JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CRIMINAL
CITATION	:	SAAD -v- BARON [2012] WASC 507
CORAM	:	BEECH J
HEARD	:	27 NOVEMBER & 14 DECEMBER 2012
DELIVERED	:	14 DECEMBER 2012
PUBLISHED	:	21 DECEMBER 2012
FILE NO/S	:	SJA 1058 of 2012
BETWEEN	:	RIMON RIMON SAAD Appellant AND CHRISTOPHER BEAU BARON First Respondent PAUL RICHARD HODGSON Second Respondent

ON APPEAL FROM:

Jurisdiction	:	MAGISTRATES COURT OF WESTERN AUSTRALIA
Coram	:	MAGISTRATE K M BOOTHMAN
File No	:	PE 37428 of 2011, PE 39652 of 2011

Catchwords:

Criminal law and procedure - Speeding offences - Application for adjournment based on partner's medical condition - Application refused - Whether discretion

miscarried - Magistrate proceeding under s 55 of the *Criminal Procedure Act 2004* (WA) when accused represented by counsel - Whether accused who does not appear in person but is represented by counsel has appeared - Whether s 55 of *Criminal Procedure Act* was engaged

Legislation:

Criminal Procedure Act 2004 (WA), s 55

Result:

Appeal upheld

Category: A

Representation:

Counsel:

Appellant	:	Mr T F Percy QC
First Respondent	:	Mr P D Spragg
Second Respondent	:	Mr P D Spragg

Solicitors:

Appellant	:	S C Nigam & Co
First Respondent	:	State Solicitor for Western Australia
Second Respondent	:	State Solicitor for Western Australia

Case(s) referred to in judgment(s):

Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch v Bell-A-Bike Rottnest Pty Ltd [2005] WASCA 157
CBFC Ltd v Charitopoulos [2009] SASC 30
Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55
Curtin University of Technology v Woods Bagot Pty Ltd [2012] WASC 449
Ebatarinja v Deland [1998] HCA 62; (1998) 194 CLR 444
Grover v Scott [2010] WASCA 164
House v The King [1936] HCA 40; (1936) 55 CLR 499

Koh v City of Joondalup [2012] WASC 493
Lewis v The State of Western Australia [No 2] [2008] WASCA 155; (2008) 37 WAR 483
Myers v Myers [1969] WAR 19
R v Gobert (1958) SR (NSW) 114
Sharma v Hodgson [2012] WASC 433
Tallot v Matier [2012] WASC 290

BEECH J:

Introduction

1 The appellant appeals against his conviction for two offences of speeding. His first ground of appeal contends that the magistrate erred in refusing an application for an adjournment. The second ground of appeal challenges the decision of the magistrate to proceed in the absence of the appellant under s 55 of the *Criminal Procedure Act 2004* (WA) (CPA).

2 At the (second) hearing of the appeal I upheld the appeal. These are my reasons. I uphold ground 1 and, if it arose, I would uphold ground 2.

Background

3 In charge PE 37428/11, the appellant was charged with speeding by driving at 92 km per hour in an 80 km per hour zone. The first court date was 31 August 2011. The prosecution notice indicates that the appellant did not appear, and was convicted in his absence under s 55 of the CPA.

4 The appellant successfully applied under s 71 of the CPA to set aside that conviction. An order setting aside the conviction was made on 22 September 2011.

5 By then, the appellant faced another speeding charge, namely PE 39652/11. That charge alleged that the appellant had driven at 72 km per hour in a 60 km per hour zone. On 6 September 2011, that charge was adjourned to 27 September 2011. On 22 September 2011, the first charge was also adjourned to 27 September 2011. After some further adjournments, both matters were listed for hearing on 13 April 2012.

6 On 11 April 2012, the appellant's solicitor wrote a letter, sent by facsimile, to the listings section of the Magistrates Court. The letter stated that the appellant would be unable to attend the trial on 13 April 2012 because he was required to accompany his partner to a medical procedure in relation to her miscarriage. The letter stated that the treating specialist had advised the appellant and his partner that she needed the support of the appellant as her partner on the day of her procedure and that she should not be left alone. The letter foreshadowed that a medical report would be provided the following day, and requested the vacation of the trial date.

7 By letter of 12 April 2012, also sent by facsimile, the appellant's solicitor enclosed a letter from the treating obstetrician of the appellant's partner. The letter stated that the appellant's partner was a patient under

his care and due to her medical condition, the appellant would need to be her primary carer on 13 April 2012.

Proceedings before the magistrate on 13 April 2012

8 As foreshadowed in the correspondence, on 13 April 2012 the appellant did not appear in the Magistrates Court. Charge PE 39652/11 was called. The appellant was represented by counsel. Very soon after counsel announced her appearance, the magistrate observed that 'you're not actually appearing for anyone today, he's not here'. Counsel responded that her client was not in court, but she appeared on his behalf (ts 2). This exchange reveals what I respectfully consider to be an error on the magistrate's part: he considered that the appellant could appear only by appearing in person. As I will explain in dealing with ground 2, in my opinion the appellant appeared on 13 April 2012 by counsel.

9 Counsel referred to the letters of 11 and 12 April. The magistrate did not refer to the letter of 11 April 2012 and, from a reading of the transcript, it would appear that he did not have a copy of it.

10 Counsel submitted to the magistrate that on 11 April her firm had been instructed that the appellant's partner had had a miscarriage and that she had to go to hospital as soon as possible and the only date available was 13 April 2012. Counsel submitted that the appellant understandably wanted to go with her to the hospital and needed to drive her there. The magistrate observed that 'she's in hospital and he's not'. His Honour then stated that 'he should be here. It's as simple as that' (ts 3). That appears, in effect, to be a ruling rejecting the adjournment application.

11 The prosecutor then stated that he would be making an application under s 55 of the CPA. Without inviting any submission from counsel for the appellant, the magistrate invited the prosecutor to proceed with that application.

12 The prosecutor stated the facts. The magistrate convicted the appellant and imposed a fine of $150 and costs of $121.95 (ts 3 - 4).

13 It appears that, at that stage, the other charge was overlooked. About 5 minutes later, after the appellant's counsel had left the court, the other charge, PE 37428/11, was called. The court proceeded in the absence of the appellant under s 55 of the CPA. Upon conviction the magistrate imposed a fine of $150 and costs of $121.95 (ts 5).

The grounds of appeal

14 The appellant appeals against his conviction of the two offences.

15 The first ground of appeal is that the appellant was denied natural justice by the magistrate's failure to adjourn the trial in the circumstances of the case. Until the hearing of the appeal on 27 November 2012, that was the only ground.

16 At that hearing on 27 November 2012, the appellant applied to amend his grounds of appeal to add further grounds. The circumstances in which that occurred were sufficiently canvassed in the course of the hearing on that day. Notwithstanding the regrettable lateness in the provision by the appellant of the additional grounds of appeal, I granted leave to amend on terms that permitted the respondent to provide further written submissions and provided for a further hearing on 14 December 2012 (appeal ts 24 - 25).

17 The further grounds are in these terms:

(a) ground 2: the learned magistrate erred in holding that there was no appearance for the appellant for the purposes of s 55 of the CPA, and erred in proceeding to deal with the appellant as though he had not appeared in court as required;

(b) ground 3: the learned magistrate erred in failing to invite or allow counsel appearing on the appellant's behalf to present evidence or call witnesses in defence of the charges; and

(c) ground 4: the learned magistrate erred by dealing with charge PE 39652/11 in the absence of, or without notice to, the appellant or his counsel.

18 I take the reference in ground 4 to charge PE 39652/11 to be an error, as it was the other charge (PE 37428/11) which was dealt with in the absence of the appellant and his counsel.

19 I propose to deal only with grounds 1 and 2 because I uphold both of them, and each of them is sufficient to sustain the appeal and setting aside of the convictions.

20 I turn to ground 1.

Ground 1 - refusal of adjournment

Legal principles

21 The decision whether to grant an adjournment is a discretionary one.

22 In ***Myers v Myers*** [1969] WAR 19, 21, Jackson J observed that where the refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party. His Honour referred to the reluctance of an appellate court to interfere with a discretionary order such as arises on a question of adjournment, unless there is a strong reason for believing that an injustice has resulted. These general observations have been cited in many cases: see for example, ***Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch v Bell-A-Bike Rottnest Pty Ltd*** [2005] WASCA 157 [34].

23 The principles of law regulating the circumstances in which an appellate court can review the exercise of a judicial discretion apply to a primary court's decision to grant or refuse an adjournment of a criminal trial: ***Lewis v The State of Western Australia [No 2]*** [2008] WASCA 155; (2008) 37 WAR 483 [40]. Error must be demonstrated in the manner explained in ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499, 504 - 505.

Did the discretion miscarry?

24 In my respectful opinion, in the circumstances of this case, the learned magistrate's decision to refuse the adjournment application in itself revealed that the discretion miscarried. In other words, in my view, a decision to refuse the adjournment was not open on any reasonable exercise of the discretion.

25 Unfortunately, it appears that the magistrate did not have available to him the letter of 11 April 2012. In refusing the adjournment application, the learned magistrate appeared to focus on the fact that it was the appellant's partner, and not the appellant, who was in hospital. Of course, that was of central relevance. However, it was not decisive. The nature and seriousness of the offences the subject of the charges were relevant to the discretion. It is, in my opinion, both reasonable and understandable that the appellant gave priority to his need to be with and support his partner while she had a medical procedure following her miscarriage. The interests of justice did not require that, in those circumstances, the

appellant come to court to defend the speeding charges which he faced or have the matter determined in his absence.

26 In the circumstances, in my opinion, a reasonable exercise of discretion could only have resulted in a decision to adjourn the trial.

27 The respondent did not concede the error the subject of ground 1, but did not make submissions to support the magistrate's exercise of discretion. Rather, the focus of the respondent's submissions on ground 1 was the proviso; that even if ground 1 might be decided in the appellant's favour, the appeal should be dismissed on the basis that no substantial miscarriage of justice has occurred: *Criminal Appeals Act 2004* (WA), s 14(2). The respondent submits that the appellant has not put forward any evidence to suggest that he has a defence to the charges, and that the appeal should therefore be dismissed on the ground that there is no substantial miscarriage of justice.

Miscarriage of justice?

28 Generally, where an accused unsuccessfully applies for the adjournment of a trial, and later appeals against the conviction on grounds of the wrongful refusal of the adjournment, the question of whether there is a substantial miscarriage of justice requires consideration of the evidence at trial: see for example, ***Lewis v The State of Western Australia [No 2]*** [47] - [54].

29 In this case, there was no trial, and no evidence. That is because the Magistrates Court proceeded under s 55 of the CPA. By s 55(4) and s 55(5) of the CPA, when the court proceeds under s 55 it may take as proved any allegation in the prosecution notice and, in the absence of evidence to the contrary, must take as proved the material facts stated by the prosecutor.

30 The respondent submits that the position on this appeal is analogous to that which arises when an application is made under s 71(2) of the CPA; it is for the appellant to demonstrate that there has been a miscarriage of justice. In that context, the question of whether the applicant under s 71 has a good defence is among the factors to be considered. See, for example, ***Grover v Scott*** [2010] WASCA 164 [95]. The respondent also relied on my recent decision in ***Sharma v Hodgson*** [2012] WASC 433. In that case, the appellant applied unsuccessfully under s 71 of the CPA to set aside a conviction that had been entered in his absence under s 55. The absence of a defence was not relevant to

whether the rejection of the s 71 application meant that there was a miscarriage of justice occasioned by the conviction.

31 In my view, these cases do not provide a helpful analogy with the present case. In those cases, the procedure in s 55 had been regularly invoked. In this case, s 55 was invoked only following, and because of, the magistrate's wrongful decision to refuse the adjournment. The defendant intended to appear at his trial, and sought an adjournment to enable that to occur. In those circumstances, in my opinion, it is not for the appellant to demonstrate a defence, or even an arguable defence, to the charges, or face dismissal of the appeal under the proviso. The prosecution has not had to prove its case. The only reason that the prosecution did not need to prove the case was the wrongful refusal of the adjournment. The result of the wrongful refusal of the adjournment was to permit the prosecution to invoke the provisions of s 55(4) and avoid the need to lead evidence, when the prosecution ought not have been so permitted. In my opinion that, in itself, is a miscarriage of justice.

32 In ***Tallot v Matier*** [2012] WASC 290 [11] - [13], Hall J held that the wrongful application of s 55 to an indictable offence left no room for the application of the proviso. For the reasons I have explained, I reach a like conclusion here respecting the wrongful application of s 55 consequent upon the wrongful refusal of the adjournment application.

33 For these reasons, I am satisfied the proviso should not be applied. Consequently, ground 1 succeeds.

34 That makes it unnecessary to determine ground 2. However, as it was fully argued, and for the sake of completeness (in case I am wrong in relation to ground 1), I will express my views on ground 2.

<u>Ground 2: did the appellant appear?</u>

The legislation and the question

35 Section 55 of the CPA provides as follows:

> **55. No appearance by accused and no plea of guilty**
>
> (1) This section applies if on a court date for a charge the prosecutor appears and the accused does not and the accused has not pleaded guilty to the charge, whether orally or by means of a written plea.
>
> (2) If on the court date the court is satisfied that the accused has been served under this Part with the prosecution notice containing the charge and a court hearing notice, or an approved notice, notifying

the accused of that date and that the court may deal with the charge in the accused's absence if the accused does not appear on that date, the court may -

(a) adjourn the charge; or

(b) hear and determine the charge in the accused's absence.

[(3) deleted]

(4) If under subsection (2) or section 51(8)(a) the court decides to hear and determine the charge in the accused's absence and the prosecution notice is signed by a person who in the notice purports to be a person acting under section 20(3), the court -

(a) must presume, in the absence of evidence to the contrary -

(i) that the prosecution notice was signed by a person who was acting under section 20(3); and

(ii) that the person had the authority to sign the prosecution notice;

and

(b) may take as proved any allegation in the prosecution notice containing the charge that was served on the accused.

(5) If under subsection (4) the court convicts the accused -

(a) the prosecutor must state aloud to the court the material facts of the charge;

(b) section 129(4) applies; and

(c) in the absence of evidence to the contrary, the court must take as proved any facts so stated.

36 Ground 2 raises a question of construction of s 55. If an accused is represented by counsel, but does not appear in person before the court, is s 55 engaged? In other words, in those circumstances, can it be said, for the purposes of s 55, that the accused does not appear? The word 'appears' is not defined in the CPA. The appellant's construction is that s 55 is not engaged when an accused appears either personally or by counsel. The respondent's construction is that there is no appearance for the purposes of s 55 unless there is personal appearance by the accused.

37 For the reasons that follow, in my opinion, on a proper construction of the CPA, an accused appears for the purposes of s 55, when an accused appears in person, or by counsel.

Principles of statutory construction

38 I refer to and apply the outline of principles of statutory construction in ***Curtin University of Technology v Woods Bagot Pty Ltd*** [2012] WASC 449 [34] - [41].

39 In broad summary, the search is for the intention of Parliament expressed and embodied in the legislation. The starting point is the text of the statute. The language of the statute should be interpreted taking into account its context, including any general purpose or policy of the relevant provision(s) that may be discerned. The consequences of an interpretation, and any perceived improbability of result, may be capable of assisting in choosing between constructional choices that are open on the language of the statute. The statute should be construed as a whole.

40 In ***Commissioner of Taxation v Consolidated Media Holdings Ltd*** [2012] HCA 55 French CJ, Hayne, Crennan, Bell and Gageler JJ recently emphasised the centrality of the text in statutory construction, saying as follows:

> This court has stated on many occasions that 'the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself [39] (footnotes omitted).

'Appears' - ordinary meaning?

41 Consistent with the relevant principles of statutory construction, I begin with the text of the section that is to be construed. In the end, the question is the meaning of the word 'appears'.

42 In this case, to my mind, the answer is not to be found in the ordinary meaning of that word. That is because, in my view, the word has more than one common usage, and each of the competing constructions is consistent with a common usage of the word. The respondent's construction is consistent with and based on an understanding of 'appear' as involving being visibly present. The appellant's construction is also consistent with dictionary definitions of the word 'appear'. For example,

one definition of 'appear' in the *Australian Concise Oxford Dictionary* is 'present oneself ... formally, esp as the accused or counsel in a law court'. The appellant's construction is also consistent with legal usage of the word 'appear' in the context of legal proceedings. In a passage cited with approval by White J in ***CBFC Ltd v Charitopoulos*** [2009] SASC 30 [18], Street CJ in ***R v Gobert*** (1958) SR (NSW) 114, 116 - 117 said that in legal proceedings 'appearance' has a special meaning and in the conduct of proceedings in court an appearance may be made by either the party appearing in person or appearing by counsel or solicitor. Street CJ observed that if counsel appears in court for a party, then that party is taken to have appeared in the proceedings.

43 I think that the interpretation of 'appear' explained by Street CJ is a natural starting point for interpreting a provision that refers to the accused appearing in the context of legal proceedings and where, as I will explain, a summons, warrant or a bail undertaking does not compel personal appearance.

44 The proper construction of 'appears' in s 55 must take account of the provisions and evident scheme of the CPA as a whole. I propose to make some general observations about the statutory scheme as a whole, before returning to s 55 itself.

The statutory setting for s 55

45 For indictable offences, with limited exceptions, an accused is required under the CPA to be personally present during proceedings: s 88. Moreover, in the case of an indictable offence in a court of summary jurisdiction, an accused will be legally compelled by force of a summons or an arrest warrant to appear personally before the court, see s 28 - s 32 and s 38(2) of the CPA.

46 The position in relation to indictable offences broadly reflects the common law position, as to which see ***Ebatarinja v Deland*** [1998] HCA 62; (1998) 194 CLR 444.

47 Unlike for indictable offences, the scheme of the CPA does not always or even generally require the personal attendance of an accused before a court in relation to simple offences. In the case of simple offences, an accused is served with a prosecution notice, accompanied by either a summons or a court hearing notice: s 24(1)(c)(i), s 28(4). In the latter case, personal appearance is not required. Section 33(2) provides as follows:

(2) A court hearing notice must inform the accused -

(a) that the accused need not appear at the time when the prosecution notice to which it relates will be dealt with by the court;

(b) that the accused may give the court written notice that the accused -

(i) pleads guilty to one or more of the charges in the prosecution notice;

(ii) pleads not guilty to one or more of the charges in the prosecution notice;

(c) that if the accused pleads guilty in writing to a charge the accused may also, in writing -

(i) explain why the accused committed the offence;

(ii) provide information to the court that it may use when imposing a sentence for the offence;

(d) that if the accused, in writing, pleads guilty or not guilty to a charge and does not appear, the charge may be dealt with in the accused's absence; and

(e) that if the accused does not enter a written plea to a charge in the prosecution notice and does not appear, the charge may be dealt with in the accused's absence.

48 By s 33(2)(d) and s 33(2)(e), a court hearing notice must inform the accused that if the accused does not appear the charge may be dealt with in the accused's absence.

49 Thus, in cases of simple offences the subject of a court hearing notice, there is no legal compulsion arising by court process that requires the personal attendance of an accused at a court. Further, there is no general provision, analogous to s 88 for indictable offences, which generally requires proceedings relating to an accused to take place in his or her presence. Rather, by s 139 of the CPA, if the court dealing with the charge is satisfied that the accused's presence is needed, the court may compel the accused to appear by various means there set out.

50 This scheme is consistent with the scheme of the *Sentencing Act 1995* (WA). Under s 14(2) of the *Sentencing Act*, an offender need not be personally present for some sentencing options, including the imposition

of a fine, unless the court requires the offender to appear personally under s 14(4).

51 Section 55 is part of the statutory scheme in the CPA and the *Sentencing Act*, in which, for summary offences initiated by court hearing notice, the accused is generally not legally compelled to be personally present. Of course, that does not determine the present question, but it is the setting in which the question is to be determined.

52 Section 172 of the CPA is another significant part of the statutory scheme in which s 55 is to be construed. I will deal with the significance of s 172 later in these reasons.

53 In some provisions of the CPA that I have mentioned under this heading, the word 'appears' is plainly a reference to personal appearance, and not appearance by counsel. See, for example, s 32(1)(e) and s 139. That is relevant to but does not control the question of construction of the word 'appears' in s 55. The starting point is that the same word is used consistently in different parts of legislation. However, that starting point may be displaced by considerations of context of object and purpose. See, for example, Pearce and Geddes, *Statutory Interpretation in Australia* (7th ed, 2011) [4.6] - [4.7].

54 That brings me back to s 55 itself.

When does s 55 apply?

55 Section 55 applies to simple offences in courts of summary jurisdiction: s 48.

56 Section 55 can apply in several categories of situation. Where the accused has not pleaded in writing, it can apply to the first court date. (If the accused does plead not guilty in writing, s 55 cannot apply to the first court date: see s 50(3) and ***Koh v City of Joondalup*** [2012] WASC 493.) If the accused pleads not guilty in writing and does not appear on the new court date set under s 50(3), s 55 applies: s 50(5). Section 55 can also apply where the accused initially pleads guilty but later changes the plea (s 51(8) and s 51(10)).

57 Section 55 applies if the accused does not appear on the date for the trial of the charge: s 61(7).

The consequences of the application of s 55

58 When s 55 applies, the court has two options. It can adjourn the charge. The other option is for the court to 'hear and determine the charge in the accused's absence'. If this latter option is taken, the guilt of the accused is decided in a radically different legal framework than generally applies in a criminal case. Rather than the prosecution being required to lead evidence to prove the offence beyond reasonable doubt, the court is empowered to take as proved any allegation in the prosecution notice, without requiring the prosecution to lead any evidence. Secondly, the accused is denied the opportunity to contest the prosecution evidence or make submissions on the evidence. See s 55(4) and ***Tallot v Matier*** [12].

59 In my opinion, these consequences of the application of s 55 should be borne in mind in determining its scope of application. These consequences of the application of s 55 also invite attention to the purpose and rationale of the section, to which I now turn.

The purpose and rationale of s 55

60 On both the appellant's and the respondent's constructions, s 55 is engaged when an accused does not appear at all, whether in person or by counsel. On the appellant's construction, that is the only situation in which the section applies. On the respondent's construction the section applies in that situation, and also if counsel appears but the accused does not.

61 On any view, cases of no appearance at all are the core of the operation of the section, and will comprise at least the vast bulk of cases to which the section applies. Given the less serious nature of the offences in respect of which personal appearance by the accused is not required, it will be unusual for an accused to retain a legal practitioner, and choose not to appear personally.

62 In a situation where an accused does not appear at all, whether in person or by counsel, the purpose and rationale of s 55 may readily be deduced. In that situation, two things can safely be said that explain s 55. First, the accused has chosen not to contest the charges. That may reflect the absence of interest in or concern about the charge, or it may reflect the absence of any issue with what is alleged. Secondly, there is no-one in the court to dispute the prosecution case. In those circumstances, the legislature has evidently determined that proof by the prosecution is unnecessary. The process is, as expressed by both counsel, 'streamlined'

by permitting the court to take any allegation in the prosecution notice to be proved, without evidence (appeal ts 51, 63).

63 The rationale for the application of s 55 when the accused is represented by counsel, but does not personally appear, is more difficult to identify. In those circumstances, it cannot be said that the accused has made a choice not to defend the charge. The contrary is true. Moreover, there is someone present in court to conduct the defence case and dispute the prosecution case. In those circumstances, it might be asked why the accused should lose the presumption of innocence and the requirement for proof beyond reasonable doubt by the prosecution. Counsel for the respondent submitted that his construction reflected a legislative choice that by choosing not to appear personally, an accused forfeits the presumption of innocence and the benefit of the obligation for the prosecution to prove its case (ts 53). In effect, the intention of Parliament is that if an accused wants to dispute a charge, he or she must appear personally in the court, and it is not open to have counsel appear on the accused's behalf to defend the charge, without personal appearance by the accused.

64 On the appellant's construction, s 55 has an evident coherent and comprehensive rationale. By contrast, on the respondent's construction the rationale for the core operation of the section (no appearance of any kind) and for its application where counsel appears (but the accused does not personally appear) are significantly different. Further, to my mind, a choice by Parliament to the effect summarised in the previous paragraph is sufficiently unlikely to constitute a factor militating against adoption of the respondent's construction. Moreover, the respondent's construction would, to an extent, undermine the entitlements conferred by s 172 of the CPA.

Section 172 of the CPA

65 Section 172 provides:

> (1) A party to a case is personally entitled to appear before the court in order to present and conduct the party's case and to call, examine, cross-examine and re-examine witnesses.
>
> (2) The entitlements in subsection (1) are subject to the powers of the court in the *Evidence Act 1906* to control the questioning of witnesses.

(3) Unless this Act or another written law expressly provides otherwise, any entitlement of a party under this Act may be performed -

(a) on a prosecutor's behalf in a court of summary jurisdiction -

(i) if the prosecutor is the State or a police officer acting in the course of duty, by a police officer acting in the course of duty; or

(ii) if the prosecutor is acting for or on behalf of a public authority, by an officer or employee of the public authority acting in the course of duty,

despite the *Legal Profession Act 2008*;

(b) on any party's behalf in any court -

(i) by a legal practitioner;

(ii) with the court's leave by an articled clerk; or

(iii) with the court's leave by a person who is neither a legal practitioner nor an articled clerk.

66 I accept, as the respondent submits, that s 172 does not directly determine the proper construction of s 55. Consistently with s 172, s 55 could be construed as referring only to personal appearance by an accused, and the entitlements conferred by s 172 as being subject to s 55. Nevertheless, for the reasons that follow, I consider that s 172 supports the adoption of the appellant's construction of s 55.

67 Section 172(1) applies to all parties to a case. It creates a personal entitlement on the part of each party, to 'appear' before the court in order to present and conduct the party's case and to call, examine, cross-examine and re-examine witnesses.

68 The position stated in s 172(3) applies unless the CPA or another written law expressly provides otherwise. There are no relevant provisions in the CPA or any other written law that, for present purposes, expressly provide otherwise.

69 Section 172(3) permits a party to exercise any entitlement under the CPA by a legal practitioner on the party's behalf. The reference to an entitlement encompasses the entitlement conferred upon parties to a case by s 172(1). Thus, reading s 172(1) and s 172(3) together, a party to a case is entitled to appear before the court to present and conduct the

party's case, and to call, examine, cross-examine and re-examine witnesses, by a legal practitioner on the party's behalf. In other words, a legal practitioner can appear on behalf of an accused to exercise the accused's entitlement to appear before the court to conduct the accused's case, and to examine, cross-examine and re-examine witnesses.

70 When counsel appears, the accused is exercising his or her entitlement to appear to conduct the accused's case (and call, examine witnesses etc). To my mind, to conclude that, in such circumstances, the accused has not appeared (for the purposes of s 55) sits uncomfortably with the language, purpose and effect of s 172. It involves saying that an accused can appear to present and conduct his or her case, and call, examine (etc) witnesses (under s 172(1)), through counsel under s 172(3), but nevertheless has not appeared (at all) for the purposes of s 55. In my view, a more harmonious reading of s 55 and s 172 is that when counsel appears on behalf of an accused, in exercise under s 172(3) of the accused's entitlement to appear under s 172(1), the accused thereby appears for the purposes of s 55.

71 Further, the respondent's construction of s 55 would diminish the practical operation of the entitlements conferred on an accused in any prosecution by s 172(1) and s 172(3), and by s 144(1). That latter section provides:

> In the trial of a charge, the accused is entitled to defend the charge and to cross-examine any witness called by the prosecutor and to call, examine and re-examine any witness.

72 Section 144(1) creates an entitlement to which s 172(3) applies, and so is exercisable through counsel.

73 If an accused does not personally appear, but is represented by counsel, counsel is entitled, on behalf of the accused, to present and conduct the party's case and to cross-examine witnesses. However, on the respondent's construction, s 55 applies. That means that the court can take the contents of the prosecution notice to be proved, and the prosecution need not call any witnesses. That would seem to me to undermine what is conferred by s 144(1) and s 172 including, in particular, the right to defend the charge and to cross-examine witnesses. If s 55 applies, there will be no prosecution witnesses to cross-examine, and the right to defend the charges has no practical content.

Authorities

74 I have already referred to the general observations made by Street CJ in ***R v Gobert*** (116 - 117).

75 The construction of s 55 which I prefer finds some support in the decision of White J in ***CBFC***. That case concerned r 75.14 of the applicable court rules for civil proceedings. That rule provides, relevantly, that 'if, when an action is called on for trial, the plaintiff appears and the defendant does not appear' then the plaintiff shall be entitled to judgment or may proceed to prove their claim. His Honour observed that in the context of r 75.14 'it is clear enough that the parties may "appear" in the relevant sense either in person or by counsel' [19].

76 In ***CBFC***, White J went on to hold that a party who appeared (whether by counsel or in person) only for the purpose of seeking an adjournment of the trial did not appear for the purposes of the rule [19] - [20].

77 In this case, in written submissions, the respondent contended that counsel for the appellant had appeared before the magistrate only for the purposes of seeking an adjournment. In my view, that is not borne out by consideration of the transcript of proceedings before the magistrate. At the commencement of the hearing, counsel announced her appearance in an unqualified way. Counsel did not withdraw when the court dismissed the application for an adjournment. Counsel was not offered any opportunity to make any submissions thereafter, but it is clear that she remained at the bar table throughout the hearing (see ts 3 - 4). In any event, the position was made clear at the hearing before me on 14 December 2012. Senior counsel for the appellant informed the court, without objection from the respondent, that counsel for the appellant before the magistrate (who was present in court on the appeal) had not appeared solely for the purpose of seeking the adjournment, but had full conduct of the matter, including for its trial.

78 For these reasons, I would construe s 55 as applying only when an accused is neither personally present nor represented by counsel. On my construction, when the accused is not personally present, but is represented by counsel, s 55 is not engaged.

Other submissions of the respondent, and other matters

79 The respondent pointed to the difference in the definitions of 'prosecutor' and 'accused' in s 3 of the CPA as supporting the respondent's

construction of s 55. For the purposes of a prosecution in a court of summary jurisdiction, 'prosecutor' is defined to mean the person who commenced the prosecution, or a person who in court represents that person. 'Accused' is defined to mean the person alleged in the prosecution notice to have committed the offence. The respondent points to the absence of a reference to a person representing the accused in the definition of accused. When the two definitions are inserted in s 55, the respondent submits, it is apparent that the section refers to appearance by the accused personally, whereas it refers to an appearance by the person who commenced the prosecution or a person representing that person.

80 I accept, of course, that when the definition of prosecutor is inserted in s 55, then, on any construction of the word 'appears', if the lawyer for the person who commenced the prosecution is at the court, the prosecutor has appeared. However, to my mind, the difference in the definitions of these two terms is not of controlling or significant weight in the proper construction of s 55. The significance of the difference in the two definitions is not to be viewed in the context of the use of those terms in s 55 alone. To the contrary, the term 'accused' is used throughout the Act in circumstances where the reference must be to the accused themself. It would not make any sense to include a reference to a person representing the accused in the definition of the accused.

81 The respondent also refers to s 142 which applies to any prosecution. That section provides that the court trying the accused on the charge must, at the start of the trial, inform the accused of the charge and require the accused to enter a plea.

82 The respondent submits that s 142 assumes the physical presence of the accused. I accept that s 142 provides some support for the respondent's construction, in that it appears to assume the accused's physical presence. However, I do not think s 142 is of controlling significance for the proper construction of s 55. I think s 142 can be reconciled with my preferred construction of s 55. Section 142 refers to the entry by an accused of a plea in accordance with s 126(1) and s 126(4). Counsel may be able to enter a plea on behalf of the accused. Alternatively, the absence of a plea by the accused would engage s 126(5), so that the court would enter a plea of not guilty on behalf of the accused.

83 Moreover, s 142 is part of div 4 of pt 5. Also in that division is s 144(1), to which I have already referred, if the respondent's construction is adopted, the right of an accused conferred by s 144(1) and s 172(3) to

defend the charge through counsel would be devoid of practical content in circumstances where the accused did not personally attend.

84 Section 55 empowers the court to determine the charge in the accused's absence. The use of the word 'absence' might be argued to indicate physical absence, in turn suggesting that appearing involves physical presence. However, in context I think the reference to absence is a reference to an accused not being present at all, whether by counsel or in person.

85 The parties did not refer to the Explanatory Memorandum for the CPA. The Explanatory Memorandum contains a sentence or two about each provision. It says, in relation to s 55, that it 'provides for a court of summary jurisdiction to deal with a matter when the accused does not attend court'. That statement supports the respondent's construction, but, for the reasons I have explained, I prefer the appellant's construction.

86 For these reasons, I would uphold ground 2 if I had not upheld ground 1.

87 On the face of it, if grounds 1 and 2 were not upheld, there is considerable force in ground 3. Indeed, counsel for the respondent acknowledged that he could not advance any argument of substance against it. However, given that I have upheld ground 1, and would have upheld ground 2, it is not necessary to deal with ground 3 or ground 4.

Conclusion

88 For the reasons I have given, I ordered that:

(a) the appellant has leave to appeal on all grounds;

(b) the appeal be upheld;

(c) the judgments of conviction be set aside; and

(d) the matters be remitted to the Magistrates Court for trial.