SUPREME COURT OF QUEENSLAND

CITATION:	*Berry v Commissioner of Police* [2014] QCA 238
PARTIES:	**BERRY, Suzanne Therese** (applicant/appellant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	CA No 92 of 2014 DC No 4499 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2014
JUDGES:	Holmes and Morrison JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal be granted.** **2. The order of the primary judge made on 24 March 2014 be set aside.** **3. The appeal against conviction is allowed.** **4. The orders of the magistrate made on 25 October 2013 are set aside.** **5. Any written submissions by the applicant on the question of costs be filed and served within 14 days of the orders above. The respondent's submissions (if any) in response are to be filed and served within 7 days after receipt of the applicant's submissions.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION – where the applicant was convicted for speeding – where the offence was driving 123 kilometres per hour in a 60 kilometres per hour zone – where the applicant was interstate at the time – where there were other traffic infringements that occurred during her absence – where her nephew and his girlfriend were house sitting at her house – where other family members had access to her house and vehicle – where there was a police investigation and trial of her nephew in relation to the vehicle offences during her absence – where the nephew was found

not guilty on the basis of identification – where the applicant assisted with the investigation and made enquires – where the traffic infringement notice was not accompanied with the correct written information under s 116(1)(b) of the *Transport Operations (Road Use Management) Act* 1995 – where the applicant was charged under s 114(1) and sought to rely upon the defences in s 114(3) of the Act – where the applicant notified the commissioner by statutory delclaration as per s 114(4) outlining the requirements in s 114(3)(b)(ii) and s 114(6) in her defence – whether the notice required in the statutory declaration provided more than what was actually notified – whether the learned primary judge fell into error – whether the application for leave to appeal should be granted

Transport Operations (Road Use Management) Act 1995 (Qld), s 114, s 116

Saunders v Bowman [2008] QCA 112, considered

COUNSEL: The applicant/appellant appeared on her own behalf
B G Campbell for the respondent

SOLICITORS: The applicant/appellant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Morrison JA and the orders he proposes.

[2] **MORRISON JA:** This is an application for leave to appeal pursuant to s 118 of the *District Court of Queensland Act* 1967. The applicant was convicted of speeding on 25 October 2013. It was alleged that on 3 January 2013 her vehicle was recorded on radar, in Brisbane, travelling at 123 kilometres per hour in a 60 kilometres per hour zone. At the time the applicant was in Tasmania. Her liability was said to arise under s 114 of the *Transport Operations (Road Use Management) Act* 1995 ("**the Act**"). The applicant was fined $1,026 and accrued a penalty of eight demerit points. Her licence was suspended for six months.

[3] The applicant appealed against the conviction under s 222 of the *Justices Act* 1886. That appeal was dismissed on 24 March 2014. It is in respect of that decision that leave to appeal is sought.

Basis for grant of leave to appeal

[4] Leave is usually only granted where an appeal is necessary to correct a substantial injustice to the applicant, and there is a reasonable argument that there is an error which should be corrected.[1]

Circumstances prior to the offence

[5] The applicant resided in Brisbane and was the registered owner of a Mazda sedan, 140-LKG. On 28 December 2012 the applicant left Brisbane to take a holiday in

[1] *Pickering v McArthur* [2005] QCA 294 at [3]; *Johnson v Queensland Police Service* [2014] QCA 195 at [29].

Tasmania. She did not return until 9 January 2013. With her in Tasmania were her mother, her sister and her brother-in-law.

[6] The applicant arranged for her nephew and his girlfriend to stay at her house while she was away.[2]

[7] Prior to leaving on her holiday the applicant left her vehicle, locked, in the garage. The applicant had two sets of keys to the vehicle. She decided not to take her own set on holiday as it was too bulky. Instead, she left them in a large bowl on the dining table. The keys were put into the bowl in such a way that they slid down and under a pile of correspondence, which, in turn, had another basket on top. In that way, the keys were out of sight. Her second set of car keys were kept in one of the drawers of a cabinet in her dining room.[3]

[8] Prior to leaving on holiday no one asked the applicant for permission to drive her vehicle, and she did not give permission for anyone to do so.[4] Her evidence was that she did not expect anyone to use her vehicle while she was away.[5]

[9] The applicant was cross-examined as to who had day-to-day control of her vehicle while she was away on her holidays. This exchange then followed:

> "Is that correct, because if the car – if the house was burning down, [the nephew's] there, you'd expect him to drive the car around and save it, wouldn't you? --- Or if [his girlfriend] was there, I'd expect her to drive the car out or push the car out or whatever.
>
> So they were looking after your car, the two of them? --- They were looking after the house, the car, the cat, the plants."[6]

[10] That answer has to be understood in the context in which the question was asked. What was being asked was whether, in the event of an emergency, would the applicant expect her nephew or his girlfriend to drive the vehicle out. Her affirmative answer to that proposition is properly confined to a situation of emergency, and not otherwise.

[11] The applicant's evidence was that the vehicle was her personal vehicle.[7] During the period of time she had owned the vehicle there were only five or six people who had driven it with her permission or authority. On only two occasions she was not present in the vehicle at the same time.[8] The applicant's nephew had not, to her knowledge, ever driven her vehicle in the past.

[12] The applicant left her nephew with a set of house keys. Additional sets of keys to her house were held by her mother (who was with the applicant in Tasmania), with her sister and brother-in-law (who were also in Tasmania), her brother and sister-in-law (who lived in another suburb in Brisbane). There was a spare set in the drawer of the spare bedroom.[9] In addition, the girlfriend of the applicant's nephew held a set of the keys while the applicant was away.

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2 AB 13.
3 AB 17.
4 AB 17, AB 23.
5 AB 23.
6 AB 26.
7 AB 23.
8 AB 18.
9 AB 21-22.

[13] The applicant was aware that her brother and his wife each had vehicles of their own,[10] as did her nephew and his girlfriend.[11] The applicant was aware that her nephew did not have a driver's licence at the time.[12]

Circumstances following the offence

[14] On the day of the offence, 3 January 2013, the applicant (in Tasmania) was telephoned by a police officer, who left a message to call him back. She attempted to contact him three or four times, unsuccessfully.[13] When she could not contact the police officer, the applicant tried to call her nephew, and on the second or third call, got through to the nephew's girlfriend.[14] By that means she was eventually successful in speaking to her nephew.

[15] The applicant asked the nephew whether he knew whether there was something happening with her vehicle, because she had been contacted by the police. His response was that, "he didn't know why the police were contacting [the applicant] and he didn't know that anything was happening with [the applicant's] car".[15] The applicant asked him whether he had been driving her vehicle and the nephew said "no". She then asked him if he knew whether any of his friends had been driving her vehicle, and the nephew again said "no".[16]

[16] The applicant made the same enquiry of the nephew's girlfriend, asking her whether she had been driving her vehicle. She said she had not.[17] The applicant then attempted to call her brother in Brisbane, unsuccessfully.

[17] The applicant attempted to call the police officer the following day (4 January 2013) and eventually made contact. She was informed that her vehicle "had been involved in a number of traffic matters, including an evade police offence".[18] The police officer asked who had access to the vehicle and the applicant initially identified her nephew, the nephew's girlfriend,[19] and the applicant's brother.[20] The police officer asked if the applicant had had a conversation with any of those persons, and the applicant told him that her nephew had denied that he had been driving the vehicle, and that he had said that none of his friends had been driving the vehicle. She also told the police officer that the nephew's girlfriend had said that she was not driving the vehicle.[21]

[18] The police officer asked the applicant, "to contact [her] nephew to see if [she] could get him to, you know, admit that he'd been driving the car".[22] The applicant agreed to do that, but the police officer then had a second thought and asked the applicant to get her brother-in-law (the nephew's father) "to call him to see if he can get him to admit to the offence".[23]

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10 AB 23.
11 AB 23.
12 AB 27.
13 AB 12.
14 AB 12.
15 AB 13.
16 AB 13.
17 AB 13.
18 AB 15.
19 Identifying her by her first name only, as she could not then recall her surname: AB 15.
20 AB 15.
21 AB 15.
22 AB 15.
23 AB 16.

[19] The applicant did so, and her brother-in-law rang the nephew. The applicant was not privy to that conversation. However, her brother-in-law told her on 4 January 2013, "that the police had asked [the applicant's] nephew to attend … the police station on the Monday and they were going to charge him with the evade police offence".[24]

[20] When the applicant eventually spoke with her brother, on 5 January 2013, she asked if he had been driving the vehicle, and if not, whether he knew who the driver was. Her brother said that he had not been driving and did not know who the driver was.[25] The applicant's evidence was that she had asked all of her family members as to who was in charge of the vehicle and they, and the nephew's girlfriend, had said it was not them.[26]

[21] The applicant was aware that the nephew did attend the police station and was charged with the evade police offence. Following that, the applicant decided not to make any further enquiries, as she "thought it was a police matter and it wasn't up to [her] to make any further inquires".[27]

[22] The applicant's evidence was that she did not maintain a log book in order to see who might have been the driver at the time because it was her personal vehicle.[28] Further, she had left her family members with no instructions relating to recording when and where they might use her vehicle, "because [she] didn't expect anyone to use [her] car".[29] At the time she did not give permission to anyone to use the vehicle, "nor did [she] expect anyone to use the vehicle".[30] No instructions were given to her family members as to the use of the vehicle.[31]

Circumstance in which the vehicle was left

[23] When the applicant went on holidays her vehicle was left in her garage, locked.[32] The garage had an electric lift door which could be opened by sensors (in the vehicle, in the house and under the house).[33] There was a lockable style paling fence through which access could be gained to underneath the house.[34] The garage door had been left down but the applicant was unsure as to whether she had locked the paling fence.[35]

[24] When the applicant returned from her holidays she found the vehicle in much the same state as she left it, parked in the garage, but it had a flat battery.[36]

The nephew's trial

[25] On 14 June 2013, the applicant's nephew went to trial on offences relating to the use of the vehicle, including evading police. The applicant was summoned to

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24 AB 16.
25 AB 14; AB 114, paragraph 10.
26 AB 23.
27 AB 17.
28 AB 23.
29 AB 23.
30 AB 25.
31 AB 25.
32 AB 19.
33 AB 114, paragraph 9.
34 AB 19.
35 AB 20.
36 AB 20.

appear at that trial.[37] She claimed privilege and as a consequence gave no evidence at the hearing.[38] At that time the charge against the applicant was still pending.[39] The magistrate at the applicant's trial was told, without objection, that the nephew was found not guilty on the basis of identification.[40]

The charge against the applicant

[26] The applicant was charged with the speeding offence recorded against her vehicle, namely, driving at 123 kilometres per hour in a 60 kilometre per hour zone. Her liability was said to arise under s 114 of the Act, which provides:

> "(1) If a prescribed offence happens and the offence is detected by a photographic detection device, a person is taken to have committed the offence if the person was the person in charge of the vehicle that was involved in the offence at the time the offence happened even though the actual offender may have been someone else.
>
> …
>
> (3) It is a defence to a camera-detected offence for a person to prove that –
>
> (a) the person was not the driver of the vehicle at the time the offence happened; and
>
> (b) the person –
>
> (i) has notified the commissioner or chief executive of the name and address of the person in charge of the vehicle at the time the offence happened; or
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> (ii) has notified the commissioner or chief executive that the person did not know and could not, with reasonable diligence, have ascertained the name and address of the person in charge of the vehicle at the time the offence happened.
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> (4) The person must notify the commissioner or chief executive about the matters specified in subsection (3)(b)(i), or the matters specified in subsections (3)(b)(ii) and (6), in a statutory declaration.
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> …
>
> (6) For subsection (3)(b)(ii) a person must prove that –
>
> (a) at the time the offence happened, the person –
>
> (i) exercised reasonable control over the vehicle's use; and
>
> (ii) had in place a reasonable way of finding out the name and address of the person in charge of the vehicle at any given time having regard to –
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> (A) the number of drivers; and

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37 AB 24.

38 AB 25.

39 The applicant's trial was on 25 October 2013.

40 AB 9.

(B) the amount and frequency of use; and
(C) whether the vehicle was driven for business or private use; and

(b) after the offence happened, the person made proper search and enquiry to ascertain the name and address of the person in charge of the vehicle at the time the offence happened.

(7) Subsection (6) does not apply if the person is able to prove that at the time the offence happened the vehicle –
(a) was stolen or illegally taken …"

[27] For the purposes of s 114(3)(b)(ii), which refers to ascertaining "the person in charge", s 113 defines the term "person in charge of a vehicle". It means, relevantly:

"(c) if there was no responsible operator for the vehicle, and the vehicle was not registered under a transport Act or a corresponding transport law, at the time the offence allegedly happened –

(i) the person who, immediately before the registration expired, was the registered operator …"

[28] The registration for the applicant's vehicle had lapsed at the time of the offence. It was immediately rectified by her once that became apparent, but under s 113 the applicant was the person who, immediately before the registration expired, was the registered operator.

The applicant's statutory declaration

[29] On 27 February 2013 the applicant made a statutory declaration in relation to the infringement notice for the traffic offence. In paragraphs 2 and 3, the applicant swore:

"2. Specifically, I seek to claim a defence to the speeding offence pursuant to sections 114(3)(b)(ii) and 114(6) of the *Transport Operations (Road Use Management) Act 1995*.

3. In relation to the offence, I was not the driver of the vehicle at the time the offence happened, and do not know and have not been able to ascertain the name and address of the person in charge of the vehicle at the time the offence happened."[41]

[30] The statutory declaration then went on in a further eight paragraphs to detail the circumstances in which she left the vehicle, who had access to the keys to her house, and her dealings with the police. Those matters provided, in a more summary form, the essential content of the matters referred to in paragraphs [5]-[12] and [14]-[23]. In relation to the circumstances in which the vehicle was left, the explanation included that the vehicle was left under her house and:

"There is an electric lift door which can be opened by a sensor in the car, a sensor in the house, or by pressing a button under the house. Entry under the house is via a paling gate near the front steps which is rarely locked because the bins and washing machine are there."[42]

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41 AB 113.
42 AB 114.

The approach of the learned primary judge

[31] The learned primary judge found that though the magistrate had convicted the applicant, she had erred in her conclusion about whether the applicant made out a defence to the charge, under s 114(3)(b)(ii) and (7).[43] For that reason her Honour held that she was able to determine the matter for herself. In that regard she said:

> "This court is capable of determining the matter for itself. The onus was on [the applicant] to prove the car was illegally taken. The taking of the car would not be illegal, unless it was done without [the applicant's] permission and, either the driver did not reasonably believe that he had her permission, or the driver was not authorised by someone who reasonably believed he had her permission to do so. For this defence to succeed, the evidence had to establish both matters on balance of probabilities."[44]

[32] Having reviewed the evidence as to the applicant's arrangements in respect of her vehicle, including that the keys "were accessible but not in direct sight,"[45] and the evidence of instructions, or lack of instructions about the use of the vehicle, her Honour concluded that in the absence of express consent it was unreasonable for the nephew to believe that he had consent to use the vehicle while he was unlicensed.[46] On that basis her Honour held that if the nephew was proved to be the driver, there would be a defence under s 114(7) of the Act. She went on:

> "However, the nephew was not proved to be the driver. Other possibilities were equally possible. No specific evidence was lead about them. For example, while the absence of a driving licence might provide a motive for the nephew to engage in high speed flight from the police, the evidence does not identify whether any of the other three key holders had a similar or other alternate motive to flee from police. The nephew's motive, therefore, does not identify him as the driver. The circumstances disclosed to the court suggest that it would be reasonable for the trusted brother and sister-in-law and the house sitter girlfriend to believe that they had authority to use the car in certain circumstances. The evidence does not exclude such a belief on the balance of probabilities. Accordingly, the defence relating to an illegal taking of the car was not proved."[47]

[33] The learned primary judge then turned to the defence based upon subsections (3)(b)(ii) and (6) of the Act. The magistrate had held that the defence was not established because[48]:

(a) the applicant had no system in place for knowing who was using her vehicle;

(b) she should have interrogated the nephew and his girlfriend further than she did; and

(c) she should have locked the keys away, saying: "She would not leave the keys at the house, if she didn't want the car to be used", and that she failed to "exercise reasonable control over the vehicle's use, as she left the keys in the house".

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43 AB 137. There was no challenge before this Court as to the correctness of that finding.
44 AB 137.
45 AB 138.
46 AB 139.
47 AB 139.
48 AB 52.

[34] The learned primary judge proceeded to make her own assessment of whether the defence under s 114(6) was made out. Her Honour held that the applicant's statutory declaration was deficient in that it did not "give notice of the matters in subsection 6, namely the exercise of the reasonable control over the use of the car, the pre-existing system in place for identifying the users of the car and the making of proper inquiry after the offence".[49] Specifically, her Honour held that the statutory declaration was "clearly deficient" because:

> "It made no reference whatsoever to any system in place for identifying the driver. This was a mandatory perquisite [sic] for proof of the defence. Furthermore, the notice did not disclose the reasonable exercise of control of the use of the car, as required by subsection (6)(a)(i). The declaration revealed that [the applicant] was absent on holiday, that she had left her keys in a bowl in the kitchen, to which other people had access. There was no other information going to her control of the use of the car. The failure to give notice of the matters in subsection 114, subsection (6) was fatal for [the applicant's] case. Without it, the second defence was not validly raised."[50]

[35] The learned primary judge held that it was unnecessary to go further, but she considered the question of the sufficiency of the evidence to prove the matters required by ss (6) of the Act. Having recited a summary of them, her Honour said:

> "From that evidence, I would conclude that [the applicant] had taken reasonable steps to safeguard the car against use by a stranger, but did not prove the exercise of reasonable control as against her relatives holding house keys and especially against those who were housesitting. Further, she did not claim to have set up any system for determining who was in charge of the vehicle at any given time in her absence."[51]

[36] Her Honour concluded that the applicant was in no stronger position than the appellant in *Saunders v Bowman*,[52] who had simply left his keys on the kitchen bench when he went to work, leaving other people with access to the keys.

[37] As to the aspect of s 114(6)(b), namely, the requirement to prove that proper search and enquiry had been made, her Honour reviewed the applicant's enquiries of the nephew, his girlfriend and her brother, and her response to the police officer who asked her to procure her nephew's confession. As to the applicant's decision not to go on with her own enquiries once the nephew was charged, her Honour held, "[t]hat was probably a reasonable response …".[53]

[38] Ultimately, her Honour did not make a determination on that question.

[39] Her Honour's conclusion was expressed in this way:

> "[The applicant] failed to establish a defence. She was properly convicted. The legal consequences of the conviction are indeed severe. [The applicant] must suffer that punishment for the speeding

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49 AB 140.
50 AB 140.
51 AB 140.
52 *Saunders v Bowman* [2008] QCA 112. (***Saunders***).
53 AB 141.

> offence committed by someone else. The legislation imposes liability on her as the registered owner because she did not prove the car was illegally taken. She did not give notice of another person in charge at the time. She did not exercise reasonable control over the use of the car or maintain a system for identifying the person responsible prior to the commission of the offence. She was properly convicted. The appeal against conviction is dismissed."[54]

The competing contentions

[40] The applicant contended for a number of errors in the approach of the learned primary judge. They were:

> Ground 1 – That the primary judge should have found that the failure to give the full information required under s 116(1)(b) of the Act, with the traffic infringement notice, rendered the traffic infringement notice invalid;[55]
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> Ground 2 – The primary judge erred in finding that the applicant should have ignored the traffic infringement notice if she believed it was invalid because of non-compliance with s 116;
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> Ground 3 – The primary judge erred in finding that it was fatal to the applicant's case to have not addressed all matters required in s 114(6) in the statutory declaration;
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> Ground 4 – The primary judge erred in that the applicant was not required to address all of the matters set out in s 114(6) of the Act in her statutory declaration, because her position was the vehicle was illegally taken and therefore ss (7) was invoked;
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> Ground 5 – The primary judge erred in determining the issue of whether the vehicle was illegally taken, on the basis of the unknown drivers state of belief as to whether that driver reasonably believed that they had the applicant's permission to take the vehicle;
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> In the alternative, the primary judge erred because the applicant had proved that it was unreasonable for anyone to believe they had her permission to use the vehicle;
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> Ground 6 – The primary judge erred in her finding that there was no defence under s 114(6)(a), because she was not required to have a "system" in place for identifying the person in charge in the circumstances; further, the applicant did have a reasonable way of identifying the driver in the circumstances, which was that she was the primary driver, she only allowed others to drive occasionally, and on each occasion when that occurred she provided her express permission;
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> Ground 7 – The primary judge should not have drawn adverse findings from the fact that the applicant applied for and was granted privilege from testifying at the trial of her nephew.

[41] For the respondent, it was contended that the statutory declaration did not discharge the requirements of s 114(3)(b)(ii) of the Act. In that respect the primary judge's conclusion was correct. Further, the magistrate and the primary judge were correct

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54 AB 144.

55 It was accepted by the respondent that the information provided was not complete.

in finding that the applicant did not satisfy the requirements in s 114(6) relating to the exercise of reasonable control, having a reasonable way of finding out the name and address of the driver, and making proper search and enquiry. As to the specific grounds of appeal, the respondent contended:

(a) as to grounds 1 and 2, that the contended invalidity of the traffic infringement notice was irrelevant, as the charge against the applicant was established by proving the speed of the vehicle and that the applicant was the person in charge at the time;

(b) as to grounds 3 and 6, the primary judge was correct to find that the defects in the statutory declaration were fatal and that the applicant had not established the exercise of reasonable control over the vehicle, or the making of proper search and enquiry; in this respect the respondent contended that *Saunders* was applicable;

(c) as to grounds 4 and 5, it was contended that the taking of the vehicle could only be illegal or unlawful if the person who used it did not hold an honest and reasonable, albeit mistaken, belief that permission would be given; in this respect the availability of the car keys, and the fact that the vehicle was returned and left where it had been, pointed to the driver being one of the persons left to look after the house, and therefore someone who might form the requisite belief; and

(d) as to ground 7, the respondent contended that the primary judge's comments were irrelevant, as she considered that it was not necessary to determine the issue.

Discussion

Grounds 1 and 2 – s 116(1)(b)

[42] These grounds can be considered together. The applicant contends that when she was served with the traffic infringement notice it was not accompanied, as it should have been under s 116(1)(b) with "written information about … the provisions of section 114". For that reason, it is argued, the traffic infringement notice was invalid.

[43] This argument cannot be accepted. Section 116 is a provision which relates to service of a notice, complaint or summons. It provides that when such a document is served on a person, it must be accompanied by written information about, relevantly, the provisions of s 114. The section is plainly one concerned with the requirements of service, and not the requirements of the notice itself. If, as is accepted to be the case here, the notice was not accompanied by full information about s 114, it does not affect the validity of the notice, but rather the efficacy of the service of that notice.

[44] In any event, as the respondent contended, any question of the invalidity of the traffic infringement notice is irrelevant. The applicant conceded that she was brought to trial by the service of a summons. The proof of the components of the charge was tendered in the form of the photographic evidence recording the vehicle, its speed, the permissible speed and the time and date. In addition a certificate was tendered showing that the vehicle was registered in the name of the applicant. Once the matter proceeded in that fashion, the traffic infringement notice was merely an historical curiosity.

[45] These grounds cannot succeed.

Grounds 3 and 6 – the statutory declaration, s 114(4) and s 114(6)

[46] The learned primary judge held that the statutory declaration provided by the applicant fell short of what was required because it did not give notice of the matters in s 114(6). She held that the statutory declaration "made no reference whatsoever to any system in place for identifying the driver", nor did it "disclose the reasonable exercise of control of the use of the car" and that was fatal to the applicant's defence.[56]

[47] Section 114(1) provides that if an offence is detected by a photographic detection device, the person in charge of the vehicle is taken to have committed the offence, even though the actual offender may have been someone else. The defences to such a charge are set out in s 114(3). Such a defence requires two things first, proof that the person was not the driver of the vehicle at the time the offence happened; and secondly, either that the person has notified the commissioner of the name and address of the person actually in charge of the vehicle at the time of the offence, or that the person has notified the commissioner that they "did not know and could not, with reasonable diligence, have ascertained the name and address of the person in charge of the vehicle at the time the offence happened". The latter requirement is in s 114(3)(b)(ii) of the Act. That is the ground relied upon in the applicant's case.

[48] Section 114(4) provides that the person in charge of the vehicle "must notify the commissioner … **about** the matters specified in … subsections (3)(b)(ii) and (6), in a statutory declaration".[57]

[49] The matters in s 114(6) concern proof at two points. The first concerns proof of a state of affairs at the time the offence happened, namely that the person exercised reasonable control over the vehicle's use, and had in place a reasonable way of finding out the name and address of the person in charge of the vehicle at any given time, having regard to the number of drivers, the amount and frequency of use, and whether the vehicle was driven for business or private use.[58] The second requires proof of a state of affairs after the offence happened, namely that proper search and enquiry was made to ascertain the name and address of the person in charge of the vehicle at the time the offence happened.[59]

[50] Section 114(4) requires simply that the statutory declaration notifies the commissioner "**about** the matters specified" in the two subsections. On its face it does not require that those matters be set out in full, nor does it require that the document contain all the evidence to be relied on for the defence.[60] The text of the section does not include words that would lead to such a conclusion, such as "setting out the matters relied on", or "providing particulars of the matters". Equally, though, it would not be sufficient to simply refer to the two subsections, without more. The evident purpose of s 114(4) is to compel a person intending to rely on the defences under subsections (3) and (6) to notify the commissioner of the essential basis for that reliance. In that sense "about" means "*in connection with*" or "*in relation to*".[61]

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56 AB 140.

57 Emphasis added.

58 s 114(6)(a).

59 s 114(6)(b)

60 Such a construction seems unlikely, as establishing the defence might require evidence that is not within the personal knowledge of the person who swears the declaration. It seems unlikely that s 114(4) was intended to require the declarant to swear to matters outside their knowledge.

61 Australian Concise Oxford Dictionary, 7th Ed.

[51] The applicant's statutory declaration[62] specifically notified that the applicant sought to claim a defence under s 114(3)(b)(ii) and s 114(6) of the Act.[63] In terms of the matters the subject of s 114(3)(b)(ii), the statutory declaration contained this material:

(a) the applicant was not the driver of the vehicle at the time of the offence as at the time she was in Tasmania;[64]

(b) the applicant did not know and had not been able to ascertain the name and address of the person in charge of the vehicle at the time the offence happened;[65]

(c) when the police contacted the applicant concerning the use of her vehicle, she contacted her nephew and her brother "to try and determine whether they were the driver, or knew who the driver was", and both denied they were the driver and said they did not know who the driver was;[66]

(d) shortly afterwards she was advised that her nephew had been charged with a number of offences in relation to her vehicle on that day;[67]

(e) as a consequence she had not pursued further enquiries as she did not want to interfere with the court process.[68]

[52] In my view those matters were sufficient to constitute notice "about the matters specified" in ss (3)(b)(ii). The learned primary judge also held that the statutory declaration "satisfied the notice requirement for the matters in subsection (3)(b)(ii)" because it "made the direct claim required by subsection (3)(b)(ii), adopting the precise language of that subsection and then by **giving some further detail of it**".[69]

[53] In terms of the matters specified in s 114(6), the statutory declaration revealed the following:-

(a) the applicant left for a holiday in Tasmania on; 28 December 2012;[70]

(b) she did not return until 9 January 2013;[71]

(c) therefore she was in Tasmania on 3 January 2013 when the offence occurred;[72]

(d) the vehicle was left under her house; there was an electric lift door which could be opened by a sensor in the vehicle, a sensor in the house, or by pressing a button under the house; entry under the house was via a paling gate near the front steps, which was rarely locked because the bins and washing machine were there;[73]

(e) two sets of her car keys were left in the house, one in the top drawer of a cupboard near her back door, and the other "in a bowl near the dining table";[74]

(f) of the eight sets of keys for her house, the only sets held by anyone then in Queensland were those held by her brother and sister-in-law,

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62 AB 113-114.
63 AB 113-114, Paragraph 2.
64 AB 113-114, Paragraph 4.
65 AB 113-114, Paragraph 3.
66 AB 113-114, Paragraph 10.
67 AB 113-114, Paragraph 11.
68 AB 113-114, Paragraph 11.
69 AB 140; emphasis added.
70 AB 113-114, Paragraph 5.
71 AB 113-114, Paragraph 5.
72 AB 113-114, Paragraph 4.
73 AB 113-114, Paragraph 9.
74 AB 113-114, Paragraph 6.

her nephew and the nephew's girlfriend; two spare sets were located in a top drawer of a cupboard near the back door, and in a drawer in the spare bedroom;[75]

(g) when she travelled the applicant had various people look after her cat while she was away;[76]

(h) when contacted by the police the applicant, in turn, contacted her nephew and her brother and questioned them as to whether they were the driver of the vehicle, or whether they knew who the driver was, with each denying that they were the driver, and saying they did not know who the driver was.[77]

[54] In my view the statutory declaration gave notice "about the matters" specified in s 114(6) of the Act. It is not required to set out the entirety of the evidence that might be called to prove the matters required under that subsection, but merely to give notice "about" those matters. The applicant notified the way in which she had exercised control over the vehicle's use (leaving the vehicle under her house, behind an electric door and inside a paling gate, with the keys left with one set in a drawer and the other in a bowl near the dining table), and the reasonable way she had of finding out the name and address of the person in charge, namely by contacting her relatives who held sets of keys to her house, and investigating whether they were the driver, or knew who the driver was. In that fashion the applicant also gave notice about the matters required in s 114(6)(b), namely that proper search and enquiry had been made.

[55] In my respectful view the learned primary judge fell into error by holding that the notice required in a statutory declaration required more than what was notified. Her Honour seems to have proceeded on the basis that the statutory declaration was required to set out the matters to be proved, rather than to give notice "about the matters specified".[78]

[56] Further, the learned primary judge approached the provisions of s 114(4) inconsistently, holding different standards between the requirement to give notice about the matters specified in ss (3)(b)(ii) and ss (6). Her Honour held that the notice requirement in respect of ss (3)(b)(ii) was satisfied because the direct claim required by the subsection was made "adopting the precise language of that subsection and then by giving some further detail of it".[79] However, even though within the same sentence the applicant made the direct claim required by ss (6), and details were given of that claim, her Honour nonetheless held that the notice was deficient.

[57] For the reasons given above, the finding was in error. The primary judge's decision was affected by that error of law and it resulted in a substantial injustice to the applicant. Leave to appeal should be granted and the orders of the learned primary judge set aside.

[58] The question then arises: what should follow from that finding? The appeal to the District Court was pursuant to s 222 of the *Justices Act* 1886 (Qld). By operation of s 223, such an appeal is by way of rehearing on the evidence below and in that exercise the court is required to make its own determination of the issues on the evidence.

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75 AB 113-114, Paragraph 7.
76 AB 113-114, Paragraph 8.
77 AB 113-114, Paragraph 10.
78 *Transport Operations (Road Use Management) Act* 1995, s 114(4).
79 AB 140.

[59] Two alternatives are open, the first being to remit the matter to the District Court to be considered afresh in the light of these reasons, and the second being for this Court to exercise its own review of the evidence in place of the learned primary judge.

[60] No attack was made on the credibility or reliability of the applicant in the trial before the magistrate. None of the magistrate's findings turned on an assessment of the applicant's credit. The case conducted by the prosecution accepted the account given by the applicant, but contended that it was insufficient to satisfy any defence. Therefore this Court is in the position where the facts before the learned primary judge were uncontested. For that reason this Court is in as good a position to conduct a review of the evidence, as was the primary judge. There is therefore no compelling reason to remit the matter.

Further consideration of the defence under s 114(6)

[61] The question which arises is whether the evidence given by the applicant made out a defence under s 114(6) of the Act. The first question to be answered in respect of that issue is whether the evidence establishes that at the time the offence happened, the applicant exercised reasonable control over the vehicle's use.

[62] The use of the word "reasonable" in the phrase "reasonable control" in s 114(6)(a)(i), signals that there is no one standard for what constitutes reasonable control over a vehicle's use. What is reasonable will depend upon the individual circumstances of each case. For example, what constitutes reasonable control over a vehicle's use will differ between what is required for a fleet vehicle in a business where there are a number of possible drivers, and what constitutes reasonable control for a private person whose vehicle is only used for that person's private purposes. Equally, when looking at what constitutes "reasonable control", what is required will vary between public or business use of a vehicle, and private use. What might be demanded in terms of instructions to possible drivers may well be more stringent if the vehicle is used for business or public use, especially in circumstances of fleet vehicles, when compared to what might be required for a private vehicle.

[63] In terms of the situation of the applicant and her vehicle when she left for holidays, the evidence establishes the following:

(a) The vehicle was the applicant's personal vehicle, and not used for business purposes;[80]
(b) the vehicle was left locked, in its garage under the applicant's house;
(c) the garage had an electronic door which could be operated by a sensor in the vehicle, a sensor in the house or by pressing a button under the house;
(d) entry to the underneath of the house was via a paling gate near the front steps; that gate was closed, but probably not locked because of the presence of waste bins and a washing machine underneath the house;
(e) one set of the applicant's car keys was in a drawer in a cabinet in the applicant's dining room,[81] and the other set was placed in a large bowl on the dining table; there was correspondence in the bowl and the keys were slid down the side and under the correspondence so

[80] AB 23; AB 127. The learned primary judge proceeded on that basis: AB 134.
[81] AB 17.

they could not be seen;[82] a second basket was on top of the correspondence;[83]

(f) the applicant's nephew and his girlfriend were staying at the applicant's house looking after her cat while she was away,[84]

(g) both the nephew and his girlfriend had a set of keys to the house;[85] another set of keys was held by the applicant's brother and his wife, neither of whom were staying in the applicant's house while she was away;[86]

(h) the applicant's nephew did not hold a driver's licence at the time, a fact known to the applicant;[87] however, he did own a car;[88]

(i) the nephew's girlfriend had her own vehicle, as did each of the applicant's brother and his wife;[89]

(j) when the applicant left to go on holidays she did not give permission or authority to anyone to use her vehicle while she was away;[90] none of the applicant's nephew, his girlfriend, the applicant's brother or his wife asked for permission to use the vehicle while she was away;[91]

(k) the applicant did not give instructions to any of those four persons in relation to the use of the vehicle; they were not told that they could not use the vehicle;[92] and

(l) nonetheless, if an emergency arose, such as if the house was burning down, the applicant would expect her nephew or his girlfriend to drive or push the vehicle out to save it.[93]

[64] In my respectful view it is difficult to see what else could be reasonably required of the applicant in terms of exercising reasonable control over the vehicle's use while she was away. The vehicle was a private vehicle, locked and in its garage. The keys to the vehicle were not on view and someone would have to look under the correspondence in the bowl in order to find the applicant's set of car keys. In that sense they were hidden from sight. I do not accept the contention that they keys should have been locked away; that would make rescue in an emergency very difficult. No one had asked if they could use her vehicle, and she had not given permission to anyone to use her vehicle. Even though she had not specifically told her nephew, his girlfriend, the applicant's brother or his wife, that they could not use the vehicle, it is difficult to understand why that would be required within the context of a family group. That is particularly so when the applicant knew that the nephew did not have a driver's licence, and therefore could not be expected to be driving any vehicle. Further, all of the other possible users of the vehicle (the girlfriend, the applicant's brother and his wife) had their own vehicles, and the brother and sister-in-law were not staying at the applicant's house.

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82 AB 17.
83 AB 17.
84 AB 13.
85 AB 113, paragraph 7.
86 AB 113, paragraph 7.
87 AB 27.
88 AB 23.
89 AB 23.
90 AB 17.
91 As to the nephew, AB 18; as to all of them AB 23, AB 25, AB 27.
92 AB 23, AB 25.
93 AB 26.

[65] Bearing in mind that the particular vehicle in question was the applicant's private vehicle, and those who might arguably have access to it were family members (or a girlfriend of a family member), the applicant did exercise reasonable control over the vehicle's use in her absence.

[66] The second part of the defence under s 114(6) concerns proving that at the time the offence happened, that the applicant had in place a reasonable way of finding out the name and address of the person in charge of the vehicle at any given time, having regard to the number of drivers, the amount and frequency of use, and whether the vehicle was driven for business or private use.

[67] As to this aspect the learned primary judge observed that the applicant "did not claim to have set up any **system** for determining who was in charge of the vehicle at any given time in her absence".[94] Her Honour went on to find that the "reasonable way of finding out the identity of drivers … indicate(s) a need for positive steps in the management of the vehicle before the offence is committed".[95] Her Honour concluded her consideration of this issue in this way:

> "[The applicant] was in no stronger position than the appellant in [*Saunders v Bowman*], who left his keys on the table as he went to work. Other people had access to those keys in the house. In the circumstances, it was held that Mr Saunders had not exercised any control at all, much less reasonable control and further, his inability to identify the driver, in itself, suggested the absence of reasonable control."[96]

[68] Effectively her Honour found that the need for positive steps in terms of finding out the name and address of the person in charge required that there be some sort of "system" in place for ascertaining the identity of the driver. In that way the learned primary judge adopted what was said in *Saunders*.[97] In that case Mr Saunders left the house to go to work, and left his keys on the kitchen bench. The extent of his enquiries as to who was driving (it not being him) was this: "I have asked everyone in the house but no-one has said that they were driving at the time".[98] As to those matters the following was said:

> "On his evidence, it is not even clear that he troubled to ask each of the people 'in the house' directly whether he or she was driving, or what their response was. There was simply no evidence that he exercised any control at all, much less reasonable control, over the use of the vehicle when he was away from home; and the fact that he was not able to say who was driving is itself suggestive of the absence of reasonable control over the vehicle's use on his part and of the absence of any reasonable system for ascertaining the identity of the driver."[99]

[69] Section 114(6)(a)(ii) does not use the word "system" in its text. All that is required is that a person prove that at the time the offence happened that person "had in place a reasonable way of finding out the name and address of the person in charge of the vehicle at any given time …". Once again the use of the word "reasonable" in the

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94 AB 140; emphasis added. The magistrate proceeded on the same basis, relying on *Saunders*: AB 47-48.
95 AB 141.
96 AB 141.
97 *Saunders* at [14].
98 *Saunders* at [6].
99 *Saunders* at [14].

phrase "reasonable way of finding out" indicates that what is required will depend upon the circumstances of each case. There is no one set standard. The word "way" bears its ordinary meaning of a "method" or "plan" for obtaining an object, or "means".[100] In some circumstances, for example those concerning a business utilising multiple vehicles and/or multiple drivers, that method or means may have the appearance of a "system" requiring a degree of formality. However, where one is considering a private vehicle and a single driver that normally uses it, the evidence to satisfy that there was "a reasonable way" may fall well short of demonstrating any organised "system", but nonetheless be reasonable in the circumstances.

[70] I do not understand that what was said in *Saunders* was intended to put a gloss on the plain words of s 114(6)(a)(ii). Whilst the word "system" was used there, it should not be understood as requiring more than the section demands, namely that there be a "reasonable way" of finding out the name and address having regard to the number of drivers, the amount and frequency of use, and whether the vehicle was driven for business or private use.

[71] Section 114(6)(a)(ii) requires that the person prove a capacity, existing at the time of the offence, to find out who was in charge of the vehicle at any given time, not simply at the time of the offence. "Person in charge of the vehicle at any given time" is not defined, as opposed to "person in charge of the vehicle in relation to an alleged offence". But "at any given time" suggests a broader reference to the state of affairs in general, rather than being limited to the time of the offence. In context, the reference to "person in charge of the vehicle at any given time" must be to the person actually exercising control over the vehicle at any particular time. The registered operator must have a means (a "reasonable way") of ascertaining who that person is at all times (not just when the offence was committed) and must be able to prove that the means existed at the time the offence happened.

[72] The use of the word "reasonable" imposes a limit to the extent of what is required; a "reasonable way" of finding out who is in charge could hardly extend to being equipped, as a matter of routine, to identify an unauthorised person who has taken charge of the vehicle in unforeseeable circumstances. But in that kind of event, where an offence is committed, s 114(6)(b) will demand further inquiry to discover who was in fact in charge of the vehicle at the particular time of the offence.

[73] The applicant's evidence established that it was a private vehicle, not used for business purposes, and she was normally the only driver. In the time that she had owned the vehicle there were only five or six occasions when someone else had driven the vehicle and on all but two of those occasions the applicant had been present in the vehicle. On the two occasions when she was not in the vehicle, she had given express permission to the person to drive her vehicle.[101] To her knowledge her nephew had never driven her vehicle in the past.[102] That evidence established the context in which one had to assess whether the applicant had, at the time that the offence happened, a "reasonable way of finding out the name and address of the person in charge of the vehicle at any given time". This was not a situation where there were multiple drivers, frequent use or use for anything other than private affairs.

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100 The Australian Concise Oxford Dictionary, 7th edition.

101 AB 18.

102 AB 18.

[74] The way in which the applicant exercised reasonable control over her vehicle whilst on holiday is set out in paragraphs [63] to [65] above. In the applicant's case, she had not surrendered control of the vehicle by making it available to anyone else, with the possible exception that in the event of an emergency her nephew and his girlfriend[103] might have to move the car. That knowledge meant that at any given time she could identify herself as the person in charge of the vehicle. In the (improbable) event of emergency during the period she was in Tasmania, she could expect to ascertain that information from her nephew or his girlfriend, or her brother and his wife, who might in that event have taken charge of the car. She had, thus, a "reasonable way of finding out the name and address of the person in charge of the vehicle at any given time". In my respectful opinion the learned primary judge erred in concluding that this was a case like *Saunders*, where the inability to determine the identity of the driver bespoke the absence of any reasonable way of finding it out.

[75] The third element of the defence under s 114(6) requires that the person prove that after the event happened, the person made proper search and enquiry to ascertain the name and address of the person in charge of the vehicle at the time.

[76] The evidence of the applicant established the following, in relation to her search and enquiry as to the name and address of the person in charge of the vehicle at the time of the offence:

(a) before she was told any details of what had occurred she telephoned her nephew, but could not get through;[104]

(b) the applicant telephoned her nephew's girlfriend and then spoke to her nephew; she asked him whether he knew there was something happening with her vehicle, because she had been contacted by the police; his answer was that he did not know why the police were contacting the applicant and he did not know that anything was happening with her vehicle;[105]

(c) she asked her nephew whether he had been driving the vehicle, and he said "no"; she then asked him whether he knew if any of his friends had been driving her vehicle, and he again said "no";[106]

(d) when the applicant spoke to the nephew's girlfriend, the applicant asked her if she had been driving her vehicle and she said "no";[107]

(e) the applicant tried to call her brother, who was in Brisbane, to see if he had been driving her vehicle, but she could not get through to him;[108]

(f) she then spoke by telephone to the investigating police officer; he gave her details of the traffic incident in which the applicant's vehicle had been involved; the applicant gave the police officer the details of who might have had access to her vehicle, identifying her nephew, his girlfriend, and the applicant's brother;[109] the applicant also related what her nephew and his girlfriend had told her;

(g) the police officer then requested the applicant to contact her nephew, and see if the applicant could get him to admit that he had been driving the vehicle; the applicant agreed to do that;[110]

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103 Or less likely simply because they did not stay at her house, her brother and sister-in-law.
104 AB 12; AB 114, paragraph 10.
105 AB 13.
106 AB 13; AB 114, paragraph 10.
107 AB 13.
108 AB 13.
109 AB 15.
110 AB 15.

(h) the police officer then modified his request; he asked the applicant to speak to her brother-in-law (her nephew's father) and ask the father to call the nephew, to see if he could get him to admit to the offence; the applicant agreed to do that;[111]

(i) the applicant asked her brother-in-law to do so, as a result of which he rang the applicant's nephew, but in a conversation to which the applicant was not a party. The applicant's brother-in-law then told her that the police had made a request to the nephew to attend at the police station, where he was to be charged with an offence;[112]

(j) the applicant was of the understanding that the nephew was charged, and as a consequence she desisted from making further enquiries, because she "thought that it was a police matter and it wasn't up to me to make any further inquiries";[113]

(k) in cross-examination the applicant agreed that she had asked "all of [her] family members who was [sic] in charge of the vehicle and they says [sic], 'It's not me.'";[114] and

(l) the applicant had contact by telephone with her brother a couple of days after speaking to the police officer; she asked him if he had been driving the vehicle, and he said "no"; her brother said that he did not know who the driver was.[115]

[77] The applicant used the telephone calls to ask each of those persons whether they were driving, and whether they knew who the driver was. Negative answers were received to all of those questions.[116] In addition, and at the specific request of the investigating police officer, the applicant prevailed upon her brother-in-law to call her nephew, to see if he could get him to admit to the offence. The brother-in-law did so, but was told (evidently by the nephew) that the nephew was required to attend at the police station where he would be charged with an offence.

[78] In terms of assessing whether the applicant made proper search and enquiry in the circumstances, it is relevant that the investigating police officer apparently went no further than the applicant did. At the police officer's request, made via the applicant, the father of the applicant's nephew telephoned the nephew in an attempt to get him to admit he was the driver. There is nothing to suggest that the police enquiries extended to the nephew's girlfriend, or the applicant's brother and his wife.

[79] Further, the circumstances in which the reasonableness of the applicant's search and enquiry must be assessed, include the fact that she was in Tasmania at the time the offence occurred in Brisbane. The obvious method of communication was by telephone. I do not accept the respondent's contention that in the circumstances there should have been some sort of log book into which potential drivers of the vehicle might have entered their details. That is hardly realistic in the circumstances of a private owner of a vehicle, used for personal purposes, where family members are staying at her house while she is away on holidays.

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111 AB 16.

112 AB 16.

113 AB 17; AB 114, paragraph 11.

114 AB 23.

115 AB 14; AB 114, paragraph 10.

116 The one exception was that the applicant did not ask her nephew's girlfriend if her nephew was driving: AB 24.

[80] In my respectful opinion, the applicant did demonstrate that she made reasonable search and enquiry. She did so by interrogating, by telephone, all of the potential drivers. I do not accept that the applicant was required to go further, in the face of negative answers, and effectively cross-examine each of those drivers. That is particularly so where the applicant discovered very quickly that her nephew was to be charged with an offence arising out of the use of her vehicle. At that point she was entitled to take the view, as the learned primary judge held, that the police had determined who they considered to be the driver, and were pursuing that person.

[81] The applicant is therefore entitled to succeed on ground 6.

Grounds 4, 5 and 7

[82] In light of the applicant's success on ground 6, it is unnecessary to deal with these grounds of appeal. Grounds 4 and 5 involve questions of whether the vehicle was illegally taken and therefore s 114(7) was applicable.

[83] Ground 7 relates to a contention that the learned primary judge drew an adverse inference from the fact that the applicant declined to testify at the trial of her nephew, on the grounds of privilege. There is no point in examining this question, as the learned primary judge found it unnecessary to determine the matter herself.[117]

Conclusion and disposition

[84] The applicant has succeeded in demonstrating error on the part of the learned primary judge, and the magistrate, relating to their rejection of the defence under s 114(6) of the Act. That defence was established. The errors resulted in the applicant's conviction and therefore a substantial injustice has occurred, and should be corrected.[118]

[85] The question of what orders for costs might follow, in the event of the application being granted, was not argued before this Court. The applicant was represented by a solicitor before the magistrate, but self represented before the primary judge and on this application. It may be that the applicant wishes to make submissions on the question of costs. She should be permitted that opportunity, though I would not consider another appearance necessary to resolve any such issues.

[86] I would order:

1. The application for leave to appeal be granted.
2. The order of the primary judge made on 24 March 2014 be set aside.
3. The appeal against conviction is allowed.
4. The orders of the magistrate made on 25 October 2013 are set aside.
5. Any written submissions by the applicant on the question of costs be filed and served within 14 days of the orders above. The respondent's submissions (if any) in response are to be filed and served within 7 days after receipt of the applicant's submissions.

[87] **NORTH J:** I agree with the reasons of Morrison JA and with the orders he proposes.

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117 AB 142.

118 *Pickering v McArthur* [2005] QCA 294 at [3]; *Johnson v Queensland Police Service* [2014] QCA 195 at [29].