle and saw it make a left hand turn contrary to a red signal. When they intercepted E. the police informant issued E. with a penalty notice which he declined to pay. When the matter came before the Court, the Prosecutor indicated that he would call the two police officers plus another two police witnesses whom he said would give relevant evidence. After the two police witnesses completed their evidence and were cross-examined, the Magistrate refused to permit the Prosecutor to call the additional witnesses, and expressed the view that she did not believe the evidence given by the first two police officers because she had formed the view they were "unreliable". Without giving the Prosecutor an opportunity to make any submissions as to the sufficiency of the evidence called, the Magistrate dismissed the charge and made an order for costs. Upon appeal—

HELD: Appeal allowed. Orders made by the Magistrate quashed. Proceedings remitted to the Local Court to be dealt with by another Magistrate.

1. The first ground of appeal was that the Magistrate had denied the prosecution procedural fairness because she did not permit the prosecutor to call such witnesses as he wished.

2. The obligation of a judicial officer hearing a defended case is to hear it fairly and to judge it according to law, upon such evidence as either party to the proceedings might wish to adduce, and which is admitted. It is no part of a presiding judicial officer's function to take over the conduct of the case of one or other party and, in effect, summarily to prevent the calling by the prosecutor of any evidence where the prosecutor considered the evidence to be relevant to making out the charge.

***DPP v Wunderwald* [2004] NSWSC 182 at [21] per Sully J, applied.**

3. In the present case, it was clear that the Magistrate should have, but did not, permit the prosecution to call the witnesses who the prosecutor submitted were relevant. If the evidence of the witness was not relevant, then after the witness was called, it was a matter for the defendant's counsel to object to the evidence on the basis of a lack of relevance: s56 *Evidence Act* 1995 (NSW). Alternatively, if it was thought to be an appropriate course, the evidence could have been tested as to its relevance on a *voir dire*. Neither of these courses was adopted. Rather, the Magistrate peremptorily refused to permit the prosecutor to call one or more witnesses.

4. In that respect, the Magistrate's conduct of the matter fell short of the required standard of a trial judge acting properly and accordingly, there had been a denial of procedural fairness.

5. The Magistrate entirely confused the differences between determining whether there was evidence which if accepted, and taken at its highest, could amount to proof of the offences charged, a question of law, with a different question, namely one of fact, that is, whether she did or did not judge the evidence which was given to be reliable and acceptable. As well, she denied the prosecution procedural fairness.

6. The legal tests, at the *prima facie* case stage, refer to evidence being "inherently incredible" or "self contradictory". The phrases used by the Magistrate in the present case dealt with reliability of the evidence and its acceptability. These are questions of fact and not law. The phrases used were not the equivalent of the legal tests.

7. A magistrate is obliged as part of fulfilling their judicial function to give reasons which

adequately explain their findings and the reasons for arriving at their findings.
***Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; and**
***DPP (NSW) v Illawarra Cashmart Pty Ltd* [2006] NSWSC 343; 67 NSWLR 402, applied.**

8. The mere statement that a witness' evidence was unreliable, without any analysis as to why that was so, or any analysis of, in this case, the nature and context of the challenge to the witness' evidence, was not sufficient to discharge a magistrate's judicial obligation to give reasons.

9. It is necessary for a judicial officer to explain why he or she has found the evidence of a witness to be unacceptable. The possible bases for such a finding would include (but are not limited to):
(a) contradictory evidence of the same events or incidents from another witness;
(b) contradictory evidence from contemporaneous documents;
(c) inconsistencies or contradictions within a witness' own evidence;
(d) the demeanour of a witness, including the manner of giving evidence; and
(e) evidence of conduct or behaviour which is inconsistent with mandatory practices of police officers, or else those practices which are regularly followed by police officers.

10. A party who has called evidence from a witness, which is relevant and apparently probative, and whose evidence is not accepted is entitled to know of the basis of that non-acceptance, in order, at least, to be able to assess the prospect of a successful appeal.

11. In the present case, the Magistrate provided no basis for disbelieving the police officers, and did not fulfil her obligations to give reasons.

12. Accordingly, the errors of law committed by the Magistrate were:
(a) a denial of procedural fairness in that the Magistrate did not permit the prosecution to call such witnesses as the prosecution wished;
(b) the ruling by the Magistrate that the prosecution had not established a *prima facie* case; and
(c) that the Magistrate failed to give adequate reasons for her ruling that no *prima facie* case had been established.

13. For the legal principles to be applied by a Magistrate at the conclusion of the evidence called by the prosecution in a summary proceeding see para 47.

GARLING J:

1. On 14 November 2010 at 2.15am, the respondent, Ali Elskaf, was stopped by police officers in Macleay Street, Kings Cross. He was, at that time, driving a black Ferrari, registered number BEA 26R. The police officers informed him that he had turned left from Greenknowe Avenue into Macleay Street, Kings Cross, contrary to a red traffic signal.

2. He was issued with a penalty notice for a fine of $344 for proceeding through a red traffic signal in breach of Rule 60 of the *Road Rules* 2008.

3. Mr Elskaf declined to pay the fine and elected to defend the proceedings.

4. On Friday 5 August 2011, the matter was heard by Magistrate O'Shane sitting in the Local Court in the Downing Centre.

5. Having heard two police officers, whose evidence she declined to accept, the Magistrate declared herself to be satisfied that there was no *prima facie* case and dismissed the proceedings. She then found that the proceedings were initiated without reasonable cause or in bad faith and pursuant to the provisions of s214 of the *Criminal Procedure Act* 1986, awarded costs in the sum of $1,650, inclusive of GST, against the prosecution.

6. On 1 September 2011, the Director of Public Prosecutions (NSW), having given notice that he would conduct the proceedings on behalf of the prosecution, filed a summons in the Supreme Court seeking an order, pursuant to s59(2) of the *Crimes (Appeal and Review) Act* 2001, setting aside the decision and order of Magistrate O'Shane to dismiss the proceedings.

7. By way of alternative relief, the Director relied upon the supervisory jurisdiction of the Supreme Court, under s69 of the *Supreme Court Act* 1970.

8. The Director sought orders that the matter be remitted to the Local Court to be dealt with according to law, but by a different magistrate, and other consequential relief.

9. Mr Elskaf, as first defendant, opposed the Director's claim for relief. The Local Court, the second defendant, filed a submitting appearance and did not take any part in the proceedings.

A Statutory Right of Appeal

10. Section 56 of the *Crimes (Appeal and Review) Act* provides that a prosecutor may appeal as of right to the Supreme Court against an order made by the Local Court dismissing a matter, the subject of any summary proceedings, and as well, against any order for costs made by the Local Court against a prosecutor in a summary proceeding.

11. Appeals pursuant to s56 can only be made as of right on a ground "...that involves a question of law alone."

12. Section 59 provides for the determination of such an appeal. Section 59(2) is in the following form:

> "(2) The Supreme Court may determine an appeal against an order referred to in s 56(1)(b), (c) or (d) or ...:
> (a) by setting aside the order and making such other order as it thinks just, or
> (b) by dismissing the appeal."

This does not include an order for costs in a summary proceeding.

13. The Director complains that the errors of law committed by Magistrate O'Shane were:

> (a) a denial of procedural fairness in that Magistrate O'Shane did not permit the prosecution to call such witnesses as the prosecution wished;
> (b) the ruling by Magistrate O'Shane that the prosecution had not established a *prima facie* case was erroneous as a matter of law; and
> (c) that Magistrate O'Shane failed to give adequate reasons for her ruling that no *prima facie* case had been established.

The hearing before the Magistrate

14. When the hearing of proceedings commenced, the issue was described to the Magistrate by Mr Brewer, the counsel for Mr Elskaf, in the following terms:

> "...the issue is that the defendant denies making the left hand turn alleged. There is no dispute that there was an appropriate sign preventing a left hand turn at that location at that hour, but the defendant denies approaching in that direction and turning left."

15. In the course of the discussion about what the case involved, and before the prosecution was able to call its first witness, the Magistrate enquired as to the nature of the evidence to be given by the four witnesses that the prosecutor intended to call. The prosecutor said "*it's only two police that saw the alleged offence* ". At that point, the Magistrate said:

> "Well, in that case those are the only officers I want to hear from. How could the evidence of any others be relevant?"

16. The discussion about the nature of the evidence that these witnesses could give and the relevance of it continued. The prosecutor continued to submit to the Magistrate that so far as he was concerned, the evidence of all of the officers was relevant.

17. The discussion concluded with this exchange between counsel for Mr Elskaf and the Magistrate:

> "Brewer: What happened your Honour was that the two police officers to whom the phone call was made were requested to stop a car. They did that and then the other police car caught up with them and then they conducted the infringement as I understand it.
> Her Honour: I still only need to hear from those first two police officers.
> Brewer: I agree your Honour.
> Her Honour: Thank you. Thank you sergeant. That's all I need. That's all the evidence I need."

18. The first witness, Detective Senior Constable Mark Spice, was called. In chief, he gave evidence that together with Plain Clothes Constable Stuart he was travelling along Ward Avenue at Darlinghurst in a southerly direction when he saw a black Ferrari motor vehicle bearing registration BEA 26R, which was travelling in a northerly direction along Ward Avenue. He was concerned about the speed at which it was then travelling – being, he thought, faster than the speed limit of 50km/h. He undertook a U-turn and then followed, with another car between them, the black Ferrari along Ward Avenue to the intersection of Greenknowe Avenue. The black Ferrari continued whilst under his observation to travel along Greenknowe Avenue and when it came to the intersection with Macleay Street, he observed it turning left into Macleay Street.

19. He gave evidence that, at that time of the evening, the red traffic light prohibited a left turn into Macleay Street and that there were a number of barriers on the road that made it plain that a left hand turn was not permitted.

20. Detective Senior Constable Spice told the Court that after the black Ferrari turned left, he waited at the traffic lights and then turned left when he was permitted to do so. He said that there was very heavy traffic in Macleay Street and that it was not necessary for him to activate his lights and siren.

21. He gave evidence that when his fellow officers pulled up the Ferrari, it was directed into Roslyn Street, a side street off Macleay Street. He said he approached Mr Elskaf and outlined what he had seen to him. He said that Mr Elskaf told him "*you must've got the wrong Ferrari*".

22. Detective Senior Constable Spice was cross-examined by Mr Brewer. Mr Brewer established that there were certain parts of the oral evidence which were not included in the officer's statement. Detective Senior Constable Spice said that he had not included those matters because they did not seem to be relevant at the time he prepared his statement.

23. When challenged about why he did not pull the black Ferrari up after it first turned into Macleay Street and before it reached Roslyn Street, the officer replied that if he had done so it would have blocked the traffic in Macleay Street.

24. The cross-examination concluded with this suggestion:

> "Q. I suggest you've been mistaken and that you've seen another black Ferrari. What do you say about that?
> A. Totally incorrect.
> ...
> Q. So your evidence is that the Ferrari turned left?
> A. From the right hand turning lane on a red arrow.
> Q. I suggest it wasn't a Ferrari bearing the plates BEA 26R?
> A. Incorrect sir. It was."

25. It was also put to the officer that had he been at all concerned with the speed of the Ferrari when he first commenced to follow it, he would have pulled it up well before the intersection of Greenknowe Avenue and Macleay Street, which was about 2km from where the officer carried out his U-turn. He rejected this proposition.

26. The second officer to give evidence was Plain Clothes Constable Stuart. She gave evidence substantially similar to that of Detective Senior Constable Spice. On cross-examination, she was confronted with these questions and gave these answers:

> "Q. I want to suggest that the Ferrari that my client got out of was not the Ferrari that turned left at the intersection of Greenknowe and Macleay Streets. What do you say about that?
> A. No, that's not correct.
> Q. Ma'am, you told the Court that you first saw this black Ferrari when the police vehicle was heading towards Lincoln Hotel, on what street was that?
> A. Ward Avenue.
> Q. That was at a time when you were travelling in the opposite direction to the Ferrari.
> A. Yes.
> Q. So you did a U-turn and following the Ferrari for what distance?
> A. ...

Q. So you're saying the distance travelled in following this Ferrari was over 2km?
A. Yes, approximately."

27. At no time was it suggested to either Detective Senior Constable Spice or Plain Clothes Constable Stuart that there was no black Ferrari on Ward Avenue or Greenknowe Avenue, nor was it directly suggested to either of them that there were two black Ferraris on Macleay Street in close proximity, one to the other, at the time that Mr Elskaf was stopped by police at Roslyn Street.

28. It is readily apparent from the cross-examination conducted by counsel for Mr Elskaf, that:

(a) he did not challenge the evidence that there was a black Ferrari, which the police officer commenced to follow from Ward Avenue, and which turned left into Macleay Street from Greenknowe Avenue, rather he challenged the identification of the vehicle as being his client's;
(b) he did not challenge the fact that his client's vehicle was on Macleay Street and had been directed into Roslyn Street.

29. The logical inference to be drawn from the absence of any challenge to the accuracy of the officers' evidence on these issues was that there were two black Ferraris on Macleay Street at the relevant time. One being that driven by Mr Elskaf, and the other being the vehicle followed by the police from Ward Avenue. It also necessarily followed that those two black Ferraris must have been in close proximity to each other whilst on Macleay Street.

30. The evidence of the two police officers, whom the prosecution was not permitted to call, would have been highly relevant to establish whether there was one, or more than one, black Ferrari motor vehicle on Macleay Street in the early hours of that morning.

31. However, at the end of Plain Clothes Constable Stuart's evidence, the following exchange occurred:

"Prosecutor: Your Honour, I call Senior Constable Rossiter.
Her Honour: No, you are not. I said to you I am not hearing from your further witnesses.
Prosecutor: Your Honour, my friend has raised issues with the identity of the vehicle. He has put to my witnesses that this Ferrari is not the Ferrari that the first officers have seen. The first officer gave evidence that ...
Her Honour: Well, how is this officer going to assist you?
Prosecutor: Well, your Honour he can confirm that the evidence of Senior Constable Spice that he rang him and gave the information of the registration of the vehicle to Senior Constable Rossiter and Senior Constable Rossiter pulled that vehicle with the same registration over.
Her Honour: I don't think there is any cause for you to call this officer at all. I indicated that to you initially and in fact, Mr Brewer, bless him, indicated that that officer's statement could go into evidence. I don't even see the need for it to come into evidence, but however -
Prosecutor: Well, I seek to tender it on that basis your Honour.
Her Honour: I can indicate to you immediately Sergeant that it won't assist you in the least. And I'll indicate to both.....
Prosecutor: I beg your pardon your Honour ...
Her Honour: I said I can indicate to you immediately that it will not assist you in the least.
Prosecutor: Yes, your Honour."

32. Some features from this, and the earlier exchange, can be noted:

(a) the prosecutor indicated that he proposed to put evidence from all four police witnesses before the Court, either orally, or else by statement;
(b) the Magistrate did not permit the prosecutor to adduce some of that evidence (that is, two further police officers) at a time:
  (i) before the witnesses had been called to give evidence;
  (ii) before the statement of those witnesses had been tendered; and
  (iii) before reading the statements to ascertain the nature and content of the proposed evidence.
(c) The Magistrate, having been briefly addressed on the relevance of the evidence, was aware:
  (i) that the prosecutor regarded the evidence as relevant in light, *inter alia*, of the issues which had been raised during cross-examination; and
  (ii) counsel for the defendant did not oppose the admission of the statement of Senior Constable Rossiter into evidence.

(d) The Magistrate had already formed a view about her decision in the case, because she was able to say that the proposed evidence would not assist the prosecution even though:

(i) the prosecutor had not closed his case;

(ii) the prosecutor had not had any opportunity to make any submissions at all as to whether the charges had been proved, either on a *prima facie* case, or on the basis of final submissions; and

(iii) counsel for the defendant had not given any indication whatever as to what course, either with respect to any application, or alternatively the calling of any evidence, he intended to follow.

33. The consequences of these features which I have noted will be considered later in this judgment.

34. It is convenient that I continue to set out the exchange which occurred:

"Her Honour: In fact let me say very clearly I have serious difficulties – I have grave misgivings about the accuracy and reliability of the evidence given by these two police officers ... I have to tell you Sergeant on the evidence as I have heard it, I simply don't believe it. I'm actually not satisfied that a *prima facie* case has been established. It has to be believed. A lot of people think that if it contains any element of the offence, then the Court has to accept it. That's not the case.
Prosecutor: Your Honour, the ...
Her Honour: If the proposition is if the Court accepts the evidence then the rest flows. I don't accept the evidence because I have formed the opinion that your witnesses are unreliable.
...
Her Honour: Sergeant, I wish you to be very, very clear about this. If the Court forms the opinion that prosecution witnesses or witnesses for a plaintiff are unreliable witnesses, then the Court does not have to accept their evidence at all and it doesn't matter whether its going to – it won't form – it won't be enough to establish a prima facie case just for that reason.
Prosecutor: Am I to understand that –
Her Honour: The Court doesn't just accept any evidence that's given its way.
Prosecutor: Is your Honour indicating that –
Her Honour: It has to be reliable and it has to be accepted by the Court. I am saying to you that I find your witnesses are thoroughly unreliable.
Prosecutor: So for the –
Her Honour: And I am saying to you that I don't accept their evidence. It follows as night follows day that there is no *prima facie* case and the information is dismissed.
Prosecutor: Your Honour is required to take the prosecution case at its highest *prima facie*, your Honour.
Her Honour: Now that bit I do know. Your (sic) dead right about that Sergeant, but it has to be acceptable, reliable evidence in the first place which the Court does not find. Do you understand?
Prosecutor: I do, as the Court pleases.
Her Honour: The Court doesn't just accept a bag of lies and say that's enough to establish a *prima facie* case. In this case, that's exactly what I've received.
Prosecutor: Your Honour, it's my submission that the Court can't find that the police officers lied.
Her Honour: Sergeant, I don't want to have to really dot very "i" and cross ever "t" for your benefit and I didn't imagine this particular scenario. Your witness told the Court that these police officers followed this driver for more than two kilometres because they were concerned about his speed. Frankly, that is claptrap. It is simply not to be believed.
...
Her Honour: I sit in this Court every day. I'm telling you their evidence is inherently unreliable and if the Court does not accept their evidence as reliable evidence, then it doesn't matter whether the Court has to take the prosecution evidence at its highest or not. The Court does not have to believe what are patently incredible accounts and this is an incredible meaning; not credible, not to be believed, is that clear?
Prosecutor: Yes your Honour.
Her Honour: Fine. That's the point at which I say to you you have not established a *prima facie* case and the information is dismissed."

35. Her Honour then went on to make an order for costs.

36. Some features of the exchange set out above can be noted:

(a) the Magistrate expressed the view that she did not believe the evidence which she had heard because she had formed the view that the witnesses were "unreliable" or "thoroughly unreliable";
(b) the Magistrate did not invite, let alone indicate, a willingness to receive, any submissions from the prosecution as to whether the evidence which had been given was sufficient to support the charge;
(c) the Magistrate dealt with the prosecutor in a high-handed and most peremptory way and in a manner entirely inconsistent with allowing the prosecutor to make any submission which he wished

> to. He was treated rather like an errant school student;
> (d) it seems quite clear, that her Honour had formed a fixed view about the matter before hearing from the prosecution, and that she did not believe that it was her role to have to articulate any more fully than she did, the basis of, or reasons for, her opinion; and
> (e) she had taken a view about the reliability of the witnesses (or their lack of it) even though no such proposition had been put directly to the witnesses in cross-examination, much of their evidence was unchallenged either as to accuracy or truthfulness and there was, or else might reasonably have been expected to be, contemporaneous documents supporting their account, such as the traffic infringement notice, and notebook or other like records.
> (f) the Magistrate seemed to have no regard to the way in which the officers were cross-examined as indicating what case, if any, was being made on behalf of the defendant, and how that case reflected upon the existence of any challenge to the reliability of any part of the police officers' evidence.

Order for Costs

37. After the information was dismissed, counsel for Mr Elskaf asked the Magistrate if she would entertain an application of costs. She said she would.

38. He reminded the Magistrate that his client, when pulled up, had denied committing any offence and then said:

> "Brewer: ...and your Honour, it's only – the offence is quite aged and its only in the last number of weeks that any statements have emerged from any of the police officers.
> Her Honour: That goes with what I have - my observations about their conduct of the matter.
> Brewer: And your Honour I note that the first witness today gave some evidence about making a registration check on the vehicle and of course that information is not contained with his statement and I note that the second corroborative - the alleged corroborative witness gave no evidence about the registration plate or registration check or any conversation to that effect and in my respectful submission your Honour this prosecution will have no absolutely prospect of being sustained and it's on that basis that I say we fall clear within the section that would allow your Honour to give cost figures to all of the Criminal Procedure Act, your Honour.
> Her Honour: I would suggest 214(1)(b) that the proceedings were initiated without reasonable cause or in bad faith and sergeant what's your response to this application?
> Prosecutor: I don't wish to be heard, your Honour.
> Her Honour: Application granted."

39. Section 214 of the *Criminal Procedure Act* provides four possible bases for the making of an order for costs. The Magistrate herself identified s214(1)(b) as the appropriate basis for an order although counsel for Mr Elskaf had not done so. However, she gave no reasons at all which justified the conclusion to which she came, or for the order for costs which she made.

Proceedings in this Court

40. I recorded earlier in [13] the errors of law which the Director complains were made by the Magistrate. It is appropriate to deal with each of those grounds upon which the Director relies.

Denial of Procedural Fairness

41. The first ground was that the Magistrate had denied the prosecution procedural fairness because she did not permit the prosecutor to call such witnesses as he wished.

42. The obligation of a judicial officer hearing a defended case is to hear it fairly and to judge it according to law, upon such evidence as either party to the proceedings might wish to adduce, and which is admitted. It is no part of a presiding judicial officer's function to take over the conduct of the case of one or other party and, in effect, summarily to prevent the calling by the prosecutor of any evidence where the prosecutor considered the evidence to be relevant to making out the charge: see *Director of Public Prosecutions v Wunderwald* [2004] NSWSC 182 at [21] per Sully J.

43. Dawson J in *Whitehorn v The Queen* [1983] HCA 42; 152 CLR 657, said at 682:

> "A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. ... It is no part of the function of the trial judge to ... [don] the mantle of prosecution or defence counsel. He is not equipped to do so, particularly in making a decision whether a witness should be called."

44. It is clear that the Magistrate should have, but did not, permit the prosecution to call the witnesses who the prosecutor submitted were relevant. If the evidence of the witness was not relevant, then after the witness was called, it was a matter for the defendant's counsel to object to the evidence on the basis of a lack of relevance: s56 *Evidence Act* 1995. Alternatively, if it was thought to be an appropriate course, the evidence could have been tested as to its relevance on a *voir dire*. Neither of these courses was adopted. Rather, the Magistrate peremptorily refused to permit the prosecutor to call one or more witnesses.

45. In that respect, her Honour's conduct of this matter fell short of the required standard of a trial judge acting properly and I conclude that there has been, as submitted by the prosecution, a denial of procedural fairness.

Error of law ruling no prima facie case

46. The second ground which was relied upon was that the Magistrate's ruling that the prosecution had not established a *prima facie* case was erroneous.

47. The legal principles applicable by the Magistrate at the conclusion of the evidence called by the prosecution in a summary proceeding are well known, but is worthwhile restating them in a succinct way:

(a) at the end of the prosecution evidence, it is open to a defendant to make a "no case" submission, which is determined by the Court as a matter of law: *Cox v Salt* (1994) 12 WAR 12 at 14; *Amalgamated Television Services Pty Ltd v Marsden* [2001] NSWCA 32; 122 A Crim R 166 at [48]- [50] per Ipp AJA (Powell and Giles JJA agreeing);

(b) the standard of proof to be applied in a no case submission is proof beyond a reasonable doubt: *R v Murphy* (1985) 4 NSWLR 42 at 69B;

(c) the question to be determined is whether on the evidence, the defendant could be lawfully convicted of the offence charged: *May v O'Sullivan* [1955] HCA 38; 92 CLR 654 at 658; *R v Serratore* [1999] NSWCCA 377; (1999) 48 NSWLR 101 at [127] per Dunford J (Greg James J agreeing);

(d) the determination of a no case submission is based upon all of the prosecution's evidence, if accepted, and
(i) taken at its highest and strongest: *DPP v Lee* [2006] NSWSC 270 at [31]; *Wunderwald* at [28];
(ii) even if it is tenuous, inherently weak or vague: *Doney v The Queen* [1990] HCA 51; 171 CLR 207 at 214-5;
(iii) unless the evidence is inherently incredible: *Haw Tua Tau v Public Prosecutor* [1982] 1 AC 136 at 151; and
(iv) unless the evidence is manifestly self-contradictory or the product of a disorderly mind: *R v Bilick* (1984) 36 SASR 321 at 337; *Cox* at 15; *Marsden* at [50].

(e) a no case submission should not be rejected even if the prosecution case is a weak one, because the finding that there is a *prima facie* case, calls upon the defendant to make answer to that case. There is no reason why a weakness in the prosecution case may not be eked out by something in the case for the defence: *Zanetti v Hill* [1962] HCA 62; 108 CLR 433 at 442-443 per Kitto J; *Wunderwald* at [26];

(f) a no case submission is to be kept distinct from any subsequent decision involving a question of fact, namely whether to accept the evidence of the prosecution witnesses or any of them, beyond a reasonable doubt. This distinction is no empty formality: *DPP v Lee* at [32].

48. After proper consideration and determination of a no case submission, the hearing of any summary proceedings follows these steps:

(a) if the determination is that there is no case to answer, then the proceedings must be dismissed;

(b) if the determination is that there is a case to answer, then each of these steps may follow:
(i) first, it may be open to the defendant to invite the presiding magistrate to give himself or herself, a "Prasad" direction: *R v Prasad* (1979) 23 SASR 161 at 163, and thereafter proceed in accordance with that authority: *Commonwealth Director of Public Prosecutions v Acevedo* [2009] NSWSC 653. However this is an approach which should be resorted to sparingly: *Acevedo* at [43]. In resorting to this approach, it is necessary that the magistrate give full and proper reasons: *Acevedo* at [43(d)];
(ii) second, the magistrate should invite a defendant to indicate whether he (or she) intends to call any witnesses to give evidence or else to tender any further evidence. This calls for a discrete decision and a process separate from the no case to answer stage;

> (iii) third, assuming that the defendant does not go into evidence or tender any evidentiary material then, assisted by appropriate submissions, the magistrate proceeds to a determination of the kind envisaged in *May v O'Sullivan* at 658, namely whether as a matter of fact, on the whole of the evidence before the Court, the magistrate is satisfied beyond reasonable doubt of the guilt of the defendant.
> There is no necessary inconsistency between a court deciding that the defendant has a case to answer, and then proceeding to hold, in the absence of any further evidence, that the case for the prosecution does not warrant a conviction: *May v O'Sullivan* at 659; and
> (iv) fourth, assuming that the defendant does go into evidence, and once all the evidence (including evidence in reply from the prosecution, if any) is concluded and submissions have been taken, then the magistrate determines whether he (or she) has been satisfied having regard to all of the evidence, beyond a reasonable doubt that a conviction ought follow.

49. Each of these steps, some of which are alternatives, are individual discrete steps which ought be attended to and not elided. That is what the dictates of procedural fairness assume. It is what the law demands.

50. The basis for the ruling that the prosecution has not established a *prima facie* case was expressed by the magistrate in one or other of the following ways:

> (a) "I have serious difficulties – I have grave misgivings about the accuracy and reliability of the evidence given by these two police officers ...";
> (b) "I don't accept the evidence because I have formed the opinion that your witnesses are unreliable ...";
> (c) "If the Court forms the opinion that prosecution witnesses ... are unreliable witnesses ... it won't be enough to establish a *prima facie* case just for that reason ...";
> (d) "I am saying to you that I don't accept their evidence. It follows as night follows day that there is no *prima facie* case and the information is dismissed";
> (e) "The Court doesn't just accept a bag of lies ... In this case, that's exactly what I've received";
> (f) "Your witness told the Court ... Frankly, that is claptrap. It is simply not to be believed.";
> (g) "I am telling you their evidence is inherently unreliable ... not credible, not to be believed. Is that clear?".

51. Each of these remarks, which were made in the course of what seems to be an exchange between the Bench and the prosecutor, do not amount to fulfilling any of the procedural steps which I have described above, nor do they either individually, or considered together, demonstrate the application of the correct legal test for determining whether a *prima facie* case had been made out by the prosecution.

52. What has happened in my view, is that the Magistrate has entirely confused the differences between determining whether there was evidence which if accepted, and taken at its highest, could amount to proof of the offences charged, a question of law, with a different question, namely one of fact, that is, whether she did or did not judge the evidence which was given to be reliable and acceptable. As well, she has denied the prosecution procedural fairness.

53. The legal tests, at the *prima facie* case stage, refer to evidence being "inherently incredible" or "self contradictory". The phrases used by the Magistrate here deal with reliability of the evidence and its acceptability. These are questions of fact and not law. The phrases used are not the equivalent of the legal tests.

54. As well, the suggestion, initiated by the Magistrate, that the evidence of the police officers was "*a bag of lies*", in the absence of any cross-examination of the officers to suggest that they were lying, was a clear error of law, and a denial of procedural fairness: see *Smith v NSW Bar Association* [1992] HCA 36; 176 CLR 256 at [37] per Brennan, Dawson, Toohey and Gaudron JJ, at [9] per Deane J.

55. The Magistrate's determination to dismiss the proceedings is not one that followed a proper process, and it involved a manifest error of law.

Inadequate Reasons

56. It is clear that the discussion, which I have earlier set out, was the totality of what the Magistrate said from which the reasons for dismissing the proceedings are to be drawn.

57. A magistrate is obliged as part of fulfilling their judicial function to give reasons which adequately explain their findings and the reasons for arriving at their findings: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Director of Public Prosecutions (NSW) v Illawarra Cashmart Pty Ltd* [2006] NSWSC 343; 67 NSWLR 402.

58. The mere statement that a witness' evidence was unreliable, without any analysis as to why that was so, or any analysis of, in this case, the nature and context of the challenge to the witness' evidence, is not sufficient to discharge a magistrate's judicial obligation to give reasons.

59. The exchange between the Magistrate and the prosecutor contains this statement by the Magistrate:

> "Sergeant, I don't want to have to really dot every 'i' and cross every 't' for your benefit..."

If this statement was intended to convey that there was no need for the Magistrate to give reasons for dismissing the proceedings, other than to say that the prosecution's evidence was not to be believed, then it demonstrates a fundamental misunderstanding about the obligation of a judicial officer to give reasons.

60. It is necessary for a judicial officer to explain why he or she has found the evidence of a witness to be unacceptable. The possible bases for such a finding would include (but are not limited to):

> (a) contradictory evidence of the same events or incidents from another witness;
>
> (b) contradictory evidence from contemporaneous documents;
>
> (c) inconsistencies or contradictions within a witness' own evidence;
>
> (d) the demeanour of a witness, including the manner of giving evidence; and
>
> (e) evidence of conduct or behaviour which is inconsistent with mandatory practices of police officers, or else those practices which are regularly followed by police officers.

61. A party who has called evidence from a witness, which is relevant and apparently probative, and whose evidence is not accepted is entitled to know of the basis of that non-acceptance, in order, at least, to be able to assess the prospect of a successful appeal.

62. Here the Magistrate provided no basis for disbelieving the police officers, and did not fulfil her obligations to give reasons.

Conclusion

63. Each of the grounds of appeal has merit. Each has identified, for the reasons that I have described, that there has been an error of law.

64. The order of Magistrate O'Shane dismissing the proceedings must be set aside, and a new hearing must be ordered.

65. That a new hearing must be ordered is regrettable. It involves further judicial time and further costs and expense to the parties. Counsel for Mr Elskaf submitted that the further judicial time and additional expense could be minimised if the matter was returned to be heard by Magistrate O'Shane in accordance with the law in this judgment.

66. The Director opposed such a course.

67. I have decided that the appropriate order must be that the proceedings are to be remitted to the Local Court to be heard by another magistrate.

68. There are two principal reasons for this.

69. The first is that it is difficult to understand how the Magistrate has fallen into errors of

the kind which I have found, since this judgment is not the first occasion upon which the proper procedure has been described, and the correct procedure pointed out to the Magistrate by this Court.

70. Her Honour has had the correct process drawn to her attention in a number of decisions of this Court, on appeal from her determinations in summary proceedings. These include:

(a) DPP v Wunderwald [2004] NSWSC 182 (Sully J);
(b) DPP v Lee [2006] NSWSC 270 (Howie J);
(c) DPP (Cth) v Neamati [2007] NSWSC 746 (Howie J);
(d) Commonwealth Director of Public Prosecutions v Acevedo [2009] NSWSC 653 (Davies J).

71. If I may say, with respect, the judgment of Sully J in *Wunderwald* sets out in a model of clarity, the Magistrate's obligations when considering whether a *prima facie* case had been established. His Honour's judgment was not followed in this case, but rather seems to have been entirely ignored.

72. In light of this history of decisions by this Court, and the failures identified in this case, I can have no confidence that Magistrate O'Shane would, if the matter was returned to her to complete, undertake the further hearing of it in accordance with the law.

73. The second is that having regarding to the strength of the views expressed by the Magistrate as to whether she believed the evidence of the two police officers, the Director would be entirely justified in asking that her Honour disqualify herself from any further hearing of the matter by reason of a reasonable apprehension of bias, and also of prejudgment.

74. Although judicial officers need to be cautious in recusing themselves from a hearing, should such an application be made to Magistrate O'Shane in this case, I have no doubt that her Honour would be obliged to grant it: see *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 at [6]; *Livesey v New South Wales Bar Association* [1983] HCA 17; 151 CLR 288; *Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48 at [31-[33] per Gummow ACJ, Hayne, Crennan and Bell JJ.

75. In those circumstances, and for these reasons I have formed the view that the matter must be heard by a different magistrate.

Relief

76. As I earlier pointed out, the Director brings these proceedings both under s56 of the *Crimes (Appeal and Review) Act* and also under s69 of the *Supreme Court Act* .

77. Relief ought be granted with respect to the substantive decision of Magistrate O'Shane under s59(2) of the *Crimes (Appeal and Review) Act*. Orders will be formulated in accordance with that section.

78. However, as I have earlier pointed out at [12], s59 makes no provision for relief to be granted if this Court is satisfied that there has been an error of law made with respect to the order for costs.

79. It seems to me that the correct procedure to be followed, when dealing with the requisite order for costs is, once an appeal is upheld under s59 of the *Crimes (Appeal and Review) Act*, to quash the order for costs pursuant to the powers of the Court as contained in s69 of the *Supreme Court Act* . That is what will happen here.

Orders

80. I make the following orders:

(a) Appeal allowed.
(b) The order made on 5 August 2011 dismissing the proceedings is set aside.
(c) The order made on 5 August 2011 with respect to costs is quashed.
(d) The proceedings are remitted to the Local Court to be dealt with by a magistrate, other than O'Shane LCM.
(e) The first defendant to pay the plaintiff's costs.

(f) The first defendant is to have a certificate under the *Suitors' Fund Act* 1951 if otherwise entitled.

APPEARANCES: For the DPP (NSW): I Bourke, counsel. Office of the Director of Public Prosecutions (NSW). For the respondent Elskaf: S Fraser, counsel. VL Macri Lawyers.
