Sauerwald v Verity [2012] NTSC 40

PARTIES:	SAUERWALD, Keith Raymond v VERITY, Brett Justin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 1 of 2012 (21010917)
DELIVERED:	8 June 2012
HEARING DATES:	26 April 2012 and 3 May 2012
JUDGMENT OF:	BARR J
APPEAL FROM:	LOWNDES SM

CATCHWORDS:

CRIMINAL LAW – APPEAL AGAINST FINDING OF GUILT AND CONVICTION – BURDEN OF PROOF
Circumstantial case – inferences suggested by appellant excluded by magistrate as unreasonable – whether magistrate should have had a reasonable doubt – no reasonable hypothesis consistent with innocence – appeal dismissed

CRIMINAL LAW – APPEAL – EVIDENCE
Tender of fresh evidence on appeal – statutory requirements – discretion to admit – fresh evidence, if received, would not afford a ground of appeal – evidence not admitted – appeal dismissed

CRIMINAL LAW – APPEAL – PROCEDURAL IRREGULARITIES
Whether unfairness to appellant due to presence in court of previous witness during cross-examination of subsequent witness – possibility for contamination of evidence – subsequent witness's evidence not affected – no material procedural irregularity – appeal dismissed

Justices Act s 176A
Summary Offences Act s 47(e)

Jaeger-Steigenberger v O'Neill [2011] NTSC 42; *Shepherd v R* (1990) 97 ALR 161, followed
Pagett v Hales [2000] NTSC 35, considered

REPRESENTATION:

Counsel:

Appellant:	Self represented
Respondent:	D Jones

Solicitors:

Appellant:	Self represented
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Bar1205
Number of pages:	25

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Sauerwald v Verity [2012] NTSC 40
No. JA 1 of 2012 (21010917)

BETWEEN:

KEITH RAYMOND SAUERWALD
Appellant:

AND:

BRETT JUSTIN VERITY
Respondent:

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 8 June 2012)

Appeal against conviction

[1] The appellant was prosecuted on complaint before the Darwin Court of Summary Jurisdiction on the charge that, on 19 January 2010, he unreasonably caused substantial annoyance to Malcolm Wayne Peterson, contrary to s 47(e) *Summary Offences Act*.

[2] Mr Peterson was an employee of Territory Housing. The prosecution alleged that the appellant sent an e-mail to Mr Peterson, via Cheryl Wall, another employee of Territory Housing, stating: "Peterson, a few words of advice. If I lose my home, you lose yours, as well as that of your cohort and troublemakers. If you think I'm joking, think again. I don't have that far to

go to sort them out, now do I?" Attached to the e-mail was a Google Earth or similar aerial photo of the residence of Mr Peterson in the suburb of Gray, Palmerston.

[3] On 21 September 2011 the magistrate found the charge against the appellant proven beyond reasonable doubt. On 16 December 2011 the appellant was convicted and sentenced to a term of imprisonment of three months, fully suspended.

[4] The appeal is concerned only with the finding of guilt and consequent conviction.

[5] The appellant represented himself in the Court of Summary Jurisdiction, and in this Court on the hearing of his appeal. The notice of appeal (prepared by the appellant) has annexed to it a 5-page document headed “Reasons for Appeal” in which the appellant set out his grounds of appeal in 36 numbered paragraphs. The essential grounds of appeal to be distilled from those 36 paragraphs are that: (1) the magistrate should have had a reasonable doubt as to the identity of the sender of the e-mail referred to in paragraph 2 above; (2) the magistrate should have found that Mr Peterson’s evidence was suspect because he was motivated by ill-will or ill-feeling towards the appellant; (3) there were procedural irregularities in the trial arising from the presence of Mr Peterson and Ms Wall in court at the same time, which resulted in unfairness to the appellant; and (4) that a witness Brent Eres made a false statutory declaration.

[6] As at 19 January 2010, the appellant was the respondent to an application made by the Chief Executive Officer of Territory Housing to the Commissioner of Tenancies under s 126 *Residential Tenancies Act*. Territory Housing was seeking to evict the appellant from his housing unit because of a complaint or complaints by other tenants about the noise made by the birds kept at the appellant's unit. Mr Peterson was the manager of the Territory Housing Anti-Social Behaviour Compliance Unit and was to be called as a witness in the application before the Commissioner. In the appeal to this Court, the appellant said that it was Mr Peterson who "had applied for an eviction order to remove me and my birds from my residence."[1]

[7] An order was made by the Commissioner on 20 January 2010 requiring the appellant to vacate his residence, although that order was subsequently quashed after a successful appeal by the appellant to the Local Court under s 150 *Residential Tenancies Act*.

[8] Irrespective of the ultimate outcome of the tenancy proceedings, it is clear that as at 19 January 2010, the appellant had reason to feel ill-will towards Mr Peterson, the person he regarded as responsible for seeking his eviction, and hence the appellant had a motive to write and send a malicious and threatening e-mail to Mr Peterson.

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[1] Reasons for Appeal, par [6].

[9] Exhibit P1, the e-mail relied on by the prosecution, read as follows (capital letters are used to reflect upper case used in the original):

> From: Keith R. Sauerwald [mailto:traveller213_72@aapt.net.au]
> Sent: Tuesday, 19 January 2010 3:02 PM
> To: Cheryl Wall
> Subject: a picture for you (FORWARD TO MAL PETERSON)
>
> PETERSON.
> A FEW WORDS OF ADVICE.
> IF I LOSE MY HOME, YOU LOSE YOURS, AS WELL AS THAT OF YOUR COHORT AND TROUBLEMAKERS.
> IF YOU THINK I'M JOKING, THINK AGAIN. I DON'T HAVE FAR TO GO TO SORT THEM OUT, NOW DO I?
>
> You have been sent 1 picture Scanl0139.jpg

[10] As mentioned in par [2] above, an aerial photo of the residence of Mr Peterson was attached to the e-mail.

[11] The contents of the e-mail were consistent with the sender being concerned about eviction from his home ("If I lose my home…").

[12] Of possible relevance was the abrupt or peremptory manner in which the appellant addressed Mr Peterson, that is, by use of his surname only. Of further possible relevance was the extensive use of capital letters. Of still further possible relevance was that there was no spacing between paragraphs.

[13] Tendered in evidence were a number of other e-mails sent by the appellant to officers of Territory Housing.

[14] One such e-mail (part of exhibit P2) was to Wally Jenkins, Housing Manager, which read in part as follows:

> From: Keith R. Sauerwald [mailto:traveller213_72@msn.com]
> Sent: Tuesday, 4 August 2009 1:27 PM
> To: Wally Jenkins Subject: Threatening e-mail/s.
>
> JENKINS, I RECEIVED YOUR THREATENING LETTER ON FRIDAY LAST.
> BE ADVISED THAT SHOULD I RECEIVE ANY MORE THREATENING AND/OR HARASSING MAIL FROM YOU THEN I WILL TAKE APPROPRIATE ACTION AGAINST YOU. …..
>
> [*paragraphs deleted*]
>
> FURTHERMORE JENKINS, SOME STRONG ADVISE FOR YOU.
> GRACE PAGE WAS ADVISED IN MID JUNE TO REMOVE THE DISGUSTING ANTI-SOCIAL RESIDENTS OF UNIT 23/2 RUNGE STREET.THIS HAS NOT BEEN DONE.
> I SUGGEST THAT YOU DO SO VERY SOON AS MY PATIENCE IS WEARING THIN ON THAT MATTER.
> YOU AND YOUR CRONIES SHOULD BE THOROUGHLY ASHAMED OF YOURSELVES IN TREATING A LONE WHITE WOMAN IN SUCH A DISGRACEFUL MANNER. YOUR PATHETIC AND DISGUSTING BEHAVIOUR IN THE RUNGE ST MATTER IS APPALLING …..
>
> KEITH R. SAUERWALD.
> 17/8 TAMBLING TCE.
> LYONS.

[15] Another of the e-mails (part of exhibit P3) was to Mr Peterson, and referred to the complaints made by the tenants of Units 18 and 16 (the appellant lived in Unit 17) about the noise made by the birds kept at the appellant's unit:-

> From: Keith R. Sauerwald [mailto:traveller213_72@aapt.net.au]
> Sent: Tuesday, 15 September 2009 12:24 PM
> To: 'mal.peterson@nt.gov.au'
> Subject: [*left blank*]

Peterson.
Under Northern Territory law, there is a maximum AUDIO DECIBEL LIMIT on noise in suburbia.
There is NO WAY POSSIBLE that my birds are exceeding that maximum audio level that my innocent birds are accused of.
There is an audio level, which, if used in excess, CAN be "offensive" to some people.
I will shortly be taking legal advice on the possibility of filing defamation charges against you, T/H, the occupant/s of unit 18 and the occupants of unit 16 with regards to their outrageous lies and false accusations submitted to me by T/H as a copy of my file.
It is nothing short of criminal, that you can be so pathetically incompetent and ignorant, in believing such pathetic lies and nonsense from units 18 16.
Making such false and baseless accusations can see you all on charges of defamation. Included will also be such charges as harassment.
Keith R. Sauerwald.

[16] A further e-mail (exhibit P4) was a somewhat condescending communication sent to Wally Jenkins in which the appellant pointed out Mr Jenkins' suggested ignorance in failing to understand the difference in meaning between the words "capacity" and "capability". I set out extracts from the e-mail below:

From: Keith R. Sauerwald [mailto:traveller213_72@aapt.net.au]
Sent: Friday, 1 October 2010 2:44 PM
To: Wally Jenkins
Subject: a picture for you

I GOT YOUR SOMEWHAT RATHER UNINFORMATIVE LETTER TODAY. IT NEVER CEASES TO AMAZE ME THAT PEOPLE CAN JUMP TO CONCLUSIONS AND SHOOT THEIR MOUTHS OF ABOUT SOMETHING OF WHICH THEY KNOW NOTHING (WHATSOEVER) ABOUT WHILE AT THE SAME TIME, FAILING TO CHECK FACTUAL DETAILS BEFORE RUNNING OFF AT THE MOUTH.
I HAVE INCLUDED A COPY OF YOUR LETTER WITH LINES 4/5/6 UNDERLINED. I SUGGEST THAT YOU READ THEM, AS YOU OBVIOUSLY DIDN'T WHEN YOU WROTE IT.

> YOU SEE, WHAT YOU FAILED TO DO, DEAR WALLY, IS CHECK THE MEANING OF THE WORD C-A-P-A-C-I-T-Y.(I DIDN'T HAVE TO, AS I ALREADY KNEW ITS MEANING/S).
>
> [*A pedantic and argumentative passage then followed. The e-mail concluded …..*
>
> YOUR LETTER IS, IN FACT, NO USE OTHER THAN THE FLOOR OF A BIRD CAGE.
> ACCORDINGLY YOU WILL NOT RECEIVE ANY FURTHER INFORMATION ON THIS SUBJECT AS THIS HAS NOW ENTERED THE REALM OF HARASSMENT.SHOULD YOU BE IGNORANT ENOUGH TO TAKE THIS UNFOUNDED AND BASELESS NONSENSE ANY FURTHER, THEN I WILL BE MORE THAN HAPPY TO ACCOMMODATE YOU.
>
> You have been sent 1 picture
> KEITH R. SAUERWALD.

[17] It can be seen that all the above e-mails appear on their face to have come from "Keith R. Sauerwald", whose e-mail address for three of them was "traveller213_72@aapt.net.au". In the case of exhibit P2, the address was very similar: "traveller213_72@msn.com". All of the above e-mails made unusual use, some almost exclusive use, of capital letters. Three of the e-mails addressed the recipient by his surname. The use of "Dear Wally" in exhibit P4 was no better; it may not have addressed Mr Jenkins by his surname, but it was sarcastic and condescending. None of the e-mails had normal spacing between paragraphs. Exhibit P4, like exhibit P1, had the same sentence at or near the end: "You have been sent 1 picture." These points of similarity are in addition to the tone of dissatisfaction, anger, resentment and bitterness which the e-mail communications exhibits P2, P3 and P4 all have in common with exhibit P1.

[18] The magistrate was satisfied beyond reasonable doubt that the appellant was the sender of the e-mail exhibit P1. His Honour's reasoning in relation to evidence as to the identity of the sender of the e-mail was as follows:

> "As mentioned throughout the hearing, this is a circumstantial evidence case. The prosecution do not rely upon direct evidence that the defendant was the author of and sent the email in the first instance to Ms Wall and that email then having been passed onto Mr Peterson. Rather, the prosecution rely upon circumstantial evidence.
>
> I must remind myself, where the prosecution relies upon circumstantial evidence, they must exclude beyond reasonable doubt any hypothesis that is consistent with innocence. Of course, any hypothesis that is put forward, of course must not be fanciful. In my view, any hypothesis that is put forward, there must be an evidentiary basis for it.
>
> In this case, the defendant puts forward the hypothesis that he was not the author of the email, nor did he send the email. The hypothesis that he puts forward is that anyone in the world could have written that email and or sent that email to Cheryl Wall. That is the hypothesis that the defendant puts forward in response to the circumstantial evidence upon which the prosecution rely.
>
> What is the circumstantial evidence? The first observation I make is that the email in question purports to have been sent by a person, Keith R Sauerwald. That email was sent to Cheryl Wall.
>
> Though having said that, nowhere on that email does there appear, for want of a better expression, a signature, for example, 'Keith Sauerwald'.
>
> I compare the subject email with other emails which were put into evidence and they are the emails which are to be found in exhibits P3 and P4. Significantly, those emails disclose that they were sent by 'Keith R Sauerwald'. In all of those cases, the email address of the dispatcher is the same, that is the previous emails disclose an address which is equivalent to the address which appears on the face of the subject email. ….

As submitted by the prosecution, there is a striking similarity between the previous emails and the email in question. In my view there are notable stylistic similarities between the previous emails and the later email. First of all, at least in one previous email, the phrase, 'A picture for you appears' that phrase is replicated in the subject email.

In the previous emails there is a reference to Peterson. That form of address to Mr Peterson is replicated in the subject email. .....

Furthermore, it is quite clear from the contents and tone of the subject email that whoever wrote that email had had a beef or grievance. I think that is patently clear and the email in question of course makes reference to it, 'If I lose my home, you lose yours'. Now of course that must relate to some pre-existing state of affairs involving Housing.

It is significant that Mr Sauerwald of course prior to the email in question was embroiled in a dispute with Territory Housing; and that, as a result of that dispute, he was at some risk of being evicted.

As it turns out, this email in question was sent very shortly before the tribunal was to hand down its decision in relation to the dispute that he was having with Housing. In my view, the contents of the subject email bear a relationship to some pre-existing dispute and I say, there is clear evidence before the court of that dispute and the fact that it was to be adjudicated upon very shortly after the email in question was sent.

One has to consider of course hypotheses consistent with innocence. The hypothesis advanced by the defendant, as I said before, is that anyone else could have sent the email and indeed used his computer or his email address to effect that purpose.

One really has to evaluate the odds of that occurring. The defendant has not suggested that a particular identified person sent that email, he hasn't suggested that. He simply believes that some unidentified person having sent the email or having written the email. He even suggests that a hacker might have done that.

One has to consider the odds of that occurring. If someone else did write the email and send it, then in my view that person would have

had to have been familiar with the tone and style in which Mr Sauerwald writes his emails. They would have to be familiar with the stylistic characteristics of the way he writes emails. They would have to have that peculiar knowledge of his style of writing.

They would also in my view, have to have some knowledge of things that were going on between him and Housing; otherwise it is hard to understand the content of that email. One has to ask oneself, 'What are the chances of that occurring?' In my view, the odds of that occurring are so infinitesimal, so remote that I think that the court can safely disregard the hypothesis put forward by the defendant.

Of course the court has to be satisfied beyond reasonable doubt on the evidence before it that the email was written and sent by him. At the same time of course, any hypothesis consistent with innocence must be negated.

In my view for the reasons that I have given, I am satisfied beyond reasonable doubt that the defendant was the author of the email and that he sent the email to Cheryl Wall on 19 January 2010."

[19] The case against the appellant was properly described by the magistrate as circumstantial, and it is well established that in such cases, the magistrate could not properly find the defendant guilty unless no other rational inference consistent with the innocence of the appellant could be drawn.[2] As Mildren J said in *Jaeger-Steigenberger v O'Neill* [2011] NTSC 42 at [39]:

> "To enable the learned magistrate to be satisfied beyond reasonable doubt of the guilt of the accused it was necessary not only that her guilt should be a rational inference, but that it should be the only rational inference that the circumstances would enable him to draw.

Relevantly for the present case, his Honour continued:

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[2] *Shepherd v R* (1990) 97 ALR 161 at 163 – 165, per Dawson J.

> "An inference to be rational must rest upon something more than mere conjecture. The bare possibility of innocence does not prevent the magistrate from finding the appellant guilty if the inference of guilt is the only inference open to a reasonable magistrate upon a consideration of all the facts in evidence."

[20] The sentencing remarks extracted in par [18] above indicate that the appellant did not suggest in the Court of Summary Jurisdiction that anyone in particular had sent the offending e-mail exhibit P1. However, in arguing his case on appeal, that the magistrate should have had a reasonable doubt as to the identity of the sender of the e-mail, the appellant contends that it was a reasonable possibility that either Mr Peterson or Cheryl Wall (or possibly someone in league with them) was the author of the e-mail. The suggested involvement of those Territory Housing officers is intended to challenge the magistrate's conclusion that the appellant must have written and sent the e-mail. The magistrate's conclusion was based on his reasoning that nobody else would have been familiar with the tone and style used by the appellant in his earlier e-mails or would have had any knowledge of the ongoing conflict between the appellant and Territory Housing. The notion that anybody else might have had such familiarity and knowledge was highly unlikely. The appellant's case on appeal, nominating Territory Housing officers as possible culprits, responds to the magistrate's reasoning. The appellant argues that Territory Housing officers would have been familiar with the tone and style used by the appellant in his earlier e-mails and would have had knowledge of the ongoing conflict between the appellant and Territory Housing.

[21] The appellant argues that the motive of the Territory Housing officer in writing the e-mail and masterfully sending it to Cheryl Wall with instructions that it be sent to Mr Peterson was to get back at the appellant for the fact that the appellant had triumphed over Territory Housing in the Local Court appeal referred to in par [7] above. The appellant refers in his written submissions to Mr Peterson's "avid and clear dislike" of the appellant, "because of his expensive taxpayer funded loss" to the appellant in the "bird case".[3] In targeting Mr Peterson in particular, the appellant submits that Mr Peterson has "a bit of aboriginal blood" and thus would know about "payback" and "humiliation". The appellant also writes, in his submissions:

> "There are countless computer literate people adequately capable of employing this scheme and putting it into effect, for the purpose of satisfying Peterson's egotistical and obnoxious desire to obtain "payback" for his humiliating loss in Carey's SM court in our bird case."[4]

[22] It was pointed out to the appellant in court on both 26 April and 3 May that the offending e-mail was sent on 19 January 2010, whereas the suggested humiliating loss suffered by Mr Peterson in the "bird case" did not occur until 2 March 2010, six weeks later. It was thus highly unlikely that, as at 19 January 2010, Mr Peterson had the motivation which the appellant sought to attribute to him. Undeterred by the apparent logic of this two-date chronology, the appellant submitted that it is possible the e-mail was put in

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3 Reasons for Appeal, par [17].
4 Reasons for Appeal, par [18].

place at an earlier time (ie, on 19 January) in anticipation that Territory Housing might ultimately lose its eviction application, in order to provide a backup excuse for Territory Housing to get back at the appellant after it lost.

[23] There was no evidence to support the appellant's speculation. In the Court of Summary Jurisdiction, the appellant cross-examined both Mr Peterson and Ms Wall, but did not specifically put authorship of the offending e-mail to either of them.

[24] The appellant cross-examined Ms Wall in order to (successfully) extract from her the concession that she did not have proof of, and that she could not be sure as to, the identity of the sender of the e-mail.[5] The appellant also cross-examined Ms Wall to extract from her the 'concession' that she had on-forwarded the offending e-mail to Mr Peterson, a matter which was not in issue. In the course of his cross-examination of Ms Wall, the appellant also made a number of statements which did not actually become questions, one of which was the observation: "… there are thousands of hackers out there who have nothing better to do in their lives than to hack into somebody's computer and they could do it to mine, they could do it to yours." The cross-examination shortly afterwards reached its climax with the following questioning:

> "MR SAUERWALD: You believe that it's possible for any – for computer literate people – and I mean really experienced computer literate people – to – my email address is well known all over the world. So any – do you believe that any computer literate could –

[5] Transcript 3/12/2010 pages 14-16.

> person could access my computer and obtain my password? They do it all the time, I might say. But do you believe that they could? - - - I'm not qualified to answer that, I'm sorry.
>
> So you don't …
>
> HIS HONOUR: She's not qualified to answer that.
>
> MR SAUERWALD: Yes."[6]

[25] Ms Wall was not asked whether she had any involvement in writing the e-mail. She was not asked if she had been the original sender of the e-mail (as distinct from her admitted sending or forwarding of the e-mail to Mr Peterson). There was no evidence from Ms Wall or from any other witness as to Ms Wall's suggested involvement in writing or sending (as the original sender) the offending e-mail.

[26] The appellant cross-examined Mr Peterson to secure a 'concession' that the offending e-mail was not sent directly to him but was in fact sent to Ms Wall. The question and the answer were as follows:

> "Therefore you did not receive an e-mail from me. Therefore you received an e-mail from Mrs Wall. Is that correct? - - - Technically correct, yes."[7]

[27] The appellant conducted his case in the Court of Summary Jurisdiction with a view to establishing a defence on the ground that the e-mail was not sent direct to Mr Peterson by the original sender, but to Ms Wall. Notwithstanding the words at the head of the e-mail "Forward to Mal

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6 Transcript 3/12/2010 page 18.
7 Transcript 3/12/2010 pages 28.

Peterson", the appellant argued that Ms Wall was under no obligation to forward the e-mail, and therefore did so of her own free will. Therefore, on the appellant's argument, the original sender did not "unreasonably cause substantial annoyance to Malcolm Peterson", because the original sender did not send the e-mail direct to him.[8]

[28] Mr Peterson gave further evidence on a later occasion and was cross-examined once more by the appellant. On that occasion, the appellant asked the following question, and received the answer set out below, in the finale to his cross-examination,:-

> "MR SAUERWALD: All right. One more. There can be no doubt that your pursuance in this unsubstantiated matter is not only fraudulent and irrelevant, but very much an extremely obnoxious, invalid and baseless claim, urged on by your pursuance for revenge in your outright loss to me in the bird case. Do you agree or disagree? - - - Mr Sauerwald, I prosecute matters all the time. I don't win them all, and I don't lose them all, but I move on. I have no reason to have anything personal against you, sir."

[29] As the above extract makes clear, the appellant cross-examined Mr Peterson about his motive for continuing with the prosecution. The appellant did not cross-examine Mr Peterson about Mr Peterson's possible motives for sending the e-mail to Ms Wall or whether Mr Peterson had any involvement in writing the e-mail. He did not ask him if he had been the original sender of the e-mail to Ms Wall. There was thus no evidence from Mr Peterson (or

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[8] The appellant continued to argue that Ms Wall was the sender of the e-mail. In pursuance of this argument, the appellant further cross-examined Ms Wall at a later stage of the trial about whether an e-mail addressed to her became her property as distinct from the property of the Northern Territory government - Transcript 16/09/2011 page 7. He further cross-examined Mr Peterson about the same issue - see Transcript 16/09/2011 pages 10 and 11.

from any other witness) as to Mr Peterson's suggested involvement in writing or being the original sender of the offending e-mail.

[30] At the hearing of the appeal, the appellant sought to enhance his case in relation to reasonable hypothesis consistent with innocence by tendering fresh evidence as to the ease with which a person could send an e-mail which would give the recipient the impression that it had come from the e-mail system of a person other than the sender. The process is known as "e-mail spoofing". The perpetrator sends an e-mail from the perpetrator's own e-mail system, which appears to its recipient to have come from the e-mail system of a third person. The effect is achieved by the perpetrator entering the third person's e-mail address into the "from" field in the perpetrator's mail program instead of the perpetrator's own address. A document ("MFIB") was tendered by the appellant on the hearing of the appeal, which had apparently been written by Debra Littlejohn Shinder, a technology consultant, trainer and writer who has authored a number of books on computer operating systems, networking and security. Under the heading "How Spoofing Works" the following explanation appears:-

> "In its simplest (and most easily detected) form, e-mail spoofing involves simply setting the display name or "from" field of outgoing messages to show a name or address other than the actual one from which the message is sent. Most POP e-mail clients allow you to change the text displayed in this field to whatever you want. … The name that you set will be displayed in the recipient's mail program as the person from whom the mail was sent."

[31] In relation to s 176A *Justices Act*, which deals with the tendering of fresh evidence on appeal, it appears that the evidence in "MFIB" is likely to be credible in the sense that it is capable of belief.[9] Assuming it were put into admissible form, I find it would have been admissible in the proceedings in the Court of Summary Jurisdiction to show how a person might have sent an e-mail to Ms Wall which would appear to have come from the appellant's e-mail address. That was relevant to whether the prosecution excluded (beyond reasonable doubt) the possibility that a third party sent the e-mail to Ms Wall. Hence it is admissible on an issue which is, directly or indirectly, the subject of this appeal.[10] Further for present purposes, I will assume in the appellant's favour that there is a reasonable explanation for the failure of the appellant to adduce the evidence in the Court below,[11] and that he has complied, or if granted an adjournment could comply with the formal requirements in s 176A(1)(c) *Justices Act* as to notice.

[32] Once the preliminary statutory requirements are established for the admission of the new evidence, this Court is required to receive the new evidence unless it decides on balance that it "would not afford a ground for allowing the appeal". This is a test of relevance to the issues on the appeal.[12] If the evidence creates a reasonable doubt that someone other than the appellant wrote and sent the e-mail exhibit P1, then the appellant is

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9 See *Hook v Ralphs* (1987) 45 SASR 529 at 535, referred to by Mildren J in *Pagett v Hales* [2000] NTSC 35 at [46].

10 s 176A(1)(a) requires that it appear to the Supreme Court that the evidence tendered on appeal "is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal".

11 s 176A(1)(b) requires that there should be "a reasonable explanation for the failure to adduce" the evidence in the proceedings from which the appeal lies.

12 *Smith v Torney* (1984) 29 NTR 31 at 33, per Muiread J.

entitled to be acquitted. In my assessment, however, the evidence, if received, would not afford a ground for allowing the appeal, and I am so satisfied. I therefore do not admit the evidence.

[33] The reason the evidence, if received, would not afford a ground for allowing the appeal is that it only goes to the issue as to how a false e-mail could have been created. The evidence is not such as to make the possibility that an unidentified third person wrote and sent the e-mail to Ms Wall a reasonable possibility. The magistrate carefully considered the odds of such a thing happening, and as to whether the appellant's defence hypothesis was a rational inference. In my assessment, the evidence still does not make the possibility of third party involvement a reasonable possibility or make third party involvement a rational inference consistent with the innocence of the appellant.

[34] Moreover, if the further evidence were combined with the appellant's recently conceived hypothesis that one of two Territory Housing officers, or someone in league with them, wrote and sent the e-mail in order to get back at the appellant for the loss of a court case, the result of which was not known at the time the e-mail was sent, the composite hypothesis is an even less rational inference on all the evidence. I note finally that the appellant did not cross-examine the two officers, when they gave evidence as prosecution witnesses, on the possibility now contended for by him.[13]

[13] See par [23] to par [29] above.

[35] The issue on appeal is whether there ought to have been a reasonable doubt on the part of the magistrate that the appellant was the sender of the e-mail. In my view, his Honour was not in error, in reasonably considering all the facts in evidence, to exclude the inferences suggested by the appellant as reasonable in the circumstances. They were not reasonable. The evidence did not compel the acceptance of any rational hypothesis consistent with the appellant's innocence. Similarly, the evidence tendered on appeal does not compel the acceptance of any hypothesis consistent with the appellant's innocence.

[36] I therefore do not admit the new evidence. For the same reasons, I do not admit the evidence contained in the document marked "MFIA".

[37] I reject the ground of appeal that the magistrate should have had a reasonable doubt as to the identity of the sender of the e-mail exhibit P1.

Other grounds of appeal

[38] As to the ground that the magistrate should have found that Mr Peterson's evidence was suspect because he was motivated by ill-will or ill-feeling towards the appellant, there was no evidence that Mr Peterson was motivated by any ill-will or ill-feeling towards the appellant. When the appellant put to Mr Peterson that there was something personal in Mr Peterson's pursuit of the prosecution, Mr Peterson denied it. I refer to the extract transcript of the cross-examination of Mr Peterson in par [28] above. There was no evidence to contradict Mr Peterson's denial or to

suggest that it was untrue. The appellant gave no evidence of unfriendly conversations, hostile actions or any other demonstration of ill-will or ill-feeling by Mr Peterson towards the appellant. In the circumstances, this ground of appeal must be rejected.

[39] As to the ground that there were procedural irregularities in the trial arising from the presence of Mr Peterson and Ms Wall in court at the same time, which the appellant says resulted in unfairness to him, the appellant was able to point to only one reference in the trial transcript to support the ground. The incident referred to by the appellant occurred during the cross examination of Mr Peterson by the appellant.[14] The relevant parts of the cross examination are set out below:

> MR SAUERWALD: All right. I'm just looking for the particular – Here we are. All right. Rephrasing that last question, it has been known – made known to these Court proceedings that, while under oath in the witness box, and under questioning from myself that Sheryl Wall has openly admitted not once, but twice, that she sent the alleged email in question to you, do you agree with her two statements to this Court regarding her evidence on this matter? Yes or no? --- I agree that she forwarded the email to me. Yes.
>
> Do you agree that, if or when an email lands in her letter box addressed to her, then it becomes her property and no-one else's? Yes or no? --- I can't answer that question with a yes or no answer.
>
> HIS HONOUR: Ms Wall, it's very important that you don't send any signals to this witness, please.
>
> MS WALL: (inaudible)

[14] Transcript 16/9/2011 pages 10-11.

> HIS HONOUR: No, I saw you moving your head. You can't do that, because it might be influencing the evidence given by Mr Peterson, so please don't do that.
>
> MR SAUERWALD: Your Honour, I was under the impression that this similar thing happened on a previous occasion, where other witnesses were in here while one witness was in the box.
>
> HIS HONOUR: I don't know. It didn't escape my attention.[15] A lot of things do, because I'm busy doing a lot of witnesses. I'm looking at witnesses and I'm making notes. I don't know.
>
> MR SAUERWALD: So, she should not be in here. Period.
>
> HIS HONOUR: She's entitled to be her, but she must not, in any way, suggested to Mr Peterson the answer he should be giving.

[40] A number of matters become apparent from the transcript extract. First, the appellant was pursuing an impermissible line of questioning. Whether or not an e-mail in Ms Wall's "letter box" belonged to her, such that it was her property to the exclusion of all others, was a question of law and was not a proper question in the cross examination of Mr Peterson. The appellant was attempting to lead inadmissible evidence in cross examination. Second, Ms Wall was entitled to be in court, because she had already given evidence. There was no procedural irregularity in her being present in court. Third, the witness moved her head, in a way which the magistrate detected, at the time Mr Peterson was being asked an impermissible question or series of questions. I will assume for present purposes that Ms Wall was indicating that 'no' was the correct answer to the question. Fourth, it is unclear

[15] His Honour probably meant the opposite to what was transcribed, ie, that it *had* escaped his attention.

whether she was intending to communicate with Mr Peterson so as to affect Mr Peterson's answer, or whether she was simply unable to restrain herself from shaking her head to indicate 'no' because of the glaringly silly propositions being raised by the appellant's questions. Whatever Ms Wall may have intended, the magistrate was quite correct to direct her to desist.

[41] I consider it most unlikely that Ms Wall influenced Mr Peterson's answer, because rather than accede to the appellant's demand that he answer "yes or no", Mr Peterson replied, "I can't answer that question with a yes or no answer". Shortly after that, the magistrate patiently informed the appellant that his questions were legal questions, which the witness could not answer, and the cross-examination came to an end.

[42] There may well be occasions where interaction between a person in court and a witness giving evidence results in the witness giving an answer on a material matter which is either untrue or which is not within the witness's knowledge, such that the interaction has a contaminating effect on the evidence of the witness and possibly even the proceeding in which the witness is giving evidence. However, that is not the case here. It does not appear that the witness's evidence has been affected, since, as mentioned, he refused to be drawn into answering yes or no. Moreover, the line of questioning was such that the answer (whatever it may have been) would not have been properly admissible in evidence.

[43] I am satisfied that there was no material procedural irregularity, and certainly nothing such as to warrant setting aside of the magistrate's finding of guilt.

[44] The appellant's statement: "I was under the impression that this similar thing happened on a previous occasion, where other witnesses were in here while one witness was in the box", leads nowhere. Whatever may have been the appellant's impression, it was only his impression and there was no evidence to support it.

[45] The ground asserting procedural irregularity or irregularities must therefore be rejected.

[46] I turn to the ground that a witness, Brent Eres, made a false statutory declaration. Mr Eres was at all material times an administrative officer in the Department of Housing, Local Government and Regional Services. One of his roles was to log all requests for "mail files" made by Departmental officers. On receipt of a request for mail files, his practice was to send an e-mail to CSG, the service provider organisation, requesting that the particular mail file be provided. Mr Eres said that the service provider organisation backs up the Department's mail every night and the backups are then kept for a year.

[47] As a result of Mr Eres' request, CSG provided Ms Wall's entire mail file in compact disk format, containing all of the e-mails and all of the calendar entries on her mail file.

[48] Mr Eres received the compact disk on or about 12 February 2010. The compact disk contained the e-mail referred to in par [2] above and the Google Earth aerial photo. It can be seen that the nature of the evidence which Mr Eres was able to give was formal, similar to chain of possession evidence.

[49] On 16 September 2011, Mr Eres gave evidence at the voir dire under s 26L *Evidence Act* in relation to the admissibility of exhibit P1. He identified exhibit P1 as the same document as that on the compact disk received by him, the only identified difference being some extra line breaks.[16]

[50] The appellant cross examined Mr Eres on the voir dire in relation to a statutory declaration made by him on 8 September 2011. In that statutory declaration Mr Eres referred to his dealings with investigating police officers and stated:

> On the 7th October 2011 I met with Constable Andreau at my work place who handed me a disc which I recognise as the original disc that I handed to Cheryl Wall last year.
>
> On the 8th October 2011 I presented to Casuarina Police Station and provided Constable Livingstone with this statement.

[51] Given that the cross-examination was taking place on 16 September 2011 and Mr Eres' statutory declaration was made 8 September 2011, neither the meeting with Constable Andreau nor the presentation at the police station

[16] Transcript 16/9/2011 page 20.

could have occurred on 8 October 2011, a date which was still some weeks ahead, and therefore the dates 7 October 2011 and 8 October 2011 could not have been the dates on which the described events happened. There were clearly two misstated dates in the statutory declaration.

[52] The obviously incorrect dates in the statutory declaration of Mr Eres did not, however, have any bearing on the evidence which he gave in court that he had caused a backup copy of Ms Wall's mail file to be brought into existence in February 2010, and that included in the mail file was the offending e-mail exhibit P1. Evidence adduced in cross-examination as to the defendant's subsequent dealings with police, some 18 months later, in relation to routine matters such as identification of evidence previously delivered up, and the making of a statement to deal with formal matters, was not material to any aspect of the defence case. It could not have discredited Mr Eres in any material way. It had no bearing on the magistrate's finding of guilt.

[53] The ground asserting the false statutory declaration must also be rejected.

Conclusion

[54] I have rejected all grounds of appeal and hence the appeal must be dismissed.

[55] I would propose to order that the appellant pay the respondent's costs of the appeal, to be taxed in default of agreement. However, I will hear the parties on the question of costs before I make any order.