

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
TRIAL DIVISION
JUDICIAL REVIEW AND APPEALS LIST

S CR 2013.....

IN THE MATTER OF an Appeal on a Question of Law pursuant to Section 272 Criminal
Procedure Act 2009

BETWEEN

KYLE MAGEE

APPELLANT

v

SHAYNE WALLACE

RESPONDENT

**NOTICE OF APPEAL FROM THE MAGISTRATES' COURT TO THE
SUPREME COURT ON A QUESTION OF LAW**

Date of document: 4 November 2013

Filed by the Appellant

Kyle Anthony Magee

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TAKE NOTICE that the Appellant appeals to the Supreme Court of Victoria under section 272(1) *Criminal Procedure Act 2009* against the final orders made on 7 October 2013 by His Honour Mr Andrew Capell, Magistrate, in the Magistrates' Court at Melbourne in Case No D10987761. Namely, the order of His Honour finding the appellant guilty of the offence of posting bills pursuant to section 10(1) of the *Summary Offences Act 1966*. His Honour convicted the appellant and fined him an aggregate sum of \$400.

QUESTIONS OF LAW AND GROUNDS OF APPEAL

Q1. When considering whether an expression should be protected pursuant to Section 15 of the Charter of Human Rights and Responsibilities Act 2006 (the Charter), should consideration of alternative, unquestionably legal modes of expression, be a factor in determining the legality of the expression chosen?

Ground 1: The learned Magistrate erred by considering the availability of alternative unquestionably legal modes of expression, as partial justification, for ruling that the expression in question was not protected under section 15 of the Charter.

Q2. Can an expression involving damage to a third party's property, or a threat of such damage, be protected by section 15(2) of the Charter?

Ground 2: In *Magee v Delaney* (2012) VSC 407 at [97] Justice Kyrou held "It is sufficient for me to state my conclusion that the exercise of the right in the form of damage to a third party's property or a threat of such damage, is not protected by [s 15\(2\)](#)." The learned Magistrate applied the law as stated in *Magee v Delaney*.

With respect, the precedent of Justice Kyrou in *Magee v Delaney* (2012) VSC 407, that any expression involving any level of damage to a third party's property, or a threat of such damage, can in no circumstance amount to a protected expression for the purpose of section 15(2), is wrongly decided. Although bound by this decision, the learned Magistrate fell into error by applying precedent wrongly decided.

Q3. Can an expression that causes no damage be equated with an expression ruled to have caused damage?

Ground 3: In *Magee v Delaney* (2012) VSC 407 at paragraph 3(b) Justice Kyrou held "Does the imparting of information or ideas by means of damage to a third party's property engage the right to freedom of expression conferred by [s 15\(2\)](#) of the Victorian Charter? No". The learned Magistrate erred in equating and substituting the "interference" of the expression in the case before him with the "damage" in Justice Kyrou's ruling above.

Q4. Can political expression that does not cause damage, carried out fully as intended and not resulting in damage, constitute a threat of damage?

Ground 4A: The learned Magistrate erred in his construction of the phrase "threat of damage" by including within it acts which neither cause, nor intend to cause, damage.

Ground 4B: On the correct construction of the phrase "threat of damage", it was not open to the learned Magistrate to find that the appellant's act constituted a "threat of damage" and was therefore excluded from protection under section 15 of the Victorian Charter, following the findings of Justice Kyrrou in *Magee v Delaney* (2012) VSC 407.

ORDERS SOUGHT IN THIS APPEAL

The Appellant seeks orders that:

1. The appeal be allowed.
2. The finding of guilt be set aside; and either:
 - a. A verdict of not guilty be entered; or
 - b. The case be remitted to the Magistrate's Court for determination in accordance with law.

LIST OF PERSONS TO BE SERVED WITH THIS NOTICE

1. Constable Shayne Wallace
Melbourne West Uniform
1/637 Flinders Street
Melbourne VIC 3000
2. The Registrar, Magistrates' Court of Victoria at Melbourne for His Honour Mr Andrew Capell, Magistrate
Melbourne Magistrates' Court
233 William Street
Melbourne VIC 3000

Date: 4th November 2013

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Kyle Anthony Magee, Appellant