SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Clark v Bluett**
Citation:	**[2016] ACTSC 312**
Hearing Date:	24 October 2016
Decision Date:	27 October 2016
Before:	Elkaim J
Decision:	1. The following convictions are set aside: (a) CC14/9236 – Possessing a prohibited firearm (shotgun) whilst not authorised. (b) CC14/9239 – Possessing a prohibited weapon (knuckle duster) whilst not authorised. (c) CC14/9240 – Possessing a prohibited weapon (extendable baton) whilst not authorised. (d) CC14/9241 – Possessing ammunition for a firearm whilst not authorised.
Catchwords:	**CRIMINAL LAW – APPEAL – JURISDICTION, PRACTICE AND PROCEDURE –** appeal from Magistrates Court – appeal against conviction – validity of evidentiary certificates – whether the presumption of regularity applies – whether a magistrate has the power to amend defective evidentiary certificates
Legislation Cited:	*Evidence Act 1995* (NSW), s 138 *Firearms Act 1996* (ACT), ss 33, 35, 269(1)(q), 269(2) *Prohibited Weapons Act 1996* (ACT), s 17(1)(a)
Cases Cited:	*Cassell v The Queen* [2000] HCA 8; 201 CLR 189 *Connolly v Allan* [2011] ACTSC 170; 212 A Crim R 320 *Chiekho v The Queen* [2008] NSWCCA 191; 75 NSWLR 323 *R v Dalley* [2002] NSWCCA 284; 132 A Crim R 169 *Dixon v LeKich* [2010] QCA 213; 56 MVR 70 *Mowdy v State of Western Australia* [2007] WASCA 165; 176 A Crim R 85
Parties:	Michael Wayne Clark (Appellant) Grant Matthew Bluett (Respondent)
Representation:	**Counsel** Mr J Pappas (Appellant) Mr M Fernandez (Respondent) **Solicitors** Ben Aulich & Associates (Appellant)

	ACT Director of Public Prosecutions (Respondent)	
File Number:	SCA 44 of 2016	
Decision under appeal:	Court/Tribunal:	ACT Magistrates Court
	Before:	Special Magistrate Doogan
	Date of Decision:	17 June 2016
	Case Title:	Bluett v Clark
	Court File Numbers:	CC14/9236, CC14/9239, CC14/9240, CC14/9241

ELKAIM J:

1. This is an appeal from a decision of Special Magistrate Doogan (the "magistrate") given on 17 June 2016. The decision followed the hearing of a prosecution against the appellant on four charges relating to the unlawful possession of assorted items.

2. The appellant was convicted of the following offences:

   (a) CC14/9236 – Possessing a prohibited firearm (shotgun) whilst not authorised;

   (b) CC14/9239 – Possessing a prohibited weapon (knuckle duster) whilst not authorised;

   (c) CC14/9240 – Possessing a prohibited weapon (extendable baton) whilst not authorised; and

   (d) CC14/9241 – Possessing ammunition for a firearm whilst not authorised.

3. The appellant has not yet been sentenced.

4. The starting point for this appeal is to state what my role is. To do so, I adopt the following paragraphs from the decision of Refshauge ACJ in *Connolly v Allan* [2011] ACTSC 170; 212 A Crim R 320, where his Honour said:

> [12] So far as the appeal against conviction is concerned, it is a rehearing. That is, the appeal court must determine whether the decision of the Magistrates Court is wrong, by that court falling into error of law, making a finding of fact that is clearly wrong or exercising a discretion on a wrong principle or in a way that is clearly wrong.
>
> [13] This court, as the appellate court, will give proper allowance to the advantage of the Learned Magistrate who has seen and heard the witnesses, so that ordinarily facts found based on the assessment of witnesses will not lightly be overturned. The appellate court is obliged to conduct a real review of the trial and the Learned Magistrate's reasons…

5. The appellant relied on a number of arguments but concentrated his attack on the evidentiary certificates tendered by the Crown to establish unlawful possession. Exhibits 20 and 21 concerned the ammunition charges, Exhibit 22 concerned the shot gun charge, Exhibit 23 concerned the extended baton charge and Exhibit 24 related to the knuckle duster.

6. Globally, it was submitted that each of the certificates was invalid. Different reasons were given for the invalidity, some going to all of the certificates, others restricted to individual certificates.

7. In relation to all of the certificates, there were two common complaints: Firstly, it was submitted that the appellant's name was stated in a fashion that did not allow for precise identification and secondly that his stated address, 2 Lazarus Place, was incorrect.

8. The complaint made about the appellant's name can be dealt with shortly. In fairness to learned counsel for the appellant, this point was not put as a point of significance. In the certificates, the appellant is referred to as "Michael Wayne Clark aka Micheal Wayne Clark". The difference is in the spelling of the first name. An examination of Exhibit 3, in particular photographs 58, 78, 96, 98 and 111b, demonstrate that different documents contained different spellings of the appellant's first name.

9. In my view the inclusion of the two names in the certificates is a correct statement of fact. There was no evidence as to which spelling was adopted on the appellant's birth so that no point was taken that "Micheal" should have preceded "Michael".

10. I reject the complaint concerning the manner in which the appellant's name is included in the certificates.

11. The next complaint about the certificates concerns the stated address. The appellant submitted that 2 Lazarus Place was not his address at the date of the certificates and he was not in occupation of that address. If that was the case then certificates related to the appellant as the occupier of 2 Lazarus Place could not be used in aid of the allegation of unlawful possession.

12. The Crown conceded this point on a theoretical level but said the evidence before the magistrate showing that the appellant was in occupation of 2 Lazarus Place was overwhelming. Therefore the address in the certificates was a correct statement of fact.

13. The appellant's case was that he did not occupy 2 Lazarus Place notwithstanding the number of items in the premises that suggested he was frequently present. Rather, he said that, in effect, the house was a meeting place for him and his partner and their child. Problems personal to his partner prevented her from living with him and their son. It was necessary for there to be a meeting place where they could be together. This was 2 Lazarus Place.

14. The appellant's case was that he actually lived at, and occupied, 65 Sternberg Crescent in Wanniassa. There is no doubt that he was connected to this address. It is found on a number of items which were located at 2 Lazarus Place (See for example photographs 58, 59, 78, 98 and 111b in Exhibit 3). In addition Ms Peden, the appellant's partner, gave evidence that the appellant did not reside at 2 Lazarus Place.

15. The difficulty with the appellant's argument is that there was a substantial body of evidence which pointed to his occupation of 2 Lazarus Place. These were set out by the magistrate in her decision. She specifically dealt with and rejected the appellant's submission that he was merely storing documents at 2 Lazarus Place.

16. I acknowledge that the documents seen in the above photographs bear the Sternberg Crescent address, but they were not at that address. They were at the Lazarus Place address and were not documents of a type that one would assume would need storing at a place other than their owner's normal residence. They are, for want of a better description, diverse and everyday documents that one might expect to be present at a person's place of residence. So for example, one would ask why taxation, licensing and

banking documents would need to be stored at a residence other than the one occupied by the person concerned.

17. In addition, and I think perhaps more importantly, the setup and furnishings of the house all bespeak occupation by the appellant. For example the pictures on the wall (photograph 15) and the picture on the bedside table (photographs 16 and 17) suggest a permanent presence of the appellant at the residence.

18. Learned counsel for the appellant said that there was no evidence that a child lived at the address which was entirely inconsistent with the appellant having custody of his young son. His attention was drawn to photograph 13 which contradicts this submission. This was accepted but it was further submitted that there was no evidence of a child's clothing at the address. My assessment of photograph 13 is that there may well be a child's clothing present and there are certainly a number of toys.

19. As for Ms Peden, the magistrate rejected her evidence. She found that Ms Peden was "not a truthful witness". I think it was open to her to find that: "They were both living there. It was their home" (T 247.43).

20. The appellant also sought to distinguish between the appellant living at the address and occupying it for purposes of the offences. There may well be situations where this distinction can be made. However in my view this is not such a situation and the magistrate's conclusion that the appellant was living at 2 Lazarus Place is sufficient, and in fact the same as, a conclusion that he was occupying the residence.

21. Accordingly this ground of appeal is rejected.

22. The next point of appeal concerns the structure of the certificates making up Exhibits 20, 21 and 22.

23. Each of these three certificates purport to be made pursuant to s 269(1)(q) of the *Firearms Act 1996* (ACT). I think it necessary to set out the relevant parts of s 269:

> **269 Evidentiary certificates**
>
> (1) In a proceeding for an offence mentioned in section 166 (1) (c), a certificate signed by the registrar stating the following is evidence of the matter stated:
>
> (q) at a stated time or during a stated period, a stated person was or was not authorised by a licence or permit.
>
> (2) A regulation may prescribe that a certificate signed by the registrar stating a prescribed matter is evidence of the matter stated.

24. The first point made was that the certificate must be signed by "the registrar". The registrar referred to is the Registrar of Firearms appointed under s 33 of the same Act. The section reads:

> The chief police officer may appoint a person who is a police officer who holds a rank of or above that of superintendent to be the Registrar of Firearms.

25. The Exhibit 20 certificate is not signed by the registrar. It is signed by "David Evans, a police officer, Acting Team Leader Firearms, position 50001848, a delegate of the Registrar of Firearms under Section 35 of the *Firearms Act 1996*...."

26. Section 35 permits the registrar to delegate his functions under the Act to a police officer.

27. The appellant submitted, firstly, that there was no evidence of the delegation permitted by s 35. Secondly it was submitted that the registrar had not been appointed by the chief police officer, as required by s 33, but rather by a Ms Charmaine Quade, who the evidence revealed to be an Assistant Commissioner of Police (Exhibit 25). Simply put, the submission was that if the registrar had not been appointed by the "chief police officer" then his appointment was invalid, and in turn, any delegation by the registrar was equally invalid.

28. As will be seen below, the Crown conceded that the train of appointment had not been established in the evidence. Nevertheless it said that there was a presumption of regularity which enabled the magistrate to conclude that the certificates were in order.

29. It is firstly necessary to point out that this is not a case like *R v Cheiko & Ors* [2008] NSWCCA 191; 75 NSWLR 323 where the relevant legislation contained the following provision in aid of the validity of a certificate:

> "18 Evidentiary certificates
>
> (1) The Managing Director or secretary of a carrier may issue a written certificate signed by him or her setting out such facts as he or she considers relevant with respect to acts or things done by, or in relation to, employees of the carrier in order to enable a warrant to be executed.
>
> (2) A document purporting to be a certificate issued under subsection (1) and purporting to be signed by the Managing Director or secretary of a carrier is to be received in evidence in an exempt proceeding without further proof and is, in an exempt proceeding, conclusive evidence of the matters stated in the document."

30. It was common ground that no regulation had been made pursuant to s 269(2) of the *Firearms Act 1996* (ACT).

31. Returning to the Crown's argument, the High Court in *Cassell v The Queen* [2000] HCA 8; 201 CLR 189, said this:

> [19] Even if it had appeared that there was some defect in the appointment of the Commissioner or the Assistant Commissioner, (which is not the case), the prosecutor may well have been entitled to rely upon the principle of the common law that where an office exists but the title to it of a particular person is defective the "acts of a de facto public officer done in apparent execution of his office cannot be challenged on the ground that he has no title to the office". [citations omitted]

32. In a dissenting judgment Kirby J said "that the presumption of regularity is unavailable in criminal proceedings to cure gaps in the evidence relevant to proof of the essential elements of an offence." He later continued: "Obliging prosecutors to prove all elements in the offence, without reliance on presumptions of regularity, is a protection to the accused of special significance in cases heard before a magistrate."

33. In *Dixon v LeKich* [2010] QCA 213; 56 MVR 70, the Queensland Court of Appeal referred to the presumption of regularity in this way:

> [20] The presumption of regularity has been described as "a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act." The applicant argued that the primary judge erred in failing to apply the presumption of regularity in relation to the photographic exhibits despite having been invited to do so. [citations omitted]

34. In paragraph 24, the Court said:

> It is clear that the presumption of regularity may be applied in an appropriate case to justify an inference that an official was the object of a delegation which the official purportedly exercised.

35. In paragraph 30, the Court described the dangers in the application of a presumption of regularity:

> The issue is whether it should be presumed that a complainant was authorised to certify a document so as to render it admissible in evidence to prove an offence by the defendant. It would be inimical to the imperative that justice be done and be seen to be done for a court simply to presume that the complainant possessed the requisite authority, particularly where the complainant omitted to take advantage of a statutory provision which facilitated proof of the authority.

36. The presumption was discussed by the Western Australia Court of Appeal in *Mowdy v State of Western Australia* [2007] WASCA 165; 176 A Crim R 85. The Court observed at paragraph 8 that "The presumption of regularity is to the effect that everything is presumed to be rightly and duly performed until the contrary is shown."

37. Based on *Cassell,* I think the presumption of regularity can be applied in a criminal prosecution.

38. The Crown did not provide written submissions prior to the hearing so that the appellant did not have an early opportunity to deal with the presumption of regularity. However as I understood the appellant's case, he said that the presumption did not assist the Crown because "the contrary" to the presumption had been shown in the evidence.

39. This understanding was confirmed in an email received from the appellant's solicitor following the hearing in which he stated "that the presumption of regularity cannot prevail when there is evidence of irregularity."

40. The irregularity referred to by the appellant was the following:

    (a) In relation to Exhibit 20 there was no evidence, or proof, of the delegation of Mr Evans as a delegate of the Registrar of Firearms.

    (b) For Exhibits 20, 21 and 22, there was no proof that the appointment of the Registrar of Firearms had been made by the chief police officer nor had it been established that the registrar was a person whose rank was at least that of a superintendent at the time of the appointment.

41. The question of the admissibility of the certificates was agitated consistently through the hearing. At T 63.40 her Honour correctly summarised the effect of the challenges being made by the defence. She said:

> HER HONOUR: That is what is being challenged, you see, Mr Hiscox, and unless there's a provision in this legislation, the *Firearms Act,* as there is in a lot of other pieces of information in the Territory that says the certificate speaks for itself, and what the certificate says is what the certificate says. If the prosecution is asked or required to strictly prove that Mr Evans has been properly delegated, then that is what you will have to do, unless, as I say, there is a provision that says that you virtually can't go behind the certificate. I think that in a lot of traffic legislation there's that provision, that it is what it purports to state that it is.

42. The prosecutor clearly understood the potential problem when he said: “So if ultimately there is a flaw in the certificate, then it would probably be the case that the prosecution would not be able to continue.” (T 64.40).

43. After further argument the prosecution observed that “the certificates are obviously critical to any prosecution case.” Her Honour responded that “There are serious issues, can I say, with pretty much all of them.” She then allowed the prosecution time to, without any disrespect, put its case in order.

44. The following day the prosecution tendered a number of documents to give validity to the various delegations that had been challenged. There then followed submissions by each side respectively advancing their positions on the certificates. Her Honour adjourned for a short period and then expressed her conclusions commencing at T 88.21.

45. Unfortunately her Honour’s conclusions did not end the debate which continued in respect of some of the aspects of the certificates. Her Honour stated that the certificates signed by David Evans still required further information (T 91.31).

46. The further information came later through a business record relating to Mr Evans. There were then lengthy submissions relating to the admissibility of the certificates (from T 154). At the conclusion of the argument her Honour said:

> I find that, having considered the provisions of the legislation, and particularly the provisions relating to delegation of certain officers into certain positions, I find that the delegations have been properly exercised and that those persons purporting to have authority under the various provisions of the legislations to act pursuant to those provisions are entitled to do so. So the delegations have been properly exercised. (I am finding that) the people purporting to act in the positions that they say they are, the delegations have been exercised appropriately and they have the powers to act in accordance with the certifications they make under the provisions of the legislation. So I find that that certificate, that first certificate, David Evans, of David Evans, is a valid certificate.

47. In reaching her conclusion it is apparent that the learned magistrate did not apply any presumption of regularity but rather based her view on her reading of the assorted provisions relating to the delegations and the authority of persons acting pursuant to those delegations. Although it might be said that she has not given reasons for her decision I think that would be unduly critical.

48. I do not agree with the magistrate that the delegations and authorities included in the tender documents established a valid chain. In explaining this conclusion I do not see it necessary to go any further than to refer to the concession to this effect made by the Crown before me. The Crown said that “there’s not evidence of the chain of authority you Honour.” In fairness to the Crown, and to put these words in context, I think it appropriate to set out the discussion that occurred between me and Mr Fernandez:

HIS HONOUR:	A certificate signed by the registrar, now in this case it’s not signed by the registrar at least not 22, 20 and 21. So then you’ve then got to establish that whoever signed it had the power to sign it. Do you want to say anything about that?
MR FERNANDEZ:	Well, only this, I have to rely upon what appears on the face of the document.
HIS HONOUR:	But the document...See section 269 says ‘a certificate signed by the registrar’. But it’s not signed by the Registrar. It’s signed by someone else.

MR FERNANDEZ: Well no, it's signed by a person purporting to be the delegate of the Registrar.

HIS HONOUR: Yes. Well what Mr Pappas is saying is that while normally you can rely on the certificate, where it says 'signed by Registrar', and the defence takes the point then you've got to show that whoever did sign it was able to sign it. Whereas you are saying that I can assume that.

MR FERNANDEZ: Well we don't have .... there's not evidence of the chain of authority your Honour. (Emphasis added)

HIS HONOUR: Well how do I deal with that?

MR FERNDANEZ: Well, again I go back to the submission to the effect of what is stated in the document being clear and to the point and providing the necessary particulars and the Crown's fallback position and the presumption of regularity and the Crown's fallback position is to the effect that that if your Honour was to find a transgression, this is really if I can characterise it as an accidental non-compliance.

HIS HONOUR: But so what? We're talking about a criminal...People are convicted beyond reasonable doubt, not 'it seems like he is guilty'.

MR FERNDANDEZ: I hear your Honour's point but the fallback position for the Crown is as enunciated in *Dalley*...that is...

HIS HONOUR: It's a serious offence so don't worry about irregularity.

MR FERNANDEZ: Well, in my submission a bit more finetuned than that your Honour...

49. The reference to *Dalley* is a reference to *R v Dalley* [2002] NSWCCA 284; 132 A Crim R 169 which is the basis for the Crown's "back-up" position. The Chief Justice in the New South Wales Court of Criminal Appeal said, at paragraph 7:

> In my opinion, the public interest in the conviction and punishment of those guilty of crime is entitled to greater weight in the case of crimes of greater gravity, both at common law and pursuant to s 138(3)(c). (See also *R v Burrell* [2001] NSWSC 120 at [38] per Sully J.)

50. Blanch AJ agreed with the Chief Justice (paragraph 102). Simpson J did not (paragraph 99).

51. The Crown submitted that, accepting the chain of authority or delegation had not been established, nevertheless relying on *Dalley,* the deficiencies could be overlooked because the crimes involved were serious. I agree that the crimes involved were serious but do not agree that the reasoning in *Dalley* can be applied here.

52. *Dalley* concerned s 138 of the *Evidence Act 1995* (NSW) which involves the application of a discretion to admit improperly or illegally obtained evidence. Firstly, the certificates were not improperly or illegally obtained. Secondly, they were not tendered on the basis that they only became admissible pursuant to a discretion (under s 138 or otherwise).

53. The certificates were tendered, after much debate and effort, as having been properly made both by the certifier and going back through the chain of delegations and appointments which ultimately permitted the certifier to sign the document. The Crown now admits that the chain of authority did not exist. This must be fatal to the admissibility of Exhibits 20, 21 and 22.

54. As noted above, the prosecution, during the hearing, recognised the importance of the validity of the certificates. There could be no proper conviction without them. The convictions in respect of the shot gun and the ammunition must be set aside.

55. The position in respect of Exhibits 23 and 24 is more straightforward. These exhibits relate to the telescopic baton and the knuckle duster. The problem here concerns the amendment of the certificates by the learned magistrate in the course of the hearing.

56. The certificates as tendered were said to be issued pursuant to s "17(a)" of the *Prohibited Weapons Act 1996* (ACT). It was common ground that there is no s 17(a) in this Act. It should have read s 17(1)(a).

57. The prosecutor recognised the deficiency. He said:

> So on its face, the certificate is referring to a section that doesn't exist. My submission in relation to this is that notwithstanding that obvious error, it's still clear on its face that the certificate relates to this section. There is only one paragraph, subparagraph (a) within section 17. However, to acknowledge that certificates need to be taken at their face value and in that sense the court made (sic), notwithstanding that, it is an obvious error, the obvious error may not be rectified simply by looking past the non-insertion of subsection (1). (T 81.35)

58. It is difficult to know if the prosecutor was making a concession that the certificate was invalid or was submitting that the omission was essentially immaterial. However he continued:

> If that was the case, really the only submission I could make is to seek the leave of the court to amend the certificate, but again that is the prosecution seeking to amend a certificate prepared under the hand of David Pryce and there would be concerns in relation to that. I do note that the certificate was prepared 12 November 2014. That is only 12 months ago. The prosecution has been on the certificate for this length of time and that is something that is unavoidable. I have to make that submission.

59. When her Honour came to consider the issue, as I read her comments, she found the two certificates were not valid but their invalidity could be cured by an amendment on her part. She said:

> The firearms certificate is not defective. What needs to be done is – rather, I beg your pardon, the firearms certificates are not defective. The certificates under the *Weapons Act* they're not defective, subject to an amendment to section 17 should obviously be section 17 (1)(a) because there is no section 17(1) as such and I propose to make that amendment. There is no prejudice to the defendant and if the defendant argues that there is a prejudice to him, well then I will allow the prosecution time to make that slight amendment, and that's all it is, to that certificate and prefer two new certificates specifying section 17(1)(a) (T 89.33).

60. The magistrate then, either by herself or with the assistance of her associate, made a handwritten amendment to each certificate. The appellant says that this was beyond the power of the magistrate. I agree.

61. Assuming the certificates were defective, as the magistrate did (subject to amendment), then the only proper means of amendment would have been an amendment by David Pryce, the author of the certificate. What the magistrate purported to do was to change a document prepared and signed by another person. The document was a certificate which had been certified by Mr Pryce. It was not, for example, a pleading which the court rules specifically allow to be amended by the court. In making the amendment herself, the magistrate placed herself in the shoes of

the certifier, a position which was not permitted to her either by rules of court or any other legal basis.

62. It follows that if the certificates were defective unless amended, as found by the magistrate, then any amendment by her (or anyone else besides Mr Pryce) could not cure the defect. The certificates therefore should not have been admitted into evidence, or if they were, they were not available to be relied upon in support of the prosecution. Therefore the convictions in respect of the extendable baton and the knuckle duster must be set aside.

63. Before stating my final orders there is one other matter that I should discuss. I agree with the Crown, as I have already said, that the charges are serious. I also agree that, subject to the validity of the certificates, the case against the appellant is very strong. I am, and should be, reluctant to set aside the convictions against this background.

64. I do have the option to remit the matter for rehearing in the Magistrates Court. I have decided not to do this however because the prosecution is dependent on the validity of the certificates. A fresh hearing will not cure their defects.

65. In addition, the issue of the validity of the certificates was at the forefront of the defence and it must be recognised that the magistrate's decision about the certificates was central to the convictions. Although the appellant may be seen to be "getting off on a technicality" it was not a technicality that became apparent on the appeal or was not stridently pursued before the magistrate.

66. In the light of my conclusions it is not necessary to consider the balance of the appellant's grounds of appeal. They were not, in any event, advanced with much enthusiasm.

67. I make these orders. The following convictions are set aside:

    (a) CC14/9236 – Possessing a prohibited firearm (shotgun) whilst not authorised.

    (b) CC14/9239 – Possessing a prohibited weapon (knuckle duster) whilst not authorised.

    (c) CC14/9240 – Possessing a prohibited weapon (extendable baton) whilst not authorised.

    (d) CC14/9241 – Possessing ammunition for a firearm whilst not authorised.

I certify that the preceding sixty-seven [67] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Elkaim.

Associate:

Date: 27 October 2016

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Amendments

28 October 2016	Replace 'Refshauge J' with 'Refshauge ACJ'	Paragraph [4]
28 October 2016	Replace *'Evidence Act 1995* (Cth)' with '*Evidence Act 1995* (NSW)'	Paragraph [52]
28 October 2016	Replace 'adiscretion' with 'a discretion'	Paragraph [52]
28 October 2016	Replace 'where' with 'whether'	Catchwords