

*Qadir v Department of Transport* [2015] NTSC 86

PARTIES: QADIR, Abdul  
v  
DEPARTMENT OF TRANSPORT

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING APPELLATE  
JURISDICTION

FILE NO: LA 13 of 2014 (21328982)

DELIVERED: 23 DECEMBER 2015

HEARING DATES: 18 SEPTEMBER 2015

JUDGMENT OF: KELLY J

APPEAL FROM: G SMITH SM

**CATCHWORDS:**

*Commercial Passenger (Road) Transport Act* – Taxi licences – Appeal by way of a hearing *de novo* – Magistrate made reference to the appellant’s criminal proceedings for the improper use of a carriage service in a menacing and harassing manner – Neither precis nor transcript of the criminal proceedings in evidence – Magistrate erred in referring to materials not in evidence – Material not relied on in reaching decision – No error of law

*Commercial Passenger (Road) Transport Act* – Taxi licences – Appeal by way of a hearing *de novo* – Inconsistencies in appellant’s evidence – Inconsistencies not put to appellant – No error of law

*Commercial Passenger (Road) Transport Act* – Taxi licences – Appeal by way of a hearing *de novo* – Magistrate made reference to the appellant’s criminal proceedings for drink driving – Neither precis nor transcript of the criminal proceedings in evidence – Unclear whether magistrate relied on material not in evidence – Error of law – Real possibility that consideration of material affected the decision - Appeal allowed

*Commercial Passenger (Road) Transport Act* – Taxi licences – Appeal by way of a hearing *de novo* – Fit and proper person – Magistrate took into account relevant considerations – No error of law

*Commercial Passenger (Road) Transport Act* ss 8, 9, 13, 18, 74, 75, 77  
*Local Court Act* s 19

*Browne v Dunn* (1893) 6 R 67; *Enterprise Goldmines NL v Mineral Horizons NL* (1988) 90 FLR 104, referred to

*Sobey v Commercial and Private Agents Board* [1979] 22 SASR 70;  
*Southern Cross Motors Pty Ltd v Australian Guarantee Corporation Ltd* [1980] VR 187; *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6, followed

## **REPRESENTATION:**

### *Counsel:*

Appellant:	M Crawley
Respondent:	L Nguyen

### *Solicitors:*

Appellant:	De Silva Hebron
Respondent:	Solicitor for the Northern Territory

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

*Qadir v Department of Transport* [2015] NTSC 86  
No. LA 13 of 2014 (21328982)

BETWEEN:

**ABDUL QADIR**  
Appellant

AND:

**DEPARTMENT OF TRANSPORT**  
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 23 December 2015)

**Background**

- [1] In 2004, the appellant, Mr Abdul Qadir, became an accredited operator of commercial passenger vehicles under s 9 of the *Commercial Passenger (Road) Transport Act* (“the Act”).<sup>1</sup> Pursuant to that accreditation, the appellant applied for and was granted a taxi licence issued under s 18 of the Act.<sup>2</sup> He had previously been issued with an identification card under

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<sup>1</sup> A person who proposes to operate a commercial passenger vehicle must be accredited under the Act [s 8].

<sup>2</sup> An accredited operator may apply for a licence under the Act [s 13(a)] and may operate a motor vehicle under the Act in accordance with the conditions specified in the accreditation [s 13(b)].

s 74(2) of the Act as an employee taxi driver. He continued to hold that identification card as an owner operator.

- [2] On 4 July 2013, the Director of Transport cancelled the appellant's accreditation and his taxi licence under s 75(2)(b) of the Act on the ground that the Director was satisfied that Mr Qadir was not a fit and proper person to be accredited to hold a taxi licence. The Director also cancelled the appellant's identification card.<sup>3</sup> The term "fit and proper person" is not defined, but there are guidelines which are used by the Director in making such assessments.
- [3] Mr Qadir appealed to the Local Court against the decision of the Director pursuant to s 77 of the Act. Such appeal is by way of hearing *de novo*.<sup>4</sup> Accordingly, the question before the Local Court was not whether the Director made the correct or preferable decision on the material before him, but what was the correct and preferable decision on the material before the magistrate, in the circumstances as they existed at the time the appeal was heard, and having regard to the relevant facts as they existed at that time.<sup>5</sup>
- [4] The appeal to the Local Court was heard in Darwin Magistrates Court on various dates between August 2013 and August 2014 and decided on 30

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<sup>3</sup> Section 74(2) requires the Director to be satisfied (inter alia) that a person is a fit and proper person to drive a commercial passenger vehicle of the relevant class (in this case a taxi) before issuing the person with an identification card.

<sup>4</sup> Section 77(8)

<sup>5</sup> *Southern Cross Motors Pty Ltd v Australian Guarantee Corporation Ltd* [1980] VR 187 at pp 190-191; *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6 at p 8

September 2014. The learned magistrate dismissed the appeal and Mr Qadir has appealed to this Court against that decision.

- [5] An appeal lies from a decision of the Local Court to this Court on a question of law only.<sup>6</sup>

### **The proceedings before the Local Court**

- [6] The matter was first heard on 20 August 2014. On that date, a great deal of material was placed before the learned magistrate about complaints that had been made about the appellant over the years alleging overcharging, rudeness, failure to produce records and other matters. On numerous occasions the appellant was fined by the Directorate following complaints and paid those fines.
- [7] In addition to these regulatory matters, on 20 August, the magistrate received evidence of misconduct of a far more serious nature. A female officer of the Department of Transport gave evidence that on 8 May 2013, at a time when she held the position of manager of the Commercial Vehicle Branch, she received a telephone call from a man who identified himself as Abdul Qadir wanting to discuss a recent court case concerning Taxi 430. She said:

I think he'd just come out of court and was appealing a decision of not providing records that we had been asking for as a condition of his licence to provide and he was a bit, I suppose, upset about the outcome of that and he stressed that to me. And then he tried to provide some excuses as to why it wasn't provided. He was away

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<sup>6</sup> *Local Court Act* s 19

and his son was supposed to be handing it in and then I told him I didn't believe that based on the evidence I had. Then he said, "My son had been sending it in but you haven't been getting it so he must have been sending it to the wrong address." Then I explained to him that I didn't believe that because it was 12 months' worth of data ... and we'd been writing to him every month to provide that data and explained that that data was outstanding. After that he became very abusive and threatening and he threatened to ... He said to me he was going to fuck me or get someone to fuck me and he was going to fix me up. Then he said, "I know where you live. Do you have a boyfriend because I'm going to come around and fuck you?" I tried then say, tried to get him to confirm, "Are you threatening rape? Is it you who is going to come around and rape me?" And I said it actually three times and he was being quite abusive. It was getting to the stage where I didn't feel the conversation should continue so I politely said to him, "I'm going to be terminating this conversation," and I hung up and that probably took a space of a few minutes.

[8] The officer said that she reported the call to her superior and to the police.

She gave evidence that police told her they had called on Mr Qadir and that she had elected not to ask for him to be charged.

[9] The appellant was self-represented in the proceeding before the Local Court and the magistrate assisted the appellant to cross examine the officer.

HIS HONOUR: Mr Qadir, do you have any questions that you wish to put to [the witness]?

MR A QADIR: No, I don't think so. I see firsthand here I've been in the office. I have nothing to do maybe because some people already against me and threatening us too.

HIS HONOUR: Well, I don't want a submission from you at this point. It's about whether you have any questions of this witness.

...

HIS HONOUR: She has given evidence that she says that a person saying he was Abdul Qadir made certain threats to her. Do you intend to put anything to her to suggest that that was untrue?

MR A QADIR: That's what I'm saying. Maybe somebody put my name and they did it but I never threatened.

HIS HONOUR: Well are you saying that you did not ring this person and make the threats that she describes to me?

MR A QADIR: No. In think someone used my name and my taxi number and say (inaudible) my world because I got ...

HIS HONOUR: Well, Mr Qadir, perhaps the question that you want to put to this witness might be in this respect: Madam, how do you know ... who the person was? Did you have any knowledge of Mr Qadir prior to that telephone conversation where you say these threats were made against you on 8 May?

WITNESS: Yes I did recognise the voice because Mr Qadir had rung me previously – abused me over the phone on various occasions.

HIS HONOUR: Prior to 8 May?

WITNESS: Yes. I was getting used to the voice.

HIS HONOUR: And how many times had you spoken to him previously do you say?

WITNESS: At least twice before.

HIS HONOUR: At least twice?

WITNESS: At least twice.

HIS HONOUR: Had you ever met him in person?

WITNESS: No.

HIS HONOUR: So, you'd never seen him before?

WITNESS: No, not Abdul Qadir, no.

HIS HONOUR: So, you're able to say to me that a person, you've given the description of a person saying that he was Abdul Qadir and he wanted to discuss the recent court case and that person you had spoken to twice before and you believed it to be Abdul Qadir as a result of these previous conversations?

WITNESS: Yes.

HIS HONOUR: Do you understand that, Mr Qadir? Now are there any other questions you wanted to put to this witness about ...

MR A QADIR: No, sir.

[10] In a brief re-examination, the witness confirmed that the caller had identified himself as Abdul Qadir, said that he had Taxi 430, and made mention of a court case she was aware of in which he had lost an appeal.

[11] Another male officer of the Department (RJ) gave evidence that on 7 June 2013 he received a phone call from someone who said, "I'm going to kill you," and hung up. The person did not identify himself. He reported the matter to his supervisors and to police and "that's currently going before the courts."

[12] Another Department officer gave evidence that on 7 June 2013 she answered a phone call from a man who identified himself as Abdul Qadir and asked to speak to one of the other Department officers. That officer was not available and she asked the man if that officer could call him back. The man said no, he would call back in half an hour. Five minutes later she received another call from the same number (which was displayed on the

phone) asking to speak to RJ. She recognised the voice as the same voice as the man who had called five minutes earlier.

[13] In cross examination, the appellant wanted to know the exact number but the witness did not know. She said it was a landline not a mobile number and the appellant said, "... somebody ringing from my place at home."

[14] A more senior officer gave this evidence: "[A]t the time [RJ] received the phone call I was standing in his proximity, very close to him. He waved me over and he said, 'That was Abdul. He's just threatened to kill me.' He was visibly shaken." In his evidence, RJ did not identify the caller as Mr Qadir, and the senior officer did not give the date of the incident.

[15] The matter went back before the court on 22 August at which time counsel for the respondent told the magistrate that the Department had no evidence that a letter requiring the appellant to show cause why his accreditation and licence should not be cancelled had been received by the appellant, although they could show it had been sent to his home address by registered post. Counsel proposed that the Local Court proceeding be adjourned to enable a fresh show cause letter to be served, for Mr Qadir to have an opportunity to respond, and for the Director to make a fresh determination. The matter was adjourned, by consent, on the understanding that, if the decision of the Director was favourable to Mr Qadir, there would be no need for the appeal to continue.

[16] The proceeding resumed before the learned magistrate on 11 June 2014. In the meantime Mr Qadir had pleaded guilty in the Court of Summary Jurisdiction to a charge of improper use of a carriage service in a menacing and harassing manner arising out of the threatening phone call to RJ. A second charge of making a threat to kill RJ was withdrawn.

[17] The court was advised of this and that the Director had again determined to cancel Mr Qadir's accreditation and taxi licence.

[18] The matter went back before the learned magistrate on 24 June 2014 for final submissions, but before inviting the parties to make submissions, his Honour said:

Now before I proceed down that track, [*ie hearing final submissions*] by accident as it turns out, I became aware that there is apparently another matter on foot for Mr Qadir in the criminal jurisdiction which has not yet been dealt with, which I'm not 100%, but I thought that I've [had] a look at it with the charges, it would be a matter which would be of significant relevance to the decision I have to make.

It appears to relate to some sort of threat. I don't know whether it's in relation to someone in the taxi directorate or in what context that is. But given that part of the case that's been put by the respondent, the registrar of motor vehicles, it seems to me that it would be rather foolish really to finalise the matter without taking that into account. If, for instance, and I'm not giving any indications at all, but if, for instance, I was to find in favour of Mr Qadir with this other matter still hanging over his head, I would have thought that the high likelihood is if he's then found guilty of a further count, then the whole thing could be started up all over again.

[19] The matter was therefore adjourned again until after the criminal matter was due to be heard. Before the court adjourned, his Honour drew Mr Qadir's

attention to the matters that had been raised against him in the respondent's case, in summary:

- (a) allegations that he had been dishonest as a taxi driver;
- (b) allegations that he had failed to provide required information to the taxi directorate; and
- (c) allegations that he had made threats to workers at the Motor Vehicle Registry when called upon to do things required of him to maintain his licence (and that he had been reluctant to comply with those requirements).

[20] His Honour strongly recommended to Mr Qadir that, before the next hearing date, he prepare an affidavit dealing with those matters.

[21] The matter was before the court again on 1 September 2014 for final submissions.

[22] On 1 September, his Honour was advised that the fresh charge of making threats had been dismissed as the prosecutor was not present to prosecute the matter. This charge did not relate to the threat to kill the male officer of the Department, or the threat to rape the female officer of the Department, but a third matter. It is not clear from the transcript whether this was the matter referred to earlier in the proceeding (namely a threat to assault another female officer of the Department which Mr Qadir had claimed in

one of his statements from the bar table to be a dispute between neighbours) or yet another allegation that Mr Qadir had made threats.

[23] On 1 September, the respondent relied on a further affidavit annexing numerous infringement notices that had been issued to Mr Qadir over the years. In final submissions, counsel for the respondent relied on those infringements and also on the fact that Mr Qadir had been found guilty of five offences between November 2010 and October 2013. Four of those related to Mr Qadir's conduct as a taxi driver (including a charge of driving a taxi with alcohol present in his blood) and the fifth related to a threat to kill a member of the Department.

[24] Mr Qadir did not make oral submissions, but handed up what were referred to as "written submissions", which may or may not have been the affidavit of Mr Qadir sworn on 18 August 2014. In any event, when it came time to hand down the decision, his Honour had that affidavit before him. In that affidavit, Mr Qadir set out what he described as "*ACCUSATIONS LIST – and DEFENCE EXPLANATIONS*" and deposed to the following matters.

(a) He dealt with a number of specific allegations made by the respondent in relation to what might loosely be regarded as "regulatory matters" – ie allegations of overcharging and other misconduct and of failure to produce records on request. In relation to some of these Mr Qadir deposed that he had no recollection of the matters; in relation to one he said, "Information not supplied by Department." In relation to another

(dealt with by the Court) he said, “This was an honest, unintentional mistake.” His answer to the bulk of the allegations was, “The fine was paid to avoid the bother of challenging it.”

(b) In relation to the criminal charges which the respondent had relied upon, Mr Qadir offered the following explanations (at paragraphs 28 and 31):

28. *3 October 2011 – Sentencing Act bond – charged on 27 October 2011 with ‘Drive Alcohol in blood – Commercial Passenger Vehicle’ and found guilty. A conviction was recorded and Mr Qadir was released immediately on giving security of \$1,000 to be of a good behaviour for 12 months.*

During the course of that night’s work, I was offered a drink by a customer which I believed was Coca Cola, I accepted and drank it. The drink must have contained some alcohol which at the time I did not detect.

31. *7 June 2013 – Allegations made that Mr Qadir contacted CPV Branch and made a direct threat to kill a staff member. Mr Qadir was served with instruments immediately suspending his accreditation, licence to drive a CPV and CPV ID Card for 4 weeks pending the outcome of a review of his fitness and properness. On 31 October 2013, Court convicted Mr Qadir of ‘use carriage service in menacing, harassing manner’ and issue Good Behaviour Bond with \$1,000 security plus \$40 victim levy. Charge of ‘threat to kill’ withdrawn.*

First, the Department’s statement is incorrect. It might be interpreted as a deliberate attempt to disparage me. Here is the wording of the charge as to Offence Description: “Use carriage service to harass”.

Second, I have proof that on 7 June I was working, driving my taxi and therefore was not at my home and able to make a phone call from the land-line phone there during the ‘working’ hours of Departmental staff. At the Court hearing, my lawyer

asked me to plead guilty. I was prepared to plead guilty to the fact that it was the home phone from which the call was made. My plea was not and could not truthfully have been “be guilty of having made a harassing call”.

[25] His Honour handed down his decision on 30 September 2014 and the paragraphs of Mr Qadir’s affidavit of 18 August 2014 (quoted above) assumed critical importance in that decision. His Honour’s orders were that:

- (a) the appellant’s license to drive a commercial passenger vehicle under s 10(2) of the *Motor Vehicles Act* be cancelled;
- (b) the appellant’s licence to operate a taxi, number 2825 issued to Abdul Qadir pursuant to s 18 of the Act, be cancelled;
- (c) the appellant’s accreditation no. 3008 under Part 3 of the Act be cancelled;
- (d) the appellant’s identity card no. 9282 issued under s 74(2) of the Act be cancelled, and
- (e) the parties bear their own costs.

[26] In his reasons for decision, the magistrate went through the various allegations that had been made against Mr Qadir in relation to overcharging and other matters and made various comments in relation to the individual complaints to the effect that this was “a minor matter” or that he “could not take too much from that”. His Honour did make a comment that there appeared to be a “pattern of conduct” in which Mr Qadir paid fines levied as

a result of complaints of overcharging and other matters and claimed that he did so “to save the bother of challenging it”. However, it is not clear to what extent these complaints and this “pattern of conduct” influenced the decision ultimately reached.

[27] There were a number of matters which the magistrate found to be of importance in reaching his decision.

[28] First, his Honour referred to the fact that “on 16 October 2010, Mr Qadir was picked up by the police, tested and found to be in excess of the alcohol limit for driving for anyone, in particular for a taxi driver”. Despite the apparent discrepancy in dates, that can only be a reference to the matter deposed to in paragraph 28 of Mr Qadir’s affidavit (quoted above). His Honour referred to that as “the first matter of some significance”.

[29] His Honour then referred to other allegations which were made by the respondent, including an allegation that Mr Qadir had threatened to assault an officer of the Department on an occasion other than the two in relation to which detailed evidence had been given. His Honour expressed understandable frustration at the fact that no evidence had been provided in relation to these allegations and, in the absence of such evidence, properly stated that he was not prepared to take those allegations into account.

[30] Next his Honour referred to the evidence given by the officer of the Department about threats to rape her, made by a man she believed to be Mr Qadir. In relation to that evidence his Honour said:

But matters go from bad to worse when there's an allegation on 8 May 2013 and I've heard evidence from the lady who was the person who said that she received the threats that are the subject of those allegations. They were allegations which involved some quite disturbing threats made [to] her and criminal charges were laid in relation to those threats.<sup>7</sup>

That was the incident which seems to have galvanised the review – or the directorate to conduct a full review of Mr Qadir's record and his fitness to be a taxi driver and an accredited operator. ...

[31] His Honour commented: “In relation to the allegations of 8 May, Mr Qadir contended that it wasn't him” but made no finding of fact on the question of whether Mr Qadir had made that threatening telephone call.

[32] His Honour then moved on to the allegation that Mr Qadir had threatened to kill another officer of the Department. He said:

... Then, within the context of that [*ie the threats to the female officer of the Department in May 2013*], on 7 June 2013, a further allegation is made of Mr Qadir making threats. Once again, I heard some evidence of that in the first leg of these proceedings. ... On 7 June he was rather less forthright in his denials, but I can only interpret that, at that stage he was not, at the very least, prepared to admit that he was the maker of the threats.

In relation to that matter, most importantly, subsequent to the matter which was before me, the aftermath of those threats of 7 June and before this matter came back on, Mr Qadir entered a plea of guilty which came before me in, I think, October of 2013, not to the charge of making a threat to kill, but to the charge of using a carriage service, namely a telephone device, in a menacing and harassing manner.

The plea was entered before me with facts which outlined that the language used was words which threat[ened] to kill. They were admitted facts. The plea was entered and I was provided with

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<sup>7</sup> His Honour appears to be mistaken about that. The evidence of the officer was that although police spoke to Mr Qadir about the matter, at her request no charges were laid.

background of Mr Qadir and in that matter dealt with him by way of a 'with conviction' bond, with \$1,000 security and \$40 victim levy.

While it's true that the charge of threat to kill was withdrawn, the charge of using a carriage service in a menacing and harassing manner, carries a maximum penalty of three years, [and] is not a minor matter. Subsequent to that, Mr Qadir has, in his affidavit, contended – made something of the fact that the department's consideration of the matter of a threat to kill was wrong. At the time it was initially considered, it remained a threat to kill charge.

While the department would be wrong if it ever said that he was convicted of a threat to kill, it is fair to say that the department's aware that he has pleaded guilty to using the telephone device in a menacing and harassing manner with facts that involved making a threat to kill one of its staff members.

So the contention in the affidavit that I might interpret any statements by the department to that extent as "a deliberate attempt to disparage me" (in the words [of] Mr Qadir), I reject.

More concerning to me is this: according to Mr Qadir's affidavit, he now subsequently says that he has proof that on 7 June he was working, driving his taxi, and therefore was not at home and able to make a phone call from the landline phone during working hours of department staff. None of this proof was put before this court and was not put before any other court. He goes on to effectively blame his lawyer for the making of the plea. He says, "I was prepared to plead guilty for the fact that it was the home phone from which the call was made. My plea was not and could not truthfully have been guilty of having made an harassing call."

I completely reject what Mr Qadir says there. It is patently obvious that Mr Qadir, with legal advice, confronted by the fact that the telephone call had been made from his home phone made a determination to plead guilty.

...

Of course there is a possibility that somebody else made a telephone call from his home phone number ... threatening a staff member of the taxi directorate. Mr Qadir has never come up with anything prior

to this to contend that that occurred or who it might be that did that. I note that in the precis in question, reference was made to the fact that Mr Qadir and other members of his family are taxi drivers. It is only a possibility that someone else in his family who is also a taxi driver, also made the call. I'm not going to make any findings in respect of that. But unless and until some serious acceptance of what occurred is made by Mr Qadir, either by himself or someone closely related to him, [it] seems to me that that is a very serious matter impacting on whether Mr Qadir is a fit and proper person to be a taxi driver.

[33] His Honour then referred back to the matter he had earlier identified as “the first matter of some significance” – drink driving on 16 October 2010. In relation to that, his Honour said:

That contention that this plea of guilty [*to the charge of using a telephone device in a menacing and harassing manner*] was not truthfully entered is made more concerning because in the matter that I would not otherwise have thought was any longer a matter which concerned me about whether Mr Qadir was a fit and proper person: that being the incident that goes all the way back to 16 October 2010 where he was picked up for drink driving and which was dealt with by the court, ultimately in October of 2011.

I've had regard to that matter only to this extent: the precis reveals that Mr Qadir was driving the passengers at the time and had a reading of .06. At the time, according to the precis, he told the police it was impossible because he was a Muslim and he didn't drink. According to his affidavit, he now says, “during the course of that night's work, I was offered a drink by a customer which I believed was Coca-cola. I accepted and drank it. The drink must have contained some alcohol which at the time I did not detect.”

This is a contention I completely reject. Mr Qadir provided the court some time ago with a significant number of references. One of the most important of those references was [from] his psychologist, Mr Millikan. Mr Millikan has been someone who has assisted him as best he could. He has been his psychologist. He made specific reference in his affidavit to Mr Qadir having had a problem with alcohol and that he had had “incidences of unwise alcohol use”. I have no doubt that Mr Qadir was drinking on that night when he drove that taxi and that he was doing so of his own accord.

[34] His Honour then drew the following conclusion:

These later contentions that someone – effectively some passenger – gave him a Coca-cola with alcohol in it which arises now in the affidavit of 18 August, causes me, on top of what is in the affidavit concerning his plea of guilty to the threat – or the improper use of a carriage service in a menacing and harassing manner, cause me very considerable concern as to Mr Qadir’s fitness and properness to be a taxi driver. It demonstrates to me a propensity to be dishonest about significant matters in a signed affidavit to the court. In that circumstance, it builds upon a sense that Mr Qadir has, rather than assist the taxi directorate when it needs to make enquiries about complaints against him, does in fact seek to avoid them. It’s not simply a matter that he has made a determination that it’s cheaper to pay the fine than to respond to the taxi directorate.

In the totality of these matters, it seems to me that the community requires its taxi drivers to be people who are monitored by the taxi directorate and who are prepared to assist the taxi directorate in making sure that they are fit and proper persons; that when there are complaints made, that they do the things they are expected to do and assist the taxi directorate to follow up those complaints.

... We need to be confident that if questions need to be asked, they are prepared to honestly respond to inquiries made by the taxi directorate.

[35] Although the magistrate had explicitly stated that he was not making a finding as to whether it was Mr Qadir or a member of his family who had made the threatening phone call on 7 June 2013, his Honour went on to say, in relation to that incident:

The plea of guilty that was entered by Mr Qadir in relation to the incident of 7 June related to a serious incident. It is true to say that it did not relate directly to conduct between a driver or taxi operator and a member of the public. But I do take the view that if a person is prepared to resort to that sort of conduct in relation to people he has to deal with on a professional basis, there is a risk that the person might do the same under pressure, in relation to those in his cabs.

Arguably, it is sufficient itself that the threats were made to the person in the directorate; they being the people who are charged with the responsibility of making sure that the people who work as taxi drivers are fit and proper persons for that job. They can only do that job if they are able to do so in a sensible working environment where taxi drivers respond appropriately.

[36] It seems from those remarks that his Honour did, impliedly, make a finding that Mr Qadir made the phone call in question. He went on:

... I completely accept the plea of guilty has been properly entered by Mr Qadir in relation to the threat, particularly confronted with the evidence that the phone call was made from his home phone.

[37] The ultimate conclusion reached by his Honour was as follows:

In those circumstances [*ie that the plea was “properly entered”*], one might have been prepared to consider him a fit and proper person if he had have acknowledged that and then taken some steps to do things that would give this court [and], prior to me the taxi directorate, confidence that that was a one-off and it wouldn't be repeated. ... That hasn't occurred. What's occurred is simply a denial which together with the denial made in relation to the earlier exceed .05 with a reading of .06, causes me to significantly be very concerned about Mr Qadir's preparedness to tell the truth. Having regard to all of those matters, I'm not prepared to take a different tack to that which was taken some time ago by the taxi directorate.

[38] The following matters appear from those portions of the reasons as noted above.

- (a) His Honour did not make a finding of fact about whether Mr Qadir had made the serious threats to a female officer of the Department about which evidence was given.

- (b) His Honour gave little or no weight to that evidence in reaching his decision.
- (c) It is not clear whether his Honour was satisfied that Mr Qadir had threatened to kill a male officer of the Department.
- (d) His Honour was satisfied that Mr Qadir had lied in his affidavit in support of his appeal sworn on 18 August 2014 about at least two matters:
  - (i) that he had not been voluntarily drinking at the time the subject of the drink driving charge on 16 October 2010,<sup>8</sup> and
  - (ii) that he had not made a considered decision to plead guilty to the charge of improper use of a carriage service in a menacing and harassing manner.
- (e) It is not clear whether his Honour was satisfied that Mr Qadir had lied in his affidavit about not making the phone call threatening to kill a male officer of the Department.
- (f) His Honour was satisfied that Mr Qadir had demonstrated “a propensity to be dishonest about significant matters in a signed affidavit to the court”.

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<sup>8</sup> Referred to in Mr Qadir’s affidavit as having occurred on 27 October 2011.

- (g) It is not clear whether his Honour was satisfied that Mr Qadir had lied when he said he paid various fines because he believed it was cheaper to pay the fine than respond to the taxi directorate.
- (h) It is not clear whether his Honour was satisfied that Mr Qadir had displayed a pattern of behaviour of failing to co-operate with the taxi directorate or of seeking to avoid dealing with complaints against him.<sup>9</sup>
- (i) His Honour did not make any finding of fact as to whether Mr Qadir had engaged in “an extensive pattern of infringements as regards regulatory matters”, including overcharging, as asserted in evidence by the Director.
- (j) It appears that the most significant factor influencing his Honour to decide that Mr Qadir was not a fit and proper person to continue to be accredited and to hold a taxi licence was his dishonesty in the affidavit of 18 August 2014.

[39] The appellant submits that, in relation to the charge of improper use of a carriage service in a menacing and harassing manner, his Honour took into account matters that were not in evidence before him in this case – namely the precis of the agreed facts on the basis of which the appellant pleaded guilty to the charge of using a telephone device, in a menacing and harassing manner, and his Honour’s personal knowledge of the plea being

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<sup>9</sup> It may be that his Honour was simply unable to make such a finding. His Honour was not assisted by having before him a morass of material in hearsay form about numerous complaints having been made against Mr Qadir, with little or no evidence as to the facts behind the various complaints, or whether the complaints had been established.

entered. This, it is contended, is an error of law. Further, it is contended that his Honour did not give notice to the parties that he intended taking this into account, so the appellant did not have the opportunity to call rebutting evidence or to make submissions about the matter.

[40] The basis of this submission is that his Honour could only have formed the view that Mr Qadir had been dishonest in the affidavit of 18 August 2014 by reference to the precis which was not in evidence and his Honour's own recollections of having dealt with the matter. I do not think that his contention is correct.

[41] It is true that his Honour referred to the precis and to his own recollections, and it is true that this was not permissible. His Honour ought to have informed the parties of his knowledge of the disposition of the criminal charge, and it would have been in order to ask whether either party wished to tender the precis or transcript: to take those matters into account without that material being in evidence would amount to an error of law. However, that is not determinative of the matter.

[42] The question is whether the magistrate actually took those matters into account in reaching his conclusion. In my view his Honour did not. The analysis set out in [32] and the conclusions set out in [35] to [37] above do not depend upon any information in the precis that is not contained in the evidence that was before his Honour, in particular in Mr Qadir's affidavit of

18 August 2014. In paragraph 31 of that affidavit, Mr Qadir sets out the substance of the respondent's allegation:

- (a) that on 31 October 2013, the Court convicted Mr Qadir of 'use carriage service in menacing, harassing manner' and gave him a good behaviour bond with \$1,000 security plus \$40 victim levy;
- (b) that this was in relation to allegations that on 7 June 2013, Mr Qadir had contacted the CPV Branch and made a direct threat to kill a staff member; and
- (c) that he had originally been charged with "threat to kill" but that charge had been withdrawn.

[43] On top of that, his Honour had heard evidence from a number of other witnesses about the substance of the telephone conversation and the date on which it had been made. His Honour did not need to resort to the precis to tie these pieces of evidence together.

[44] Mr Qadir's affidavit also contained all of the other information needed for his Honour to draw the conclusions he did:

- (a) that the relevant telephone call had been made from Mr Qadir's home telephone number; and
- (b) that he had pleaded guilty to the charge.

[45] In light of this evidence, one can readily understand why his Honour reached the conclusion that Mr Qadir's plea of guilty could not be "blamed" on his lawyer, but represented a deliberate decision to plead guilty in light of the known fact that the threatening phone call in question was made from Mr Qadir's home telephone. Although it is not clear whether his Honour made a finding of fact that Mr Qadir did make the phone call in question, it would not be surprising if such a finding had been made. Mr Qadir's "explanation" that he had "proof" that he was working that day (which was not provided) and could not have made the call (which does not, in any event, follow) was inherently improbable.

[46] I therefore conclude that although his Honour erred in referring to the precis in his reasons for decision, his Honour did not make the error complained of. His Honour did not base that part of the decision on material which was not properly before the court.

[47] The other complaint made by the appellant concerns the magistrate's reference to the precis of the charge of drink driving on 16 October 2010. His Honour based his determination that paragraph 28 of Mr Qadir's affidavit was untrue by reference to material contained in the precis of that charge – namely that Mr Qadir had told police that he was a Muslim and did not drink. His Honour considered that to be inconsistent with the evidence of the psychologist, Mr Milliken, that Mr Qadir had a drinking problem. Counsel for the appellant complained that these "apparent inconsistencies"

were never put to Mr Qadir so as to enable him to answer them or to call Mr Milliken to explain.

[48] Dealing with the second point first, this is not a *Browne v Dunn*<sup>10</sup> situation. Both Mr Milliken's affidavit and Mr Qadir's affidavit formed part of Mr Qadir's case and it seems to me that his Honour was entitled to take into account what he saw as inconsistencies between the two in forming a view of Mr Qadir's credit.

[49] However, his Honour was not entitled to have regard to what was in the precis of the drink driving charge. It was not in evidence in the case before him. His Honour did have some regard to that material and to do so amounted to an error of law. It is unclear from the reasons for decision whether his Honour relied on the material in that precis in reaching the conclusion that he "had no doubt that Mr Qadir was drinking on that night when he drove that taxi and that he was doing so of his own accord". It is possible that the contrast between what Mr Qadir told police in relation to that charge and what Mr Milliken said about Mr Qadir's drinking was a significant factor leading to his Honour's conclusion. On the other hand, his Honour may have formed that view by simply comparing the affidavit of Mr Milliken with the (implausible) denial in Mr Qadir's affidavit of 18 August. His Honour's reasons do not clearly explain how he reached this conclusion.

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<sup>10</sup> (1893) 6 R 67

[50] The question for this Court is whether the error of law which has been identified affected the decision made by his Honour, or rather whether there was a real possibility<sup>11</sup> that the error of law affected his Honour's decision. It seems to me that there was ample evidence on which his Honour could have been satisfied that, notwithstanding Mr Qadir's denials from the bar table, Mr Qadir had made threats to rape a female officer of the Department and to kill a male officer of the Department. Had his Honour been so satisfied, those matters alone, it seems to me, would have amply justified a determination that Mr Qadir was not a fit and proper person to be an accredited operator or to hold a taxi licence. Had his Honour been satisfied, in addition, that Mr Qadir had engaged in a pattern of behaviour of failing to co-operate with the taxi directorate and/or of seeking to avoid dealing with complaints against him, such a determination would have been almost inevitable. The difficulty is that his Honour did not make explicit findings of fact about these matters, and it is not appropriate for this Court to make such findings in an appeal on a question of law.

[51] What is clear from the reasons for decision is that the most significant factor identified by his Honour in concluding that the appellant was not a fit and proper person to continue to be accredited and to hold a taxi licence was Mr Qadir's dishonesty in the affidavit of 18 August 2014. I am unable to be satisfied that his Honour was not influenced by the precis of the drink driving charge in reaching this conclusion, and in the absence of findings of

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<sup>11</sup> See *Development Consent Authority v Phelps* (2010) 27 NTLR 174; [2010] NTCA 3 at [23].

fact and an explanation by his Honour of how (if at all) the other relevant matters referred to in [50] above affected his Honour's determination, I am forced to conclude that there was a real possibility that the error of law made by his Honour in referring to material not in evidence before him did affect the ultimate decision. I have therefore, with some reluctance, come to the conclusion that this appeal must be allowed on this ground.

[52] The appellant's final contention was that neither of the matters relied upon by the magistrate are relevant to whether or not Mr Qadir was a fit and proper person for the purposes of s 75 of the Act. I do not accept this submission. A decision about whether an applicant is a "fit and proper person" for a particular role or purpose requires a consideration of the qualities necessary to fulfil the role or purpose. It would also generally require some consideration of the person's moral integrity and rectitude of character as well as the applicant's knowledge, ability and honesty as it relates to the role in question.<sup>12</sup> The magistrate's finding that Mr Qadir had demonstrated "a propensity to be dishonest about significant matters in a signed affidavit to the court" is certainly relevant to such an assessment. Moreover, his Honour was satisfied that Mr Qadir had been drinking when he was picked up for drink driving while driving a taxi. That, too is relevant to an assessment of whether Mr Qadir is a fit and proper person to hold a taxi licence and accreditation under the Act. It is unclear whether his Honour was satisfied that Mr Qadir had made the telephone call threatening

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<sup>12</sup> *Sobey v Commercial and Private Agents Board* [1979] 22 SASR 70

to kill an officer of the Department: if he was so satisfied, that, too was relevant to the assessment his Honour had to make.

[53] On the hearing of the appeal, counsel for the respondent sought to tender “fresh evidence” – a “Certificate of Proceedings” showing that on 25 March 2015 (ie after the learned magistrate’s decision) Mr Qadir was convicted of a further offence of using a carriage service in a menacing or harassing manner, the victim being, once again, an officer of the Department. Ms Nguyen relied on a decision of this Court<sup>13</sup> to the effect that (in the appropriate circumstances) fresh evidence may be adduced in an appeal ‘*strictu sensu*’. However, an appeal lies to this Court from a decision of the Local Court on a question of law only<sup>14</sup> and on such an appeal, it is very difficult to see how it could ever be appropriate to adduce evidence. I therefore decline to admit the ‘fresh evidence’.

[54] Orders:

- (a) The appeal is allowed.
- (b) The matter is remitted to the Local Court for determination according to law.

[55] This does not necessarily mean that the whole appeal should be re-heard from scratch. It will be a matter for the learned magistrate to give directions

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<sup>13</sup> *Enterprise Goldmines NL v Mineral Horizons NL* (1988) 90 FLR 104

<sup>14</sup> *Local Court Act* s 19

as to the future conduct of the matter, including whether additional evidence may be adduced, and what further submissions (if any) will be received.