SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**Jakaj v Kinnane (No 2)**
Citation:	**[2020] ACTCA 28**
Hearing Date:	7 May 2020
Decision Date:	11 June 2020
Before:	Burns, Elkaim and Mossop JJ
Decision:	The orders of the Court are: 1. Appeal dismissed. 2. No order as to costs.
Catchwords:	**JUDICIAL REVIEW** – APPEAL – Appeal from primary judge's judicial review of a decision of a magistrate – whether Territory courts' jurisdiction depends upon judges and magistrates swearing or affirming allegiance to the Queen – whether the prosecution must give evidence that legislation is validly passed – whether appellant discriminated against under s 117 of the Constitution – whether prosecution required to be brought in the name of the Crown – appeal dismissed **JUDICIAL REVIEW** – APPEAL – Notice of Appeal in the form of written submissions – jurisdictional point taken but no oral submissions made in support of the appeal – whether reasons required to be given for dismissal of appeal
Legislation Cited:	*Acts Interpretation Act 1901* (Cth), ss 6, 15A *Australian Capital Territory (Self-Government) Act 1988* (Cth), ss 7, 22 *Australian Road Rules*, r 300 *Bill of Rights 1688* 1 Will and Mary sess 2 c 2 *Commonwealth of Australia Constitution Act 1900* (Imp), cls 2, 5, s 42, 58, 117, 118 *Court Procedures Rules 2006* (ACT), r 3356(5), Div 6.10.2 *Crimes Act 1900* (ACT), s 282 *Crimes (Forensic Procedures) Act 2000* (ACT), s 92 *Director of Public Prosecutions Act 1990* (ACT), s 6(c)(ii) *Evidence Act 2011* (ACT), ss 141, 143 *High Court of Australia Act 1979* (Cth) *Interpretation Act 1967* (ACT), s 20 *Interpretation of Legislation Act 1984* (Vic), s 53 *Judiciary Act 1903* (Cth), s 80 *Justice (Northern Ireland) Act 2002* (UK), s 19 *Legislation Act 2001* (ACT), s 26 *Magistrates Court Act 1930* (ACT), Sch 1, ss 10P, 19, 25, 54, 114, 208(1)(c) *Magistrates Court (Civil Jurisdiction) (Amendment) Act 1997* (ACT)

	Oaths and Affirmations Act 1984 (ACT), s 6 *Road Transport (Safety and Traffic Management) Regulations 2000* (ACT), regs 5, 11 *Supreme Court Act 1933* (ACT), Sch 1, s 19 *Supreme Court (Amendment) Act (No 2) 1993* (ACT) *Supreme Court (Amendment) Act (No 7) 2001* (ACT)
Cases Cited:	*Acuthan v Coates* (1986) 6 NSWLR 472 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 *Flowers v State of New South Wales* [2020] NSWSC 526 *Heyward v Bishop* [2015] ACTCA 58; 73 MVR 426 *Jakaj v Kinnane* [2019] ACTSC 71 *Jakaj v Kinnane* [2020] ACTCA 19 *Makucha v Sydney Water Corporation* [2013] NSWCA 177 *Palmer v City of Gosnells* [2013] WASC 446
Parties:	Eduard Jakaj (Appellant) Magistrates Court of the Australian Capital Territory (First Respondent) Damien Kinnane (Second Respondent)
Representation:	**Counsel** Self-represented (Appellant) K McCann (Second Respondent) **Solicitors** Self-represented (Appellant) ACT Director of Public Prosecutions (Second Respondent)
File Number:	ACTCA 16 of 2019
Decision under appeal:	Court/Tribunal: Supreme Court of the ACT Before: McWilliam AsJ Date of Decision: 22 March 2019 Case Title: Jakaj v Kinnane Citation: [2019] ACTSC 71

BURNS AND MOSSOP JJ:

Introduction

1. On 10 August 2018 the appellant, Eduard Jakaj, was convicted of using a mobile phone while driving a motor vehicle, contrary to r 300 of the *Australian Road Rules*. The offence occurred on 12 August 2017. In addition to a conviction he was ordered to pay a fine of $416, court costs of $80 and the victims services levy of $60.

2. While he had a right of appeal under s 208(1)(c) of the *Magistrates Court Act 1930* (ACT), he instead sought judicial review of the magistrate's decision. The defendants in the judicial review proceedings were the Magistrates Court and the police officer who

was the informant in the Magistrates Court. The joining of the Magistrates Court as a defendant was required by r 3556(5) of the *Court Procedures Rules 2006* (ACT).

3. During the course of the hearing before the primary judge, the arguments put by the appellant were refined to 10 issues. The decision of the primary judge was structured by reference to those 10 issues and on appeal to the Court of Appeal the appellant structured his argument by reference to those 10 issues. The primary judge determined each of those issues adversely to the appellant and he has now appealed to the Court of Appeal.

4. The Notice of Appeal is lengthy, containing 163 paragraphs purporting to be grounds of appeal. It is defective in that these "grounds of appeal" are in the form of written submissions and fail to identify with precision the grounds upon which it is alleged that the primary judge erred. It is, however, structured by reference to the 10 issues which were addressed by the primary judge. In relation to each issue the appellant contends that the primary judge erred. It will be convenient, therefore, to address the appellant's contentions by reference to those 10 issues. It should be noted, however, that the appellant's submissions are difficult to understand. While they involved voluminous reference to legal concepts they often do not present legally coherent contentions.

Preliminary issue

5. It is first necessary to address a preliminary issue. Prior to the commencement of the hearing in the Court of Appeal, the appellant indicated that he wished to have confirmation that each of the judges of the Court of Appeal had provided an undertaking that he had taken an oath with explicit reference to Her Majesty Queen Elizabeth II under the Crown of the United Kingdom "as required under Section 42 of the Commonwealth of Australia Constitution Act 1901 and under Clause 2 of the Commonwealth of Australia Constitution Act 1901".

6. When the hearing commenced he sought to question the members of the court as to whether the Queen referred to in the schedule to the *Supreme Court Act 1933* (ACT) was the same Queen referred to in covering clause 2 of the *Commonwealth of Australia Constitution Act 1900* (Imp) (the Constitution). The appellant questioned how a judicial officer could sit without having an allegiance to Her Majesty Queen Elizabeth II. He said that unless he was satisfied that oaths to Queen Elizabeth II had been taken, he was not satisfied that the court was properly constituted.

7. The members of the court declined to answer the questions posed by the appellant, on the ground that it was not the role of the court to do so, but indicated a willingness to hear any submissions of the appellant as to whether or not the Court of Appeal had jurisdiction.

8. The appellant then sought an adjournment of the proceedings, which was refused. He indicated that he wished to have the charge against him dropped. He did not indicate that he was not pursuing his appeal. He did not make any oral submissions in support of his appeal. In those circumstances, the matter is most appropriately dealt with by addressing the substance of the appeal based upon the matters raised in the Notice of Appeal.

9. So far as the preliminary jurisdictional point is concerned, the members of the court were satisfied that the form of oath or affirmation which each had taken did not present any impediment to their exercise of jurisdiction in the matter.

10. Although the contentions put by the appellant were difficult to discern, it is possible to say the following.

11. First, none of the judges sitting on the appeal were required to take an oath under covering clause 2 or s 42 of the Constitution. Covering clause 2 provides that the provisions of the Constitution referring to the Queen extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom. Section 42 of the Constitution requires every senator and every member of the House of Representatives to take an oath or affirmation of allegiance in the form set out in the schedule to the Constitution. Neither of those provisions have any application in relation to judges of the Supreme Court of the Australian Capital Territory (ACT).

12. Second, the *Supreme Court Act* provides for the taking of oaths or making of affirmations which do not involve any pledge of allegiance to the sovereign. Section 19 of the *Supreme Court Act* requires a judge to take an oath or affirmation in accordance with either Pt 1.1 or Pt 1.2 of Sch 1 to the Act, prior to exercising the functions of a judge. Part 1.1 provides for an oath and an affirmation which confirm allegiance to the Queen. The oath and affirmation provided for in Pt 1.2 include no reference to the Queen. The Act thereby provides judicial officers with a choice as to whether or not they swear or affirm allegiance to the Queen when taking office.

13. This choice in the form of oath or affirmation to be taken has not always been available. The *Supreme Court (Amendment) Act (No 2) 1993* (ACT) inserted Sch 1 into the *Supreme Court Act*. A judge was required to take an oath or affirmation in the form provided in Sch 1 (s 19). Both the oath and affirmation required "true allegiance to Her Majesty Queen Elizabeth the Second, and Her Heirs and Successors". Prior to this amendment, s 19 required judicial officers to make two oaths or affirmations. The first was the oath or affirmation of allegiance in the form set out in the Schedule to the Constitution. The second oath or affirmation was outlined in s 19 itself, which required that judicial officers swear or affirm to "well and truly serve our Sovereign Lord the King…". Section 20 of the *Interpretation Act 1967* (ACT) provided that a reference to the King should "be read as a reference to the Sovereign for the time being".

14. The system of oaths and affirmations by which judicial officers can choose whether or not to promise allegiance to the Queen was provided for by the *Supreme Court (Amendment) Act (No 7) 2001* (ACT). The bill introducing these amendments was a private member's bill presented in August 1998: Supreme Court (Amendment) Bill (No 2) 1998 (ACT). There were various cognate bills, including the Coroner (Amendment) Bill 1998 (ACT) and the Oaths and Affirmations (Amendment) Bill 1998 (ACT). Debate on the bills was adjourned until March 1999. The Supreme Court (Amendment) Bill, as presented, included a schedule of oaths and affirmations with no reference to the monarchy. The opposition in the Legislative Assembly opposed the bill on the grounds that repealing references to the Queen in legislation could be seen by the public as pre-empting the Australian Republic Referendum, which was to be held in November that year. Debate on the bill was adjourned and did not take place again until February 2001. At that time the bill was passed with amendments that provided those taking an oath or affirmation with the choice as to whether or not to promise allegiance to the Queen.

15. Third, if it was relevant, there is no difference between the current Queen identified by operation of covering clause 2 of the Constitution and "Queen Elizabeth the Second" identified in Sch 1, Pt 1.1 of the *Supreme Court Act*.

16. Fourth, the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (*Self-Government Act*) does not impose any restriction on the powers of the Legislative Assembly to vary the oath of office required to be taken. In particular, there is no constraint on the capacity of the Assembly to permit or require an oath which requires no statement of allegiance to the Queen. It is worth noting that in Northern Ireland, a part of the United Kingdom, the United Kingdom Parliament has seen fit to not require judicial officers to swear or affirm any oath of allegiance to the Queen: *Justice (Northern Ireland) Act 2002* (UK) s 19. In the ACT, the absence of any requirement for an oath of allegiance is consistent with (but not required by) the form of self-government which, although involving a "body politic under the Crown" (*Self-Government Act* s 7), does not involve any representative of the Crown in the day-to-day administration of the government of the Territory.

17. Consequently, there is no legal basis for the appellant's contention that the court could not be properly constituted unless its judicial officers swear or affirm allegiance to the Queen.

Grounds of appeal

18. As pointed out above, the matter was conducted before the primary judge on the basis of 10 identified issues. Those issues also provided the framework for the appellant's Notice of Appeal. Having regard to the absence of properly articulated grounds of appeal, it is convenient to address the contentions of the appellant set out in the Notice of Appeal (to the extent to which they can be discerned), within the framework of those 10 issues.

Issue 1

19. The primary judge identified this issue as follows:

> The oath sworn by magistrates of the Magistrates Court (contained in Schedule 1 to the *Magistrates Court Act*) does not contain any reference to swearing allegiance to her Majesty, Queen Elizabeth II and therefore does not comply with clause 5 of the *Commonwealth of Australia Constitution Act* (Imp). As a result, the magistrate in the court below did not have jurisdiction to proceed with the hearing.

Decision of the primary judge

20. The primary judge identified that the appellant relied upon covering clauses 2 and 5 of the Constitution, the terms of the oath contained in the schedule of the Constitution and s 42 of the Constitution.

21. Her Honour said that there was no requirement for a judicial officer in the Territory such as a magistrate to subscribe to the oath set out in the Constitution. The requirement to make such an oath only applies to members of the House of Representatives and senators. She held that there was no constitutional prohibition on the Legislative Assembly providing different wording for the oath or affirmation to be taken by judicial officers in the Magistrates Court as that was within the scope of power to make laws for the peace, order and good government of the Territory, set out in s 22 of the *Self-Government Act*.

22. Her Honour referred to the decision of Edelman J in *Palmer v City of Gosnells* [2013] WASC 446 (*Palmer*), where his Honour found there was no basis for the assertion of

any invalidity of a magistrate's commission based upon any failure to swear an oath or affirmation to the sovereign.

23. Finally, on this point she said that even if there was a defect in the oath sworn by the magistrate, the hearing and determination of the proceeding would have been protected by the de facto officer doctrine and referred to the decision of Barrett JA in *Makucha v Sydney Water Corporation* [2013] NSWCA 177 at [16]-[21].

Appellant's submissions

24. Insofar as it was possible to discern the arguments put by the appellant, they were, in summary, as follows:

    (a) Covering clause 5 makes the Constitution binding upon "the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State". The oath referred to in s 42 of the Constitution is the only oath referred to in the Constitution. The Chief Justice of the High Court took an oath of allegiance and office. Therefore, all judicial officers needed to take such an oath.

    (b) The *Bill of Rights 1688* 1 Will and Mary sess 2 c 2, specified a form of oath of allegiance which was required to be taken.

    (c) Any judicial officer of a court exercising federal jurisdiction had to swear or affirm an oath of allegiance in the same manner that the Chief Justice of the High Court had to swear or affirm such an oath.

    (d) The Court of Appeal was not bound by any court decision in Western Australia (such as that in *Palmer*), because on an issue of federal law the court was only bound by rulings of the High Court.

    (e) There was no irrefutable presumption that legislation has been properly passed and the prosecution was required to provide "discovery" to demonstrate that statutes have been passed properly.

Decision

25. None of the submissions made by the appellant demonstrate any error in the approach adopted by the primary judge. They may be addressed in the manner that they are articulated above:

    (a) Section 42 of the Constitution has no application to a magistrate of the Magistrates Court. Covering clause 5 of the Constitution does not alter the position because s 42, on its terms, has no application to ACT magistrates. The Chief Justice of the High Court is required to take an oath of allegiance by reason of the terms of the *High Court of Australia Act 1979* (Cth), not by reason of some indirect application of s 42 or any other provision of the Constitution. Therefore, the fact that the Chief Justice of the High Court may have taken an oath of allegiance to the Queen does not provide any basis for saying that a magistrate must do so.

    (b) The *Bill of Rights Act* remains in force in the Territory. It is correct to say that the *Bill of Rights Act* does provide an oath of allegiance "by all persons to whom the oaths of allegiance and supremacy might be required by law":

> I, A B, do sincerely promise and swear that I will be faithful and bear true allegiance to their Majesties King William and Queen Mary.
>
> So help me God.
>
> I, A B, do swear that I do from my heart abhor, detest and abjure as impious and heretical this damnable doctrine and position that princes excommunicated or deprived by the Pope or any authority of the see of Rome may be deposed or murdered by their subjects or any other whatsoever.
>
> And I do declare that no foreign prince, person, prelate, state or potentate has or ought to have any jurisdiction, power, superiority, pre-eminence or authority, ecclesiastical or spiritual, within this realm.
>
> So help me God.

It is sufficient to say that whatever else might have been the applicability of such oath, it has no application in relation to a magistrate in relation to whom the oath or affirmation required is that set out in the *Magistrates Court Act*. Section 10P of the *Magistrates Court Act* prevents a person appointed as the Chief Magistrate, a magistrate or special magistrate from exercising the powers of a magistrate under law, unless they have taken the oath or affirmation provided in Sch 1 of the Act. The oath and affirmation in the schedule do not refer to the Queen. Earlier versions of the oath and affirmation included reference to the Queen. The reference was removed by the *Magistrates Court (Civil Jurisdiction) (Amendment) Act 1997* (ACT). In the Legislative Assembly debates, the requirement to swear an oath to the Queen was described by one member as "anachronistic", in light of the legislative amendments to the *Oaths and Affirmations Act 1984* (ACT) which no longer requires a member of the Legislative Assembly to swear allegiance to the Queen. Section 10P of the *Magistrates Court Act* is, to the extent to which it provides an oath or affirmation inconsistent with the oath in the *Bill of Rights Act*, an implied repeal of that provision in relation to magistrates. Even in the absence of s 10P, s 6 of the *Oath and Affirmations Act* would have been sufficient to exclude the requirement to take any oath in accordance with the *Bill of Rights Act*.

(c) There is no requirement that a court exercising federal jurisdiction be constituted by persons who have sworn an oath in the same terms as that taken by the Chief Justice of the High Court.

(d) While the court is not bound by any decisions of the Western Australian Supreme Court, it is not necessary for the court to be so bound in order to reach the conclusion that the submissions made by the appellant are without merit.

(e) While it is correct to say that there is no irrefutable presumption that legislation has been properly passed, there is no burden upon the prosecution to prove the validity of statutes to be relied upon and no obligation to provide "discovery" on that issue.

Issue 2

26. The primary judge identified this issue as follows:

> The magistrate denied the [appellant] procedural fairness. The [appellant] had sought discovery from the prosecution on 14 August 2017 and had received no response. The

magistrate refused to allow the [appellant] to agitate for the documentation sought on discovery.

Decision of the primary judge

27. Her Honour identified that the appellant had issued a "notice for discovery" seeking certified copies of the original certificate of proclamation for the legislation relied upon by the prosecution to found the charge. Through the notice he also sought certified copies of documents relating to the exemption of the Australian Capital Territory from the requirements of s 58 of the Constitution. Section 58 of the Constitution relates to royal assent of bills passed by both Houses of Parliament.

28. Her Honour considered that the notice for discovery was misconceived and that the prosecution had no obligation to discover the legislation requested or any associated proclamation. She pointed to s 143 of the *Evidence Act 2011* (ACT) which provides that proof is not required about the provisions and coming into operation of an Act of the Territory, a Commonwealth Act or a regulation or rule made under an Act. She also pointed to s 26 of the *Legislation Act 2001* (ACT) which provides that proof is not required of, relevantly, the passing of a proposed law or the making, notification or publication of it in the Gazette.

29. Her Honour pointed out that as at October 2017 the *Australian Road Rules* were incorporated into the *Road Transport (Safety and Traffic Management) Regulations 2000* (ACT) by reg 5.

30. She then considered whether or not the appellant had been denied procedural fairness because the magistrate did not even permit him to agitate his "notice for discovery". This notice was drawn to the magistrate's attention by counsel for the prosecution who indicated that the appellant had demanded the Director of Public Prosecutions provide him with copies of various Acts and copies of other documents. He indicated that they had not been provided because it was not necessary for the Director to do so. The primary judge identified that the notice for discovery was not issued pursuant to any rule applicable in criminal proceedings in the Magistrates Court and she had not been made aware of any principle, legislative provision or authority that suggested that it was an issue in relation to which the magistrate was obliged to permit the appellant to be heard.

31. Her Honour was not satisfied that the magistrate was required to invite submissions from the appellant on the issue of discovery. In any event, her Honour said that any relief in relation to a denial of procedural fairness would be a matter of the court's discretion and that because the document issued to the prosecution was plainly without legal foundation she would have refused relief in any event.

Appellant's submissions

32. The arguments raised in the Notice of Appeal appear to be:

    (a) Discovery is an inherent right of an individual.

    (b) The statutes of the ACT are invalid if they do not comply with ss 58 and 118 of the Constitution.

    (c) The validity of the statutes is also affected by ss 6 and 15A of the *Acts Interpretation Act 1901* (Cth) as well as s 80 of the *Judiciary Act 1903* (Cth).

(d) There was a burden of proof upon the prosecution as the moving party to prove the authority of the legislation being relied upon to provide the court with jurisdiction.

(e) For the purposes of deciding whether or not discovery was available, it was not possible to determine whether the matter was a criminal proceeding or a civil proceeding because the authority of the alleged statutes had not been established and hence the proceedings were a nullity.

Decision

33. The prosecution bore the burden of proof before the magistrate: *Criminal Code 2002* (ACT) s 56. Proof was not required about the coming into operation of an Act, regulation or instrument of a legislative character: *Evidence Act* s 143(1). Similarly, proof is not required about the passing of a law by the Legislative Assembly or its notification or the making or notification of any subordinate law, disallowable instrument or notifiable instrument: *Legislation Act* s 26. The appellant did not identify any legal basis for the contention that he was entitled to discovery from the Director about any of these matters. An entitlement to discovery is not an inherent right of an individual. There is no substance in any of the appellant's contentions.

Issue 3

34. The primary judge identified this issue as follows:

> The magistrate erred in law in applying the *Australian Road Rules*, made under the *Road Traffic Act 1961* (Cth) to him. First, the *Australian Road Rules* have not been properly passed in the Territory in accordance with the *Constitution*. Secondly, section 117 of the *Constitution* binds the Territory. Thirdly, as the relevant legislation in the Territory does not apply the *Australian Road Rules* to 'subjects of the Queen', such rules are not applicable to the [appellant], who was a holder of a Victorian driver's licence, driving in the Territory.

Decision of the primary judge

35. Her Honour pointed out that reg 11 of the *Road Transport (Safety and Traffic Management) Regulations* applied the rules to vehicles and road users on roads and road-related areas. There was no basis for questioning the operation of those rules in the Territory in 2017.

36. She found that the appellant's arguments were without merit. So far as they argued that the *Australian Road Rules* did not specify that they applied to a subject of the Queen, her Honour said that there was nothing to suggest that the appellant was not a road user at the time of the conduct. So far as he relied upon s 117 of the Constitution, the primary judge reasoned that although the appellant's driver's licence was issued in Victoria, the *Australian Road Rules* were largely uniform and there was nothing put before the court that gave rise to any argument that there had been discrimination on the basis of the appellant's state of residence.

Appellant's submissions

37. The appellant repeated the arguments put in relation to issue 2 as to the validity of the laws said to give the Magistrates Court jurisdiction.

38. He also submitted that he had been discriminated against contrary to s 117, but that claim of discrimination appeared to be on the basis that the court registry had refused,

at some unspecified time, to permit him to file an interlocutory application to determine the existence of jurisdiction. It is not clear which court this claim related to. He submitted that the registry had refused to accept his application because of its form. He referred to s 53 of the *Interpretation of Legislation Act 1984* (Vic) which provided that strict compliance with prescribed forms was not necessary. He submitted that the primary judge erred in finding that "there was nothing put before the Court that gave rise to any argument of discrimination on the basis of the [appellant's] residence".

Decision

39. The decision of the primary judge was plainly correct. The Road Transport Regulations clearly applied to the appellant. On its face, s 117 had no application because it applies to discrimination "in any other State". We express no opinion on whether it might apply by reason of the fact that the Australian Capital Territory was once part of New South Wales: cf *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 276-279. Even if the section did apply there was no evidence that the appellant had been discriminated against under s 117, either through the application of the *Australian Road Rules* to his conduct in the Territory or as a result of a refusal by the court registry to permit him to file a particular application. Insofar as the appellant refers to s 53 of the *Interpretation of Legislation Act*, it had no application to documents filed in either the Magistrates Court or the Supreme Court and hence could not provide a foundation for an allegation of discrimination between subjects of the Queen.

Issue 4

40. The primary judge identified this issue as follows:

> The magistrate denied the [appellant] procedural fairness through the manner in which the hearing was conducted. The magistrate failed to consider all of the paperwork that the [appellant] wished to put before the court below, and further failed to give the [appellant] the opportunity to agitate procedural arguments that he had sought to raise earlier through either filing documents with the registry which were rejected or through interlocutory applications before the registrar which were dismissed.

Decision of the primary judge

41. The primary judge found that there had been a denial of procedural fairness because the appellant was not properly heard on the issue that was of the single greatest importance to him, namely, the jurisdiction of the court to hear the proceedings. Notwithstanding that finding, her Honour determined that no relief should be granted because the question of jurisdiction was one of law and that was decisively determined against him in the course of dealing with his other grounds for judicial review.

Appellant's submissions

42. The appellant relied upon the refusal of the magistrate to compel the prosecution to satisfy his request for discovery and the fact that the administrative staff at the Magistrates Court registry refused to allow him to lodge an interlocutory application to determine the authority of the alleged legislation relied upon by the prosecution.

43. The appellant submitted that the court registry denied his right to access to the courts to lodge an interlocutory application to determine the authority of the legislation relied upon by the prosecution. He said that the powers under Div 6.10.2 of the *Court*

Procedures Rules did not override the rights that he held under s 53 of the Victorian *Interpretation of Legislation Act*.

44. He also submitted that in circumstances where the court had found that he had been denied procedural fairness, a costs order should not have been made against him. Rather, he submitted that compensation for his time and effort to bring the matter to judicial review should have been awarded to him.

Decision

45. There was clearly no error on the part of the primary judge in reaching the conclusion that no relief ought to be granted by reason of the denial of procedural fairness. The contention that the prosecution was required to provide "discovery" and prove the validity of every law which was relied upon was obviously meritless. Insofar as the registry had declined to accept an earlier interlocutory application designed to raise those issues, such an application would not have advanced the appellant's position.

46. The contention that s 53 of the *Interpretation of Legislation Act* had any application to the filing of documents in the registry of the Magistrates Court or qualified any power in Div 6.10.2 of the *Court Procedures Rules* is clearly without merit.

47. So far as costs are concerned, this is an issue dealt with at [83]-[84] below.

Issue 5

48. The primary judge identified this issue as follows:

> The prosecution was not a valid prosecution as it should have been brought in the name of the Crown. The police informant was not the correct individual and the identity of the person prosecuting the charge kept changing, which the [appellant] feels was unfair.

Decision of the primary judge

49. The primary judge identified that indictable offences are those that are punishable by imprisonment for longer than two years or are declared to be an indictable offence. Given that a breach of r 300 of the *Australian Road Rules* is a fine only offence, it is a summary offence and can be dealt with in the Magistrates Court: *Magistrates Court Act* s 19. Section 25 of the *Magistrates Court Act* provides that a criminal proceeding may be started in the court by information laid by the informant or by a lawyer or anyone else representing the informant. Section 6(c)(ii) of the *Director of Public Prosecutions Act 1990* (ACT) then empowers the Director to conduct summary prosecutions initiated by that person. Her Honour therefore rejected the appellant's contention.

Appellant's submissions

50. The appellant submitted that there were documents relating to the proceedings which styled them as "R v Jakaj", "Kinnane v Jakaj" and "Police v Jakaj" and it was later clarified that the Australian Capital Territory was the prosecuting party. He submitted that the identity of the prosecution "has unlawfully changed throughout".

51. He said that there was no law to allow the matter to be brought under the names of different parties. Further, he did not accept the authority of any legislation relied upon by the prosecution for the reasons developed in relation to earlier issues.

Decision

52. The decision of the primary judge was plainly correct. The informant in the case was Damien Kinnane, a police officer. The bringing of proceedings by individuals is authorised by s 25 of the *Magistrates Court Act*. Neither the document containing the charge and identifying the informant, nor any other document describing the parties to the proceedings in the Magistrates Court was put before the Court of Appeal. The assertion by the appellant that on some unspecified documents the parties to the proceedings were identified as other than the informant and the appellant does not disclose any defect in the proceedings or that the prosecuting party changed during the course of the proceedings. Because the offence in question was not punishable by imprisonment for longer than two years, or otherwise declared to be an indictable offence, it did not need to be prosecuted on indictment. On no view was there any requirement that the prosecution be brought in the name of the Crown.

Issue 6

53. The primary judge identified this issue as follows:

> The magistrate acted in bad faith by intentionally preventing the [appellant] from pursuing his legal arguments in the court below and in proceeding to deal with the merit of the hearing before determining the jurisdictional questions the [appellant] had raised.

Decision of the primary judge

54. The primary judge understood this argument to be that the perceived absence of jurisdiction should have stopped the magistrate from dealing with the charges before her and that because the magistrate intentionally proceeded, this amounted to bad faith. She identified that an error of law based on a mistake rather than a specific finding of bad faith would actually capture the complaint made by the appellant. She found that the magistrate was entitled to proceed whether or not the appellant continued to participate in the hearing. She referred to the operation of ss 54 and 114 of the *Magistrates Court Act*. She summarised the appellant's argument as being that the magistrate did not genuinely undertake the task of considering his jurisdictional argument and that if she had done so then the hearing on the merits would not have proceeded.

55. The primary judge found that the magistrate satisfied herself of the court's jurisdiction and then, in the absence of an application for an adjournment, proceeded to hear the case. As a result, the primary judge rejected any suggestion of bad faith and found that the submissions made in relation to issue 6 had not been made out.

Appellant's submissions

56. The appellant submitted that there was a deliberate decision not to genuinely investigate whether the court had jurisdiction or to strike the matter out and that this was "a manifest exhibition of bad faith and an obstruction of the process of law". The complaint was that the magistrate had denied the process of "discovery". The appellant submitted that this "stripped the alleged magistrate of any potential judicial immunity".

57. He submitted that s 54 of the *Magistrates Court Act* did not apply in circumstances where he had appeared to conduct a bare protest against jurisdiction.

58. He submitted that the primary judge erred in saying that the magistrate had satisfied herself of the court's jurisdiction "in part through an exchange with counsel for the prosecution" because counsel for the prosecution was not acting on the appellant's behalf.

59. He repeated his submission that he did not accept the authority of any legislation relied upon by the prosecution because of the failure to comply with his "discovery requests".

Decision

60. The decision of the primary judge was plainly correct. The magistrate was correct to find that she had jurisdiction. In those circumstances she had a duty to hear the case. There was no error in proceeding to hear a case where the court had jurisdiction to do so.

Issue 7

61. The primary judge identified this issue as follows:

> The magistrate erred in law by entering a not guilty plea on behalf of the [appellant] when he indicated that he was unable to plead due to the jurisdictional questions he had raised.

Decision of the primary judge

62. The primary judge recorded that the appellant had declined to enter any plea in the court below until his complaints about jurisdiction had been addressed. The magistrate entered a plea of not guilty on his behalf. Her Honour referred to s 282 of the *Crimes Act 1900* (ACT) which permits the court to enter a plea of not guilty where a person "stands mute, or will not answer directly to the indictment". Indictment is defined in the *Legislation Act* to include an information. Her Honour found that in the circumstances the magistrate's power to act under s 282 was enlivened and that was a complete answer to the appellant's argument.

Appellant's submissions

63. The submission of the appellant was that he did not accept any authority under the *Crimes Act* or the *Legislation Act* that were relied upon to support the entry of the plea because of the failure to comply with the "discovery requests" raised in issue 2. Further, he submitted that because the jurisdiction of the court had not been established, the proceedings were a nullity.

Decision

64. The appellant's arguments are dependent upon the proposition, rejected earlier in relation to issue 2, that the prosecution had an obligation to prove the validity of the statutes upon which it relied to establish the charge and statutes which gave jurisdiction to the Magistrates Court. Because there was no such obligation, there was no obligation to comply with his "discovery requests" and it was entirely proper for the court to exercise the power given under s 282 to enter a plea of not guilty on his behalf.

Issue 8

65. The primary judge identified this issue as follows:

> The [appellant] was subject to duress by the hearing proceeding on a substantive basis when the jurisdiction of the court below had not been established.

Decision of the primary judge

66. The primary judge referred to the submission put by the appellant as being misconceived. She understood him to be arguing that because he did not consent to the jurisdiction of the court and was not permitted to make his case on jurisdiction, he was attending the court "under duress".

67. Her Honour identified that the magistrate correctly decided that the court had jurisdiction to hear the information and proceeded to hear it. The court did not compel the appellant to participate. In fact, the magistrate indicated during the hearing that the appellant was excused if he wished no longer to participate and was free to go.

68. The primary judge also referred to the fact that the appellant's presence at the hearing was as a result of legal procedure being followed, including a ruling against him on the issue of jurisdiction, not as a result of any threat or coercion that might be characterised as duress. As a consequence, her Honour was unable to see how any question of duress arose on the facts and the complaint described as issue 8 was not substantiated.

Appellant's submissions

69. The appellant repeated his submission that he felt he had no choice but to attend and remain at court. The premise of his submission was that the court was proceeding without jurisdiction and that he needed to witness what occurred in case the actions of the court were to be reviewed.

Decision

70. As the Magistrates Court had jurisdiction, the decision of the primary judge was correct. If the magistrate had lacked jurisdiction then the appellant would succeed because of that lack of jurisdiction, not because he was "under duress".

Issue 9

71. The primary judge identified this issue as follows:

> The [appellant] seeks the return or destruction of any DNA samples that were unlawfully taken from him during the time he was in custody after being pulled over by the police for driving with a mobile phone, a period of 9 hours.

Decision of the primary judge

72. Her Honour identified that this was an issue that was separate from, and outside the scope of, the judicial review proceedings. The conviction of the appellant did not depend upon the taking of a DNA sample. There was no evidence before the court below about the taking of a DNA sample. Any issue in relation to a DNA sample did not provide a proper ground for judicial review of the magistrate's decision.

Appellant's submissions

73. The appellant submitted that he had attempted to make an application seeking the return or destruction of any unlawfully taken property, but the staff of the court registry discriminated against him by refusing to accept the application. He also referred to the "lower court" refusing to acknowledge or act upon the application.

74. He submitted that "a court sitting as independent arbiter is the appropriate venue to have dealt with the return or destruction of that DNA property".

75. He submitted that the taking of the DNA was closely associated with the charge relating to the mobile phone because without the allegation of an unlawful use of a mobile phone there would have been no attempt to obtain DNA samples.

Decision

76. The Originating Application seeking judicial review sought review of the decision of the Magistrates Court to fine the appellant, require him to pay court costs and impose the victims services levy. Review of that decision did not involve review of any conduct of police officers relating to the taking of a DNA sample. Any jurisdiction to make an order under s 92 of the *Crimes (Forensic Procedures) Act 2000* (ACT) was never invoked. The primary judge was plainly correct in deciding that this was outside the scope of the judicial review proceedings.

Issue 10

77. The primary judge identified this issue as follows:

> The magistrate failed to give any reasons or sufficient reasons for convicting the [appellant] and for the sentence imposed.

Decision of the primary judge

78. The primary judge referred to the content of the obligation to give reasons described in *Heyward v Bishop* [2015] ACTCA 58; 73 MVR 426 at [22] and the comments of Kirby P in *Acuthan v Coates* (1986) 6 NSWLR 472 at 479.

79. The primary judge recorded that a police officer had given evidence that he saw the appellant drive up next to his unmarked police car and that the officer observed him talking on his mobile phone. The magistrate told the appellant that having heard the witness' evidence, if the appellant did not ask any questions of the witness then she would accept it. The appellant said that he was not participating and refused to accept the evidence. Later in the hearing the magistrate recorded that she considered that there was a case to answer and gave the appellant an opportunity to give evidence in relation to the charge. The appellant said that he was not going to get into any merit-based argument. That inevitably led to the magistrate finding the offence proved.

80. The magistrate did not give reasons for finding the offence proven but she had earlier done so by explaining to the appellant what her reasoning would be if he did not challenge the witness' evidence. The primary judge said that in light of the simplicity of the charge, the clarity of the unchallenged evidence and the magistrate's discussions with the appellant, the nature of the hearings conducted in the Magistrates Court and the disclosure of the magistrate's reasoning process in the transcript, she was not satisfied that there was any failure to fulfil the obligation to give reasons.

Appellant's submissions

81. The appellant submitted that there was a failure to give reasons as to why the evidence led to the finding of guilt or in relation to the quantum of the penalty imposed. He submitted that the obligation to give reasons was an "irreducible constitutional requirement" and that the failure to comply with the duty to give reasons impairs the institutional integrity of the court and amounts to a denial of procedural fairness.

Decision

82. It is not clear whether the point taken on appeal in relation to reasons for the quantum of the penalty was taken before the primary judge. Nevertheless, having regard to the refusal of the appellant to take any part in the proceedings other than to indicate his objection to the jurisdiction and the fact that he declined to make any submissions in relation to a penalty to be imposed, in our view, the magistrate was not obliged to give any additional reasons for the selection of the traffic infringement notice amount as the penalty.

Costs

83. The appellant also appeared to challenge the order for costs made in favour of the second defendant in the proceedings. He submitted that because one of his complaints had been substantiated, that would provide a basis to avoid costs and "the right to request compensation for the unnecessary effort that we have been compelled to undertake due to the unlawful actions of the lower court".

84. In our view the primary judge did not err in exercising her discretion in relation to costs. She made specific reference to the fact that the appellant had succeeded on one of his complaints but indicated that the complaints were numerous and the one on which he succeeded did not warrant the court exercising its discretion to grant relief. There is no error disclosed by her Honour's reasons.

Orders

85. The appeal must be dismissed. The second respondent did not seek any order for costs of the appeal.

86. The orders of the Court are:

    1. Appeal dismissed.

    2. No order as to costs.

ELKAIM J:

87. I have had the benefit of reading, in draft, the judgment of Burns and Mossop JJ. I agree that the appeal should be dismissed. I would however like to make some additional comments because I am of the view that the majority of the reasons given by their Honours, while correct, were not necessary. This comment does not apply to reasons concerning the court's jurisdiction to hear the appeal and the refusal of an adjournment sought during the hearing.

88. The origins of this appeal lie in the appellant's use of a mobile phone while he was driving on 12 August 2017. This was an offence contrary to r 300 of the *Australian Road Rules*. The appellant was charged. He defended the charge but was convicted in the Magistrates Court on 10 August 2018.

89. Although he had a right of appeal, the appellant proceeded by a different route of redress, namely he sought a judicial review of the Magistrate's decision.

90. The review was heard by McWilliam AsJ on 19 March 2019 and decided on 22 March 2019 (*Jakaj v Kinnane* [2019] ACTSC 71). The review was derived from a number of complaints which are described by her Honour from [5] of her decision. It can be seen that the appellant challenged the process adopted in the Magistrates Court and also

the jurisdiction of the court, including complaints about the oath sworn by the Magistrate and the validity of the *Australian Road Rules*.

91. Her Honour dealt comprehensively with the appellant's complaints. She rejected all but one of his arguments. The one matter on which she agreed with the appellant was that the Magistrate had denied the appellant procedural fairness in the manner in which the hearing was conducted. Notwithstanding that this complaint was established, her Honour nevertheless found that the denial did not affect the conviction finding. This was because the issue in which procedural fairness had been denied concerned the challenge to the Magistrate's jurisdiction which, her Honour found, was conclusively established.

92. The appellant filed a Notice of Appeal on 23 April 2019. The notice is a very lengthy document, generally making little sense and certainly not in the form one would expect of such a notice. At the end of the notice the appellant states:

> The appellant wants to largely present the appellant's case in writing, but seeks some oral presentation in addition to examining the Attorney General of the Australia [sic] Capital Territory via subpoena under their oath or affirmation.

93. On 4 March 2020 the appellant filed an Application in Proceeding seeking a number of orders preliminary to the Court of Appeal hearing listed for 7 May 2020. This application was dealt with by Burns J on 18 March 2020 and decided on 22 April 2020 (*Jakaj v Kinnane* [2020] ACTCA 19).

94. Burns J, like McWilliam AsJ, probably to some extent unnecessarily, dealt as comprehensively as he could with the matters raised by the appellant. Ultimately he dismissed the application.

95. Coming now to the appeal hearing on 7 May 2020, notwithstanding that the appellant had said he wished to present his case "largely in writing" he did not file any written submissions at all, let alone in accordance with the applicable rules and practice direction.

96. This omission was noticed by the relevant officer in the registry who sent the appellant an email on 5 May 2020 asking him if he intended to file any additional material. The appellant responded, on the same day, with an email, also making little sense but, inter alia, stating that:

> As the Court of Appeal has not yet demonstrated that it intends to be held to execute judgment in a jurisdiction that holds authority over a loyal subject of Her Majesty Queen Elizabeth II under the Crown of the United Kingdom, we will be conditionally attending the matter on the 7th of May 2020 to request that the Judges in attendance provide an undertaking that they will fully comply with their lawful obligations under the Commonwealth of Australia Constitution Act 1901.

97. At the commencement of the hearing Burns J, the presiding judge, asked the appellant if he wished to make any submissions even though he had not filed any written submissions. There then followed a somewhat circular debate, better viewed through the transcript, in which the appellant requested the court to answer a number of questions that he wished to pose before making any submissions. These questions related to the oaths taken by the judges and generally to the jurisdiction of the court.

98. The appellant was informed that the court was satisfied that it had jurisdiction and invited him to make submissions on the balance of the appeal. He responded that he

wished to consider the court's statement of satisfaction of its jurisdiction before making any submissions. Accordingly he sought an adjournment.

99. The adjournment was opposed. The court refused the adjournment. The appellant declined to make any submissions. The court reserved its decision. Reasons for the decisions on jurisdiction and the refusal of the adjournment have been given in the judgment of Burns and Mossop JJ. My comments relate to the provision of reasons going beyond these two topics.

100. I appreciate the appellant was self-represented and considerable leeway must be given to a litigant who acts for his, or her, self.

101. This leeway does not extend to abandoning all relevant rules of court. The rules may be relaxed, a litigant may be excused from complying with some rules and a degree of 'advice' might even be given by the court.

102. Leeway was given to this appellant, in particular by inviting him to make submissions notwithstanding that he had chosen not to file any written submissions. Further latitude was given to him in making the immediate decision on jurisdiction and inviting him to make any submissions on why the decision of the Associate Judge was incorrect.

103. The appellant knew that the matter had been set down for hearing on 7 May 2020. There was never any suggestion that this was a directions hearing or any other type of hearing which might have given rise to the appeal not proceeding.

104. The Notice of Appeal is expansive and might be viewed as constituting written submissions on the appeal. However these 'submissions' were not adopted by the appellant before the court. He was interested only in the jurisdiction of the court.

105. Once the court ruled on jurisdiction the appellant was free to make submissions on the other matters raised in his appeal. The court specifically invited him to do so, notwithstanding the absence of written submissions. He chose not to do so.

106. In the absence of submissions on his appeal, excepting reasons for the two decisions made during the hearing (on jurisdiction and the adjournment), no more was necessary to dismiss the appeal.

107. In my view that would have been the appropriate course to take in this case. The preparation of additional reasons rejecting the appeal were not necessary. Had there been a semblance of sense in the Notice of Appeal I may have taken a different attitude. I conclude with recent remarks by Harrison J in the Supreme Court of New South Wales in *Flowers v State of New South Wales* [2020] NSWSC 526 at [19]. Not all, but a large part of his Honour's observations are applicable here:

> Finally I should note that Mr Flowers has appeared throughout in these proceedings without legal advice or assistance or representation. The courts necessarily extend significant latitude to people in his position in order that indolence or suspicion or even choice should not frustrate the prospect of securing the protection of the law and the vindication of a right or access to justice. However, Mr Flowers is not alone in craving his day in court. The resources of this Court and others like it are finite and delays are often unavoidable despite the best efforts of all concerned. Mr Flowers wants his case heard and the State of New South Wales evidently shares his view. In such circumstances it is very important that Mr Flowers not become diverted by unhelpful voices chattering on the sidelines or by loud drums being beaten by folk with unhelpful agendas that are inevitably destined to frustrate his progress before eventually discarding him and moving on to their next target. There must

necessarily be a limit to the amount of valuable court time Mr Flowers (or anyone like him) can be permitted to dedicate to silly arguments or confected obsessions that clog the court and waste everybody's time without advancing his case.

I certify that the preceding one hundred and seven [107] numbered paragraphs are a true copy of the Reasons for Judgment of Burns, Elkaim and Mossop JJ.

Associate:

Date: 11 June 2020