

***R v Lumsden* [2019] NSWDC 149 (15 March 2019) – New South Wales District Court**

‘Burden of proof’ – ‘Credible witness’ – ‘Damaging property’ – ‘Evidence’ – ‘Physical violence and harm’

Charges: Intentionally or recklessly destroy/damage property x 1; common assault x 1.

Case type: Appeal against conviction.

Facts: The appellant and complainant had separated and have a child together. They had ongoing issues regarding the complainant’s use of a phone and their separation in general. The appellant grabbed the complainant’s handbag, containing her phone. In cross-examination, he confirmed that he held the bag to taunt her about the phone because he was upset ([11]). The altercation resulted in the complainant suffering bruises and a scratch on her leg.

Issue: The appellant appealed against the conviction, pursuant to section 18 *Crimes (Appeal and Review) Act 2001*.

Held: Grant DCJ allowed the appeal. He quashed the conviction, set aside all other orders of the Local Court, found the appellant not guilty and dismissed the charges.

The appellant gave sworn evidence of his good character which was uncontested ([10]). The magistrate was faced with a single witness with no independent supportive evidence ([12]). The appellant had the presumption of innocence ([22]).

Grant DCJ found that, in determining the guilt of the appellant, the Magistrate engaged in ‘illogical, speculative, reverse reasoning’ that led him into error. The Magistrate’s reasoning in respect of the matters listed at para [14] was found to be flawed. He wrongly inferred that because the complainant had not been cross-examined about any inconsistency with a statement made to police, the evidence she gave must be consistent with that statement, therefore supporting her credibility. Such an inference was found to be entirely speculative as no one knew the contents of the statement. Further, Grant DCJ held that making a self-serving statement, or any statement to the police, and giving evidence in accordance with that statement, does not automatically add to a witness’ credibility ([15]-[16]).

The appellant was given the opportunity to conduct an electronic record of interview which he declined. Grant DCJ found that the Magistrate correctly set out the law in that the refusal to participate in a record of interview cannot be construed as an admission of guilt. However, the Magistrate went on to say that such a refusal was relevant in assessing the accuracy of memories in relation to a certain account noted in [19]. Grant DCJ found that this reasoning would lead to the proposition that 'if a defendant engaged in a record of interview and it was consistent with his evidence, then a witness could be looked upon as a more credible witness.' This finding would undermine the appellant's right to silence and may shift the onus on the appellant to demonstrate his credibility by participating in a record of interview ([18]-[20]).

To find the appellant guilty, the magistrate would have to disbelieve his account beyond reasonable doubt ([23]). Grant DCJ was not persuaded that the Magistrate could have properly convicted the appellant ([23]).