

AUSTRALIA / JUDGMENT

O'Toole v R

[2026] NSWDC 348**COURT**

District Court

DECIDED

25 September 2026

BEFORE

Priestley SC DCJ

CASE / FILE NUMBER

2024/455094

2024/105318

Decision under appeal

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District Court**New South Wales****Medium Neutral Citation:** O'Toole v R [2026] NSWDC 348**Hearing dates:** 15 September 2026**Date of orders:** 25 September 2026**Decision date:** 25 September 2026**Jurisdiction:** Criminal**Before:** Priestley SC DCJ

Decision: Orders in Passat matter
(1) Appeal allowed.
(2) In respect of each of the 2 charges the subject of the appeal, the convictions are set aside and the charges are dismissed.

Orders in Motorbike matter
(1) Appeal allowed
(2) In respect of each of the 7 charges the subject of the appeal, the convictions are set aside and the charges are dismissed.

Catchwords: CRIME — Appeals — Appeals against conviction**Legislation Cited:** Crimes (Appeal & Review) Act 2001
Evidence Act 1995

Cases Cited:	Charara v R [2006] NSWCCA 244 Davidson v R (2009) 75 NSWLR 150 Dyason v Butterworth [2015] NSWCA 52 Fox v Percy (2003) 214 CLR 118 Minister for Immigration and Border Protection v SZVFW 92018) 163 ALD 1 Livesey v NSW Bar Association (1983) 151 CLR 288 Lunney v DPP [2021] NSWCA 186 McNabb [2021] NSWCA 298
Category:	Principal judgment
Parties:	Texas Blaze O'Toole (Appellant) Director of Public Prosecutions (Respondent)
Representation:	
Solicitors:	Aboriginal Legal Service for the Appellant Director of Public Prosecutions for the Respondent
File Number(s):	2024/455094 2024/105318 Decision under appeal
Court or tribunal:	Local Court
Jurisdiction:	Criminal
Date of Decision:	06 February 2026
Before:	Judge M Dakin LCM
File Number(s):	2024/455094 2024/105318

JUDGMENT

Introduction and section 18

The appellant appeals his convictions in respect of 9 offences. Two of those convictions resulted from a hearing which concluded on 8 May 2025. The charges in that matter were of police pursuit and driving when never licensed. It was alleged the appellant was driving a VW Passat motor vehicle. The magistrate found the offences proven beyond reasonable doubt in reasons given on 8 May 2025. This matter will be referred to as the Passat matter.

Just 10 days before, on 29 April 2025, the same magistrate had convicted the appellant in respect of the other 7 charges the subject of the appeal. Those charges involved allegations of the appellant's use of a Honda motorbike. This matter will be referred to as the motorbike matter. In the magistrate's reasons he made adverse findings to the credit of the appellant, including that in answering questions in an interview that the appellant was being deliberately evasive, and "It was cunning on his part and a deliberate attempt to mislead". The magistrate then stated "I do not accept he was truthful in fact". It was never raised by any party either at the time of the Passat

hearing, or as a basis of appeal, but there must be some concern as to the appropriateness of the same magistrate hearing the Passat matter after having so recently made adverse findings against the appellant in the motorbike matter for the reasons considered in cases such as *Livesey v NSW Bar Association* (1983) 151 CLR 288. That said, it must often be the case that the Local Court, perhaps even moreso in regional areas, deals with defendants in respect of whom they have previously made unfavourable findings. In the event, nothing turns on this given the conclusion I have reached on the Passat matter.

Both appeals are brought as of right under s11 of the Crimes (Appeal & Review) Act (CARA). Section 18 of CARA provides that the appeal is to be by way of rehearing on the basis of evidence given in the original Local Court proceedings, with some exceptions. There was no application for the giving of any further evidence.

The approach to take in respect to an appeal under section 18 of the Crimes (Appeal and Review) Act has been the subject of numerous Court of Appeal and Court of Criminal Appeal decisions. The approach I take is based on cases such as *Charara v R* [2006] NSWCCA 244 and *Dyason v Butterworth* [2015] NSWCA 52 and is as follows:

The appellate judge is to form their own judgment of the facts while recognising the advantage enjoyed by the magistrate who saw and heard the witnesses called in the hearing: *Charara v R* [2006] NSWCCA 244 at [18].

The Court is entitled to consider the reasons of the magistrate including an assessment of credibility issues because the appellate function could not properly take place without reference to them: *Charara v R* [2006] at [23]-[24]. The advantage of the magistrate is observing and hearing the witnesses give their evidence must be acknowledged and taken into account.

The Court is obliged to give the judgment which in its opinion ought to have been given in the first instance: *Fox v Percy* (2003) 214 CLR 118 at [23].

The Court is not obliged in every case to undertake a complete review of the whole evidence and form its own view of the appellant's guilt regardless of the issues raised by the appellant. The extent of the review will depend on the circumstances of the case and the kind of error alleged: *Lunney v DPP* [2021] NSWCA 186 at [44].

The approach may also be described in the way stated by Justice Gageler in *Minister for Immigration and Border Protection v SZVFW* 92018) 163 ALD 1 as the "correctness standard" which was his Honour's way of describing the standard being spoken of in *Fox v Percy*.

In *McNabb* [2021] NSWCA 298 Bell P (as he then was) described the task of a District Court judge in a section 18 appeal as follows, at [25]:

"the task for a District Court judge in hearing a section 18 appeal is to form his or her own judgment on the facts and to determine on the basis of the evidence that was before the magistrate (supplemented by any further evidence received pursuant to section 18 (2) of the CAR Act or as a result of the calling of a witness pursuant to section 19) whether that evidence was sufficient to demonstrate the appellant's guilt beyond reasonable doubt. If it did not, error will have been established. Error of law in reaching

the conviction may also be established and the rehearing will involve the court reaching a fresh conclusion as to the appellant's guilt on the basis of evidence given in the local Court but without the error of law which tainted the result at first instance." His Honour then went on to observe that a dismissal of a section 18 appeal against conviction will necessarily carry the conclusion that the magistrate did not commit "some legal factual or discretionary error" citing Allesch.

The Passat matter

The evidence of the prosecution in this case consisted of a video of a police pursuit of a Passat motor vehicle. The video was recorded by a highway patrol officer patrolling on a fully marked highway bike by use of a helmet cam. That officer, SC Rodney Allan Ferris also gave evidence. A still photograph of the Passat was tendered. Two documents were tendered, one being a certificate from Transport NSW evidencing that the appellant had never been issued a driver's license, and the second being a section 14 Form of Demand on the owner of the vehicle. The owner of the vehicle was the appellant's sister. The response to the demand by the owner was "honestly I don't know who it was" (that was driving), and "my memory is so bad".

The evidence in chief of SC Ferris was that on 4 December 2024 he observed a black Passat driving towards him. He said he was aware one of those vehicles had been involved in a pursuit a couple of days prior so he slowed down. He said he was going slow. He observed black and yellow number plates and "as it drove past I saw a male known to me to be driving, through an open window", and he identified that male as the appellant.

Officer Ferris said he knew it was the appellant because he had a "couple" of dealings with him in the past and had seen lots of photos as well. He described him on this day as wearing a stripy T shirt, no sunglasses, no hoodie, and with a bit of a mullet haircut, which is different "today". The driver's window was "half way down", and he said no one else was in the car. When the police motor bike passed the Passat they were about a metre away.

At T18 officer Ferris gave this description of his pursuit of the Passat:

Q. Can you tell the Court what happened from the point that you saw the vehicle in Shearman Drive?

A. So, after I turned on the vehicle, I obviously turned the - turned the recording on, I activated my lights and sirens and I rode after it. Saw that they turned left onto Sherman Drive, when I got up to there I seen it - saw it turning right onto Pleasant Street on the incorrect side of a give way sign. So, it was basically the wrong side of the road. I lost sight of it for around about ten seconds as I - as I drove up the hill. I got up to the crest, I observed it cutting between a west and an eastbound vehicle over the double centre lines down near the Rouse Road roundabout. I then observed the vehicle turn right onto - on the incorrect side of the traffic island on Rouse Road. As I got down to the Rouse Road roundabout, I've looked to the right and I observed the vehicle some distance down the road on the far right-hand side of the road passing a, a northbound vehicle travelling south, and the car was basically against the gutter, the, the Passat and the, the northbound vehicle had passed on the other side of it. I got down to the, the next bend which is

the Teven Street intersection and I could see along to the Oliver Avenue roundabout and the - and the road, and the start of Oliver Avenue, and I observed the black Passat blast around a, a taxi heading in the same direction. At that point, I knew it was - that was a pretty dangerous spot just there, because it's a, a slight crest, and that it was, you know, 1 o'clock in the day. It's fairly busy traffic, so I terminated the pursuit.

The issue in this case is identification. Officer Ferris has given recognition evidence; he asserts he recognised the appellant by looking through the driver's window of the Passat as the Passat passed him from the other direction. When asked in chief to describe the person he saw in the Passat, SC Ferris said:

So, on that day, yeah, he didn't have any - he was wearing a T-shirt, a stripy T-shirt. He didn't have any sunglasses on, and he had no, no hoodie. Just, he's had a bit of a mullet haircut that day, which is different to today.

The evidence of the basis of SC Ferris recognising the appellant was at T21, when he said he had "only two" previous dealings with the appellant, and yet somewhat at odds with that, said that he had observed the appellants' photograph countless times, and that he could not put a figure on it. The evidence does not make clear if this is one photo seen countless times, or more than one. The evidence does not disclose whether in the photos SC Ferris is referring to the accused had a mullet hairstyle. When asked if he was sure it was the appellant he said "I'm 100% sure. If I wasn't sure, I wouldn't have proceeded".

When cross examined SC Ferris said he could not see through the windscreen of the Passat. Officer Ferris described what he did in these terms:

A. I panned down and looked at the number plate as I was slowing down. And then I couldn't see the driver, as you state, through the windscreen because of the reflection of the light, but the door window was down and so was the one directly behind it. So I looked in as I drove past.

Officer Ferris agreed the vehicles passed for no longer than a second. Later he described this as a "brief snippet". He agreed all he saw was the side of his face, his shirt and his hair. He agreed that he had said to a witness at the time that "I think I know who it is".

In the magistrate's judgment he concluded that it was an overwhelming circumstantial case. He noted he was invited to give himself a warning pursuant to s165 that the recognition evidence is often categorised as unreliable. The magistrate does not expressly then give such a warning, or direct himself as s116 may require, but I do not consider that an error for two reasons. Firstly because the magistrate is plainly aware of the nature of recognition evidence by his reference to its known unreliability, and secondly because he then goes on to consider whether he should treat this evidence as reliable. In doing so he sets out the basis of his finding that the evidence of SC Ferris should be accepted.

With respect to the magistrate, I reach a different conclusion, both factually and due to what I consider to be the need to place greater weight on the recognised unreliability of recognition evidence. It is not a question of whether the witness is honest, but a question of the reliability of this type of evidence.

I do not consider the evidence of SC Ferris, taken with the other evidence, sufficient to satisfy me beyond reasonable doubt that it was the appellant who was driving the Passat on 4 December 2024 as alleged by SC Ferris, for the following reasons:

The identification is based on what the witness himself calls “a brief snippet”. The Passat and the police motorbike are travelling in opposite directions. The officer could not see through the windscreen; what he observed is limited to a side on view of the person in the Passat. In the evidence it is estimated to be no more than a second, and having seen the video, is literally a fraction of a second.

The officer has only had 2 interactions, which I take to mean face to face dealings with the accused. That is not a large sample. Further, the officer deals with people daily, and over time inferentially a great number of people. The officer says he has seen the accused photo countless times; putting aside the oddity of that assertion, which was not challenged, was it one photo, two, three or many? The accused is aged 22 at the time of the alleged offence; how long before that date was the interaction with the officer, and how long before was/were the photo/s taken? Had the early 20s accused developed in any way since the times the officer saw the photo/s or had interaction? Did the photos show the accused with or without a mullet hairstyle?

The magistrate acknowledged that there was a limited opportunity for the identification but said the actual circumstances in which the opportunity arose are the primary consideration. Without explaining just what that means, the magistrate then states “no other reasonable hypothesis inconsistent with guilt arises on the evidence as it was”. This is the language of a circumstantial case. The real issue is how reliable is the recognition evidence. There is plainly another hypothesis available, namely that the driver of the Passat is not the accused, which only becomes unavailable if the fact finder is satisfied beyond reasonable doubt by the recognition evidence. In any event the better way to approach this case is to consider the circumstances of the recognition, and what it is based on, and to also bear in mind s116 of the Evidence Act, and the need for special caution in considering identification / recognition evidence. The need for that caution is heightened in the circumstances in which this recognition occurs, as set out above.

Directions commonly given to juries pursuant to s116 include:

That whilst a witness may be honest, that does not necessarily mean the evidence is reliable.

The experience of the criminal courts over the years, both in Australia and overseas, has demonstrated that identification evidence may turn out to be unreliable. There have been notorious cases over the years in which evidence of identification has been demonstrated to be wrong after innocent people have been convicted.

Matters to take into account in considering recognition evidence include the opportunity the witness had to make their observation; here, as noted above, it was extremely brief. What were the conditions like? The person could only be viewed through the side window, meaning not only that he was viewed side on only, but it also means the time of the viewing was limited to the fraction of a second as the officer passed the side window. Was there anything distinctive above the person in the car? No, a stripy shirt was asserted, but never otherwise mentioned in evidence, and the description was more of what the person did not have; no sunglasses, no hoodie, and reference to a mullet hairstyle which the accused did not have in court, and with no evidence beyond the alleged recognition of the accused by SC Ferris of the accused having such a hairstyle at the time of the alleged recognition. How soon was the identification made? The evidence shows the officer stated to a witness at the time “I think I know who it is”, which by the time of his evidence in court had become “100%” certain.

There was other evidence, on which the magistrate placed significant weight, namely the Form of Demand of the Passat owner, referred to above, and the fact that the owner was the sister of the accused. The evidence does not disclose where the owner lives, nor is there any evidence as to the nature of the relationship between the accused and his sister. The magistrate described this as “the other compelling link in the circumstantial chain”. That the car was owned by the accused’s sister plainly leaves open a finding that the car may be more readily accessed by the owner’s brother, the accused, than by someone unknown to the owner; but it does not amount to a “compelling” link in a circumstantial evidence chain (or strand in a rope) in this case. Rather, in my view it borders on the speculative to be satisfied that it was the accused driving the car at that time by reason of the accused being the brother of the owner, and the owner not remembering who was driving it at the relevant time.

The appellant argued the recognition evidence of SC Ferris was not reliable enough to make out the police case, and that the Form of Demand evidence added little. The respondent argued it was open to accept SC Ferris’s evidence, and the Form of Demand supported the conclusion it was the appellant who was driving the Passat.

As already noted, the case turns on the recognition evidence, which needs to be treated with caution, and in this case was based on a “brief snippet”, or if you like, a glimpse, through a side window for a fraction of a second. Also as noted the evidence of the officer as to his honesty need not be impugned; the issue is the reliability of this category of evidence in the circumstances of this case. For the reasons outlined above that is enough to decide this appeal.

I note the approach to a section 18 appeal set out above. In my view the magistrate has erred by not treating the recognition evidence with sufficient caution. Rather, he accepts the honesty of the officer, and in my view finds that the opportunity for the recognition, namely a clear view of the driver, to be more helpful to the police than it in fact is. The fact that this recognition occurs in a brief side on snippet is part of the reasoning as to why I do not consider that evidence sufficiently reliable to allow the prosecution case, with the other evidence, to be made out beyond reasonable doubt.

The appeal should be allowed and the charges dismissed.

Orders in Passat matter

Appeal allowed.

In respect of each of the 2 charges the subject of the appeal, the convictions are set aside and the charges are dismissed.

Motorbike matter

The appellant appeals 7 convictions entered on 29 April 2025, based on matters alleged to have occurred on 16 February 2024 and 18 and 19 March 2024. The charges on which convictions were entered were:

Date

Charge

H Ref

16.2.24

51B police pursuit

948/3

16.2.24

Drive never licensed

948/4

16.2.24

154A drive conv taken w/o consent

948/13

18.3.24

S117 RTA drive reckless (at a speed dangerous)

948/5

18.3.24

Drive never licensed

948/9

18.3.24

154A drive conv taken w/o consent

948/14

19.3.24

474.18(1) Make false call to emergency services

948/11

The police case is that all of these offences save for the false call matter involved a Honda motor bike with Queensland registration VNM 98, on a red plate with black letters and numbers (“the Honda”). The issue in respect of those charges arises because the direct evidence relied on to make them out does not comprehensively identify the motor bike, nor is there any direct evidence of the face of the rider of the bike at the time of the alleged offending. There is for example video evidence of a motor bike being pursued on 16 February 2024, and of being ridden at speed on 18 March 2024, but that video evidence does not allow for an identification of the motor bike by any meaningful reference, such as size of engine, make or model, nor the registration. There was direct evidence from SC Briginshaw going to the bike’s registration from 16 February, and a description of the colour of the number plate as red and black by SC Ferris on 18 March. The evidence does not allow for any direct identification of the rider; for example, the ICV footage never shows the rider’s face. Rather the police case is to seek to prove that the appellant has on occasion ridden the Honda, and further, was riding it at times and locations proximate to the time of the conduct relied on for the charges. The police also rely on, and the magistrate accepted, that the accused made a false emergency call to assist him to evade apprehension in respect of the events of 16 February and 18 March.

The case extended over a number of days and in total 5 police officers were called in the police case, which included an ERISP with the accused. There were also 12 exhibits. Each party has provided written submissions for this appeal. In essence, the appellant argues the police case does not make out the identification of the rider of the bike as the accused. The two drive without consent charges and the false call charge are also challenged on the basis of the police case not making out the “knowledge” element or intent element respectively, though in oral argument the points really were that the evidence did not establish the bike as stolen, nor was the evidence sufficient to make out the false call charge. The prosecution argument on appeal was that the temporal connection between the two occasions of speeding by the motorbike to the sighting of the accused (at the Liberty service station on 16 February and the pod village on 18 March) and the making of the 000 call (if established) allow for the conclusion that it was the accused riding the speeding bike on both occasions.

The appeal proceeded by going through the evidence. That evidence will now be set out, and it will be seen once that has been done and applying the section 18 approach as set out above just how the matter should be decided. The matter of the false emergency call will be dealt with after the other charges.

The evidence

Exhibit 1 (FN223) was video from a police car (in car video, ICV) showing a motor bike travelling at speed in wet conditions on 16 February 2024. This is the basis of the first 3 charges, of police pursuit, drive never licensed and driving a conveyance taken without consent. There is some audio on the video. There are comments that can be heard such as a reference to “Kawasaki”, NSW number plates, and the rider having a brown shirt and a white helmet and of him leaving the servo, and of someone decamping at 10.36am. The timestamp on the video at its commencement is 10.47am. The Honda allegedly has Queensland plates, and is not a Kawasaki. The helmet seen in the ICV cannot be seen to be the same as that shown in exhibit 2, but is seemingly of a light colour. It is not suggested by the prosecution that any identification of the rider can be made from this footage. There is however direct evidence of SC Brigginsshaw regarding the number plate.

Exhibit 2 is still photographs taken from a CCTV recording of a Liberty service station on 16 February 2024. The photos have a description and a time written at the bottom. The time is stated in each of the 4 photos to be 10.57am, so clearly are not the time of the actual event being recorded. The location is Ballina Road Lismore. The photos show a man on a motorbike wearing a helmet that looks predominantly blue and red on the part that is visible in photo 1. Photo 2 is another angle of a man on a motorbike with a helmet that looks predominantly white, but with some blue and white markings; it was not argued this was not the same bike and person as photo 1. Photo 3 shows a motorbike with the number plate VNM 9 and with it appearing that there may be an indistinct number after the 9. The police case is this is a Queensland number plate, but that is not discernable from the digital or paper copy of the photo. Photo 4 shows the man said to be the rider of the motorbike exiting the store of the service station. The accused in his ERISP denied that was him. It shows the man wearing a pair of ASIC sports shoes, or runners. The evidence referred to them as “pumps”, which were said to be green, and appear green in the photo, and were described by the note on the photo in the police case as green. When the appellant was arrested he was wearing shoes that were ASICS and were similar, and were the “pump” style; exhibit 9 is a photo of these shoes. Yet the shoes of exhibit 9 which the accused was wearing are blue “pumps”, not green.

Exhibit 4 was a certificate that the accused had never been issued a NSW license. Subject to the oral evidence, that is largely the evidence concerning the 3 charges arising from 16 February 2024. All the evidence in the hearing was tendered in respect of all charges. I note exhibit 3 is a photo taken on 19 March 2024. This is a photo of a motorbike with a number plate that matches the number plate in photo 3 of exhibit 2, save that the number 6 is clearly seen after the number 9, giving the registration “VNM 96”; the state of the registration remains indistinct. The angle of the photo is different to photo 3 of exhibit 2, but it appears to be the same motorbike.

Exhibit 5 (FN221) was a second ICV, this time from 18 March 2024, at 11.18am. It records a motorbike travelling at speed. It is the basis of a charge of driving reckless, at a dangerous speed, of driving never licensed, and of driving (riding) a conveyance without consent. No complete identification can be made of the motorbike or rider from this ICV. The rider appears to have a

light coloured top and a light coloured helmet. Apart from when the bike approaches and then passes the police car from the opposite direction, the bike is not seen on the ICV. There is however direct evidence of SC Ferris regarding the number plate.

Exhibit 7 was a number of pieces of CCTV footage from the Lismore pod village. In one a person alleged to be the accused is seen walking to a motor bike and getting on it and riding away; by the time the man is seen on a moving bike it is 11.15am according to the timestamp and he can be last seen in the carpark leaving the view of the camera at 11.15.55. Whilst walking the man can be seen carrying a helmet which appears to be coloured predominantly white with blue and red markings. Another clip (CH 3) shows a man on a motorbike either turning onto or out of a road that leads to the village; the evidence does not say which, though the evidence of a sign suggests the rider is entering the village; this footage is timestamped 11.20.15 am. Other footage (CH 6) shows a motorbike being ridden through and away from the pod carpark at 11.19.53 to 11.20.04. The police evidence was that the distance between where the motorbike was seen speeding and the pod village is about 2 kilometres.

The next day 19 March 2024 the offender was arrested. The accused was seen driving a white Astra motor vehicle and was stopped by police. This was at about 3.15pm. Shortly prior to that police had received a 000 call (exhibit 6) from a person giving the name "Blaze Cole" and a phone number starting 0466 and ending 079, reporting what is alleged to be a fake emergency of a man waving a gun in East Lismore.

The accused was compliant upon arrest. He agreed to an ERISP and was polite.

The following is noted from the ERISP:

The accused was very polite and compliant.

The accused admitted to knowing the Honda, described by the officers as being "a Victor-November Mike 9 6, so its a Queensland registered, registration motor vehicle being a black Honda CBR 1000". He said he had never ridden it but had been on the back of it multiple times. He later said he had ridden it but not on a public road. He denied it was his.

He then asked police to clarify which bike they were referring to, and asked if it was one of "them ones", at which point he raised his hands, indicating a bike with high handlebars, which is not the Honda. He said the one that he rode had bars, which I take to mean handlebars.

He is then shown presumably some video as the officer states "look who rides it in yesterday", being 18 March, and presumably the CCTV of the pod village is shown. The accused denies that is him on that bike, and later denied using it at all. There is no identification of the bike in these videos by its registration.

It was put to him that there were photos of the bike on his phone. He variably answered that it was either Josh's phone and they had swapped SIM cards, and that the photo was to do a rego check as "the guy's have ridden it like a fucken spastic".

He denied knowing the bike was stolen. He said he had only been at the pod village for 2 nights.

He was then shown the photos from the Liberty service station and denied he was the person in the photos.

On a number of occasions the officer put to the accused was wearing the same shoes when arrested as he was wearing on 16 February, and made reference to the green pumps. The only evidence of the shoes he was arrested in is the photograph which is exhibit 9. The description of that photo describes them as green pumps. Yet as noted on the appeal hearing, exhibit 9 in digital form clearly shows they are blue pumps. The prosecution did not contradict this or offer any explanation. The position is further confused by the answer to Q188 where the accused when being asked about the shoes in the Liberty photo is put the proposition that he was wearing the same shoes today, and the accused replies he has got “the” shoes. These questions and answers suffer from people talking over each other, and it is not very clear. What can be said is that the accused is saying he has got the shoes, meaning the ones he has in custody. What is also clear on the evidence, is that the police are wrong to assert the shoes shown on the Liberty photo are the shoes the accused was arrested in; the former are green pumps, the latter are blue pumps.

The oral evidence began with SC Briginshaw.

SC Briginshaw was driving the police car which recorded the ICV of 16 February 2024. At T3.47 of 1.10.24 he identifies the registration of the bike as “Off the top of my head, VPN 9, I believe. Black registration. Red on the black”, and that it was partial as the end number had been blackened out. He described the rider “appeared to be young, sports joggers, duffel bag over his shoulder. Black and white - sorry, red and white helmet”. He said the bike he saw in the Liberty photos was the bike he saw recorded on the ICV.

In cross examination he agreed he had seen an incident log when he was preparing “the matter”, which I take to mean preparing the matter for hearing. He agreed that incident log note a partial plate, of VNM 9 was provided. He agreed the description he was given of the rider was of wearing a red T shirt, whereas the description on ICV audio was brown shirt, and also “pretty confident” of a black Kawasaki, and a white helmet. He accepted that his note of 21 February 2024 recorded that “Number plate was obscured. Unable to correctly ID vehicle”; T13.49. The officer made his statement in on 19 September 2024, so 7 months after the event, and at a time that the bike he suspects was on the ICV had been photographed. It is not clear from the evidence in chief whether SC Briginshaw is saying he identified the motorbike registration in the sense that he noted it, or whether it matched a registration he had been made aware of over the police radio. The point here is there is no record of SC Briginshaw recording VMN 9 as the registration of the bike until he came to make his statement; the evidence does not support him making such a record, or stating that to anybody on 16 February, or before his statement.

SC Hudson gave evidence concerning 18 March 2024. He was in the police car which recorded the ICV of exhibit 5. He said the rider was wearing a white T shirt and dark shorts and a light coloured helmet. The next day, 19 March the Honda was located at the pod village and impounded. The officers at the pod village put out a broadcast for the white Astra. Whilst that was occurring there was the 000 call, and SC Hudson noted the name Blaze for that informant, the same as the accused's middle name.

The evidence from SC Hudson as to the false call was that when he got back to the station the phone of the accused had been seized by police. SC Hudson also had the phone number of the person who had made the emergency call from the information about that job. His evidence was that he called that number and the phone taken from the accused rang. He said he did not validate any of the information from the 000 call, and no arrests were made.

In cross examination he agreed he took no further steps in relation to the 000 call after ringing the phone. The cross examination established there was no evidence to support SC Hudson's evidence other than the word of SC Hudson. It showed he did not obtain the phone from the accused, he had no property docket for the phone, he did not record his conduct of dialling the number and the phone ringing by his BWV or any other means, there was no Cellbrite conducted, and he was not aware of any checks conducted on the phone. The basis of SC Hudson's belief that the phone that rang was the accused's phone is not the subject of evidence, other than the fact the accused's phone was seized that day. There is no evidence to show that the phone that rang was the phone that was seized. His evidence that it is the accused's phone is at best hearsay. The basis of SC Hudson stating the number he says he dialled was from the information from the emergency call, yet that information is not in evidence, and that evidence too is hearsay at best.

SC Ferris was in the back of the police car on 18 March 2024 when the ICV was taken. He stated he saw the Honda approach at speed, he turned as it went past, and saw it had a black number plate with red letters and numbers, but could not make them out. He described the rider as male, white helmet, light coloured shirt, dark coloured pants, like shorts, and dark shoes. The next day he located the Honda at the pod village which he believes is the same bike he saw on 18 March. He says when they found the bike SC Briginshaw did a mobipol check and determined it was stolen. He claims the clothing in the CCTV of the pod village is what he saw the day before. He said CH3 was video of the exit to the pod village; the expression "exit to" does not really clarify if it is showing the rider entering or exiting the village. Nor does he state whether the bike in CH3 is exiting or entering the exit, ie exiting or entering the pod village.

In cross examination SC Ferris agreed he made no facial ID of the rider on 18 March when he was in the back of the police car. Nor did he see the face of the driver of the Astra on 19 March, though when a car matching that description including the first couple of letters of registration was stopped, it was the accused in that car.

SC Sims gave evidence of pulling the white Astra over on 19 March 2024 at about 3.15pm, not long after he heard the broadcast put out by SC Ferris. He said the accused was wearing blue and black joggers, army style cargo khaki pants, and a light coloured T shirt.

In cross examination he stated he did not recall the accused saying the phone was his brother's (ERISP Q&A 125 when this officer present), and made inquiries as to the owner of the phone but it came up to an unregistered person. He was prepared to accept he was wrong about the colour of the shirt in his description; when asked how long the pants were he first answered "I'm not a tailor" and then said down to the boot.

That concluded the evidence on 1 October. The matter was then adjourned to 4 February 2025. At the conclusion of 1 October the prosecutor stated, inter alia, that the prosecution needed an adjournment to call evidence from Alex Savage regarding the ownership of the Honda, which the prosecutor said was needed to prove the 154A sequences. On 4 February 2024 Mr Savage was called but did not appear. The prosecutor stated, contrary to what was said on 1 October, that the accused required Mr Savage. Mr Savage did not give evidence, which the prosecution had acknowledged was needed to make out the s154A charges.

SC Coyle of Buladelah then gave evidence concerning an incident at Buladelah on 23 December 2023, namely a motorbike doing a burnout there. The bike was described as a dark coloured road bike with registration VNM 96, a NSW plate, white with black lettering.

The magistrate's reasoning

The magistrate delivered his judgment on 29 April 2024. He began by referring to the evidence concerning events at Buladelah in December 2023, which at T8.30 was described as being evidence the prosecution considered an indispensable link in the chain linking the accused to the riding of the bike on 16 February; logically, on that view it would also impact on the consideration of the charges arising from 18 March. In this appeal, the prosecution has accepted that evidence is not to be considered. In those circumstances, it would seem to follow that the prosecution accept they do not have an indispensable link, namely the possession at 23 December 2023 by the accused of what the magistrate seems to have accepted was the Honda.

Even if taken into consideration, that evidence is too weak to satisfy me to any level that the rider of that bike is the accused, nor for that matter, that the bike is the Honda. That evidence seeks to identify the accused as the rider of a bike with the same number plate letters and numbers, but different colour and state. The identification of the accused is hearsay; some person on the phone, purporting to be the accused's father, says that it is the accused on that bike. The magistrate's approach show a tendency to treat the identification of the accused and the identification Honda as one; ie, if it can be shown that the bike in the two ICVs is the Honda, then the rider must be the accused; or if it can be shown the rider is the accused, then the bike must be the Honda. That approach assumes that nobody rides the Honda but the accused, and the accused rides no bike but the Honda. It is not a sound approach, for obviously the accused may ride more than one bike, and more than one person may ride the Honda.

The magistrate described the case as a “link in the chain” circumstantial case, with the indispensable link seemingly being the Buladelah evidence, no longer relied on. It would not be a fair reading of the judgment however to say that absent the Buladelah evidence the magistrate would have dismissed the charges as is clear from the whole of his reasons. The case is one where there is no facial identification of the person riding the bike in the two ICVs. The prosecution is based on a range of circumstantial matters seeking to prove that person is the accused. As such, the case is more properly described as a “strands in a rope” type of circumstantial case.

The matters the magistrate found and relied on to be satisfied beyond reasonable doubt that the rider in the ICVs is the accused were the focus of his judgment. The structure of the judgment is to go through the circumstantial matters and having considered them, the magistrate accepts them as made out. The matters are set out in the following paragraphs.

The evidence from the Buladelah incident on 23 December 2023. The police case is that identifies the accused (through the hearsay phone call) and the bike (presumably through the registration, despite the obvious difference in State and colour), and that is said to be the same bike as seen in the two ICVs.

That a black bike with a full faring was seen driving recklessly through Clunes towards Lismore.

The bike seen by SC Brigginsshaw on the 16 February and ICV matched that description; ie it was black with full faring, which in the absence of evidence as to what that is, I take to mean a guard like part of the bike at the front.

A partial numberplate was obtained; that is the effect of the evidence of SC Brigginsshaw on 16 February and SC Ferris on 18 March.

A bike of similar description seen at Liberty Service Station shortly before the incident.

The photos from the Liberty service station showing the helmet; the magistrate notes officers noted it marked SMK at time of pursuit (not clear where that is in the evidence) and having a red and black pattern. Also captures registration “VNM 96”.

Pod village CCTV from 18 March showing a man walking through the car park to a motorcycle similar to the Honda; and to an area where the police the next day located the Honda. Whether other motorbikes were in the area is not clear.

Magistrate gives this time as 11.10am; relevant to note the bike did not leave until 11.15am.

Clothes being worn on 18 March and said to be similar to what was worn when seen in ICV. Also notes CCTV shows the bike being ridden through pod village car park at 11.19 and riding out again at 11.20.

SC Ferris sees Astra and puts out broadcast and Sims sees it and pulls it over, whilst he actually about to respond to emergency call. The accused is driving.

A roadside test was positive; not subject to any charge being determined but said to be of “direct relevance”. Why that is relevant is neither stated, nor apparent.

Wearing black and blue joggers on arrest. Said to be the same as seen on Liberty photos from 16 February.

Notes SC Sims says accused did not mention some kind of accident re C2 and discharge from hospital; yet Sims did in fact acknowledge something said about a shoulder injury.

The magistrate sets out about 5 ½ pages of the ERISP. AT T19 he notes the argument of the police which he later accepts, namely that the offender was lying in the interview about being confused as to which bike is being referred to, and never having ridden it, and then saying only in a small area.

The CCTV footage of a young male fitting the description of the ICV and riding the bike around the pod village where he was staying with his father.

The 000 call with the name Blaze used was temporally and geographically proximate to where the Astra was seen leaving the pod and then stopped. This is said to have been an intended diversion. The magistrate accepted that the accused made the call for two reasons. Firstly because of its temporal connection to the police assertion, which he accepted, of the accused being seen at the pod village in the white Astra and with a phone. Secondly, because the magistrate accepted that the mobile phone of the accused was seized by the police and the number on that phone had been provided by the 000 caller. His Honour further accepted that the police were satisfied that it was a deliberately fictitious report.

The magistrate drew the “compelling” inference that the accused was aware the were police closing in.

The magistrate was satisfied that the motorbike seen in the ICV of 16 February and 18 March was the same motorcycle used on 23 December 2023 at Bulahdelah. He said there was “no evidence before the court that the - which would on the balance of probabilities as it were break the link in the chain merely on the basis of the time between the Bulahdelah offence and the first offence in Lismore on 16 February”.

The similarity in the clothing described by the two police officers on 16 February to that seen presumably in the Liberty pictures. That there may be some inconsistency was reasoned away as being a minor difference which could be expected in the circumstances of the observation of the offices.

The helmet matched the description.

The physical description of the rider matches the description.

His Honour was satisfied the person depicted in the Liberty photographs was the accused which he said was about 10 minutes or less later when it was in fact prior, but the point remains he considered that the accused was temporally and geographically connected to the area of the pursuit.

That the motorcycle was available to him at any time during the period 23 December to 16 February.

The shoes that are seen were relied on. That is he considered the shoes seen in the Liberty photographs to be the same as what the accused was wearing when he was arrested.

The description of the numberplate as black and red by Constable Ferris.

The magistrate rejected the denials made by the accused in the record of interview and found that he was not truthful in saying he was confused about which motorbike was being referred to. He did not treat this as consciousness of guilt.

The magistrate then found the offences to be proven.

In terms of legal principle applied by the magistrate he made reference to the fact that this was a circumstantial case, made reference to the case of *Baden Clay v R* and in my view quite correctly directed himself that he could not return a verdict of guilty unless the Crown had excluded all reasonable hypotheses consistent with innocence. Expressed differently in line with *Barker* but to the same effect the magistrate stated he could not return a verdict of guilty unless the circumstances are such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused.

The magistrate also made reference to a *Liberato* direction but did not give himself such a direction. In cases such as this where the accused case is in effect to deny the charges that seems appropriate. The end result certainly in this case is the same whether or not a *Liberato* direction is given. That is, where the version of events put forward by an accused is rejected it remains for the finder of fact to consider the Crown case to determine whether the elements of the offence of been established beyond reasonable doubt.

Consideration of appeal

The magistrate repeatedly referred to this being a “link in a chain case”. That expression is used where the case is a circumstantial one and the inference, or one of them, the fact finder is asked to draw is a finding without which there would not be a case left to put to the fact finder; see *Simpson J in Davidson v R* (2009) 75 NSWLR 150 at [74]. In this case, that factual finding is never clearly identified, but seems most likely to be a reference to the finding that the rider of the bike in the two ICVs was the accused.

The correct way to approach this case is as a “strands in the rope” circumstantial case. The fact sought to be proven is that the accused is the rider of the bike in the two ICVs. The prosecution set out to prove that fact, which it is required to prove beyond reasonable doubt, by asking the fact finder to find certain basic facts proven, and then, based on those established facts, draw the inference or conclusion that the rider was the accused.

The direction commonly given to juries in this regard is in part as follows:

[But] in a circumstantial case no individual fact can prove the guilt of the accused. Where the Crown’s case depends either wholly or in part on circumstantial evidence, then the jury is asked to reason in a staged approach. The Crown first asks the jury to find certain basic facts established by the evidence. Those facts do not have to be proved beyond reasonable doubt. Taken by themselves they cannot prove the guilt of the accused. The jury is then asked to infer or conclude from a combination of those established facts that a further fact or facts existed. The ultimate fact the Crown asks the jury to find based upon the basic facts is that an accused person is guilty of the offence charged.

A case based on circumstantial evidence may be just as convincing and reliable as a case based upon direct evidence. This will depend upon the number and nature of the basic facts relied upon by the Crown when considered as a whole (not individually or in isolation). And it will depend upon whether all of the evidence leads to an unavoidable conclusion that the Crown has established the guilt of the accused. It is important that you approach a circumstantial case by considering and weighing, as a whole, all the facts you find established by the evidence. It is wrong to consider any particular fact in isolation and ask whether that fact proves the guilt of the accused, or whether there is any explanation for that particular fact or circumstance which is inconsistent with the accused’s guilt.

The correct approach is first to determine what facts you find established by the evidence. As I have already told you, any particular fact to be taken into account by you does not need to be proved beyond reasonable doubt. You then consider all of those facts together as a whole and ask yourself whether you can conclude from those facts that the accused is guilty of the offence charged. If such a conclusion does not reasonably arise, then the Crown’s circumstantial case fails because you are not satisfied of guilt beyond reasonable doubt. Of course, it follows that you must find the accused not guilty.

But if you find that such a conclusion is a reasonable one to draw based upon a combination of those established facts then, before you can convict the accused, you must determine whether there is any other reasonable conclusion arising from those facts that is inconsistent with the conclusion the Crown says is established. If there is any other reasonable conclusion arising from those facts that is inconsistent with the guilt of the accused, the circumstantial case fails because you are not satisfied beyond reasonable doubt of the accused’s guilt.

In this case therefore, each of the matters considered by the magistrate are matters which he was being asked to find had been established. The magistrate's task was to then consider those facts that he had found had been established to conclude the accused was guilty of the offences charged (and the issues concerning the s154A matters and the false call matter beyond identification can be put to one side for the moment).

The accused argues that the evidence does not support the findings of fact made by the magistrate, and even if they did, the question remains whether they allow the drawing of the inference that the rider is the accused, something which in turn requires being satisfied there is no other reasonable inference open inconsistent with guilt.

It is therefore necessary to consider each of the findings of the magistrate, already noted above in canvassing the magistrate's reasons.

The findings of the magistrate:

That it was the accused at the BP service station at Buladelah. Further, it seems the finding was the bike being ridden there was the Honda. The evidence for this finding was that a police officer made inquiries and he gave evidence. That witness, SC Coyle said he was told of a conversation by telephone where a man on the phone said he was the accused's father, and that it was his son at the service station on the bike. The evidence of the number plate is of the same letters and numbers, but on a NSW black and white plate, not a Queensland black and red plate. The prosecution do not rely on this evidence in this appeal. That is a concession properly made. The evidence as to it being the accused is at least third hand hearsay, and seemingly given by a person who did not see the events at the service station, and the number plate evidence is inconsistent. These secondary facts are not made out. The finding that the accused had been in continuous possession of the bike therefore also cannot stand, and is a somewhat tenuous conclusion in any event.

A black bike with full faring driving recklessly through Clunes on 16 February 2024. It was open to the magistrate to make this finding. It is a matter which can be taken into account along with any other relevant facts that are established. The difficulty however is that on a common sense basis the fact that a bike no better described than as black with a full faring was in a location in the region of Lismore driving recklessly cannot meaningfully add to the likelihood of the accused being the rider seen in the two ICV's. In other words the fact that has been found is of marginal relevance.

Such a bike was seen by SC Brigginsshaw on 16.2.24. The same comments apply here as in the previous paragraph. Further this is what he saw that was caught on the ICV, and does not assist.

The evidence of SC Brigginsshaw that the registration of the bike he saw on 16 February 2024 being VPN 9 ("off the top of my head"), which the magistrate reasonably took to mean VMN 9. On my interpretation of the evidence there was no contemporaneous record made by SC Brigginsshaw of that being his observation prior to the making of his statement on 19 September 2024. Rather he accepted in cross examination that his note made on 21 February 2024 was that

“number plate was obscured. Unable to correctly ID vehicle”. That said, I note and take into account that the ICV does show the police car with SC Brigginsshaw in it quite close to the rear of the bike as it turns on to the Bruxner Highway and again shortly afterwards as the police car gained on and then lost the bike. The conditions were wet, and there was significant spray coming from the back wheel of the bike. To my observation, which is undoubtedly different to that of SC Brigginsshaw, no letters or numbers can be made out from the ICV. The concern here is that the making of his statement has been influenced by information he learned later from other sources such as the incident log, the Liberty service station photographs, and the location, impounding, inspection and photographing of the Honda on 19 March. In addition to the late emerging assertion of recognising the number plate on 16 February 2024 it should also be noted that the audio of the ICV of that date records comments being made that the police officers or at least one of them were “pretty confident” that the motorbike in question that they had seen was a black Kawasaki. The conclusion I reach is that this evidence of SC Brigginsshaw is not sufficiently reliable or persuasive to permit a finding that the bike that passed him was registration VNM 96.

A bike similar in appearance to the Honda was seen at the Liberty service station, with registration number VNM 9 with an apparent indistinct number after the 9. The magistrate also made reference to the helmet of the rider having the letters SMK. It is not in dispute that service station is in reasonably close proximity to where the bike is seen speeding. The magistrate considered this to be a temporal and geographical connection between the bike at the Liberty service station and the offending bike. This is undoubtedly the case. The question remains whether the bike in temporal and geographical proximity is the offending bike. There is also a live issue as to whether the rider of the bike is the accused. The accused denied in his ERISP that it was him. The helmet seen in the pod village CCTV does not show clearly show both sides of the helmet. The parties could not identify any evidence in the case of the SMK being on the helmet other than at the Liberty service station; so not on the pod village CCTV, nor on the two ICVs, or by any evidence of any police officer. This however may not be the case. I note the man in the CCTV (Ch10 carpark) is holding a motorcycle helmet, and that helmet appears to have indistinct lettering on its side, in the same location as the “SMK” can be seen in the Liberty photos. This is visible as he turns left off the path to go down the steps to cross the car park. The lettering is decidedly unclear in the pod village CCTV, and I have noted above the views of the parties, which I initially accepted that there was no other evidence of the SMK. This evidence suggests otherwise. It gives a link between the Liberty service station rider and the accused. But there remains the different shoes. And there is no evidence of how common the SMK on a helmet may be. Further, it needs to be remembered that this gives a link between the accused and the Liberty photos, but not the accused and the offending bike seen in the ICV. Even accepting it is the Honda and the accused in the Liberty photos all it establishes is that the accused was in the vicinity at the time of the offence, as, I would be prepared to infer, are numerous other motor bikes with riders. There is a further fact arising from those photos; they show the shoes of the person in the photos. The police case is that those shoes with green pumps are the accused’s shoes and that he was wearing them at the time of his arrest; exhibit 9. Yet the shoes in the Liberty photo have green pumps; exhibit 9 shows shoes with blue pumps; they are not the same shoes. The above

discussion reveals conflicting evidence. Having considered all of that evidence, I am not satisfied the man shown in the Liberty photos is the accused.

His Honour relied on the pod village CCTV showing a man going to a bike similar to the Honda. That could only be arrived at by inference; the CCTV shows the person in the CCTV going to a bike, but it is too far away and too obscured to determine what type of bike it is. The other CCTV footage from the pod village does show a similar bike, and it is a reasonable inference that the man on the CCTV seen getting on the unidentifiable bike, is the same man as on the bike that appears similar, so that the finding is open. The next day the accused was apprehended when driving a car that was seen at the pod village, so it can be inferred that at that time there was some connection between the accused and the pod village. In his ERISP the accused said he had stayed at the village for two nights, which I infer is the two nights prior to arrest. The evidence of the person in the pod village CCTV (CH10 carpark) being the accused is simply based on the police asserting it is him. I accept based on that evidence and the police having seen the accused in person and on the CCTV, that the person in the CCTV is of similar appearance to the accused. On my assessment of the evidence, it was the accused riding the bike at the pod village on 18 March; the person is of similar appearance, and there is a connection to the pod village. If that is accepted, the timings of the alleged movements of the accused need to be considered. Those timings are

11.15.55

Bike seen leaving the pod village with rider, the accused

11.15.55

11.18.10

ICV captures bike travelling at speed

11.18.10

11.19.53-11.20.04

Bike seen passing through pod village car park, seemingly exiting

11.19.53-11.20.04

11.20.15

Bike seen either entering or exiting pod village; in light of the immediate prior footage, seems likely to be exiting.

11.20.15

The evidence was of it being approximately 2 kilometres between where the ICV captures the bike, and the pod village. Plainly enough, 2 kilometres can be covered in the 2 minutes 15 seconds between 11.15.55 and 11.18.10. The same distance could be covered between 11.18.10 and 11.19.53. So it is possible that the accused on the bike could have left the village, almost

immediately offended, and then immediately returned to the pod village. One difficulty with this is that the bike on the CCTV seems to be leaving at 11.19.53. On the police case, why would he return only to immediately then go back out to the streets? It would seem more likely he would stay put. On the other hand, perhaps he is leaving, and leaving for the first time, so was not even on the road at 11.18.10 when the ICV recording is made. I am not satisfied by this evidence that the bike in the ICV is the same bike as seen in the pod village CCTV.

Clothes of 18.3.24 CCTV similar to when arrested the next day. Without some distinguishing feature, this is unhelpful. The pod village CCTV shows a young man wearing a white T shirt and dark coloured shorts and runners. The number of people in Lismore in March who may be similarly attired would be significant. Further SC Sims stated he was wearing army style sort of cargo pants and a light coloured T shirt and blue and black joggers. Yet the shirt appears dark coloured on the video of the arrest, something SC Sims in a qualified way accepted. When asked what the length of the pants were, he unimpressively first answered by saying he was not a tailor, and when pressed said they were down to the boot style. Yet it is clear in the footage of the arrest that the accused is wearing shorts. One cannot help but query whether SC Sims is confused by perhaps being informed of what it is alleged the accused had allegedly worn on earlier occasions. Suffice to say this evidence does not assist the police circumstantial case.

The Astra departs when sighting the police. I accept this is the accused, and the inference that he did not want to deal with police is open, and one that I would draw. What needs to be considered, is what are the available reasons on the evidence as to why that might be so? The magistrate also relied on the positive road side test that was returned; why that was found to be of direct relevance was not clearly stated. It does however give a reason as to why the accused did not enter the village. At its highest this may along with some other evidence support the police case, but in my view it is of little weight.

The magistrate relied on the shoes worn by the accused when arrested as being the same as those in the Liberty photos; but as shown above, this is incorrect, and no argument to the contrary was put for the police on the appeal. SC Sims actually gave evidence of exhibit 9 being blue and black joggers, that is, different to those on the Liberty photo.

The magistrate found the accused was not truthful in the ERISP. In particular, his answers to questions about whether he had ever ridden the Honda. This finding was in my view open; the manner in which the accused sought to backtrack by asserting he had confused the bike being asked about with one that had handlebars was unconvincing, and one that he had never ridden. The magistrate did not take this into account as consciousness of guilt, in my view quite fairly. That the accused may be lying for reasons other than a consciousness of guilt is easy to infer; for one, he may simply have wanted to distance himself from anything to do with these allegations. The consequence of this is twofold. That the accused is being untruthful can be a matter that can be added to other facts that are established. Yet where it is not seen to be consciousness of guilt, it adds little. Rather, and secondly, it shows that the accused's denial should be rejected, which, means that what remains is to consider the police evidence in the case to determine whether the case has been made out beyond reasonable doubt.

The making of a false 000 call. The evidence on this issue was canvassed at [36]-[38] above. For two main reasons I have some doubt that it has been established do not find that it has been established that the accused made the 000 call. Firstly, because the basis of the evidence of SC Hudson is hearsay. The evidence does not disclose what number SC Hudson dialled; there is no evidence of a chain of possession that the phone said to have rung, was the same as that seized from the accused. SC Hudson's evidence was:

A Okay. Texas was arrested for a traffic offence. When he was brought back to the station, I believe his mobile phone was taken off him by Senior Constable Green. I still had the job for the one with the gun open on my computer which had a mobile phone number listed on it. So, I called the number and the phone rang that they had taken off Texas.

This evidence does not disclose what number was rung. It does not prove a link between the phone that allegedly rang and the phone taken from the accused is the same one. And with all due respect to SC Hudson, there is nothing but his say so that goes to showing this happened at all. Further, in his evidence he asserted he did not validate any information given in the emergency call, giving the distinct impression that there had been investigations carried out. In cross examination it was made clear that he did not carry out any investigation, so there was no attempt to validate or invalidate the call. As the cross examination made clear, it was a simple matter for this supposed testing of the phone to be recorded on BWV, and I would add, a simple task to confirm the phone being supposedly rung had been taken from the accused, and that the number the officer had rung was the number given to the 000 operator. That of course leaves the coincidence of the name Blaze being used, but that is all that is left. It is not even established, other than by SC Hudson's say so, that the number given to the operator was the number of the phone taken from the accused. Whilst it is not unknown for wrongdoers to bring about the own undoing by not being sufficiently deceptive, it strikes me as a little odd that the accused would use his own middle name and give his true number to the operator. That said, the operator plainly could see some of the numbers, and the accused may have panicked in the making of the call when asked for his name, and simply reached for his own middle name. Despite the deficiencies in the evidence of SC Hudson and his methods, I would find that it is possible the 000 call was made by the accused, and I am sufficiently satisfied about that to take it into account in determining whether the other charges are made out. I am not however satisfied beyond reasonable doubt as to the 000 charge. The matters just outlined leave me with reasonable doubt as to whether it was the accused who made that call.

Similar clothing as described on 16 Feb to what seen on the Liberty photos. My findings as to SC Briginshaw's evidence concerning the registration identification are equally applicable here. I have viewed the ICV. As noted already, it is wet and seemingly raining, with much spray coming from the rear wheel of the bike. It strikes as borderline impossible to identify the pants of the rider as camo pants, though of course that is what is soon seen on the man at the Liberty service station, and I might add, there is no evidence of the accused having, or at any other time wearing, such pants. I place some, but not great, weight on this evidence. It certainly can be said that the shirt on the ICV and Liberty photos is more dark than light, but this evidence is not very

effective at limiting the potential number of riders of the offending bike.

Helmet description. I note and repeat the considerations at [85.5] above. I would add that there is no evidence from the two ICVs showing the helmet with those letters. It does not assist.

Physical description of rider. So far as can be determined the ICVs show a rider of similar physical dimension to the accused, and that can relevantly be taken into account.

In contrast to SC Brigginsshaw, SC Ferris' evidence concerning the number plate is easy to accept. He does not suggest some ability to note down the registration of a fast passing motorbike, but was in the back seat, and able to turn and at a glance see its colour was red and black. That too is able to be taken into account, together with the fact of the bike the accused is riding at the pod village had the same coloured number plate.

The secondary facts that are available to consider whether or not the inference of the rider in the two ICVs is the accused based on the above considerations are:

That a black bike was ridden through Clunes recklessly on the same day, which is of marginal if any relevance.

That the accused left the pod village in the white Astra when he saw the police.

Not only does the evidence concerning the shoes not assist the police case, it positively tends the other way to suggest the person at the Liberty service station was not the accused.

The accused was untruthful in his ERISP.

That the accused may well have made the 000 call.

A degree of similarity between the clothing in the Liberty photos and what was witnessed by the officers and on ICVs. This is of limited assistance given the shoe issue, and the lack of weight that could be given to this similarity.

In broad terms a similarity in physical build of the accused to the rider seen in the ICVs.

In respect of the 18 March, the identification of a red and black number plate by SC Ferris.

From these 8 matters each carrying varying weight, I must be satisfied beyond reasonable doubt that it bears out that it was the accused who can be seen in the two ICVs. I am not so satisfied. The factors need to be considered together, but it is relevant to consider just how much weight they each carry. The only two factors that carry meaningful weight in my view is the evidence of SC Ferris concerning 18 March, and therefore not of assistance concerning 16 February, and the fact that it may well have been, and for present purposes I will find, that it was the accused who made the 000 call, not being something for these purposes that I need to be satisfied of beyond reasonable doubt. The untruthfulness of the accused in the ERISP is also of note, but is not so persuasive. I take these matters into account, and when considering the whole of the evidence I am not satisfied beyond reasonable doubt that it was the accused riding the Honda as alleged on 16 February and or 18 March.

In relation to the s154A charges, they need not be further considered, but it is notable that the police prosecutor stated on 1 October that the adjournment was necessary as the evidence of the alleged owner was needed to make out the police case. When the matter resumed on 29 April this seems to have been forgotten, for when the witness did not appear the prosecutor stated the witness was needed or sought by the accused. That was wrong, and it should have been pointed out to the magistrate. It was the police who needed that witness on their own presentation of the case, to make out their case, i.e. to prove for the purposes of the s154A charges that the vehicle was stolen.

As to the false call charge, for the reasons given above I am not satisfied beyond reasonable doubt on the evidence as presented by the police that the accused made that call.

Orders

Appeal allowed

In respect of each of the 7 charges the subject of the appeal, the convictions are set aside and the charges are dismissed.

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