CITATION:	*Wurramara v Blackwell* [2018] NTSC 89
PARTIES:	WURRAMARA, Jadelen v BLACKWELL, Owen
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 46 of 2018 (21811678)
DELIVERED:	14 December 2018
HEARING DATE:	7 December 2018
JUDGMENT OF:	Kelly J

CATCHWORDS:

CRIMINAL LAW – Appeal against finding of guilt of unlawful use of a motor vehicle – Whether finding of guilt unsafe or unsatisfactory – Inappropriate judicial notice taken of kinds of cars driven by boys in Angurugu – requirements for judicial notice in *Evidence (National Uniform Legislation) Act*, s 144(1) not met – Procedural requirements in s 144(4) not complied with – Sufficient evidence in the form of DNA on a cigarette butt found in the car on which the judge could be satisfied beyond reasonable doubt that appellant was present in the stolen vehicle – Vehicle being driven erratically and then rolled in a manner consistent with unlawful use and inconsistent with lawful use – Occupants ran from the rolled vehicle - Sufficient evidence on which the judge could be satisfied beyond reasonable doubt that occupants knew the vehicle had been stolen - Whether the appellant knew the car had been stolen when he was present in the car – Window of 12 hours for commission of offence – No evidence of when appellant was present in the car - Judge must have entertained a doubt on the whole of the evidence – Appeal allowed

Criminal Code, s 218(2)
Evidence (National Uniform Legislation) Act, s 144(1), 144(4)
Youth Justice Act, s 144(1), s 144(3)

Avopilang (NSW) Pty Ltd v Menard Bachy Pty Ltd [2012] NSWSC 1466, *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 107, *Coombes v Roads and Traffic Authority* [2006] NSWCA 229, *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; 243 CLR 588, *Hurpurshad v Sheo Dyal* LR 3 Ind App, 259, *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205; [2010] 1 Qd R 302, *Jones v The Queen* [1997] HCA 56; 191 CLR 439, *Libke v The Queen* [2007] HCA 30, 230 CLR 559, *M v The Queen* [1994] HCA 63; (1994) 181 CLR 48, *Meethun Bebee v Busheer Khan* 11 Moo Ind App, 21, *McKay v Commissioner of Main Roads* [2013] WASCA 13, *Musico v Davenport* [2003] NSWSC 97, *Niehus v The Queen* [2018] NTCCA 10, *Owens v Repatriation Commission* (1995) 59 FCR 559, *Properjohn v Gaughan* [1998] ACTSC 26, *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering And Infrastructure Pty Ltd* [2014] WASC 40, applied

REPRESENTATION:

Counsel:

Appellant:	G Chipkin
Respondent:	H Riley

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Wurramara v Blackwell [2018] NTSC 89
No. LCA 46 of 2018 (21811678)

BETWEEN:

JADELEN WURRAMARA
Appellant

AND:

OWEN BLACKWELL
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 14 December 2018)

[1] On 19 July 2018, Jadelen Wurramara ('the appellant') was found guilty following a trial in the Youth Justice Court at Alyangula of a single count of aggravated unlawful use of a motor vehicle, contrary to s 218(2) of the *Criminal Code*.

[2] The prosecution case was that at approximately 10.00 am on 17 December 2017, the appellant was present inside a stolen car that crashed and rolled onto its side near Angurugu community on Groote Eylandt. The car had been stolen sometime between the evening of 16 December and about 9.30 am on 17 December from the home of the complainant in Alyangula.

[3] Police arrived shortly after the stolen vehicle had rolled onto its side and noticed a “big cloud of dust”. The officers saw four boys or young men climb out of the windows of the vehicle and run away. Police were about 200 metres away and they were unable to identify any of them. Nor could they provide descriptions of their appearance.

[4] Police found two cigarette butts in the car near the backseat passenger foot-rail. DNA matching the appellant’s DNA profile was found on one of the cigarette butts.

The appeal

[5] An appeal to the Supreme Court lies from a finding of guilt, conviction, order or adjudication made by the Youth Justice Court.[1] The provisions of the *Local Court (Criminal Procedure) Act* relating to appeals from the Local Court apply, with the necessary changes.[2]

[6] The appellant appeals against the finding of guilt. The sole ground of appeal is that the conviction is unsafe and unsatisfactory.

Principles

[7] The requirements for this ground of appeal are set out in *M v The Queen*.[3] The effect of that decision has been summarised by the majority in

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1 *Youth Justice Act*, s 144(1)

2 *Youth Justice Act*, s 144(3)

3 [1994] HCA 63; 181 CLR 487 at 493

Jones v The Queen[4] in the following terms:[5]

The test for determining whether a verdict is unsafe or unsatisfactory

In *M*, Mason CJ, Deane, Dawson and Toohey JJ said that the test for an unsafe or unsatisfactory verdict was whether the court thought that, upon the whole of the evidence, it was "open to the jury" to be satisfied beyond reasonable doubt that the accused was guilty. The majority emphasised, however, that it was not the function of the court to answer that question merely by examining the transcript of evidence and the exhibits. Their Honours said that:

> *in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.*

The majority judges explained the application of the test as follows:

> *In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.*

Gaudron J agreed with the majority formulation of the test, as did Brennan J, although his Honour said that the question as to whether it was "open to the jury" to be satisfied of guilt beyond reasonable doubt was to be resolved by asking whether the jury was "upon the whole of the evidence ... bound to have a reasonable doubt" or whether "the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused".

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4 [1997] HCA 56; 191 CLR 439 at 450-451

5 See also *Niehus v The Queen* [2018] NTCCA 10 at [22] – [23]

[8] In *Libke v The Queen*[6] Hayne J (citing the passage from the majority judgment in *M v The Queen* referred to above) said:

> But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.

[9] The same principles apply where the trial is conducted by a judge alone.

The trial

[10] The evidence at the trial was very short. A police officer gave evidence that police had received calls that overnight two vehicles had been stolen and she and her partner were on their way to Angurugu to have a look and see if they could find them. Just as they were driving past the airport, they got two calls just to say that there were cars that had been stolen outside the community grounds. As they got into Angurugu Community, they turned right onto a main road and saw a car on its side. The police officer didn't see the car roll but it was obvious that it had just rolled. There was a big cloud of dust and she saw four boys jump out the windows and run off.

[11] They inspected the car, found two cigarette butts in the backseat on the foot-rail. She seized those and put them in a seizure bag.

[12] In cross-examination, the police officer agreed that there was a striped bag on the back seat of the car. She was also asked:

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6 [2007] HCA 30; 230 CLR 559 at 596-597 para [113]

> Now, I just wanted to clarify as well, you've said that four people ran from the car, and you said that you were about 200 metres away; you couldn't give any indication as to whether they looked older or younger?

She answered, "No."[7]

[13] The owner of the car gave evidence. She identified the car from a photograph and confirmed that she was the owner. She said that on 17 November,[8] the police rang her and asked if she realised that her car had been stolen. She told them no, she wasn't aware of that, she thought it was parked in the driveway. She checked whether or not it was parked in the driveway and it wasn't. She had last seen the car on "the evening prior". At that time there were no cigarette butts in the car. She and her husband do not smoke. She did not know the appellant. He would have had no reason to be in her car. She did not give anyone permission to use the car at that time.

[14] In cross-examination, the complainant agreed that the car did not have any particular markings on it which associate it with a business. She said she thought it was a '95 model and it was in good condition. She was asked whether there was a striped shopping bag in the backseat and she said she could not recall whether there was or not. She also said, "We have a lot of camping items. There might have been some sort of minor loose items in the backseat".

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7 Transcript of proceedings 19 July 2018 at 7.1

8 This was an error in the prosecutor's question. It was agreed that the correct date was 17 December 2017.

[15] The DNA evidence was tendered by consent, as was the statement of the other police officer who was present. He said in his statement:

> I saw 4 males exit the vehicle through the passenger rear and front windows, it was too far away to identify the males by eyesight and by the time we got close enough they had decamped and left the scene of the motor vehicle incident.

[16] Also tendered by consent was the statement of the senior constable who took a phone call advising that a suspected stolen vehicle was being driven in an erratic manner in Angurugu Community, and who sent the other police officers to investigate.

[17] Defence counsel made the following submissions at the trial:

> The issue here, your Honour, is that the vehicle had been unlawfully used by somebody. The issue here is whether, first of all, Mr Wurramara was in the vehicle; and second of all, even if he was, whether or not he knew that vehicle was being used unlawfully.
>
> In respect of that evidence, cigarette butts are an inherently movable object and it's common knowledge that they're frequently shared between young boys. What your Honour saw was a photo of the back of the car where there was a shopping bag.
>
> A hypothesis consistent with innocence today is that, while the evidence before the court is that Mr Wurramara had definitely been in contact with those cigarette butts, there are other reasons why those cigarette butts could have been in the car, other than him also being the car at the same time.
>
> …
>
> The other issue is, your Honour, even if he is found and even if your Honour is to draw an inference that he was in the car, his knowledge that the car was being unlawfully used hasn't been proved beyond reasonable doubt today.
>
> Your Honour heard that the car had no specific Jenidu(?) markings on it, it's an older style car, about a 1995 model, perhaps, not entirely uncommon for vehicles of that particular type - your Honour has seen photos of it - and that particular age to be driven around communities.

HIS HONOUR: Well, you can call the evidence about that.

In respect of the boys running from the car, there are other reasons why the boys could have been running from the car other than be caught because the car was being unlawfully used.

Your Honour's heard that there was a (inaudible); there could have been other reasons why they were running.

[18] In finding the appellant guilty, the trial judge said:

> … I've got no doubt of his guilt. In my view, the submissions from Ms Donaldson, although earnestly made, speculate on fanciful inferences.
>
> Young boys in Angurugu, it is my experience of 20 years coming here, don't own cars, don't travel in such cars, such that they could disappear from a residence in Alyangula, turn up in time proximate after leaving a lawful place, ending up in the community, on its side, with the dust still there, with cigarette butts identifying with no doubt that the defendant had been there.
>
> In my view, to suggest that maybe there was shopping bag that had an old butt in it, is fanciful and not worthy of belief. The inferences are so strong, in fact, I would describe the prosecution case as overwhelmingly strong, and I've got no doubts that he was in the car.
>
> To say that even if he was in the car, he didn't know that it was illegal, is another fanciful inference that defies common sense and I don't accept it. I find him guilty beyond reasonable doubt.

The basis of the appeal

[19] The appellant contends that the finding of guilt is unsafe and unsatisfactory for the following reasons:

(a) The Crown case relies entirely upon a single piece of circumstantial evidence, namely the DNA on the cigarette butt found inside the stolen car which, the appellant contends is, by itself, a very tenuous link between the appellant and the car.

(b) A cigarette butt is easy to transport and there are a number of possible reasonable explanations as to how it may have ended up inside the vehicle.

(c) The DNA could have got onto the cigarette butt in a number of ways, for example by being handed to another person by the appellant or by secondary transfer.

(d) There was another item in the car which did not belong to the owner – the striped bag. The butts could have been introduced into the car inside the striped bag.

(e) Even if the appellant was in the car, there is no evidence that he intended to use the car unlawfully or foresaw it as a possible consequence of his conduct. There were no markings on the car which would alert a member of the public that the car belonged to someone other than the driver. The car was also an older 1995 model.

(f) The sole circumstance from which the trial judge inferred the requisite fault element was that in his 20 years experience going to Angurugu young boys don't own or travel in such cars. The appellant submits that this is not a matter of which the trial judge could take judicial notice.

(g) In any event, the trial judge could not have been satisfied that the males who got out of the car were boys because in cross-examination, the

police witness said she was unable to ascertain if the males who jumped out of the vehicle were younger or older.

(h) The appellant submitted that there are a number of reasonable hypotheses consistent with innocence:

- The appellant smoked the cigarette while standing outside the car, he then passed it to a person who later entered the car and drove away with the cigarette.

- The appellant smoked the cigarette while standing outside the car, then passed it through an open window to a passenger already inside the car.

- The cigarette butt was previously left inside the striped shopping bag and introduced into the car without the appellant's knowledge.

- The appellant touched the cigarette at an earlier point in time. He then gave the cigarette away. The cigarette then came into possession of a passenger inside the car without the appellant's knowledge.

- The appellant never actually touched the cigarette but his DNA was deposited on it via an intermediary, such as a friend or family member.[9]

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9 Counsel for the appellant at the trial conceded that the appellant had definitely been in contact with the cigarette butt.

- The appellant briefly sat inside the car while it was parked in circumstances where the car was not in the course of a journey and therefore not in “use”.

- The appellant was present inside the car but didn’t know it was stolen, given the age of the car and the lack of markings to indicate that it belonged to a local business or organisation.

[20] In light of these matters, the appellant submitted that the trial judge ought to have entertained a reasonable doubt as to the appellant’s guilt.

Discussion of the parties’ contentions

[21] In relation to the DNA evidence, the respondent submitted that any hypotheses premised on the transfer of the cigarette to another person or innocent transfer of DNA onto the cigarette must be assessed in light of the unchallenged evidence that the only DNA profile obtained from the cigarette butt was that of the appellant. There was no other contributing profile identified.[10]

[22] Counsel for the respondent submitted that the report did not specifically state that no other DNA profile had been found on the butt. It was not necessary for it to do so. Under the heading “Examination, DNA Result and Interpretation” the report stated: “A DNA profile was obtained that matched the DNA profile attributed to Jadelen WURRAMURA.” Under the heading

10 Exhibit PI, at page 3

"Statistical Weighting", the report stated, "The DNA profile is at least 100 billion times more likely to have occurred if it originated from Jadelen WURRAMURA than if it originated from an unknown individual." If DNA from more than one individual had been found on the butt, one would have expected the report to refer to "a mixed DNA profile" and to refer to the statistical weighting in terms of the probability of its occurring if it "originated from Jadelen WURRAMARA and an unknown individual". The author of the report was not required for cross-examination.

[23] The respondent also contended that such alleged possibilities also need to be assessed in light of the means by which cigarettes are ordinarily used. The act of smoking a cigarette converts much of it to smoke and ash, leaving behind only the butt, which is held in the smoker's fingers and mouth during use. The inescapable conclusion from the butt yielding only a single DNA profile is that the profile was that of the smoker. The respondent contended that the trial judge was right to dismiss hypotheses of secondary transfer of DNA or transfer of the cigarette to another person as fanciful speculation. I agree.

[24] As far as the hypothesis that the butt came from the striped bag is concerned, the respondent pointed to the fact that, contrary to the appellant's submission, it is not clear that the shopping bag was an item in the vehicle that did not belong to the owner. While the complainant could not recall whether or not there was a striped shopping bag in the backseat before the car was stolen, she said, "… we have a lot of camping items.

There might have been some sort of minor loose items in the backseat …"[11] The photograph of the striped bag inside the vehicle was not shown to the complainant during cross-examination and it was not put to the complainant that the bag did not belong to her.

[25] The respondent also submits that the position of the bag as shown in the photograph[12] tendered at the trial is arguably not consistent with an inference that a cigarette butt has fallen out of the bag and onto the floor of the car. The bag is resting on its side against the door of the car with various items lying on top of it where the opening would be. I do not think anything much can be made of the position of the bag given that the car had rolled over. Nevertheless, I agree that the butts in the bag hypothesis is nothing but fanciful speculation.

[26] I agree that it was open to the trial judge to be satisfied beyond reasonable doubt that the appellant smoked the cigarette which produced the butt while he was present in the car.

[27] In response to the appellant's submissions concerning judicial notice, the respondent submits that it was open to, and appropriate for, the judge to take into account his knowledge gained from 20 years of experience in attending court in Alyangula.

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11 Transcript of proceedings 19 July 2018 at 9.8

12 Exhibit P2 - Photograph Index, Photograph 7

[28] Under s 144(1)(a) of the *Evidence (National Uniform Legislation) Act* ("UEA"), proof is not required about knowledge that is not reasonably open to question and is common knowledge in the locality in which the proceeding is being held or generally. The judge may acquire such common knowledge in any way the judge thinks fit and the court is to take that knowledge into account.

[29] The respondent submitted that it is common knowledge in Angurugu and Alyangula that young boys do not drive cars of the kind that was stolen, and the circumstances in which cars commonly go missing from their lawful residences in Alyangula and end up crashed in Angurugu are likewise well known. Twenty years of attending court at Alyangula would have provided the judge with knowledge of these matters.

[30] I agree with the appellant that the learned trial judge was in error in taking judicial notice of the fact that young boys in Angurugu, don't own cars or travel in cars like the one that was stolen. Section 144(1) of the UEA provides:

> (a) Proof is not required about knowledge that is not reasonably open to question and is:
>
> (i) common knowledge in the locality in which the proceeding is being held or generally; or
>
> (ii) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
>
> (b) The judge may acquire knowledge of that kind in any way the judge thinks fit.
>
> (c) The Court (including, if there is a jury, the jury) is to take knowledge of that kind into account.

(d) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind to ensure that the party is not unfairly prejudiced.

[31] The fact that young boys in Angurugu, don't own or travel in cars like the one that was stolen is not a matter capable of verification by authoritative documentary sources so as to fall within s 144(1)(b). If it is to be the subject of judicial notice under s 144(1), it must be a matter of common knowledge (local or general) coming within s 144(1)(a). In any case, for either limb to apply, the "knowledge" must be "knowledge that is not reasonably open to question".

[32] The inference drawn by the trial judge was that, on the assumption that the appellant was a mere passenger, none of his associates could have owned or lawfully possessed a vehicle of this type and, therefore, he must have known that it was stolen. That is a belief on the part of the trial judge. It may or may not be a reasonable one, but it is not a matter of incontestable fact (ie "not reasonable open to question") which satisfies the prescription in s 144(1) for use as common knowledge.[13]

[33] Counsel for the appellant at the trial certainly questioned it. Her submission was that the stolen car was an older model car such as one might expect to see driven in Angurugu. As counsel for the respondent pointed out, the fact

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13 This case is similar to *Dasreef Pty Ltd v Hawchar* [2011] HCA 21, 243 CLR 588 in which the High Court found that the trial judge had erred when he said that he was permitted to take his experience in a specialist dust diseases tribunal into account in determining what caused the plaintiff's silicosis. However, the appeal was unsuccessful as the court held that there was otherwise sufficient evidence for the defendant to have been held liable.

that defence counsel did question it does not, *ipso facto*, mean it is not reasonably open to question. However, this is not the kind of matter which can be the subject of judicial notice. Judicial notice can be taken of "known facts", but not merely of opinions which can be expressed with a high degree of confidence.[14] In *Properjohn v Gaughan*[15] Gallop J made the following observations about the scope of s 144:

> The basic essential is that the fact is to be of a class that is so generally known as to give rise to the presumption that all persons are aware of it. This excludes from the operation of judicial notice what are not "general" but "particular" facts. As to "particular" facts, even the Judge's own personal knowledge is not to be imported into the case: *Hurpurshad v Sheo Dyal* LR 3 Ind App, 259 at p286 and *Meethun Bebee v Busheer Khan* 11 Moo Ind App, 213 at p221. To import knowledge of a particular fact in issue would be to import evidence in the strict sense regarding a matter as to which the Court is supposed to have no knowledge whatever of its own.

[34] That is not to say that a trial judge's life experience can have no part to play in the judge's decision making, but it cannot be a substitute for evidence.

> A judge, as part of the fact finding process, is entitled and often required to make a value judgment in respect of matters of fact adduced in evidence. Such evaluation will be based on many factors, including the judge's life experiences as an individual in society and the judge's training and experience as a lawyer or judge. The evaluation, however, must be in respect of proved facts. A trial judge is not entitled to use personal experience to make findings of fact or to draw inferences unless that personal experience satisfies the prescription for the use of matters of common knowledge.[16]

[35] Further, even if the alleged fact were such an incontestable fact, the trial judge did not give the appellant an opportunity to make the submissions as

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14 *Owens v Repatriation Commission* (1995) 59 FCR 559 at 590

15 [1998] ACTSC 26 at [13]

16 *Coombes v Roads and Traffic Authority* [2006] NSWCA 229 at [68]

to whether his Honour could take that "knowledge" into account as required by s 144(4).

[36] The appellant submitted, during the hearing of the appeal, that this amounted to a denial of procedural fairness. There is a great deal of force in this submission. The position was summarised (and the relevant authorities cited) in the Supreme Court of Western Australia in *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering And Infrastructure Pty Ltd:*[17]

> Procedural fairness does not normally require decision makers to disclose their proposed conclusions. A decision maker should notify the parties of proposed conclusions that were not put forward by the parties and could not be easily anticipated: see *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 1074; (1994) 49 FCR 576; *Musico v Davenport* [2003] NSWSC 977; *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205; [2010] 1 Qd R 302; *Avopilang (NSW) Pty Ltd v Menard Bachy Pty Ltd* [2012] NSWSC 1466.Generally speaking, the parties must anticipate possible findings and make submissions at the trial of the potential findings on the issues litigated. Nevertheless, procedural fairness may require the judge to hear the parties further if certain matters emerge in the judge's consideration of the case after trial which the judge regards as potentially dispositive but in relation to which, in all the circumstances, it is to be inferred that the parties did not have a proper opportunity to address at trial: *McKay v Commissioner of Main Roads* [2013] WASCA 135 [156] (Murphy JA).

[37] In this case, it could not reasonably have been anticipated by either party that the trial judge would rely upon his own "knowledge" of what cars boys in Angurugu own and travel in when no evidence on the issue had been called. If the trial judge was intending to decide the case on that basis, it is

17 [2014] WASC 40 at para [10]

highly arguable that he should have alerted the parties and given them an opportunity to make submissions as to why he should or should not do so.

[38] However, it is also questionable whether the appeal can be allowed on this ground. Although the appellant raised in submissions that it was not permissible for the trial judge to take judicial notice of his experience of what cars boys from Angurugu drive, the notice of appeal did not assert denial of procedural fairness as a ground of appeal, and there has been no application to amend the notice of appeal. The sole ground of appeal is that the verdict is unsafe and unsatisfactory.

[39] The test articulated by the majority in *M v The Queen* for whether a verdict is unsafe or unsatisfactory is whether the court thought that, upon the whole of the evidence, it was open to the decision maker to be satisfied beyond reasonable doubt that the accused was guilty. On that test, the question would be whether, leaving aside the trial judge's impermissible reliance on his experience of what cars boys in Angurugu drive or travel in, there was sufficient evidence on which the trial judge could have been satisfied beyond reasonable doubt of the appellant's guilt.

[40] In this case, although extremely brief, the trial judge gave reasons for his decision from which it can be determined that his impermissible reliance on his own experience of what cars boys in Angurugu drive and travel in formed the basis of his decision. If the appeal were being argued on the basis of denial of procedural fairness, that would necessitate allowing the

appeal regardless of the rest of the evidence: the matter on which the trial (arguably) failed to accord procedural fairness was an indispensable plank in the reasoning process leading to the guilty verdict.

[41] Counsel for the respondent did not object to the appellant raising the issue of procedural fairness on the hearing of the appeal.[18] However, counsel for the respondent did not make any submissions on the issue; the respondent had no notice that the issue was to be raised; and it was not included as a ground of appeal on the notice of appeal. In those circumstances, if I had been of the view that on the whole of the evidence it was open to the trial judge to be satisfied beyond reasonable doubt of the appellant's guilt, I would have invited further written submissions on the issue of whether leave should be given to amend the notice of appeal and whether there had been a denial of procedural fairness. However, it is unnecessary for me to decide whether it was open to the appellant to raise denial of procedural fairness, as I have determined that the appeal should, in any event, be allowed on the unsafe and unsatisfactory ground.

[42] In relation to the appellant's contention that the trial judge could in any event not have been satisfied that the males who climbed out of the windows of the car and ran away were in fact young boys, the respondent submitted that the question in cross-examination of the police officer (set out at [12] above) was misleading, since her evidence in chief was that she saw "boys"

[18] It was raised by counsel for the appellant in response to a question from the bench about whether there had been compliance with s 144(1)(d).

running from the car – not "people". The answer is also somewhat ambiguous: "younger or older" than what? Further, counsel for the appellant at the trial did not submit that the trial judge could not be satisfied that the males running away from the car were boys. She made the following comments on the evidence: "In respect of the boys running from the car, there are other reasons why the boys could have been running from the car other than be caught because the car was being unlawfully used".[19] I agree that it was open to the trial judge to be satisfied that the males seen running away from the overturned car were boys or young men. (The appellant was 17 years old at the time.)

[43] The respondent submitted that upon proper consideration of all the evidence before the Youth Justice Court, it was open to the trial judge to find that:

(a) the appellant had been travelling in the car because the cigarette butt containing the his DNA was present in the car;

(b) the appellant had been travelling in the car after it was stolen as there were no cigarette butts in the car before it was stolen from the complainant's residence;

(c) the car was taken from the complainant' residence in Alyangula sometime between the evening of 16 December 2017 and 9.30 am on 17 December 2017;

19 Transcript of proceedings 19 July 2018 at 11.8

(d) the car is not of a type usually owned or used by boys or young men from Angurugu;

(e) at approximately 9.30 am on 17 December 2017 the car was being used in a manner consistent with its being unlawfully used and inconsistent with it being innocently used, namely being driven in an erratic manner around Angurugu such that it rolled;

(f) the appellant could not have entered the car after it had rolled and left behind the cigarette butt as at the time police arrived the car had freshly rolled;

(g) the appellant is not known to the complainant and had no permission to use the car;

(h) the appellant, aged approximately 17 years and six months at the time, was one of the boys or young males seen jumping out the windows of the freshly rolled car; and

(i) the appellant fled the scene of the roll over as he knew (or foresaw) that the use of the car was unlawful.

[44] The respondent submitted that when the united force of all the circumstantial evidence is considered as a whole there was sufficient evidence for his Honour to be satisfied that the only rational inference the circumstances enabled him to draw was that the appellant was guilty of the offence charged.

[45] In summary, the respondent's final position was as follows.

(a) It was open to the trial judge to be satisfied that the appellant was present in the car after it was stolen and before it was rolled over on the basis of the DNA found on the cigarette butt.

(b) Even without the judge taking judicial notice of the fact that young boys from Angurugu do not usually drive cars of the kind that was stolen, there was sufficient evidence on which the trial judge could have been satisfied beyond reasonable doubt that the appellant knew that the car was stolen. The car was being driven in an erratic manner, noticeably so, such that it was reported to police and it ended up being rolled, consistent with it being used unlawfully and inconsistent with it being used by the owner who might be expected to take care of his property. One can also infer consciousness of wrongdoing from the fact that the occupants of the car ran from the scene of the rollover.[20] On the basis of this evidence, the fact that the appellant knew the car was stolen (and hence intended to use it unlawfully or was at least reckless as to that consequence) is not something about which the trial judge must (rather than might) have had a reasonable doubt.

20 The respondent also submitted that the unlawful use occurred at night and that that was further evidence which supported an inference that the appellant must have known the car was being used unlawfully. However, the rollover occurred at around 10.00 in the morning and there is no evidence about how long before that the car was stolen.

[46] I agree that it was open to the trial judge to be satisfied that the appellant was present in the car after it was stolen and before it was rolled over on the basis of the evidence of his DNA on the cigarette butt.

[47] I also agree that trial judge could have been satisfied beyond reasonable doubt, on the evidence of the manner in which the car was driven and the boys/young men running away from the rollover, that whoever was in the car at the time the car was being used in that manner knew the car was stolen.

[48] However, the appellant submitted that there was a window of twelve hours or more during which the car could have been stolen and that in the circumstances the Crown had not established that the appellant knew that the car was stolen at the time he was present in the car. I agree.

[49] The evidence establishes that the car was stolen at some time between "the evening prior" and shortly before the rollover when someone called police to report the erratic driving. All the DNA evidence establishes is that the appellant was in the car at some point after the car was stolen. It does not establish that he was in the car when those things which the Crown relies on to establish guilty knowledge occurred.[21] Given that potential window of 12 hours or more during which the appellant could have been in the car, in the absence of the impermissible reliance on his personal experience of what

21 The appellant submitted that the Crown had to prove that the appellant had the requisite knowledge, from which one can infer intention, at the time he entered the car. It would not suffice that he subsequently became aware. It is not necessary to make any determination about that. The evidence does not establish that the appellant was in the car when the matters relied on by the Crown to establish guilty knowledge occurred.

cars boys from Angurugu drive (or any evidence to that effect), the trial judge, acting reasonably, must have entertained a reasonable doubt about whether the appellant was present in the car when it was rolled, and therefore must have entertained a reasonable doubt about whether the appellant knew the car had been stolen when he was present in the car. Hence the trial judge, acting reasonably, must have entertained a reasonable doubt about whether the appellant intended to unlawfully use the car.

[50] The appeal is allowed.
