Psaras v Littman [2006] NTSC 75

PARTIES:	PSARAS, Charley
	v
	LITTMAN, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 40 of 2005 (20416018)
DELIVERED:	5 October 2006
HEARING DATES:	4 September 2006
JUDGMENT OF:	MARTIN (BR) CJ
APPEAL FROM:	Court of Summary Jurisdiction, 20416018, 12 August 2005.

CATCHWORDS:

CRIMINAL LAW

Criminal law – appeal – Justices Appeal – appeal against conviction – failure by prosecution to call witness – refusal by Magistrate to reopen hearing – Magistrate not functus officio – evidence of witness lacking in credibility – no miscarriage of justice – appeal dismissed.

Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic (1990) 92 ALR 93; *S v Recorder of Manchester* [1971] AC 481; *McNicholl v Tothill* (1988) 47 SASR 134, applied.
Jones v Dunkel (1959) 101 CLR 298, cited.
Putland v The Queen (2004) 218 CLR 174, followed.

REPRESENTATION:

Counsel:

Appellant:	A McLaren
Respondent:	G Bryant

Solicitors:

Appellant:	Asha McLaren
Respondent:	Office of the Director of Public Prosecutions

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

Psaras v Littman [2006] NTSC 75
No. JA 40 of 2005 (20416018)

BETWEEN:

PSARAS, Charley
Appellant

AND:

LITTMAN, Andrew
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 5 October 2006)

Introduction

[1] This is an appeal against a conviction by a Magistrate for the offence of Dangerous Act. The appellant's vehicle was involved in an accident and the critical question at trial was whether the prosecution had proved that the appellant was driving.

[2] Although the grounds of appeal include a complaint that the conviction is "unsafe and unsatisfactory", the primary complaint is centred on the failure of the prosecution to call a witness ("HM") who was in the appellant's vehicle and upon the refusal of the learned Magistrate to reopen the hearing approximately eight months after finding the appellant guilty for the

purposes of hearing evidence from HM. The Magistrate declined the application on the basis that he was functus officio. Based on the additional evidence, the appellant complains that there was a miscarriage of justice.

Functus officio

[3] The accident occurred on 11 July 2004. The trial proceeded on 6 October 2004 and the evidence, including evidence by the appellant, was completed in one day. On 26 November 2004 the Magistrate gave oral reasons and found that the appellant was the driver of the motor vehicle at the time of the accident. In a finding not challenged by the appellant, his Honour found that the prosecution had proved that the manner of driving amounted to the crime of Dangerous Act. Following those findings his Honour found the appellant guilty of the charge.

[4] On 21 July 2005, before sentence was imposed, counsel for the appellant applied to reopen the hearing for the purposes of leading evidence from HM. The Magistrate declined to reopen the hearing into the question of guilt on the basis that he was functus officio. His Honour did not consider the merits of the application including the question of the potential credibility of the proposed evidence.

[5] In substance, the appellant submitted that until final adjudication through the imposition of sentence, the function of the Magistrate was not complete and his Honour possessed the power to allow the prosecution or the

appellant to reopen their case and call further evidence. As counsel expressed the position in the written outline of submissions:

> "The Magistrate has only one officium which cannot be divided. The officium to carry the case to its final conclusion does not take place until there is a finding of guilt and a sentence has also been imposed."

[6] The Crown submitted that in respect of the hearing to determine guilt or otherwise, the role of the Magistrate was complete when the record of a finding of guilt was recorded in accordance with s 70 of the Justices Act and, in respect of that question, the Magistrate was then functus officio. Counsel endeavoured to distinguish those cases in which it has been held that following a plea of guilty, a Magistrate is not functus officio and may permit the withdrawal of the plea at any time before sentence is imposed.

[7] In *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93, Gummow J pointed out that whether a decision-maker is functus officio because the power residing in the decision-maker is spent is a matter of "interpretation of the statute conferring the particular power in issue" (112). In essence, therefore, the answer to this appeal depends upon the proper construction of the Justices Act which conferred the power upon the Magistrate to hear and determine the charge against the appellant.

[8] The Court of Summary Jurisdiction is created by Part IV of the Justices Act. Subject to the limited power of a single Justice to "hear and determine a

matter of complaint", s 43 provides that "every matter of complaint" shall be "heard and determined" by a Magistrate. Section 49 provides for the making of a complaint in relation to the commission of a "simple offence".

[9] The jurisdiction of the Magistrate to conduct a summary trial, determine guilt and impose sentence upon the appellant is found in Division 2 of Part V of the Justices Act. In the case of the indictable offence of Dangerous Act with which the appellant was charged, it is a jurisdiction found in s 121A "to hear and determine the charge in a summary manner, and pass sentence on the person so charged". Section 121A is concerned with charges for an indictable offence which may be dealt with summarily. Section 120 confers a jurisdiction to "hear and determine in a summary manner" a charge against provisions of the Criminal Code specified in s 120 as "minor offences". Although s 120 does not specifically state that a Magistrate has power to "pass sentence" in respect of matters heard and determined in a summary way pursuant to s 120, the power to pass sentence must be inferred.

[10] Additional jurisdiction to "hear and determine in a summary manner" a charge in respect of other indictable offences is found in s 131A. Again, the words "pass sentence on" do not appear, but the power to impose sentence must be inferred.

[11] In respect of indictable offences, s 132 provides that a finding of guilt following a summary trial under Division 2 "shall have the same effect as a finding of guilt upon an indictment for the same offence would have had".

[12] Division 3 of Part IV is concerned with the hearing of matters in the Court of Summary Jurisdiction. Various powers are conferred in respect of the conduct of the hearing. Section 67 applies if a defendant pleads guilty and provides:

> "(2) If the defendant admits the truth of the complaint, and shows no sufficient cause why he should not be found guilty, or why an order should not be made against him, the Court shall find him guilty or make an order against him accordingly."

[13] Section 68 provides that if a defendant does not admit the truth of the complaint, the court shall proceed to hear the evidence. Subsection (3) directs that the practice with respect to the giving of evidence shall be in accordance "as nearly as may be" with the practice of the Supreme Court upon trials at the criminal sittings of that Court.

[14] As to the determination of guilt, s 69 is in the following terms:

> "69. **After hearing the parties Court to find guilty or dismiss**
>
> When the parties and their evidence have been heard, the Court shall consider and determine the whole matter, and shall find the defendant guilty or make an order against the defendant or dismiss the complaint, as the case may require: Provided that the Court may, at any time before the matter has been finally determined, permit the complaint to be withdrawn, upon such terms (if any) as it thinks fit."

[15] Division 4 is headed "Judgment". Sections 70 and 71 are concerned with the recording of the findings of the court:

> "70. **Finding of guilt to be minuted**
>
> (1) When the Court finds the defendant guilty or makes an order against the defendant a minute or memorandum of the finding of guilt or order shall then be made.
>
> (2) No fee shall be paid for any minute or memorandum under this section.
>
> 71. **Order and certificate of dismissal**
>
> (1) If the Court dismisses the complaint a minute or memorandum of that fact shall be made and the Court may, on being required to do so and if it thinks fit, draw up an order of dismissal and give the defendant a certificate thereof.
>
> (2) A certificate of dismissal shall, upon production and without further proof, be a bar to any subsequent complaint for the same matter against the same party."

[16] There is no dispute that on 26 November 2004 when the Magistrate found the appellant guilty, the finding of guilt was recorded on the court file in accordance with the usual practice followed in the Court of Summary Jurisdiction. The question of sentence as then adjourned.

[17] The principal authority upon which counsel for the appellant relied is *S v Recorder of Manchester* [1971] AC 481. The House of Lords was concerned with whether a Court of Summary Jurisdiction could allow the withdrawal of a plea of guilty before sentence was passed. Their Lordships unanimously

held that the Magistrate was not functus officio and could allow the withdrawal of a plea of guilty and substitution of a plea of not guilty.

[18] The facts in *S* were different from those under consideration. The finding of guilt followed a plea of guilty. The appellant's guilt was determined following a plea of not guilty and the hearing of the evidence. Nevertheless, observations were made in *S* which provide strong support for the view that the power of a Magistrate is not spent until the entire function is completed through the imposition of sentence and the recording of both a finding of guilt and the sentence.

[19] Lord Reid observed that it has "long been the law" that a trial Judge can permit a change of plea to not guilty at any time before the case is finally disposed of by sentence or otherwise. His Lordship commented that it was not easy to understand why a different rule had emerged in recent times with regard to the powers of Magistrates in summary proceedings. The judgment continued (489):

> "Much of the difficulty has arisen from the fact that 'conviction' is commonly used with two different meanings. It often is used to mean final disposal of a case and it is not uncommon for it to be used as meaning a finding of guilt. It is proper to say that a plea cannot be changed after 'conviction' in the former sense. But it does not at all follow that a plea cannot be changed after "conviction" in the latter sense. It is perfectly true that 'conviction' is used in this latter sense in the Magistrate' Courts Act, 1952, and a number of other statutes. But I cannot infer from that any intention of the legislature to alter as regards summary jurisdiction the old rule that a plea can be changed at any time before final disposal of the case."

[20] For present purposes, the following observation of Lord Reid is significant (490):

> "In my judgment Magistrates have only officium – to carry the case before them to a conclusion. There is no reason to divide up their functions and hold that at some stage in the proceedings one officium comes to an end and another begins."

[21] Lord MacDermott drew together the stages of the proceedings in which guilt or otherwise is determined and sentence imposed (492):

> "As to the first of these questions, the exercise of a complete criminal jurisdiction – and I use that expression to exclude special statutory procedures in which guilt is found by one court and punishment awarded by another – naturally falls into two parts, whatever the status of the court concerned. There is the ascertainment of guilt or innocence; and after that there is the sentencing or determination of what should be done with the guilty. In a sense these parts are distinct, and the temporal gap between them has tended of recent times, in certain types of case, to become longer as the need for a closer investigation of the convicted person's health and background has obtained wider recognition. But that is far from saying that each part stands isolated from and independent of the other. *The evidence relevant to the commission of an offence is generally relevant to the sentence. And that part of the hearing which is directed to the sentence may well cast new light on the question of guilt or innocence. I think it is safe to say that this has long been recognised and that the tenor of English law has been against erecting any barrier between these two parts or stages which would place them, as it were, in watertight compartments and so reduce the scope of judicial ascertainment and discretion*. There must, of course, be an end to all things and any court becomes functus eventually. But such a platitude does nothing to establish the barrier under discussion which is arbitrary in nature and, in my opinion, prejudicial to the due administration of criminal justice. Every experienced judge knows that, even in uncontested matters, the truth has a habit of emerging in bits and pieces, and that the legal ingredients of the offence charged may not be fully understood by the accused. Pleas of guilty of stealing where there has been no intention to deprive the owner permanently, or of receiving where there has been no guilty knowledge at the time of receipt are but notorious examples of what has happened and can still happen

> through this sort of ignorance or misunderstanding which, be it noted, may not proclaim itself when the plea is made. The risk of this is certainly not rare enough to be left out of account. Legal aid may reduce it, but it would be rash to assume that it will eliminate such mistakes entirely; and it must also be remembered in this connection that quite a number of modern statutory offences are sufficiently complex in their make-up to confuse both the lay and the learned. Once made, a mistaken plea may be properly accepted and the mistake may never stand revealed. But if, as can happen, the truth comes to light during the second stage of the proceedings, when the question of what to do with the accused is under consideration, why should it not be acted upon and a changed plea of not guilty allowed where the interests of justice so require? There is no good reason for thinking that such a course would create an administrative problem or open the door to a widespread abuse of process. *As respects trials on indictment, including trials before justices at quarter sessions, the attitude of the common law on this matter has been clear for generations. Such a change may, at the discretion of the court, be allowed at any time before the case has been disposed of by sentence. On principle I see no reason why this discretionary power should be denied to courts of summary jurisdiction. It is as necessary there as elsewhere if the justices are to be free to do justice while they have seisin of the proceedings*" (my emphasis).

[22] Lord MacDermott's view that a Magistrate only becomes functus officio when sentence is passed was confirmed in His Lordship's remarks when discussing the judgment of Salmon J in *Reg v Essex Justices, Ex parte Final* [1963] 2 QB 816. Justices dismissed an information after they had determined guilt and imposed a fine. Not surprisingly, the Court of Appeal held that the Justices were functus officio, but Salmon J commented in the course of his judgment that "once the Justices have convicted or acquitted, they are functi officio and cannot alter their decision. As to those remarks, Lord MacDermott said (498):

> "I think the learned judge must here have been using the word 'convicted' in its wider sense as including not only the finding of guilt but the subsequent adjudication as to punishment. There is

nothing in the context or in the case to suggest that he meant to refer to a finding of guilt and nothing more."

[23] Lord Morris was of the same view (501 and 502):

"*If magistrates are trying a case summarily they will not have completed their duty in regard to the case until they either (a) dismiss the case or (b) find the accused guilty and deal with him on that basis.* The finding of guilt may involve reaching a conclusion in regard to disputed or contested facts. It may involve proceeding on the basis of or 'accepting' a confession made in court by way of an unequivocal and unambiguous plea of guilty which so far as the court can tell was intentionally made with full appreciation of all that it involved. *But if there is a finding of guilt the court will only have advanced part of the way in the discharge of its duty.* There must be a separation in time between the one part of the duty and the other part. If the court has to consider what course to follow in regard to someone who is found to be guilty it will be relevant and generally necessary to have information which will include information as to previous convictions. It would be quite wrong for the court to have such information before the time when there is a finding of guilt. But after such time and before the court has disposed of the case by making whatever order it deems appropriate the court is still engaged upon its duty. Applying this reasoning to the present case it seems to me that it is wrong to say that, at the end of the hearing on May 30, the magistrates were functi officio. They were not. They still had an important part of their duty to perform. It was because they had such a duty that they remanded the appellant in custody for three weeks. … The entry made in the register as to what had taken place on May 30 (whether made impliedly or expressly by their authority) could have no other effect than that of recording the events of May 30. The entries then made have the effect of confirming that the magistrates had further duties to discharge and that they were not functi officio. When, therefore, on June 6, and June 20, the appellant made the request to withdraw his plea it was, in my view, open to the magistrates, if for good reasons they saw fit, to accede to the request.

The word 'conviction' may sometimes be used to denote merely a finding of guilt and sometimes to denote such a finding followed by an appropriate order. The language of section 14(3) of the Act of 1952 illustrates use in the former sense. A magistrates' court may in order to determine 'the most suitable method of dealing with the case' exercise its power to adjourn 'after convicting' the accused and before sentencing him or otherwise dealing with him. So 'the case'

> is merely adjourned. It is still before them. The magistrates are clearly not functi officio. They will have reached a stage in their task but I see no reason why that stage should be regarded as having been finally reached or why steps in reaching it could not for good and valid reasons be retraced" (emphasis mine).

[24] Lord Upjohn noted that in the High Court and at quarter sessions the court does not become functus officio upon a finding of guilt and it is only when sentence has been passed that the judgment of the court is complete. His Lordship was of the view that the same principle applied to a Court of Summary Jurisdiction and spoke of the meaning of the word "conviction" in the following passage (506):

> "The primary meaning of the word 'conviction' denotes the judicial determination of a case; it is a judgment which involves two matters, a finding of guilt or the acceptance of a plea of guilty followed by sentence. Until there is such a judicial determination the case is not concluded, the court is not functus officio and a plea of autrefois convict cannot be entertained. This has been the law from the earliest times: see *Hale's Pleas of the Crown* (1778), Vol 2, ch 32, p 251, and it is equally applicable in a court of summary jurisdiction (see *Rex v Harris* (1797) 7 Durn & E 238)."

[25] Later in his judgment, Lord Upjohn observed that the word "conviction" is also used in a secondary sense to identify a verdict of guilty or acceptance of a plea of guilty. His Lordship noted that in the legislation with which the Court was concerned, the word "conviction" was used in its primary sense and also in the secondary and narrower sense of a verdict.

[26] *S* has been consistently cited with approval. In *McNicholl v Tothill* (1988) 47 SASR 134, a bench of five Justices of the Supreme Court of South Australia overruled an earlier decision of that Court in the light of the

decision of the House of Lords in *S*. After reviewing the authorities and the history of the relevant legislation, Legoe J concluded that the same construction should be applied to the Justices Act 1921 (SA) provisions as was applied by *S* to the Magistrates' Courts Act 1952. Prior J observed (150):

> "The judgment of a Magistrates' Court is complete as soon as it is pronounced, but that does not occur in a case like this until conviction in the sense of a determination of guilt and disposition of the matter occurs. A finding of guilt alone does not make a magistrate functus officio. Any minute or memorandum made at the time of a plea of guilty is to be distinguished from that required by s 70 of the Justices Act 1921. Conviction in that section means a complete judgment; in this case, both the determination of guilt and the imposition of penalty … ".

[27] In *Putland v The Queen* (2004) 218 CLR 174 the High Court was concerned with the operation of s 68 of the Judiciary Act 1903 (Cth) in picking up the provisions of the Sentencing Act (NT) in connection with offences against Commonwealth legislation. In the course of their joint judgment, Gummow and Heydon JJ referred to the primary meaning of the word "conviction" in s 68(2) of the Judiciary Act [32]:

> "The expression 'the trial and conviction on indictment' has to be read in the light of the primary meaning of the word 'conviction'. This denotes the judicial determination of a case by a judgment involving two matters, a finding of guilt or acceptance of a plea of guilty followed by sentence [*S v Recorder of Manchester* [1971] AC 481 at 506]."

[28] The power conferred on the Magistrate was to "hear and determine the charge in a summary manner, and pass sentence on the person so charged".

As Lord Morris pointed out in *S*, a Magistrate conferred with such a power will not have completed the duty imposed upon the Magistrate until either the case has been dismissed or the accused has been found guilty and sentenced. It is a single function and it is not appropriate as a matter of statutory construction or general principle to sever the function into two sections concerned with conviction and sentence. The power to carry out the single function is not spent until sentence has been imposed.

[29] It follows from these reasons that, in my opinion, the Magistrate was not functus officio when the appellant applied to re-open the hearing for the purposes of calling further evidence relevant to the question of guilt. His Honour erred in declining to deal with the merits of the application. Notwithstanding that error however, as explained later in these reasons, in my view the application was doomed to fail and no miscarriage of justice has occurred.

Sequence of events/course of proceedings

[30] The accident occurred during the evening of Sunday 11 July 2004. The appellant's vehicle was travelling south on the Stuart Highway at Coolalinga and executed a right-hand turn into the median strip before exiting the median strip and crossing the highway in the face of northbound traffic. A collision occurred with the northbound vehicle causing that vehicle to leave the road and collide with a stationary vehicle containing 10 occupants.

[31] It was the prosecution case that the appellant was driving his vehicle. The appellant gave evidence that he was in the rear seat of his vehicle which was being driven by another unknown male person.

[32] The Magistrate accepted the evidence of eyewitnesses that immediately after the collision the appellant exited his vehicle from the driver's door or was seen walking away from the driver's side of the vehicle. None of the witnesses saw a second male person leave the vehicle. In addition, the Magistrate found that the appellant's evidence was quite "highly implausible". In my opinion, not only was that finding open to his Honour, it was an obviously correct finding.

[33] Notwithstanding the significant impact of the collision, immediately after the collision HM was seen to be asleep in the front passenger seat of the appellant's vehicle with the seat in a reclined position. When police subsequently attended, HM was still unconscious in the passenger's seat. The evidence established that his HM was unconscious by reason of the effects of alcohol.

[34] Police took a statement from HM. The statement is dated 12 July 2004 but it is unclear whether the statement was taken in the early hours of the morning or later in the day.

[35] The statement taken from HM did not assist the case for the appellant. It tended to assist the prosecution. The relevant portion of the statement was as follows:

> "On Sunday the 12th of July, 2004, I was drinking in the Palmerston area, at Jabiru camp near the Palmerston hospital. I had been drinking too much grog.
>
> In the afternoon, I can't remember exactly when, I got up and started to walk to Palmerston. After that, I was trying to walk to 15 mile camp. Along the way some fella picked me up in his car. I can't remember what sort of car it was, I was too drunk. I can't remember the driver very well, I was so drunk. I think he was tanned, skinny, he was acting full drunk. I don't know his name. He just pulled up next to me as I was walking to 15 mile camp.
>
> When this bloke pulled up next to me I asked him to take me back to Palmerston. He didn't say anything that I remember, he just started to drive off. I was too drunk, the next thing I know, there are fire engines and ambulances and there was some kind of accident. I don't know what happened."

[36] The prosecution provided counsel for the appellant with a copy of HM's statement dated 12 July 2004 and HM was listed as a prosecution witness. At trial, however, the prosecution did not call HM. At the conclusion of the prosecution evidence, counsel for the appellant did not raise with the Magistrate the failure of the prosecution to call HM. No request was made to adjourn the trial to enable the prosecution to call HM or to give the appellant the opportunity to locate HM and consider calling her to give evidence. After a short adjournment the appellant gave evidence. No other evidence was called by the appellant.

[37] The transcript records that after the evidence was completed on 6 October 2004, discussion occurred concerning the rule in *Jones v Dunkel* (1959) 101 CLR 298. No detail is recorded in the transcript, but it is common ground

that no request was made to adjourn the trial to enable HM to be located and called to give evidence.

[38] On 7 October 2004 the issue of HM's absence was again discussed in the context of a submission by counsel for the appellant that the Magistrate should draw an inference adverse to the prosecution on the basis of the rule in *Jones v Dunkel*. Counsel for the appellant submitted that the prosecution had a duty to produce all material witnesses and contended that HM "could have definitely shed some light on my client's story". In response, the prosecutor indicated that he had intended to call HM, but because she was an "itinerant long-grasser" the attempts to locate her had been unsuccessful. The prosecutor indicated he could call evidence in connection with attempts to serve a summons upon HM, but counsel for the appellant opposed the reopening for such a purpose. No evidence of attempts to locate or serve HM with a summons was given. Subsequently counsel for the appellant urged the Magistrate to draw an inference adverse to the prosecution by reason of the failure to call HM, but the Magistrate declined to do so.

[39] If nothing further had happened with respect to the version given by HM, while the appellant may have complained that the Magistrate erred in not drawing an inference adverse to the prosecution by reason of the failure to call HM, there would have been no suggestion that the trial was unfair or that a miscarriage of justice had occurred solely by reason of the failure of the prosecution to call HM. As circumstances stood at the conclusion of the hearing, on the material available to the prosecution and counsel for the

appellant, had HM been called her evidence would have been adverse to the case for the appellant. In those circumstances, it is not surprising that counsel for the appellant did not complain about the absence of HM because it was to the advantage of her client that HM was not called to give evidence. Counsel made a forensic decision to take advantage of the absence of HM.

[40] Notwithstanding that counsel made the obvious forensic choice with respect to the absence of HM, on the appeal counsel for the appellant submitted that a miscarriage of justice had occurred because the prosecutor had failed to comply with the duty of the prosecution to call all relevant witnesses. This submission was divorced from any consideration of a later statement given by HM. It was also divorced from the application of the relevant principles to the facts of the case. It amounted to a submission that regardless of the circumstances and consequences, if the prosecution fails to call a relevant witness that failure amounts to a breach of duty and, necessarily, a miscarriage of justice will occur.

[41] The submission is without substance. The principles governing the prosecution duty with respect to the calling of witnesses are not in doubt. But the content of the duty must be determined according to the individual circumstances of the case. If a witness is likely to be adverse to a defendant and a defendant consents or does not object to the absence of the witness, it cannot be said that the prosecution is in breach of its duty to call such a witness. Similarly, if a breach of duty occurs, the question whether a

miscarriage of justice has resulted can only be determined according to the issues at trial, the evidence that the absent witness would have given and the particular circumstances attending the failure of the prosecution to call the witness. The potential credibility of the evidence may also be relevant.

[42] The case under consideration is a good example of why a failure to call a relevant witness, in itself, might not amount to a breach of duty. As circumstances stood at the conclusion of the trial, it was to the advantage of the appellant that HM was not called to give evidence. Counsel for the appellant made a forensic decision to endeavour to take advantage of the absence of the witness. In these circumstances, it cannot realistically be contended that the prosecution was in breach of its duty or that the failure to call the witness, divorced from later events, necessarily gave rise to a miscarriage of justice.

[43] I return to the sequence of events. After submissions on 7 October 2004, the hearing was adjourned and did not resume until 26 November 2004. In the interim, police located HM at the home of the appellant. She told police that she met the appellant on the day of the accident and that she had subsequently visited the appellant occasionally. HM told the police that she regarded the appellant as a friend of hers. She said that she was with the appellant on 13 November 2004 at his home.

[44] On 14 November 2004 police took a second statement from HM. As to the circumstances of the accident, HM said:

> "Back in July, 2004, I was in an accident at Coolalinga. I was in the passenger seat at the time of the accident. Charlie [the appellant] was driving the car, he had just picked me up from Palmerston before the accident happened. When he picked me up, he said his name was Charlie.
>
> There were two single seats in the front of the car, I was in the passenger seat, Charlie was driving. There was no-one else in the car. I don't know how to drive. I was full drunk at the time, I don't remember much of the accident."

[45] The prosecution did not disclose to the appellant or the Court the existence of the second statement taken on 14 November 2004. On 26 November 2004 the Magistrate delivered his decision finding the appellant guilty.

[46] On 11 July 2005, almost eight months after the Magistrate delivered his decision, counsel for the appellant took a further statement from HM. Contrary to her previous two statements, HM asserted that the appellant was not driving at the time of the accident. In contrast to the statement taken by police on 12 July 2004 in which HM spoke of "some fella" picking her up in a car as she was trying to walk to 15 mile camp, in the statement of 11 July 2005 HM gave an account of movements before the collision. It is noteworthy that this account accords with the evidence given by the appellant. The relevant part of the statement is as follows:

> "On 11 July 2004 I was at the Palmerston Tavern drinking with some of my girlfriends. Charlie came there looking for a woman. They told me to go with him. So I did. That was the first time I met Charlie. I had never met him before.
>
> The other women knew him from Katherine and as Charlie was looking for a woman they told me to go with him. From the

> Palmerston Tavern Charlie and I caught the mini bus to his place. I remember he had a little block with a caravan on it.
>
> I stayed with Charlie at his place for about 6 hours that day. Charlie was cooking corn beef. I was drinking. He put the silverside to cook and went to sleep. Whilst he was sleeping I was drinking.
>
> From there we went to the Coolalinga Shops in Charlie's car. He was driving the car. From there another person drove the car to Howard Springs Tavern. I don't know who this other person was. I have never seen him before. I can't remember what he looked like. I do know that I was sitting in the front passenger seat and Charlie was sitting at the back. The other man was driving the car to Howard Springs Tavern. Charlie never drove the car to Howard Springs at any time.
>
> At the Howard Springs Tavern I continued to drink there. I remember drinking beer and playing the poker machine. I also know that I won $25.00 at the pokies that day. We were at the Howard Springs Tavern for about 1½ to 2 hours. Then we got into the car and I was very drunk. I remember getting into the front passenger seat. Charlie got into the back. The other fellow was driving the car.
>
> We did not stop anywhere before the accident. I did not know how the accident happened I was too drunk. After the accident the police put me in a paddy wagon and took me to the cells."

[47] On the appeal, the appellant sought to explain why the additional statement was not obtained until July 2005. In an affidavit of 25 August 2006 counsel for the appellant set out details of restrictive bail terms and hours of work following which the affidavit stated as follows:

> "8. I am told by the defendant and therefore believe that having been prohibited from driving a motor vehicle along with the strict bail conditions meant that he had limited resources especially time and conveyance at his disposal to go looking for [HM]. At all times relevant to this case the defendant did not have an address or other contact details for [HM]."

[48] No mention is made in the affidavit of HM being with the appellant at his home on 13 and 14 November 2004.

Credibility

[49] Regardless of the question whether the Magistrate was functus officio, the appellant's case on appeal faces an insurmountable difficulty. It is a difficulty that also stands in the way of the application to call additional evidence. It relates to the credibility, or lack of it, attending the proposed evidence.

[50] In the words of the evidence, HM is an "itinerant long-grasser". The fact that HM is such an itinerant does not, in itself, mean that her evidence is not capable of being credible. However, her circumstances are to be considered in conjunction with the evidence that she was so drunk that she slept through the collision and did not wake until police spoke to her. That evidence sits well with the first statement given by HM on 12 July 2004 that she could not remember the car or the driver because she was too drunk.

[51] In this context, and bearing in mind the contents of each of the statements, at best from the appellant's point of view the evidence of HM would lack any credibility whatsoever and would have been disregarded by the Magistrate. The clear implication from HM's statement of 12 July 2004 is that the appellant was driving the vehicle. On 14 November 2004 HM plainly told police that the appellant was driving and no-one else was in the car. A statement made nearly eight months later, and after HM had kept

company with the appellant at his home, reversing her previous statements and giving a detailed version of events that she was previously unable to recall, is totally lacking in any credibility whatsoever. At worst from the point of view of the appellant, there is a risk of a view being reached that the appellant has persuaded HM to give false evidence.

[52] If the Magistrate had considered the merits of the application to re-open, inevitably his Honour would have rejected it. The proposed evidence lacked even a semblance of credibility.

[53] No miscarriage of justice has occurred. The appeal is dismissed.
