Parker v Brennan [2006] NTSC 90

PARTIES:	DARREN JAMES PARKER
	v
	MICHAEL DAVID BRENNAN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA11/2006 (20420922)
DELIVERED:	23 November 2006
HEARING DATES:	8 August 2006
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Appellant:	J Lewis
Respondent:	A Elliott

Solicitors:

Appellant:	Brian Johns
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	tho200615
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Parker v Brennan [2006] NTSC 90
No. JA11/2006 (20420922)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

DARREN JAMES PARKER
Appellant

AND:

MICHAEL DAVID BRENNAN
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 23 November 2006)

[1] This is an appeal from a finding of guilt and a conviction imposed by Mr Wallace SM on 7 March 2006.

[2] The appellant had entered a plea of not guilty to a charge that:

> "Between the 1st August and 7th September 2004 did steal a forklift valued at $9,000 the property of National Fleet Network contrary to Section 210 of the Criminal Code."

[3] The matter proceeded to hearing. The Crown called a number of witnesses to give evidence. The appellant, Darren James Parker, gave evidence in his own defence. At the conclusion of the hearing, the learned stipendiary magistrate analysed the law relevant to the offence of stealing and made findings of fact on the evidence presented to him.

[4] The appellant filed a notice of appeal stating the following grounds:

> "1. The learned stipendiary magistrate was in error in ruling that the prosecution case was able to be characterised as having a '*strong version* [transcript of Reasons for Judgment 10.9] and able to be characterised as having a '*weak version which depends on the definition of stealing in the Criminal Code and the definition of depriving in section 209*' [*page 11.1*]
>
> 2. The learned stipendiary magistrate was in error, having regard to the opening of this particular prosecution case, in ruling that the case was able to be decided with reference to the definition of '*stealing*' in the Criminal Code Act which defines the word '*depriving*' as to including '*borrowing*' in the context of the present case.
>
> 3. The learned stipendiary magistrate having heard the opening address of the prosecutor was in error in having proceeded to treat the accused Parker as having stolen the forklift by lending it on two occasions without first obtaining the permission and authority of his employer to do so, a case which was neither contemplated nor opened on as being the gravamen of the prosecution case.
>
> 4. The learned stipendiary magistrate failed to direct himself that the obligation of the prosecutor in opening the prosecution case was not merely to outline the facts which the prosecution proposed to establish in evidence but also to establish in conceptual terms the nature of the prosecution case, to assist the Court, the accused and Counsel so that the accused understood from the beginning just what the prosecution intended to establish by the evidence and so that the defendant was given an opportunity at the earliest time in the clearest terms to answer the charge or charges.

5. The learned stipendiary magistrate, having found that: *[10.9] "I am not persuaded beyond a reasonable doubt that that was the sequence at all and I am not therefore persuaded of the strong version of the prosecution case"* was in error in not discharging the accused and acknowledging that if the prosecution had thought to bring a further case of 'stealing by lending' it was open to the prosecution to do so subject to any limitation of time."

[5] The defendant was employed with National Fleet Network Pty Ltd on 24 November 2000. Mr Shane Walters, the person referred to by the Crown Prosecutor as the defendant's co-accused, was employed with the same company in August 2003. The business premises were at 11/66 Coonawarra Road, Winnellie. Both the defendant and Mr Walters were employed as mechanical fitters. Their duties were operating and repairing heavy machinery, including forklifts.

[6] In 2004 both men were advised that National Fleet Network was downsizing. The two men discussed opening their own forklift maintenance business to be called Gold Band Forklifts. It is Mr Walter's evidence that they discussed stealing a forklift owned by their employer. Mr Walters gave evidence they jokingly spoke about stealing one or borrowing one for a while - "swap them around". He stated they were not interested in taking parts, they were just interested in stealing the forklift.

[7] On 26 August 2004, the appropriate application was lodged and the business name Gold Band Forklifts was formally registered in both the name of the defendant and the co-accused Shane Walters.

[8] The Crown allegation is that about mid-August 2004, the defendant, without the consent or knowledge of his employer National Fleet Network Pty Ltd, leased a yellow Heister forklift unit number ss594 owned by National Fleet Network Pty Ltd to a friend. The friend worked for a company known as HLH. The defendant was at the same time repairing the said friend's own forklift.

[9] The Crown allege that soon afterward, Mr Walters agreed to loan the same forklift to a friend of his known as Steve who worked for a company known as Spits and Polish Detailers. The business premises of Spits and Polish Detailers was across the road from HLH. The forklift was delivered by Mr Walters who drove it to the business premises of Spits and Polish Detailers. This loan was also without the knowledge or consent of the employer at National Fleet Network Pty Ltd. The prosecution allege that the defendant was aware of this agreement to loan the forklift.

[10] Mr Walters gave evidence that two days later he received a telephone call from Steve at Spits and Polish asking to return the forklift. Mr Walters gave evidence he told Steve to have the forklift delivered to 1706 Marjorie Street, Pinelands, the premises of M&J Welding. Mr Walters' evidence was that he telephoned Darren Parker and said this was a good opportunity to grab the forklift. It is his evidence that Mr Parker was in agreement. Mr Walters gave further evidence that this particular forklift was the best of the lot because they had done a couple of thousand dollars worth of work on it.

[11] It is Mr Walters' evidence that he and the defendant entered into an agreement with the proprietor of M&J Welding, Mr Michael Dunne, to service the machine at no extra cost in exchange for the use of his shed for their business. Mr Dunne was not aware that the forklift delivered to the premises had been stolen.

[12] Statements by Robyn Ann Martin who was the regional administrator of National Fleet Network Pty Ltd were tendered as Exhibits P8 and P9. Ms Martin discovered the forklift was missing on 18 August 2004 whilst undergoing a check of the equipment in the yard. A report about the missing unit was made to the regional manager in Adelaide.

[13] Ms Martin twice asked the defendant and the co-accused if they knew of the whereabouts of the forklift. It is Ms Martin's evidence that on the second occasion, Mr Parker had said "It'll turn up. Darwin is a small place".

[14] Mr Nigel Bounds, the regional manager of National Fleet Network Pty Ltd flew to Darwin. He attended the premises of M&J Welding having received certain information. The forklift could not be located. Following the departure of Mr Bounds, Mr Dunne found the forklift in a back shed on his 5 acre property.

[15] Mr Dunne telephone Mr Parker who was with Mr Walters at the time of the receipt of the call and demanded the forklift be removed from his premises immediately.

[16] Mr Dunne gave evidence that Mr Walters arrived at about 6.00pm on 8 September to pick up the forklift. Mr Dunne gave evidence that as Mr Walters was driving out the gate with the forklift, Mr Dunne telephoned Mr Bounds to advise him a forklift was being driven out of his premises which he assumed was the forklift Mr Bounds was searching for.

[17] Mr Bounds gave evidence that at 8.00am the following morning he returned to M&J Welding. Mr Dunne pointed in the direction of where the forklift was, which was down the road on a dirt track. Mr Bounds gave evidence that he, in company with David Heintsey, drove along the dirt track and discovered the missing forklift. All of the National Fleet decors on the side of the truck had been removed. Mr Bounds contacted police. Mr Bounds gave further evidence that shortly afterwards, Mr Parker turned up and then the police arrived.

[18] Mr Parker attended Darwin Police Station and was interviewed by Constable Maccioni. In his record of interview transcript of which was Exhibit 13, Mr Parker made certain admissions including the following (pages 3-4):

> "MACCIONI: Alright … basically Darren .. I'd like to hear your side of the story in regards to the yellow forklift that went missing on the eighteenth of August, you care to tell me?
>
> PARKER: Oh – it started off as a job … for HLH I had to get these ***jobs out before I went on leave, I had some work backed up & his was one of them, when it went out it failed, so I offered to fix it for him in my own time, which I did in my own time &*** I loaned him one of their machines so I'm in breach of contract there with them and that would constitute unlawful use of a machine I suppose but as far as it being moved or ***taken I don't know, I was having a baby at that time. I, you know, I*** didn't

move it, I didn't have anything to do with moving the machine, I don't know where it went or what happened to it so …. I'd taken leave and after it got moved well, it got moved but then I became aware of it ***as well*** so I can accept that basically I'm an accessory to it, I became aware of it and I did nothing about it, so you're ***gonna have to*** include me ***in this thing.***'

and at page 21 interviewed by Constable Paul Breen:

"BREEN: Alright. Did you have permission at any stage to take ***either the Eurolifter or the*** forklift?

PARKER: Nup.

BREEN: Did anyone make you take ***either of these items?***

PARKER: Nup – ***no one can make you do anything can they.***

BREEN: Anyone threaten you at any time?

PARKER: Nup.

BREEN: Nup – I think that's all the questions I've got.

MACCIONI: Alright – Darren have you got …. anything else to say in regards to these matters?

PARKER: Um – no, it was a bad mistake ***apologise so.***

MACCIONI: Sorry for your actions?

PARKER: Yeah, sorry for me actions ***being the misuse of a company asset and going against their code of conduct.***

MACCIONI: Okay.

PARKER: I apologise and I'm … willing to ***sort it out***."

[19] In his evidence to the Court, Mr Parker stated that it was only after the forklift had been taken to the firm Spit and Polish Detailers, he learned it

was there. Mr Parker gave evidence he did not discuss with Shane Walters the machine being taken to Spit and Polish Detailers. He agreed he did approve of the lending of the machine to the company referred to as HLH who had their business premises adjacent to Spit and Polish. Mr Parker also gave evidence that after he learned the machine had been loaned to Spit and Polish he did not disapprove of that lending. He stated he thought it would be a small job that would be taken care of quickly.

[20] Mr Parker's evidence was that on Monday or Tuesday in the first week of September he had a conversation with Mr Walters who told him that forklift 594 was going to stay at M&J Welding and would not be returned to their employers. Mr Parker stated he told Mr Walters the forklift unit should be returned and had explained to Mr Walters that their employers had lost nearly $4m worth of assets. He stated he said this to reinforce his statement that the forklift should be returned because their employer will be out to get somebody for this. Mr Parker gave evidence the following day he saw the forklift at the premises of Mick Dunne and again said to Shane Walters that the machine should be returned. The following day Mr Dunne telephoned and spoke to Mr Walters. Mr Walters left and stated he was going to "Mick's place". The following day Mr Parker received a telephone call to say the forklift had been found in bushland behind Pinelands. Mr Parker left to travel there and saw the forklift about 50 metres off the road in the bushland. Present at the forklift were Nigel Bounds and David Heintsey. Photographs of the forklift machine were tendered as Exhibit P2. In his

evidence in chief, Mr Parker made certain amendments to the transcript after listening to the taped record of interview.

[21] Mr Parker gave evidence that he was reluctant to say anything about Shane Walters in the record of interview because he still believed that no charges would be laid and the matter could be sorted out between themselves and the company.

[22] Mr Parker gave evidence he never agreed or intended to steal the subject forklift.

[23] Under cross examination Mr Parker gave evidence that he indicated to Mr Walters he was not interested in taking the forklift and had further stated to him that a lot of equipment had gone missing from their employer company who were clamping down on that sort of thing.

[24] Mr Parker agreed he had loaned the forklift machine to HLH without authorisation from his employer company. He explained that he did this because he was working on HLH's own machine in his own time and it was so HLH could have a machine to use. He gave evidence Shane Walters kept on about stealing the forklift machine. Mr Parker gave evidence he told Shane Walters he wanted nothing to do with it. The appellant says he made it clear that he thought the machine should be returned to their employers. Mr Parker said in evidence he did not want to "dob" Shane into anyone, he just wanted Shane to return the forklift machine. Mr Parker's evidence is

that he considered the matter was Mr Walter's problem, he wanted nothing to do with it and had in fact encouraged Shane to return the unit.

[25] It is Mr Parker's evidence in cross examination that on 8 September he received an anonymous telephone call and was told the forklift that was missing was dumped in the bush behind Pinelands.

[26] Mr Parker's evidence is that at the site of the forklift he spoke with Nigel Bounds and David Heintsey and assisted in finding the serial number on the forklift machine. Mr Parker agreed he had made a written statement to his employers and a week later attended his employers office asked for and obtained a return of the written statement. He agreed he had apologised to his employers for unlawfully using their vehicle by which he meant lending it to HLH without his employers knowing about it. He gave evidence he was not aware till after the event that the forklift had been moved from the premises of Spits and Polish to Mick Dunne's yard which is known as M&J Welding.

[27] Mr Parker gave evidence that when he made the record of interview he gave the answers he did because he preferred to take the blame rather than dob in Shane Walters. He went onto say he did not think Shane Walters would turn the whole thing upside down and blame him.

[28] At the completion of the evidence the learned stipendiary magistrate made findings which amongst other findings included the following (tp 11):

" It is admitted in this case that Mr Parker borrowed the property, that is took it… or organised its being taken to City Wreckers and arguably treated the property as his own by lending it to HLH. That is, disposed of it by lending.

This is not a case where he has disposed of it under a condition as to return that he may not be able to perform such as pawning the goods or something. But rather, he has disposed of it by lending, and he did that, regardless of the rights of the person to whom it belongs, that is National Fleet Network.

If that is not clearly enough a case for treating the property as his own, in my view the second lending to Steve at Spit and Polish, which cannot be justified at all in terms of customs of the trade … to gratuitously further lend your employer's vehicle to a third party, Steve who has no claim whatsoever on the company, just as a sheer gesture of kindness…, plainly would be an appropriation. It involves an assumption of the rights of the owner.

And it seems to me, the prosecution case in that sense must clearly be made out on the facts admitted by Mr Parker.

The lending to HLH was explicitly – and known to Mr Parker for being specifically contrary to what he had been told to do in relation to lending machines – and the lending to Steve was even less justifiable. So although neither of these loans, borrowings, lendings is particularly dishonest in itself, dishonesty is not an element of the offence as such.

And in that sense, I don't think I need go much further to consider what Mr Parker knew and when he knew it as to the moving of the vehicle to M & J Welding's yard, the removable of the decals from the vehicle which whoever did that was clearly, in my view, appropriating the vehicle, taking a step towards its complete appropriation.

In short, without taking the matter any further, I am satisfied beyond a reasonable doubt that in that sense, in the weaker sense of the prosecution case, the prosecution case is made out and the acts by Mr Parker, stopping at Spit and Polish, constitute a theft of the vehicle and he is guilty of stealing and the case is proved."

Grounds of Appeal

Ground 1. The learned stipendiary magistrate was in error in ruling that the prosecution case was able to be characterised as having a

'strong version' **[transcript of Reasons for Judgment 10.9] and able to be characterised as having a *'weak version which depends on the definition of stealing in the Criminal Code and the definition of depriving in section 209'* [page 11.1]**

[29] The Crown before the Court of Summary Jurisdiction intended to prove beyond reasonable doubt that the appellant and Mr Walters intended to permanently deprive National Fleet Network and steal a forklift for their own business purposes (tsp 3). The Crown alleged that Mr Parker acted in concert with Mr Walters in relation to each of the following movements of the forklift:

1. from National Fleet Network to HLH;
2. from HLH to Spit and Polish;
3. from Spit and Polish to the shed at M & J Welding; and
4. from M & J Welding to the bushland.

[30] It was alleged that the registration of the business name by the appellant on August 26 2004 supported this. This version of events is referred to be the learned stipendiary magistrate as the "strong version" of the prosecution case (decision p 10.8).

[31] Mr Wallace SM did not accept the evidence of the co-accused, Mr Walters regarding Mr Parker's level of involvement in the process and could not find enough evidence corroborating the statements of Mr Walters that the appellant actively agreed to steal the forklift with him. The learned stipendiary magistrate also found that he could not unequivocally reject the claims of the appellant that he is not a thief (decision p10).

[32] The learned magistrate however, was able to find on the appellant's own admissions that Mr Parker had treated the forklift as his own by lending it to HLH without the knowledge or approval of National Fleet Network and had approved the further loan to Spit and Polish (decision pg 12). This was referred to as the "weak" or "weaker version" of the Crown case (decision pg 12).

[33] The definition of "stealing" is set out in s 209(1) of the *Criminal Code* as follows:

> "'appropriates' means assumes the rights of the owner of the property and includes, where the person has come by the property without stealing it, any later assumption of a right to it by keeping or dealing with it as the owner;
>
> 'depriving' means permanently depriving and appropriating or borrowing property without meaning the person to whom it belongs permanently to lose the property if the intention of the person appropriating or borrowing it is to treat the property as his own to dispose of (including to dispose of by lending or under a condition as to its return that he may not be able to perform) regardless of the rights of the person to whom it belongs;
>
> 'steals' means unlawfully appropriates property of another with the intention of depriving that person of it whether or not at the time of the appropriation the person appropriating the property was willing to pay for it, but does not include the appropriation of property by a person with the reasonable belief that such property has been lost and the owner thereof cannot be discovered."

[34] The appellant was charged with stealing the forklift. The Crown set out to prove the appellant's involvement with intent to steal in steps 1- 4 (above) in the process of the appropriation of the forklift. The learned magistrate found that the appellant was involved in steps 1 and 2 of the appropriation

of the forklift, which demonstrated an assumption of a right to the forklift by dealing with it as the owner. It is not an error to categorise the evidence or for the learned magistrate to refer to his findings in this way.

Ground 2. The learned stipendiary magistrate was in error, having regard to the opening of this particular prosecution case, in ruling that the case was able to be decided with reference to the definition of *'stealing'* in the Criminal Code Act which defines the word *'depriving'* as to include *'borrowing'* in the context of the present case.

[35] Mr Lewis on behalf of the appellant submitted that it was not open to the learned magistrate, having not fully accepted the evidence of Mr Walters as to the extent of Mr Parker's knowledge of and role in relation to the theft of the forklift, to find Mr Parker guilty of the charge. It was argued that it was not open to the learned magistrate to 'introduce a legal concept which was not the Prosecutor's case at the outset' (submissions, par [11]), by deciding the case with reference to the definition of 'steals' in s209 of the Criminal Code.

[36] On behalf of the Crown, Mr Elliott submitted that the conduct of the prosecution's case was consistent throughout, arguing the existence of a common plan between the appellant and Mr Walters to permanently deprive National Fleet Network of the forklift and that the appellant acted in concert with Mr Walters to steal the vehicle.

[37] Ms Mathers, in the prosecution opening in the Court of Summary Jurisdiction, stated inter alia:

> "… It is alleged by the prosecution that sometime around mid-August 2004 the defendant, without the knowledge or consent from their employer, leased a yellow Heister forklift, unit number SS594, owned by National Fleet Network, to a friend who worked at HLH, whilst his own forklift was being repaired by the defendant in his own time.
>
> Soon after the co-accused, Walters, then agreed to loan that same forklift to a friend Steve, from Spits and Polished Detailers. The business premises was across the road from HLH and the forklift was delivered by Walters. … The prosecution allege that the defendant was aware of this agreement to loan the unit. This was again done without the knowledge or consent of their employer." (tp 3)

[38] Mr Wallace SM after hearing the evidence reached the conclusion that, on his own admissions Mr Parker had had involvement in appropriating the forklift from National Fleet Network, by arranging the unauthorised loan to HLH and then approving the further loan to Spit and Polish. This was in line to some extent with the prosecution opening. The transcript states the prosecutor used the word "leased" to HLH. There is evidence from Mr Walters and Mr Parker that the subject forklift was "loaned" to HLH. Both were in agreement in their evidence that this was done without the knowledge or approval of National Fleet Network.

[39] Mr Elliott submitted that the appellant was charged with stealing and convicted of stealing. This was not a case where the appellant had been charged with one offence and convicted with another.

[40] I accept these submissions. Mr Parker was charged with stealing. On the basis of admissions made by Mr Parker in evidence the learned magistrate found Mr Parker guilty of stealing with reference to the definition of

"steals" in the Criminal Code. The relevant admissions made by Mr Parker in evidence were not inconsistent with the prosecutor's opening. The learned stipendiary magistrate was satisfied beyond reasonable doubt the prosecution had proved part of their allegations sufficient to establish the charge of stealing against Mr Parker. The learned magistrate was not in error in turning to the definition of 'steals' in the Criminal Code in reaching this decision. This is not a case where the offence as alleged by the Crown differ from the particulars upon which a finding of guilt was made. The learned stipendiary magistrate essentially found that the Crown had only proved some of the alleged particulars and not others, making it a less serious example of stealing. The particulars that were proved, amount to an offence of stealing, albeit a less serious or (weaker) offence of stealing.

Ground 3. The learned stipendiary magistrate having heard the opening address of the prosecutor was in error of having proceeded to treat the accused Parker as having stolen the forklift by lending it on two occasions without first obtaining the permission and authority of his employer to do so, a case which was neither contemplated nor opened on as being the gravamen of the prosecution case.

[41] As discussed under Ground 1, Ms Mathers in the Crown opening in the Court of Summary Jurisdiction alleged that Mr Parker acted in concert with Mr Walters in permanently depriving National Fleet Network of the forklift.

[42] The appropriation of the forklift was alleged to have occurred via a series of four transactions, outlined under Ground 1. The learned magistrate was able to find beyond reasonable doubt that Mr Parker was involved in the first two

of these transactions, which demonstrated an assumption of the rights of the owner and resulted in National Fleet Network being deprived of the forklift (decision pgs 11-2).

[43] It could not be said that this finding was inconsistent with the prosecution opening. The appellant was well aware from the outset of the hearing of the facts that were alleged by the prosecution that the learned stipendiary magistrate ultimately found were proved.

Ground 4. The learned stipendiary magistrate failed to direct himself that the obligation of the prosecutor in opening the prosecution case was not merely to outline the facts which the prosecution proposed to establish in evidence but also to establish in conceptual terms the nature of the prosecution case, to assist the Court, the accused and Counsel so that the accused understood from the beginning just what the prosecution intended to establish by the evidence and so that the defendant was given the opportunity at the earliest time in the clearest terms to answer the charge or charges.

[44] As outlined under Grounds 1 and 3, the Crown in its opening stated that it was seeking to establish that Mr Parker acted in concert with Mr Walters in depriving National Fleet Network of a forklift through a series of four transactions. The learned magistrate was able to find beyond reasonable doubt that Mr Parker was involved in the first two of these transactions. As Mr Parker's involvement to this extent demonstrated an appropriation of the forklift, His Honour did not see it necessary to make further findings in relation to Mr Parker's involvement in the other two transactions (decision pg 12).

[45] As the finding of the learned magistrate was not outside the case outlined by the Crown in its opening, it was not necessary for His Honour to direct himself regarding the obligation of the prosecutor in opening the prosecution case.

Ground 5. The learned stipendiary magistrate, having found that: [10.9] "I am not persuaded beyond a reasonable doubt that that was the sequence at all and I am not therefore persuaded of the strong version of the prosecution case" was in error in not discharging the accused and acknowledging that if the prosecution had thought to bring a further case of 'stealing by lending' it was open to the prosecution to do so subject to any limitation of time."

[46] As outlined under Ground 2, it was argued by Mr Elliott on behalf of the Crown that the accused had been charged with stealing and convicted of stealing. The learned magistrate was not in error to turn his mind to the definition of stealing in the Criminal Code in reaching this decision.

[47] In *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92, a majority of the High Court held at pg 100:

> "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding."

[48] In the circumstances of this case, it would have been an error for the learned magistrate to discharge the accused and acknowledge that it was open to the prosecution to bring a case of ‘stealing by lending’ at a later time. This ground of appeal also fails.

[49] The appeal is dismissed.