COURT: SUPREME COURT OF TASMANIA

CITATION: *Szabo v Moore* [2018] TASSC 31

PARTIES: SZABO, Christine
v
MOORE, Luke

FILE NO: LCA 1771/2017

DELIVERED ON: 29 June 2018

DELIVERED AT: Hobart

HEARING DATE/S: 23 November 2017

JUDGMENT OF: Geason J

CATCHWORDS:

Magistrates – Appeal and review – Motion to review – Tasmania – Procedure and evidence – Matters relating to decision - Reasons for decision – Duty to state reasons – Magistrate's failure to resolve factual basis for determination – rational inference consistent with innocence open on facts.
Aust Dig Magistrates [1348]

Magistrates – Appeal and review – Motion to review – Tasmania – Procedure and evidence – Procedural errors made by magistrate – No apprehension of bias – Procedural errors did not lead to a miscarriage of justice.
Aust Dig Magistrates [1348]

REPRESENTATION:

***Counsel*:**
Applicant: F Cangelosi
Respondent: O Hinns
Solicitors:
Appellant: Simmons Wolfhagen
Respondent: Director of Public Prosecutions

Judgment Number: [2018] TASSC
Number of paragraphs: 65

CHRISTINE SZABO v LUKE MOORE

REASONS FOR JUDGMENT **GEASON J**
29 June 2018

1 The applicant was tried on a single count of stealing contrary to s 234 of the *Criminal Code* (the Code). The prosecution alleged that in the course of her employment with the St Michael's Association, the applicant had removed a "communication book", which she had failed to return upon the termination of her employment.

2 The matter came on for hearing before Magistrate S Cure on 6 June 2017. The applicant was unrepresented.

3 Section 234 of the Code says that any person who steals anything is guilty of a crime. Stealing is defined in s 226 of the Code:

> "**226 Interpretation**
>
> (1) A person who, without the consent of the owner thereof, dishonestly —
>
> (a) takes; or
>
> (b) being lawfully in the possession thereof, either as a servant of the owner or as a bailee or part owner thereof, converts to his own use or to the use of any person other than the owner —
>
> anything capable of being stolen, with intent permanently to deprive the owner thereof, steals such thing."

4 The prosecution case was that the applicant, being in possession of something "capable of being stolen", converted it with intent to permanently deprive the owner of it.

5 The book had only a nominal value. The complaint cited a value of $5. The book recorded events involving the treatment of patients at the nursing home operated by the complainant, the St Michael's Association. It was the applicant's case that she had taken the book when she went on leave, intending to put it back upon her return, and having used the information in it to raise her concerns about the matters it recorded. She told the court that she believed she had a legal obligation to raise those matters. (In circumstances where it might be expected that the employer's purpose was to operate a nursing home that discharged its duties properly and in the interests of its residents, the use of the book for the stated purpose might well have been considered to be outside the definition of stealing: s 226(3). ("A servant who takes anything out of the possession of his master with intent to apply it to his master's use, and who so applies it, or who converts anything belonging to his master to his master's use, does not steal the thing, although such taking or conversion is wrongful").

6 Her evidence was that her employment was terminated before she could return the book.

7 It was for the Crown to prove its case beyond reasonable doubt. There were no admissions. The court was invited to conclude that the only rational inference which was open on the evidence was that the applicant had an intention to permanently deprive the nursing home of the book. The prosecution case relied entirely upon the fact of the applicant's possession of the book continued after her employment had been terminated and she had been asked to return any property of the employer. The applicant's purpose in having the book was not disputed at hearing. She had maintained that claim from the beginning.

8 The evidence at trial consisted of:

(1) Evidence from two witnesses – Constable Williams, and Mr Gilpin, on behalf of the employer.
(2) A record of interview between the applicant and police and the transcription of that recording.
(3) The termination letter from the applicant's employer.
(4) The book itself.
(5) A policy document of the employer; and
(6) An induction form relating to the applicant's employment.

9 The applicant gave evidence but did not otherwise adduce evidence.

10 The learned magistrate found the complaint proved. She amended the complaint so that the date of the offence coincided with the termination of the applicant's employment, at which time the learned magistrate found the conversion occurred. She ordered that the applicant be released on an undertaking that she be of good behaviour for a period of 12 months and appear for conviction and sentence if called upon.

The grounds of appeal

11 The applicant advances six grounds in support of her appeal. They are as follows:

"1 The learned magistrate erred in law and in fact in finding that, because she did not accept that the applicant did not know that she was required to return the book, she was satisfied that the applicant intended to keep the book and use it against its owner.

2 The learned magistrate erred in law by reversing the burden of proof in that she found that the applicant intended to keep the book and use it against its owner, because the applicant had not satisfied her that she did not know that she was required to return the book.

3 The learned magistrate erred in law in disallowing cross-examination by the applicant of the witness John William Gilpin of the applicant's motivations for taking the book on the grounds that evidence about motivation for taking the book was not relevant to the question of whether the book had been taken dishonestly or with intent of permanently depriving the owner.

4 The learned magistrate erred in failing to state any or any adequate reasons for:

(a) finding that the applicant intended to keep the book, and did not intend to return it;

(b) finding that the applicant intended to use the book against its owner;

(c) finding that the applicant's possession 'becomes unlawful and under s 226 (1) definition of the Code that makes out the charge'; and

(d) her implied finding that the applicant's intention of keeping the book was dishonest.

5 A reasonable, impartial observer would have apprehended bias on the part of the learned magistrate to the extent that:

(a) the learned magistrate cross-examined the applicant;

(b) the learned magistrate did not allow the applicant to present her case in her own way, subject to the rules of evidence;

(c) the learned magistrate ruled inconsistently between prosecution and defence on the relevance of the applicant's motivations for taking the book;

(d) the learned magistrate repeatedly asked the applicant to confirm that she had not told the witness John William Gilpin that she would return the book, with the implication that an adverse inference was available to be drawn by the learned magistrate from the applicant's silence.

6 The learned magistrate erred in law when dealing with the applicant as an unrepresented defendant by:

(a) failing to explain to the applicant that she had the right to re-examine herself at the conclusion of her cross-examination by the prosecutor; and

(b) taking into evidence an Audio CD of the applicant's record of interview, without playing it in open court or having regard to it, and without inviting submissions from the applicant whether the Audio CD ought to be played in open court or otherwise had regard to; and

(c) taking into evidence a transcript of the applicant's record of interview and reading it in silence in open court, without inviting submissions from the applicant whether:

i it ought to be read aloud in open court; or

ii the applicant was familiar with the contents of the transcript, or had received from prosecution a copy of the transcript."

12 Ground 5(b) was abandoned.

13 The learned magistrate's reasons for her decision were as follows:

"I do not accept that you did not know that you were required to return the book or the documents. So I am satisfied that you intended to keep them and use against St Michaels and I am satisfied therefore the date at which you were terminated that your possession becomes unlawful and that is in fact the – I think the 14th of July and therefore I amend the charge to the 14th of July, because I am of the view that you convert that book for your own use at that date and it was your intention to air grievances in the process against St Michaels.

I am not satisfied that you intended to return it, even though I am satisfied you handed it back willingly and you cooperated [sic]. I accept that you didn't take it dishonestly initially, but your possession becomes unlawful, and under section 226(1) [of] the Code that makes out the charge."

14 In *Langley v Lyons* [2017] TASSC 48, Brett J summarised the relevant principles for an evidence based motion to review at [22]:

"[22] In *Phillips v Arnold* [2009] TASSC 43, 19 Tas R 21, Crawford CJ said at [46]:

'Those principles include the following. The *Justices Act*, s107(4)(a), requires there to be shown an error or mistake on the part of the magistrate on a matter or question of fact alone, or of law alone, or of both fact and law. A motion to review is not of the nature of an appeal by way of rehearing and the principles of *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531 do not apply. On a review of the conclusion of a magistrate based on the evidence, the question is whether upon the evidence the magistrate might, as a reasonable person, have come to the conclusion to which he or she did. *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at 351; *Bedelph v Weedon* [1963] Tas SR 69 at 81; *Benson v Rogers* [1966] Tas SR 97 at 99; *Richardson v Shipp* [1970] Tas SR 105 at 117'."

Grounds 1, and 2

15 Grounds 1 and 2 of the notice to review were argued together.

16 The evidence is the starting point for a consideration of the question referred to by Brett J in *Phillips v Arnold* (above): whether upon the evidence the magistrate might, as a reasonable person, have come to the conclusion which he or she did.

17 The case against the applicant was a circumstantial one. A circumstantial case is one which relies on evidence of facts, from which can be *inferred the existence* of the fact in issue (*Shepherd v The Queen* (1990) 170 CLR 573. See also *Doney v The Queen* (1990) 171 CLR 207; *Festa v The Queen* [2001] HCA 72, 208 CLR 593; *Myers v DPP* [1965] AC 1001.) The fact in issue was whether the applicant had converted the book to her own use with an intention to permanently deprive the owner of it.

18 In *Taylor Weaver and Donovan* (1928) 21 Cr App R 20 at 21*,* Hewart LCJ observed that:

> "It has been said that the evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

19 And in *Martin v Osborne* (1936) 55 CLR 367 at 375, Dixon J said:

> "If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation."

20 If there is *any reasonable explanation* of the circumstances which is consistent with innocence, the applicant is entitled to a verdict of not guilty: *Shepherd v The Queen* (1990) 170 CLR 573; *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521; *Barca v The Queen* (1975) 133 CLR 82; *Plomp v The Queen* (1963) 110 CLR 234.

21 The evidence in this case established that the applicant was in possession of the book, and that her possession continued after she was asked to return items of property belonging to her employer. The evidence also linked the fact of possession to an uncontradicted purpose, being disclosure of certain events recorded in its pages. That disclosure hadn't occurred at the time the applicant was searched and the book recovered. Once it was accepted, as it was, that the reason for possession was limited to that purpose, one which could be carried out and the book returned, there was an explanation of the circumstances of its possession, which was consistent with innocence. That explanation was a reasonable one, and not contradicted by any evidence led by the prosecution.

22 It is well established that in a case where there is any reasonable explanation which is consistent with the innocence of the defendant, the court must find her not guilty: *R v Hodge* (1838) 2 Lew 277; *Plomp v The Queen* (above); *Shepherd v The Queen* (above). This conclusion follows from the obligation to find the charge proved beyond reasonable doubt. I uphold ground 1.

23 Ground 2 challenges the learned magistrate's reasoning. It is submitted that the reasons for decision disclose an approach that required the applicant to satisfy the court that she did not know she had to return the book, and if she could not do that, it followed that she intended to permanently deprive the owner of it.

24 The reasons given by the learned magistrate begin: "I do not accept that you did not know that you were required to return the book …" Then follows this: "*So I am satisfied* that you intended to keep them and use them against St Michaels …".(my emphasis). That is a non sequitur. The finding in the first limb, does not sustain the conclusion appearing in the second. The two propositions are not linked in the way the learned magistrate's reasons suggest. I agree that by linking the two propositions the learned magistrate has reasoned that the applicant needed to satisfy her that she did not know that the book had to be returned if she was going to avoid the finding that her possession established an intention to keep it permanently. She did not bear that onus. Mere possession could not make that case. Approaching the matter this way the learned magistrate fell into error. I uphold ground 2.

25 I will deal with ground 4 next. Ground 4 challenges the adequacy of the learned magistrate's reasons. The giving of reasons is an incident of the judicial process: *Public Service Board v Osmond* (1986) 159 CLR 656; *Soulemezis v Dudley Holdings* (1987) 10 NSWLR 247. A court's reasons for decision should disclose the grounds for the conclusion reached: *Ta v Thompson* [2013] VSCA 344 [42].

26 The applicant refers the Court to the decision in *Australian Securities Corporation v Schreuder* [1994] TASSC 127 for a statement of principle applicable to the assessment of the adequacy of reasons for decision. It submits that that case is authority for the proposition that it is generally insufficient for a judicial officer to state conclusions without stating the facts that have been found relevant to the issue. Moreover it is put that there must be a demonstrated reasoning process to show why one conclusion has been preferred over another. The criticism made by Underwood J (as he then was) is adopted. At [40] his Honour said:

> "… what is clear is that no primary facts are found, no inferences are drawn and no reasoning process for the order made is disclosed. It might be inferred from what the learned magistrate said that in his evidence on the examination before Zeeman J, the defendant claimed an honestly and reasonably held mistaken belief in certain facts which if true would have rendered his conduct innocent. The learned magistrate did not state what he found those facts to be, nor did he find whether the defendant's belief in them was honestly but mistakenly held on reasonable grounds. In addition, there is no reasoning process which this Court can examine to demonstrate how the learned magistrate reached the conclusion stated."

27 As if to concede the point, the respondent urged me to give the learned magistrate an opportunity to restate her reasons pursuant to s 110(2A) of the *Justices Act* 1959.

28 The reasons for decision are required to reveal that the court has turned its mind to the elements of the charge required to be proved, and, reasoning correctly, determined each of those elements in accordance with the evidence. In this respect I do not accept that the obligation is any less onerous in a magistrate's court than in higher courts. The fact that summary courts are busy will influence the extent of the detail which accompanies the reasons, but it will not relieve the court of the obligation to disclose its grounds for the findings it makes. There is not a general licence in the lower courts to conceal the court's method. Here the court's reasons do not disclose the grounds upon which the court's conclusion was based. They do not grapple with the legal issues which arise in a circumstantial case and do not deal with competing hypotheses which emerge from the facts. That makes them inadequate for their intended purpose. I uphold ground 4. Had I not determined that grounds 1 and 2 were made out, I would have considered remitting the matter for a restatement of reasons.

29 Ground 3 asserts errors in the conduct of the hearing. Those errors are submitted to have occurred in the cross-examination of a witness, John Gilpin, who gave evidence on behalf of the applicant's former employer. The applicant's cross-examination of Mr Gilpin related to his knowledge of workplace health and safety issues at St Michael's. These issues were central to the applicant's reason for possession of the book as a source of material enabling her to acquit her stated purpose. The applicant attempted to cross-examine Mr Gilpin on the contents of an email which related to information about practices at the home recorded in the book. The court disallowed this cross-examination. The applicant submits that the court erred in doing that because the motivation for taking the book was relevant to the applicant's intention to permanently deprive its owner of it, and whether the book had been taken dishonestly. As such it is submitted that the question was relevant to facts in issue at the hearing; and as relevant evidence, it was admissible unless subject to an exclusionary rule of evidence, which it was not.

30 Since the reason for taking the book was not in dispute, the respondent submits that containment of the cross-examination was appropriate, or at least not inappropriate.

31 Whilst the applicant's motives and purpose were relevant, they were not disputed. It is perfectly appropriate for a court to contain cross-examination going to a matter which is not in issue. It is a matter for judgment in every case, but prima facie, time spent pursuing matters not in issue merely wastes court time. To the extent there was an apparent inconsistency in the approach of the learned magistrate as between the prosecution and defence case, I consider that that was the result of the prosecution bearing the onus of proof. Ground 3 is dismissed.

32 Ground 5 asserts that a reasonable, impartial observer would have apprehended bias on the part of the learned magistrate.

33 The applicant refers to the decision of *Denney v Lusted* [2015] TASSC 10, where Pearce J summarised the principles pertaining to the conduct of a hearing. At [15] his Honour said:

> "[15] It is useful to first set out some matters of principle:
>
> (a) The Magistrates Court is a court of record: *Magistrates Court Act* 1987, s 3A(2).
>
> (b) The *Evidence Act* 2001 applies to all proceedings in a Tasmanian court: *Evidence Act,* s 4(1). In hearing and determining complaints made under the *Justices Act*, magistrates are required to apply the rules of evidence.
>
> (c) A judge or magistrate must try a case before him or her on the evidence and arguments presented in open court by the parties or their legal representatives and by reference to those matters alone unless Parliament provides otherwise: *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350.
>
> (d) A criminal trial is an adversarial, not an inquisitorial, process: *Dietrich v The Queen* (1992) 177 CLR 292 at 334. It is not a pursuit of the truth: *Whitehorn v The Queen* (1983) 152 CLR 657 per Dawson J at 682. The question in a trial is whether the prosecution has proved its case against the accused beyond reasonable doubt: *R v Griffis* (1996) SASR 170; 91 A Crim R 203.
>
> (e) The protagonists in a trial are the prosecution on the one hand and the accused on the other. Each is free to decide what evidence to call and what questions are to be asked in examination-in-chief or in cross-examination, always subject to the rules of evidence, fairness and admissibility: *Rattan v The Queen* (1974) 131 CLR 510 at 517. It is generally left to the parties to define the issues and select the evidence: *Crampton v The Queen* 206 (2000) CLR 161 at 173. If a party's evidence is deficient the ordinary consequence is that it does not succeed: *Whitehorn* at 682.
>
> (f) A judicial officer should take care not to descend into the adversarial arena: *Yuill v Yuill* [1945] 1 All ER 183 at 189. The role of the judge or magistrate is to 'hold the balance between the contending parties without himself taking part in their disputations': *Whitehorn* at 682. He or she should objectively evaluate the evidence from a detached distance: *R v T, WA* (2013) 118 SASR 382 per Kourakis CJ at [38], repeated in *Zanker v Kupsch* [2014] SASCFC 13. It is permissible and proper practice for a judge to ask a question or questions to elucidate answers given by the witness where he or she considers this course desirable in the interests of justice: *Re Damic* [1982] 2 NSWLR 750 per Street CJ at 762–763. In *Galea v Galea* (1990) 19 NSWLR 263 at 281-282 Kirby ACJ set out a series of principles concerning complaints about judicial intervention. It is not necessary that I repeat them here but I respectfully adopt his Honour's remarks. The boundary between permissible judicial intervention in a criminal trial and intervention of a kind that results in an unfair trial is not capable of clear definition: *R v Thompson* (2002)130 A Crim R 24 at [38]. In *R v Esposito* (1998) 45 NSWLR 442; 105 A Crim R 27 at 56 it was said that the task of destroying the credit of a defence witness should always be left by the judge to the prosecutor. The care that is required of a judge conducting a criminal trial involving a jury is explained by Wood CJ at CL in *Esposito* at 56-57:

'The line that a trial judge walks when asking questions of a witness is a narrow one. There is nothing wrong with questions designed to clear up answers that may be equivocal or uncertain, or, within reason, to identify matters that may be of concern to himself. However, once the judge resorts to extensive questioning, particularly of the kind that amounts to cross-examination in a criminal trial before a jury, then he is treading on thin ice. The thinness of that ice will depend upon the identity of the witness being examined (here the person on trial), and on whether the questions appear to be directed towards elucidating an area of evidence that has been overlooked or left in an uncertain or equivocal state, or directed towards establishing a point that is favourable or adverse to the interests of one or other of the parties.'

(g) Greater latitude should be allowed to a judge sitting alone and, by extension, a magistrate: see *Galea v Galea* at 281-282 per Kirby ACJ. The Magistrates Court is a court of summary jurisdiction. The demands on the time of a magistrate are heavy. It is in the public interest that a magistrate is able to control the proceedings of his or her court so as to enable the timely and efficient disposition of court business. As a general rule, I think it is quite proper for a magistrate to intervene, within reasonable and legitimate boundaries, to clarify evidence and identify issues, to overcome unclear, imprecise, repetitive or irrelevant questioning and so prevent undue delay or unnecessary prolongation of hearings: see *FB v Regina; Regina v FB* [2011] NSWCCA 217 per Whealy J at [90]-[110]. The motivation for judicial intervention and the reason for allowing latitude were discussed by Vanstone J in *R v T, WA* at [93]. The conduct of criminal trials remains subject to different and more stringent requirements than a civil trial. It is impossible and undesirable to mark out the permissible limits of judicial intervention. As I earlier pointed out, the boundary is inevitably unclear and will depend on the circumstances of each case. As Kirby ACJ said in *Galea v Galea*, at 282, when considering whether excessive judicial intervention amounted to prejudgment of issues, 'the decision on whether the point of unfairness has been reached must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions'. It is a question of balance, degree and judgment: *R v Thompson* (2002) 130 A Crim R 24 at [44]."

34 The applicant contends that the learned magistrate's approach, whilst initially guiding the applicant in the conduct of her case, became heavy handed. The applicant refers to three passages of transcript to support that submission. The applicant’s contentions and the excerpts from the transcript are these:

"5.4 The learned Magistrate's approach became more heavy-handed …. In the course of the applicant's evidence the learned Magistrate asked:

'*I mean the real issue for me and I am going to in a moment invite Mr Collins to ask you some questions, but the real issue is this at what point can I be satisfied that you were going to return it. What can you say to me about that? When were you planning to return it?*'

'*You were waiting for them to ask for it?*'

'*You didn't turn your mind let's say to the requirement that you return the book?*'

5.5 During cross-examination from the prosecutor about a letter from St Michaels Association requiring the return of documentation, the learned Magistrate volunteered:

'*I am going to read it to her because I think it's a critical part of your case. "Return any copy STMA documents you have in your possession as you may be in breach of privacy policy and legislation. And return any policy and procedure documentation you may hold of STMA". So there's two – you are being asked to return any documents you have basically.*'

5.6 There then followed what the applicant contends was a distinct descent by the learned Magistrate 'into the arena'. Following questioning about why the book was not returned, and the answers from the applicant that she did not want to work 'in a violent', [sic] but to take the Book home and address it at home, the following exchange occurred:

'*HER HONOUR: Can I read into that, you wanted to build a case against St Michaels, because that's what it seems to me.*

WITNESS: No well I wanted to bring up the issues that weren't brought up – that's why I took it, I wanted to bring these issues up. Yes I did, I wanted to bring up these issues.

HER HONOUR: You wanted to build a case against them about practices that were going on.

WITNESS: Yes if you put it that way, yes. Yes I did.

HER HONOUR: I mean that's a fairly bold interpretation but I think it's accurate.

WITNESS: Yeah.

HER HONOUR: And that may not – was that your intention when you took it or did that become your intention?

WITNESS: Well I took it because I did want to bring up these issues.'

5.7 As a result of this questioning, the prosecutor was able to press-home the apparent conclusion of the Magistrate:

'*So you didn't make a decision to photocopy what you needed to, as it's been stated, to build your case. You didn't take that option to photocopy it and have the book returned. You decided to keep it and you were going to keep it for as long as you needed it. That's right, isn't it?*'"

35 Referring to the evidence of Mr Gilpin of St Michael's, the learned magistrate proceeds as follows: [T42, line 34]:

"Now from the evidence he's given you don't then do that. That's the point, that's the only point at which, if I accept your evidence that you took this document, this book, to support allegations of conduct that you were concerned about, your failure to return it then is the problem, is it not? What's your intention when you hang onto the book?

[APPLICANT]: Well I didn't – there was no intention to keep the book. I had no reason to keep the book. He knew–

HER HONOUR: Why didn't you return it when he–

[APPLICANT]: I was under enormous stress and I probably – wasn't even – one thing that – I went to see a psychologist the day that–

HER HONOUR: I can imagine that it was stressful.

[APPLICANT]: It just wasn't something that was – because there was a lot of emails going past backwards and forwards, because I was trying to get him to address things that were really serious and I had evidence for it, I just didn't have concerns without any proof. I had proof of a lot of things."

36 Then follows in the transcript an engagement between the learned magistrate and the applicant with respect to the contents of the book:

"HER HONOUR: The fact that you've written in this book doesn't make it your book.

[APPLICANT]: No, no, it doesn't. No. That's not the point I was making your Honour.

> HER HONOUR: No.
>
> [APPLICANT]: But I had no intentions of keeping it. …
>
> HER HONOUR: That doesn't get around the problem that I'm faced with, and the problem is you are directed upon your termination to return any copied documents you have in your possession and it may well be that he doesn't know you've got the original, he can't find the original but he thinks you've got copies. ...".

37 I observe that, in the face of a series of questions from the learned magistrate, the applicant did not resile from the proposition that her motive was her concern about the operation of St Michael's, and the need for evidence to substantiate those concerns. It appears from the transcript that an episode of patient care which was of concern to the applicant, did not appear in the book. In the applicant's mind that omission, and another email which referred to the omitted episode, were evidence of incomplete disclosures about the events at St Michael's.

38 At the conclusion of her cross-examination, the applicant was spoken to by the learned magistrate as follows: [T63]

> "Yes. All right, well Ms Szabo it's lunchtime but what do you want me to do …, I mean I've got to make some findings about this, I think I will do it at 2:15. Is there anything else you want to say to me, I've got to make a finding as to what I'm satisfied of, what the evidence suggests or shows, what inferences I can draw. I don't think that there's too much more that you can say is there? It's really going to come down to whether I am satisfied that you had the requisite or the necessary intention and–
>
> [APPLICANT]: Well I do your Honour, I did it with all what I believed at the time to be a legal obligation and obligation in relation to my contract of employment and I am sure if I didn't do it, it would have been – I would rather try and do the right thing than get into trouble for doing the wrong thing. So in the end I really believe that's – I had–
>
> HER HONOUR: Well I need to think through what the evidence suggests.
>
> [APPLICANT]: Yes."

39 The court then adjourned. Upon its resumption the learned magistrate gave her reasons for decision.

40 The first complaint is that the learned magistrate cross examined the applicant. The respondent concedes that a number of the questions asked by the learned magistrate of the applicant are framed as if in cross-examination. It submits that the learned magistrate was simply ensuring that the applicant gave evidence relevant to her case and covered all areas that were potentially in dispute, thereby ensuring that the applicant received a fair hearing. For example, prior to reading the employer's letter, the learned magistrate said, "I am going to read it to her because I think it's a critical part of your case." It is put that this properly and unambiguously characterises the purpose of the learned magistrate's intervention; that her Honour was ensuring that the applicant was aware of exactly what aspect of the evidence was being discussed, and determining the applicant's interpretation of it. The same interpretation is urged in relation to the other exchanges produced in the applicant's case.

41 The second element in ground 5, involves an assertion that the learned magistrate did not allow the applicant to present her case. For example, the applicant was restricted by the learned magistrate in the way she was allowed to cross examine, and she was prevented from re-examining after her own cross examination.

42 The third element, asserts inconsistency in the court's approach taken to the prosecution and defence cases. Specifically, that the learned magistrate proceeded inconsistently in the way she allowed the cases to be put on the question of the motive for removing the book. The respondent

concedes this occurred. But it does not accept that any occurred as a result. It is submitted by the respondent that at the time the matter was raised by the prosecution, there was a possibility that workplace issues, including the termination of the applicant's employment, could be relevant to the applicant's intention at the time. But it contends that by the time the applicant sought to cross-examine about that issue, it had been resolved, and was no longer in issue. As such it is submitted that it was not necessary for the matter to be pursued. The inconsistencies in the rulings are said to reflect that change, which emerged as the case progressed.

43 The final element in this ground, relates to the approach taken by the court in relation to the applicant's silence about her intention to return the book, in conversations with Mr Gilpin. The respondent concedes that the learned magistrate asked the applicant about this matter on a number of occasions, but submits that was merely to ensure that as an unrepresented litigant she did not inadvertently omit evidence going to an important matter. It is submitted that it does not follow that an adverse inference was drawn by reason of the applicant not having told Mr Gilpin that she would return the book.

44 The applicant contends that the nature of the judicial intervention that occurred in the course of the applicant's evidence, resulted in a miscarriage of justice in that it would have appeared to a reasonable impartial observer that the learned magistrate had predetermined the question of the applicant's guilt before the close of the evidence, and was attempting to elicit from her evidence that confirmed that conclusion.

45 This ground is not based upon an assertion that the learned magistrate's interventions caused the trial to miscarry. Rather, that a lay observer would apprehend bias on the learned magistrate's part. A discrete submission that those interventions caused the trial to miscarry, because the applicant was denied a fair trial, is not put.

46 It is clear that an apprehension of bias may be the result of the court discharging its obligations during the course of a hearing: *Galea v Galea* (1990) 19 NSWLR 263. In that case, Kirby ACJ said at 278:

> "But other cases in the High Court illustrate the fact that a reasonable apprehension of bias can arise not only from some suggested source of disqualification which existed at the commencement of the trial but also from an event which occurred during its conduct."

47 Later, he said:

> "From first to last, from beginning to end, the appearance of an impartial and unprejudiced mind on the part of a judicial officer is of the essence of the system of justice. If at any point there is a loss, in fact or appearance, of that impartiality the trial will thereafter miscarry. The litigant who can establish such a miscarriage has not had a trial according to law."

48 It is also clear that the matter is to be judged in the context of the trial as a whole: *Galea v Galea* (above) at 279.

49 The Court considers that the interventions of the learned magistrate were excessive, but the proposition that those interventions would have caused a reasonable lay observer to apprehend bias, is not made out. The interventions were directed to focussing the applicant on her case, and to ensuring that she addressed the matters in issue. There are instances in the transcript which suggest that the effect of the interventions went beyond what was necessary in order to do that, and some of the interventions had the effect of interrupting the applicant in the course of her cross-examination of Mr Gilpin. At times the learned magistrate's interventions derailed the progress of cross-examination, but in the context of the whole of the trial, the Court is satisfied that the applicant was able to present

her case. I am satisfied the court was open to persuasion, and that despite her interventions the learned magistrate was able to judge the case on its merits. Ground 5 is not made out, and is dismissed.

50 Ground 6 draws the Court's attention to two matters said to constitute errors of law. The first is the failure to explain to the applicant the right to re-examine at the conclusion of her cross-examination by the prosecution. The second relates to the taking into evidence of the record of interview.

51 The applicant relies upon the statement of law contained in the decision in *Isherwood v Tasmania* [2010] TASCCA 11, per Crawford CJ, Evans and Blow JJ at [57]-[58]:

> "[57] A judge presiding at a criminal trial is under an obligation to ensure that the trial is conducted fairly and in accordance with law. *MacPherson v R* (1981) 147 CLR 512 at 523. Because of that obligation, the general rule is that the trial judge must advise the unrepresented accused person of any fundamental procedure or right which could be advantageous to the accused. A trial in which a judge allows an accused to remain in ignorance of such matters can hardly be labelled as fair. *MacPherson* at 534, 547.
>
> [58] Advice to unrepresented accused persons about such matters enables them to make effective choices whether to exercise their rights. *R v Gidley* [1984] 3 NSWLR 168. The duty to give advice may not extend necessarily to a duty to advise as to how rights and choices should be exercised. *R v Zorad* (1990) 19 NSWLR 91 at 99. But a failure to inform an unrepresented accused person of his or her rights may result in unfairness and therefore a miscarriage of justice. *R v Andrews* (1938) 27 Cr App R 12; *R v Nilson* [1971] VR 853 at 864; *Dietrich v R* (1991) 177 CLR 292 at 325. Further, an inadequate explanation of the accused person's rights may also lead to a miscarriage of justice. *R v Bellino* [1993] 1 Qd R 521; (1992) 59 A Crim R 322."

52 The transcript [T61-62] discloses that at the conclusion of her cross-examination by the police prosecutor, the applicant was relieved. She was not afforded any opportunity to re-examine. Re-examination in the case of unrepresented defendants will take the form of an opportunity to reply to issues raised in cross-examination that require clarification. Subsequently, and upon the applicant having left the witness box, the learned magistrate asked the applicant if there was anything else she wanted to say, noted that she did not think there was more that could be said, and explained what she proposed to do. This was an invitation to make closing submissions, not re-examine. Evidence could not be given by the applicant once she had left the witness box. The applicant made a short statement [T63] and the matter concluded. The applicant complains that this was a failure in a fundamental matter of procedure.

53 The respondent contends that notwithstanding the learned magistrate's failure in this respect, no substantial miscarriage of justice has occurred. It relies on the statement of what constitutes a substantial miscarriage of justice appearing in *Auspine v Kent* [2009] TASSC 38. In that case Tennent J adopted the statement of principle articulated by Barwick CJ in *R v Storey* (1978) 148 CLR 364 at 376, where his Honour considered a miscarriage of justice in terms of the loss of a real chance of acquittal. The respondent submits that, notwithstanding the learned magistrate's failure in respect of re-examination, it cannot be said that the applicant was deprived of a real chance of acquittal. Accordingly it is submitted that there was not a substantial miscarriage of justice in consequence of the learned magistrate's failure in that respect. Absent a substantial miscarriage of justice, this Court cannot intervene.

54 The court undoubtedly adopted a wrong approach to this aspect of the trial.

55 The other procedural error relates to the receipt of the record of interview. It began with an assertion by the police prosecutor that the applicant had received a copy of the record of interview. No enquiry was made by the learned magistrate of the applicant to confirm that fact. Nor was it made clear whether the applicant had received a copy of the interview in CD format, or in written form.

56 The record of interview was taken into evidence on an audio CD, and a transcript was handed to the learned magistrate who read it in silence. The recording of the interview was not played. Potentially, says, the applicant, the learned magistrate received evidence which the applicant had not seen, and did so in circumstances where the applicant was not afforded an opportunity to make any comment about its contents, let alone challenge any aspect of it.

57 The failure to have the interview read out compounded the ambiguity of the prosecution submission about what material the applicant had been given. It also meant that the applicant was unable to hear the evidence which was taken in, or compare that evidence with her own record, or indeed her own recollection of the interview. The learned magistrate failed to satisfy herself that the applicant had seen the evidence which the court was being invited to consider. There was no basis upon which the court could be satisfied that the applicant had seen it.

58 Similarly, the applicant was deprived of any opportunity to point to favourable matters such as the consistency of her claims from the time of her record of interview to the time of hearing, with respect to her use of the book.

59 The practice adopted in this case is one which should not occur. The interview should have been played. The conduct of a trial is a public one and justice should be conducted in open court; *R v Causby* [1984] Tas R 54 per Green CJ at 61. As such the evidence contained in the interview was required to be received in open court. That required the interview to be played in open court.

60 Each of these matters constitutes a serious procedural error. Whilst I do not accept that there was any deliberate attempt to deprive the applicant of her rights in the trial, such errors deny an accused a fair trial.

61 I am not persuaded however that these errors led to a miscarriage of justice.

62 I have considered the content of the interview in reaching a conclusion on this ground of appeal. The content of the interview the court considered was consistent with the applicant's case at hearing, and emphasised the applicant's position that she did not intend to steal the book. It confirmed the claims made at hearing that the applicant's intention related to the disclosure of practices at St Michael's about which she was concerned. There was nothing in the record of interview which could have undermined the applicant's claims to a legitimate purpose for her possession of the book. On the contrary it reiterated them as having been consistently made, which cannot have harmed the assessment of their veracity. While the applicant lost a forensic advantage, in the sense of being able to emphasise the consistency of those claims, that consistency will have been obvious to the learned magistrate.

63 I have reached the same conclusion in respect of the court's failure to advise the applicant of her right to re-examine. The transcript does not disclose that the applicant's evidence in cross examination created ambiguity which it might have been necessary to cure. In a practical sense no right was interfered with. I do not think that the applicant has been deprived of a real chance of acquittal, nor that any unfairness has accrued. Ground 6 is dismissed.

64 The Court has been invited to consider the matters raised in grounds 3, 5 and 6 separately. Pleaded that way the cumulative effect of those matters on the fairness of the trial is not a matter before the court.

65 Grounds 1, 2, and 4 are made out. The Court upholds the appeal and quashes the conviction. I have been asked to send it back to the Magistrates Court. The Court makes that order. The matter is remitted for determination according to law by a differently constituted court.