Supreme Court of Western Australia

CALANDRA -v- CIVIL AVIATION SAFETY AUTHORITY [2013] WASC 411 (18 November 2013)

Last Updated: 18 November 2013

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

IN CRIMINAL

CITATION : CALANDRA -v- **CIVIL AVIATION SAFETY** AUTHORITY [2013] WASC 411

CORAM : KENNETH MARTIN J

HEARD : 22 & 23 AUGUST 2013

DELIVERED : 18 NOVEMBER 2013

FILE NO/S : SJA 1027 of 2013

BETWEEN : JOSEPH PEPPE CALANDRA

Appellant

AND

CIVIL AVIATION SAFETY AUTHORITY

Respondent

ON APPEAL FROM:

Jurisdiction : MAGISTRATES COURT OF WESTERN AUSTRALIA

Coram : MAGISTRATE S R MALLEY

File No : BM 2127 of 2010, BM 2129 of 2010

Catchwords:

Criminal law - Appeal against conviction - Alleged miscarriage of justice at trial - Aviation safety offences - Damage to helicopter - Tail rotor blade - Contact with 'small branch' - Decision by pilot to fly tourists after impact with foliage

Legislation:

Civil Aviation Act 1988 (Cth), s 20AA
Civil Aviation Regulations 1988 (Cth), reg 233
Criminal Appeals Act 2004 (WA), s 8, s 9

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : Mr R W Richardson

Respondent : Mr P N Bevilacqua

Solicitors:

Appellant : GSM Lawyers

Respondent : Director of Public Prosecutions (Cth)

Case(s) referred to in judgment(s):

KENNETH MARTIN J:

Introduction

1 This is an application for leave to appeal pursuant to s 9(1) of the *Criminal Appeals Act 2004* (WA) against two convictions against Mr Calandra, the appellant, by his Honour Magistrate S R Malley under reasons for decision of 14 January 2013.

2 The convictions followed a threeday trial conducted between 21 and 23 November 2012, after which the learned magistrate reserved his decision. That trial was significantly focussed upon events that occurred four years earlier, chiefly, on 21 August 2008.

3 Mr Calandra was convicted of two Commonwealth aviation safety offences, namely that on or about 21 August 2008, from the banks of the Fitzroy River in the Kimberley to Broome in the State of Western Australia:

(i) he did contravene s 20AA(4)(c) and/or (d) of the *Civil Aviation Act 1988* (Cth) in that as the pilot of an Australian aircraft (VHHXS) he commenced a flight in the aircraft when there was damage that may have endangered the safety of the aircraft or any person or property, and/or when the aircraft was unsafe for flight; and

(ii) he did contravene reg 233(1)(g) of the *Civil Aviation Regulations 1988* (Cth) in that as the pilot in command of aircraft VH-HXS he commenced a flight before receiving evidence or taking such action as was necessary to ensure that the aircraft was safe for flight in all respects.

4 On 4 February 2013, the learned magistrate imposed a global penalty of a $5,000 fine against Mr Calandra in respect of the two convictions.

5 I observe at the outset:

(a) the appeal in respect of the appellant's summary convictions as regards Commonwealth offences, to this State court, finds its jurisdictional basis in s 68(1)(a) and (d) of the *Judiciary Act 1903* (Cth), which provides:

> **68 Jurisdiction of State and Territory courts in criminal cases**
>
> (1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:
>
> (a) their summary conviction; and
>
> ...
>
> (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;
>
> ... shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

(b) no challenge was raised or addressed to me at the hearing over the appellant's ultimate conviction under pars (c) 'and/or' (d) of s 20AA(4) of the *Civil Aviation Act*;

(c) I will set out later the text of s 20AA(4), as well as the text of reg 233(1)(g), which is phrased in somewhat different terms, albeit nevertheless, directed towards a pilot's obligations to ensure an aircraft is safe for flight before take-off; and

(d) by *Criminal Appeals Act* s 9(1), leave to appeal is necessary to be obtained in respect of each ground of any appeal. Here there are three proposed grounds of appeal. The issue of leave for each ground proposed has been referred to the hearing of the appeal under the programming orders made by Hall J, on 22 April 2013.

Section 20AA of the *Civil Aviation Act 1998* (Cth)

6 The appellant was convicted of an offence against s 20AA(4)(c) and/or (d). This provision is located within pt III div 1 of the *Civil Aviation Act*. It is unnecessary to elaborate upon subsections (1) - (3). They deal respectively with the subject matters of

flying an unregistered aircraft, or flying without a certificate of airworthiness.

7 Relevantly, s 20AA(4) provides:

> An owner, operator, hirer (other than the Crown) or pilot of an Australian aircraft must not commence a flight in the aircraft, or permit a flight in the aircraft to commence, if one or more of the following apply:
>
> ...
>
> (c) there is a defect or damage that may endanger the safety of the aircraft or any person or property;
>
> (d) the aircraft is unsafe for flight.
>
> Penalty: Imprisonment for 2 years.

8 The chapeau to s 20AA(4) is proscriptive against 'one or more' of subpars (a) - (d). Early objection was taken before the learned magistrate that invoking '(c) and/or (d)' in framing a charge of contravening s 20AA was duplicitous. However, the point seems then not to have been further pressed at trial (see ts 5, 12 and 18) and is not raised before me on the appeal.

Regulation 233(1)(g), *Civil Aviation Regulations 1988* (Cth)

9 Regulation 233(1) in respect of which the appellant was also convicted is found within pt 14 div 3 of the *Civil Aviation Regulations* entitled 'Conduct of Operations'. The regulation carries the heading 'Responsibility of pilot in command before flight'. It reads (relevantly):

> (1) The pilot in command of an aircraft must not commence a flight if he or she has not received evidence, and taken such action as is necessary to ensure, that:
>
> ...
>
> (g) the aircraft is safe for flight in all respects;
>
> ...
>
> Penalty: 50 penalty units.
>
> ...
>
> (4) An offence against subregulation (1), (2) or (3) is an offence of strict liability.

10 (The term 'strict liability' is defined in s 6.1 of the *Criminal Code* (Cth)).

Grounds of appeal

11 The appellant raises three grounds of appeal challenging his convictions. Leave to appeal is required in respect of each ground: see s 9(1) and (3) of the *Criminal Appeals Act*.

12 The test for leave, explained by reference to the requirements of s 27(1) of that Act, is found set out in the joint judgment of Steytler P, Wheeler & Roberts-Smith JJA in ***Samuels v The State of Western Australia*** [2005] WASCA 193; (2005) 30 WAR 473 [26], [37], also [56]. Section 27 applies to appeals from superior courts. But the section is materially identical to s 9(1), which governs appeals such as the present, from courts of summary jurisdiction.

13 Relevantly, in ***Samuels*** the court said of the test for leave to appeal upon proposed grounds that

> [t]he requirement for leave and the statutory test explained above call for a single judge or this court on such an application to give consideration to the merits of each proposed ground of appeal. That will not be a detailed consideration of all the evidence and all the issues in the case; it will be confined to the ground of appeal as particularised – but it must, of course, always be a full consideration of that which is advanced in the appellant's case in support of the application. That having been done, if the court or judge is not positively satisfied the ground has a reasonable prospect of success, leave to appeal must be refused. Where leave is refused, sufficient reasons should be given to enable the appellant to understand why that decision was made. As the High Court (Mason CJ, Brennan, Dawson and Toohey JJ) said in ***Bailey v Director of Public Prosecutions NSW*** [1988] HCA 19; (1988) 62 ALJR 319 at 319 – 320, when the Court of Criminal Appeal is satisfied that an application for leave to appeal against sentence is without merits, the grounds of refusal of leave 'should be stated, though they need not be elaborated' [60].

14 Referral of the issue of leave for each proposed ground to the hearing of the appeal vis-à-vis the three grounds relied upon, invokes s 9(4)(b) of the *Criminal Appeals Act*. This provides:

> The Supreme Court may decide whether or not to give leave to appeal –

...

(b) before or at the hearing of, or when giving judgment on, the appeal.

15 On the present hearing (traversing one and a half days) there has been full argument on and consideration of the merits of the appellant's three grounds. The approach effectively assumed leave to appeal would be granted on all grounds, although that issue remains pending.

16 I proceed to the appellant's grounds.

17 By notice filed 1 March 2013, the appellant identifies three proposed grounds of appeal. I append the grounds as an attachment at the end of these reasons.

Ground 1:

18 The first appeal ground reads:

Ground 1 – miscarriage of justice

The convictions be set aside on the grounds that there has been a miscarriage of justice, in that, on the whole of the evidence it was not open to the learned magistrate to be satisfied beyond reasonable doubt that the accused was guilty of the offences.

19 Particulars 1.1 through 1.26 follow. Particulars to ground 1 span 18 pages length.

20 The particulars can be subdivided into three main subcategories.

21 First, particulars 1.1 through 1.7.4 look to assert in general terms the trial evidence did not show beyond reasonable doubt that 'the damage to the rear tail rotors ... was caused while landing at Fitzroy River'. Next, particulars 1.8 through 1.21 appear to challenge findings of fact in the learned magistrate's reasons for judgment. Third, particulars 1.23 through 1.26 look to advance grievances as to the prosecution allegedly changing its case at the trial.

Grounds 2 and 3

22 The second proposed ground reads:

Ground 2 – speculation

The learned magistrate erred in law and in fact in finding that the evidence of the experts, Mr Alder and Mr Pfeiffer, was mere speculation. [Reasons, [66]]

23 The last proposed ground asserts a reversal of the burden of proof at the trial. It reads:

Ground 3 – reversal of the burden of proof

The learned magistrate reversed the burden of proof by imposing both an evidentiary and a legal burden on the appellant to prove that the damage to the tail rotors was not caused by the manner asserted by the prosecution.

Observations: Miscarriage of justice - First ground of appeal and its 26 particulars

24 The first ground is framed as an attempt to invoke s 8(1)(b) of the *Criminal Appeals Act*. I should then set out s 8(1)(b) and (3):

(1) An appeal may be made under this Division on one or more of these grounds

...

(b) that there has been a miscarriage of justice.

...

(3) Despite subsections (1) and (2), no decision of, or proceedings before, a court of summary jurisdiction, nor any document in such proceedings, shall be held to be bad for want of form.

25 There is no definition of the term 'miscarriage of justice' in the *Criminal Appeals Act*.

26 Underlying the somewhat inscrutably framed ground 1 and its lengthy accompanying particulars may be an underlying premise that this court in determining whether there has been a 'miscarriage of justice' would engage in something akin to a review de novo in the ***Sperway Constructions*** sense: see ***Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*** [1976] HCA 62; (1976) 135 CLR 616 [20] (Mason J) and ***Fox v Percy*** [2003] HCA 22; (2003) 214 CLR 118 [20] (Mason CJ, Gummow and Kirby JJ). If so, I would not accept the validity of that premise. The character of the appeal is by way of a rehearing, upon the evidence adduced at the trial. A correct appreciation of the character of the appellate court approach is vital, particularly in

circumstances where the appellant's two convictions are founded upon detailed reasons for decision. The starting focus for a properly formulated ground of appeal, where there are such reasons provided by the decision maker, should in my view be upon an identification by the ground of error within the reasons and not what may be read as some generalised assertion as to dissatisfaction with the end result.

27 In the present case, ground 1 and its lengthy particulars look to have rather lumped together a litany of miscellaneous grievances by shielding them under the linguistic umbrella of the term 'miscarriage of justice'. Not only is this unhelpful in the process of seeking to identify potential error(s) in the underlying reasons, it renders the task of assessing potential merit in such a ground of appeal as something akin to the requirements of a trial de novo.

28 Nevertheless, ground 1 and its particulars were fully argued out at hearing. There was no conceptual challenge raised against the ground or its particulars by the respondent, who chose to address seriatim ground 1 and its particulars, on their individual merits.

29 Because of that stance by the respondent, the admonition against concerns as to form in documents stated by s 8(3), and because ground 1's particulars do at some points manifest some alleged errors within the learned magistrate's findings (see particulars 1.8 through 1.21 - which in my view should have been framed as individual grounds of appeal, by reference to such alleged errors), I shall proceed to a full consideration of the merits of this ground of appeal and its so-called particulars. In the process, I will proceed to examine some principles relevant to the determination of the three grounds, then review aspects of the learned magistrate's reasons.

30 First, however, having now reviewed all the trial evidence afresh in conjunction with the parties' extensive written submissions, I shall provide a recounting of the generally uncontentious (save where I otherwise indicate) relevant events of 21 and 22 August 2008 at Broome, Western Australia - which found the basis for the charges and eventual convictions made against Mr Calandra as the pilot of a Robinson R44 helicopter.

Overview of incident

31 In 2008, the applicant was a helicopter pilot based in Broome. He was employed by Broome Helicopter Services Pty Ltd. His two convictions arise out of a series of events which commence at Broome airport around 9.00 am on the morning of 21 August 2008.

32 That morning the appellant as pilot took off from Broome airport in VHHXS, a Robinson R44 four-seat helicopter (the 'R44'), accompanied by two paying passengers, Mrs Karen and Mr Michael Brown (the Browns). The Browns were tourists from Melbourne, visiting Broome. Earlier, they had arranged to be flown in a helicopter piloted by the appellant for a day's sightseeing and fishing at remote locations in the Kimberley region of Western Australia.

33 Six days earlier the Browns had been out with the appellant in the same helicopter on a similar day-long fishing excursion across Roebuck Bay to Jack's Creek.

34 There was and is no suggestion the R44 was otherwise than in perfect working order and condition when the pilot and passengers first took off from Broome airport that morning.

35 Mrs Karen Brown had her video camera with her that day. From her passenger seat in the R44 she filmed aspects of the day's journey, which became important trial evidence. This featured visits to two fishing locations on the Fitzroy River that day and the return of the R44 to Broome that afternoon via Willie Creek.

36 Once the appellant and the Browns returned to Broome airport around 4.00 pm that afternoon, the Browns paid their account and the appellant then drove them by car to their nearby accommodation in the Broome township. The appellant then returned to the airport, having been away for approximately half an hour. The R44 helicopter had not otherwise been flown that day. Around 4.30 pm, as the appellant was making arrangements to tie down the blades of the R44 at its hangar for the evening, he says he then noticed for the first time that there was some physical damage apparent to a tail rotor blade of the R44.

37 The rotor blade was clearly damaged by way of indentations located towards the outer part of the blade upon its leading edge. This physical damage was photographed next day by a Mr Christopher Holland.

38 At trial, the appellant confirmed the physically damaged condition of the tail rotor blade, which he says he first noticed on the afternoon of 21 August 2008, as being wholly in accord with what is visible in the three photographs of the tail rotor blade, which became exhibits B1, B2 and B3 at the trial. Colour copies of the three photographs of the tail rotor blade are set out in Attachment 2 to these reasons.

39 Having now seen this damage, the appellant says that same afternoon he telephoned Mr Christopher Holland, a licensed aircraft mechanical engineer ('LAME') with significant experience regarding helicopters. Mr Holland was principal of a local aircraft service company based at the Broome airport, Kimberley & Pilbara Air Services. This business had, by Mr Holland personally, serviced the R44 in the past for the appellant and his employer.

40 Kimberley & Pilbara Air Services' Broome business base was operating at hangar premises located on the other side of the Broome airport's runway - opposite to where the Broome Helicopter Services business premises were located.

41 Mr Calandra and Mr Holland were familiar with each other from past business dealings. They were not on particularly friendly terms.

42 There was a factual dispute at the trial over whether Mr Holland was at home or work when he received the afternoon phone call from the appellant on 21 August 2008. But a telephone conversation undoubtedly transpired between them that afternoon, at 4.32 pm. It is confirmed by Mr Calandra's mobile telephone records (see exhibit T).

43 In his telephone call Mr Calandra informed Mr Holland of the damage to the tail rotor blade of the R44. The correlative issue of repair by Mr Holland's business was discussed.

44 At that time Mr Holland had not himself seen the helicopter. So he was then unaware of the degree of severity of damage to a tail rotor blade or blades of the R44. Depending on the extent of the damage, various remedial repair or replacement options and inspection regime requirements could differ significantly, as would the related and accompanying cost of a repair regime.

45 According to the Robinson (manufacturers') manual for the R44 helicopter, the extent of repairs and investigations might begin at a relatively low level, for example, in only replacing the tail rotor blades. But depending on the degree of blade damage, a more extensive level of investigation might be required. This would involve a more time consuming and expensive level of investigation and repair or replacement of the R44 helicopter's components. The possible repair, replacement and investigation costs might range from around $2,000 for a bare tail rotor blade(s) replacement scenario, to up to approximately $12,000 for a higher regime of inspection, investigation and replacement (see ts 50 - 54 of Mr Holland's evidence at trial).

46 Mr Holland's first personal inspection of the R44 at Broome airport appears to have occurred not later than early the next morning (at which time it is accepted Mr Holland took the three photographs of the damaged tail rotor blade of the R44).

47 Mr Calandra's trial evidence had suggested that the first inspection by Mr Holland had happened immediately following his first telephone call to Mr Holland, shortly after 4.30 pm, on 21 August 2008. Again, dispute over that point of detail is not that significant. Plainly, Mr Holland did make his physical inspection of the R44 and then saw that at least one tail rotor blade was damaged. Exhibit B (Mr Holland's three photos) clearly captures the blade's then damaged condition. This condition was accepted at the trial to be in accord with the damage to the tail rotor blade Mr Calandra says he first noticed at around 4.30 pm, on 21 August 2008.

48 Upon first inspection (whether that inspection occurred late on 21, or early on 22 August 2008) Mr Holland said he personally assessed the rotor blade damage visually as serious. He then told Mr Calandra it would require the more extensive and expensive level of inspection, investigation and repair. The appellant disagreed. Mr Calandra said he had assessed the rotor blade damage as less severe, and so only requiring a replacement of the tail rotor blades. The two men were then in disagreement over this issue.

49 There is a more significant factual dispute over whether or not Mr Holland observed one or two damaged tail rotor blades, at the time. It is accepted Mr Holland only photographed one of the R44's two tail rotor blades. Mr Holland told the court at trial he had observed damage to both tail rotor blades and said that he assessed the blade he photographed as the more damaged of the R44's two tail rotor blades, although the other blade was physically damaged as well.

50 A lot was made of this at the trial, as the appellant said only one of the two tail rotor blades had manifested an indentation at the end of it.

51 Mr Holland additionally said at the trial that he had noticed some green staining evident on the tail rotor blade, which he says is captured in his photographs. He said he also identified some green staining on the tail boom of the helicopter.

52 Mr Holland said he had assessed the green stains he saw as consistent with the tail of the R44 and its rear rotor blades having encountered or struck tree foliage. Mr Calandra disagreed with this assessment. He questioned whether any green was visible in the three photographs taken by Mr Holland (exhibits B1, B2 and B3) or, if present, whether any green colour that is observable is just the exposed green undercoat of the rotor blade.

53 As I mentioned, the level of physical damage to a tail rotor blade (or blades) bears heavily upon the level of investigation and repair that is required, as indicated under the Robinson R44 manufacturers' manual. A key distinction is drawn by the R44's manual as to damage at a higher level to tail rotor blades. Such higher degree blade damage is more likely to have been inflicted in circumstances referred to in the R44's manual as a 'sudden stoppage'.

54 It was accepted at trial that a 'sudden stoppage' event is an event under which the motion (rotation) of the tail rotor blades is either completely stopped, or at least impeded and thereby slowed - in terms of diminishing the normal rate of revolutions of the helicopter's blades - by reason of blade contact with an external object. Sudden stoppage contact is more likely to cause a more serious and higher level of damage as to a helicopter, hence requiring a more thorough repair inspection and examination of all tail boom components, including the tail shaft. Contact with the ground would be one example of a sudden stoppage of tail rotor blades.

55 By contrast is a less serious scenario described in the R44 manual as a 'free air strike', under which tail rotor blades may be impacted by an object but are not impeded in terms of their rotation or rate of rotation. Impact contact from a thrown up stone would be one example of a free air strike.

56 Mr Holland and Mr Calandra's disagreement over the character and seriousness of the observable tail rotor blade damage to the R44 raised an underlying definitional dispute - over whether or not the state of the tail rotor blade (or blades) reflected, as Mr Holland considered it, the more serious repair scenario of sudden stoppage or, as Mr Calandra told him, a less serious free air strike situation.

57 The two men's disagreement over the character of the observable blade damage and an ensuing inspection and repair regime for the R44 was eventually resolved. This emerged on the basis Mr Holland told Mr Calandra he would get in contact with the American manufacturer of the R44 helicopter, Robinson Aircraft Corporation of California, and seek its view as to the appropriate repair regime. Mr Calandra agreed to abide by the outcome of that proposal. Mr Holland immediately sent out an email to Robinson Aircraft, to which communication he attached his three photographs (see exhibit F).

58 Mr Holland's communication to Robinson Aircraft Corporation, as seen at the bottom half of exhibit F, was in terms:

> ... original message from: Kimberley & Pilbara Air Services
>
> To: Customerservice@Robinsonheli.com
>
> Sent: Thursday, August 21, 2008 8:11 pm
>
> Subject: T/R strike
>
> Dear Pat
>
> I have attached photos of a tail rotor blade that struck a small branch. Would you consider this a free air strike or a sudden stoppage? The tail drive shaft runout check is within limits and there appears to be no cracks in the forward yoke.
>
> Your quick response would be greatly appreciated.
>
> Kind regards Chris Holland (electronic signature)
>
> Director Kimberley & Pilbara Air Services Pty Ltd PO Box 2506
>
> Broome WA 08 919 37511

59 The response from Robinson Aircraft Corporation to Mr Holland's email appears to have been forthcoming about 27 and a half hours later from a Mr Chris Sennett of RHC Tech Support. (Reference to 'Pat' was to a Mr Pat Cox of Robinson Aircraft Corporation California, someone with whom Mr Holland had had prior dealings.)

60 Mr Sennett's email response was (see the upper part of exhibit F) in these terms:

> From: Customerservice [Customerservice@Robinsonheli.com
>
> Sent: Friday, 22 August, 2008, 11:43pm
>
> To: Kimberley & Pilbara Air Services
>
> Subject: T/R strike
>
> Hello Chris,
>
> Pat is on vacation until next week.
>
> That looks like a pretty good sized dent on the TR Blade. I would have to recommend inspecting per R44 MM Sec.2.520 part B just to be safe.
>
> Best Regards, Chris Sennett
>
> RHC Tech Support

61 After this reply was received, Mr Holland's business (Kimberley & Pilbara Air Services) proceeded to repair the R44 on a basis of the manual's more thorough level of inspection, investigation and repair. This regime was consistent with the damage to the tail rotor blade being caused by a sudden stoppage, although the 'just to be safe' response received from Mr Sennett was certainly not definitive as to the assessed character of the blade damage.

62 Once Mr Sennett's emailed response was received at Broome it was fully accepted (then implemented) without dissent or challenge from Mr Calandra.

63 There was no dispute at trial that Mr Calandra had been (blind) copied by Mr Holland into the (two) passing email communications to and from Robinson. The learned magistrate's reasons note that the appellant did not raise any objection or correction issue against the terms of any of these emailed exchanges at the time, although Mr Calandra was obviously vitally interested in and made privy to their contents when exchanged. The exchange effectively resolved the deadlock with Mr Holland over the required level of repair.

64 At trial the admissibility of the emailed response from Mr Sennett was objected to on behalf of Mr Calandra as being hearsay,

if that communication was being tendered by the respondent for the truth of its content. That position as to hearsay was accepted. Nevertheless, the words alone of the communication were otherwise relevant to what transpired over the eventual repairs to the R44.

65 But of even greater significance than Robinson's repair recommendation was Mr Holland's earlier initiating email communication to Robinson as seen by the appellant at that time. Mr Holland's email referred to his attached photos of the tail rotor blade that '**struck a small branch**'.

66 It was overwhelmingly probable on the trial evidence that the 'small branch' blade impact explanation concerning the rotor blade damage, as had been advised in the email sent by Mr Holland to Robinson Helicopters on 21 (or 22) August 2008, had emanated from Mr Calandra as the originating source of that information in his conversations with Mr Holland. Nevertheless, Mr Calandra denied this at the trial.

67 Mr Holland was then challenged in cross-examination about the 'struck a small branch' statement in his email at the 2012 trial. However, Mr Holland in August 2008 had no ostensible reason to invent the information in the email he sent to Robinson Aircraft as to the 'small branch'. Further, his email to Robinson Aircraft was blind copied to Mr Calandra at the time. It is accepted Mr Calandra said and did nothing to contradict the 'struck a small branch' explanation in Mr Holland's email to Robinson Aircraft. The learned magistrate thought this omission to contradict or clarify the small branch explanation Mr Holland had relayed to Robinson Aircraft was significant: see reasons at [70]. So do I.

68 Though denied by the appellant, it was both logical and fully open for the learned magistrate to conclude at the trial from all the evidence, as he did, that the originating source of the cause explanation offered in August 2008 within Mr Holland's email as to the photographed tail rotor blade having 'struck a small branch' was Mr Calandra. In the process of reaching that conclusion the magistrate necessarily accepted Mr Holland's evidence on this point and necessarily also rejected the denial of evidence of Mr Calandra, to the effect at no stage had he offered or volunteered to Mr Holland any explanation for how the damage to the R44's rotor blade had come about. The learned magistrate rejected Mr Calandra's denial evidence on that issue, assessing it, in context, to be implausible. It was fully open to the learned magistrate to reach that view from all the evidence he heard at the trial.

69 There was a protracted cross-examination of Mr Holland at the trial by reference to what Mr Holland in 2012 could then remember as to his August 2008 conversations with the appellant. The learned magistrate at a point in his reasons described Mr Holland's responses to cross-examination as 'prickly'. Nevertheless, he clearly assessed Mr Holland's evidence to be reliable and of significance. He preferred it in the end over Mr Calandra's on this issue. That course was open. Furthermore, at the trial the appellant himself could point to no other tangible evidence to explain the photographed damage to the tail rotor blade.

70 There was some speculation offered by the defence at trial over a stone possibly being thrown up upon the R44 taking off at the Fitzroy River, or upon it returning to Broome and then landing at the end of the day, or possibly a stone being thrown up from a lawnmower operating in the vicinity of the R44 at around 4.00 pm that afternoon at Broome airport, after the R44 had returned from its day excursion to Fitzroy River and back. But there was no tangible trial evidence of any stone impact incident seen or heard that day.

71 The learned magistrate did not accept that Mr Calandra had offered no explanation for the rotor blade damage to Mr Holland. He found as a fact Mr Calandra had told Mr Holland, as Mr Holland had said in his trial evidence, that the tail rotor blade damage observable on Mr Holland's inspection in August 2008 was attributable to blade contact with a 'small branch'.

72 For the events of 21 August 2008 the only tangible trial evidence of 'small branch' rotor blade contact incident involving the R44 had happened when the R44 descended into a clearing surrounded by trees on the banks of the Fitzroy River, at a second (of two) fishing locations the appellant had landed at with the Browns that day.

73 The R44's descent into the clearing, or 'sink hole', as it was called by the learned magistrate, was being filmed by Mrs Brown from her position as a passenger, then seated in the rear of the helicopter. Her footage of the descent and other aspects of the day and the journey back to Broome, became exhibit D at the trial. Her film footage of the descent at the Fitzroy River was viewed as evidence at the trial for the benefit of the learned magistrate and witnesses.

74 From that footage, it is observable that just before the R44 completes its descent to the clearing at the Fitzroy River, it is positioned a metre or so above the ground. The R44 then rotates its tail in an anticlockwise direction, in a semi-circular rotation of approximately 180 degrees. In the course of that rotation and landing manoeuvre, the recording captures a distinct noise. The noise was described by witnesses (Mrs Karen Brown, Mr Michael Brown and Mr Calandra) as like a 'whipper snipper' or 'buzz-saw' sound. It was discernible to the learned magistrate.

75 The footage of the R44's descent also captures a spontaneous comment then uttered by Mr Michael Brown, made to the pilot (Mr Calandra), along the lines, 'You gave that tree a bit of a haircut'. Mr Brown's words (undoubtedly part of the res gestae in the trial) were immediately followed by the acknowledged sound of Mrs Karen Brown laughing at her husband's comment. This is all audible evidence from exhibit D, although I confess as I first watched and listened to the footage, I had some difficulty discerning any particular impact sound of a 'whipper snipper' or 'buzz-saw' type description. Nevertheless, the learned magistrate and trial witnesses (including experts) all heard the sound, which is the more important thing.

76 The R44 helicopter then completed its landing at the Fitzroy River clearing site and its rotors were shut down. After landing the appellant and his passengers exited the R44.

77 It was the trial evidence of Mrs Brown that alighting the R44 she, her husband and the appellant first walked to the rear of the

helicopter to inspect its tail and tail rotor blades: see Mrs Karen Brown, examination at ts 21 (day 1); cross-examination at ts 28 – 29; Mr Michael Brown, examination at ts 39 - 40; cross-examination at ts 43; Mr Calandra, examination at ts 72 (day 2) and cross-examination at ts 10 (day 3).

78 Mrs Brown said in her evidence she was then looking out for damage to trees surrounding the clearing where the helicopter had landed. She said she saw no evidence of any contact damage with the surrounding trees at the landing site.

79 Mr Brown was closer to the appellant as he then carried out an inspection of the tail rotor blades. He observed Mr Calandra running his hands along the leading edges of both tail rotor blades.

80 From this evidence it was open to the learned magistrate to conclude, as he did (as I would have, had I been trial Judge), that the first area of close examination of the R44 after landing at the Fitzroy River was directed at the tail rotors at the rear of the helicopter.

81 The Browns' further trial evidence (uniformly) was that they themselves saw no damage to the tail rotor blades. If they had, they said they would have been concerned. They were not. They gave evidence that they saw Mr Calandra at that time look to check out the tail rotor blades and then the rest of the R44, including the main rotor blades. At an indeterminate point, they also saw Mr Calandra examine visually the main rotors by climbing up on to the helicopter's canopy.

82 For the Browns, their (uniform) trial evidence was that there was no damage they saw personally, or which they had seen the pilot detect to the R44, at any point that day, including to tail rotor blades, or to main rotor blades. Had they become aware of any such damage, the Browns would have been concerned from a safety perspective about flying any more in the R44. Their (uniform) evidence was that they held no safety concerns whatsoever as they continued their journey back to Broome Airport in the R44 that day.

83 After the landing and the inspection, the Browns went fishing on the banks of the Fitzroy River for a couple of hours. Mostly they were in the company of the appellant. Following an unsuccessful fish catching experience, they returned to the R44 back at the clearing site.

84 The Browns then saw the appellant now conduct another (second) physical inspection of the R44, including its tail rotor blades and main rotor blades, before take-off. Again the Browns perceived nothing untoward with the R44's condition before it took off from that clearing.

85 Returning to Broome Airport, Mr Calandra followed a less direct and more scenic, longer route back to Broome via Willie Creek, so the Browns could capture an aerial view of the Willie Creek pearl farm.

86 As far as the Browns were concerned, the R44 helicopter in which they flew back to Broome, not only that day, but also just six days earlier, sounded, behaved and performed as normal during the flight back via Willie Creek, returning to Broome. Albeit day trip tourist passengers and not qualified as helicopter aircraft engineers or pilots, the Browns' nonexpert trial evidence was that they had perceived nothing at all different (to before) or untoward in the R44's behaviour or flight characteristics, during their journey back to Broome that afternoon.

87 The appellant told the court in his trial evidence his personal inspections as pilot of the R44 after landing at the Fitzroy River at the incident site had been thorough. Still he said he had detected no irregularities at all in the tail rotor blades upon making his physical inspection and close examination of all rotor blades just after the landing. He told the court he attributed a 'whipper snipper', noise which occurred just before the landing at the Fitzroy River clearing site, to contact between the main rotor blades of the R44 with tree foliage, not to contact with the tail rotor blades.

88 The appellant said that he checked out everything on the R44 before takeoff a second time, once the Browns completed their fishing. He then took off again on the return journey to Broome via Willie Creek.

89 Mr Calandra's trial evidence was that during the return journey to Broome there were no manifesting external indicators as to any possible problem with the R44's tail rotor blade or blades. There were, he related, no untoward noises or unusual vibrations or, for that matter, any manifestation as to a possible problem from his readings of the R44's instrument gauges. There was no physical symptom of a problem manifesting through the behaviour of the foot pedals of the R44 during the return journey to Broome – which could signify a possible tail rotor blade issue. Likewise, Mr Calandra said there was nothing out of the ordinary which he had detected during his end of trip Broome airport return descent and landing to indicate any issue of possible concern with the R44 or its rotor blades.

90 The return landing at Broome was normal. It was filmed by Mrs Brown (exhibit D). Her footage shows the R44 descending to land upon a flat bedded square trailer platform - a mobile device used to later enable a landed helicopter to be moved over the ground whilst at its hangar at Broome airport.

91 Nevertheless, somehow on Thursday, 21 August 2008, there was undoubtedly physical damage sustained to at least one of the R44's tail rotor blades. This is irrefutably captured by the three Holland photographs (exhibits B1, B2 and B3). How did this come about?

92 At trial, Mr Calandra testified that he would as pilot have been very concerned had he, in fact, observed and known of the damage to a tail rotor blade, as is depicted in the three Holland photos, after landing at Fitzroy River. Mr Calandra said he would not have flown the R44 in such a condition. That conduct as a pilot would, he acknowledged, have put both himself and his

passengers' safety at risk. Mr Calandra fully accepted the serious potential safety implications which could arise by he, as pilot, flying an R44 helicopter with its tail rotor blade in a condition as is depicted by Mr Holland's exhibit B photographs.

93 But Mr Calandra's trial evidence was that there was no such blade damage present or discernible to him during his close physical inspections of the R44 whilst landed at the clearing at the Fitzroy River and before he took off on a return journey to Broome.

94 Nor, he said, were there any detectable manifestations to him as the pilot of any blade damage problem, such as through unusual vibrations, abnormal instrument gauge readings, or something else discernible to him through the behaviour of the R44's foot pedals he operated during the flight.

95 The learned magistrate necessarily rejected this (negative) evidence by Mr Calandra as to there being no manifesting problematic behaviour in the R44 on the return flight to Broome. He also concluded Mr Calandra must have noticed the damage to the tail rotor blade at the landing site at the Fitzroy River. The learned magistrate rejected the hypothesis (for which there was no underlying trial evidence) that the R44's rotor blade damage, occurring that day, was caused by a stone thrown up on landing, or a stone from a lawnmower operating at the Broome airport, in proximity to the R44 that afternoon.

96 The appellant was then convicted by the learned magistrate of infringing the Act and the Regulations. As a part of the learned magistrate's significant core conclusions he reiterated he had been satisfied beyond reasonable doubt:

(a) it was the R44's tail rotor blade, not its main rotor blades, that had made contact with tree foliage at the clearing landing site at the Fitzroy River as the helicopter descended and had been rotated through 180 degrees just before its landing;

(b) physical damage to the tail rotor blades as depicted in the three exhibit B photographs had occurred during the landing at the clearing site on the banks of the Fitzroy River - at the time a 'whipper snipper' or 'buzz-saw' sound had occurred and proximate to when Mr Brown made a spontaneous comment to the pilot about giving the site trees a 'haircut'; and

(c) the appellant had been aware of the damage to the tail rotor blade whilst landed and on the ground at the Fitzroy River clearing site and before he took off in the R44 again to return to Broome airport that afternoon with Mr and Mrs Brown.

97 A global penalty of $5,000 was imposed.

98 I turn now to address the learned magistrate's reasons before expressing some relevant law, then the merits of the three grounds for which leave to appeal is sought.

The learned magistrate's reasons

99 The reasons for decision, delivered 14 January 2013, span 81 paragraphs. By reference to the prosecution's asserted contraventions against s 20AA(4)(c) and/or (d) and reg 233(1)(g), the core factual issues at the trial were:

(a) whether it was the main rotor blades, or the tail rotor blades which had struck tree foliage at the landing site at the clearing on the banks of the Fitzroy River on 21 August 2008;

(b) when and how the undoubted physical damage to the tail rotor blade, as depicted in the three Holland photographs which are exhibit B, had occurred; and

(c) whether and when the appellant first came to be aware of the physical damage to at least one tail rotor blade of the R44, on 21 August 2008.

Reasons: First core factual issue

100 Towards the first of the pivotal issues, the learned magistrate observed, at between pars 27 and 30 of his reasons:

27. The Browns' video footage of the takeoff and landing at the second location was played during Mrs Brown's evidence. The footage speaks for itself. It shows the helicopter descending into a clearing. Facing the helicopter on the far side of the clearing, was a tree with what can be described as hanging foliage. As the helicopter descends to within a close distance of the surface the pilot rotates the helicopter anticlockwise away from the tree and it is when he has turned approximately 180 degrees, an audible noise can be heard. To a casual observer there was no visible alteration to the aircraft's manoeuvre albeit the witness Alder suggests otherwise.
28. I am satisfied that the contact made was to the foliage of the tree I have referred to and the noise heard relates to that contact. There is a dispute as to which rotors, namely top or rear, made contact. Noone saw contact, however there are markers in my view that resolve the issue. The prosecution says it was tail rotor because of the location of the damage, the noise like a buzz saw or whipper snipper, the presence of green foliage stain on the tail rotor blades and the evidence of Fenton, unchallenged, that similar stain marks were found on the tail boom.
29. The accused says that the foliage hit the main rotor and Pfeiffer, the defence expert witness, also suggests the main rotors based on the noise. With due respect particularly to Mr Pfeiffer, the noise I hear is more of a buzz saw tone and not the intermittent albeit at high speed tone he suggests. Further the presence of green marks on the tail boom are compelling and it is the case that Pfeiffer agreed if such marks were found as they were by Fenton then that was entirely consistent with tail rotor contact and inconsistent with main rotor.
30. Given those findings I am satisfied beyond a reasonable doubt it was the tail rotor that made contact with tree foliage ...

101 Mr Alder was an expert aviation witness called on behalf of the prosecution. He was an in-house employee of the **Civil Aviation Safety** Authority and called to express his expert views. The learned magistrate was rather kind in his remarks towards Alder, observing at par 45 that Mr Alder had at times 'confused his role'. By that he presumably meant Mr Alder had confused his role by not behaving independently as an expert witness and instead seeking to express partisan views to advance the case of the prosecution.

102 At par 45, the learned magistrate effectively negated the impact of Mr Alder's evidence by concluding 'there is significant commonality with Mr Pfeiffer's evidence'. Mr Pfeiffer was the expert aircraft (helicopter) engineer witness called at trial on behalf of the appellant.

103 The reasons therefore show Mr Alder's partisan expert evidence was only used in circumstances where it was in harmony with the evidence of the defendant's expert. That accords with my independent review of how Mr Alder's evidence ought to be used.

104 In those circumstances, I assess it as safe to conclude Mr Alder's participation in the trial, in the end, delivered no prejudice to Mr Calandra. In the future, however, it should be said in firm terms that any practice of calling demonstrably partisan in-house experts as prosecution witnesses is both unsatisfactory and unacceptable.

105 Mr Kevin Fenton, a witness whose evidence the learned magistrate referred to at reasons par 28, was an aircraft engineer and employee of Kimberley & Pilbara Air Services, working under Mr Holland.

106 Mr Fenton was called at the trial by the prosecution. Like Mr Holland he was a licensed aircraft and mechanical engineer (LAME) who was very experienced in working on helicopters.

107 Mr Fenton was more personally involved in the actual inspection and investigation of the damage than Mr Holland. He played a more significant 'hands on' role in the implementation of repairs to the R44. This was after the decision was taken to proceed with a repair or replacement regime following the email exchange with Robinson Helicopters.

108 As such Mr Fenton was in a sound position to observe upon the state of the damage to the tail rotor blades and the tail boom and the green staining from a perspective of his experience. Mr Fenton was a wholly independent witness of fact. He had no personal issues with Mr Calandra.

109 The learned magistrate's reasons at par 28 concerning Mr Fenton's evidence as to his detected presence of green foliage stains on the tail rotor blades, was significant. The learned magistrate also observed Mr Fenton's evidence was unchallenged. Moreover, Mr Fenton's evidence is not challenged under any particulars to ground 1.

110 A presence of green marks on the R44's tail boom, as observed by Mr Fenton, was described (fairly, in my view) by the learned magistrate at reasons par 29, as 'compelling'.

Second and third factual core issues

111 The second factual inquiry at trial concerned how and when the undoubtedly sustained physical damage to the R44's tail rotor blade or blades of 21 August 2008, had actually occurred.

112 The learned magistrate commenced to resolve this issue at approximately par 63 of his reasons.

113 This began with the learned magistrate reiterating his earlier conclusion that it had been the R44's tail rotors and not its main rotors, which had made contact with vegetation at the clearing (sink hole) at Fitzroy River upon the R44 landing at that site (see par 63). He then observed (at par 64):

> There is undisputed evidence that upon the second landing contact was made between the helicopter and foliage. As I have said, the tree in question is visible on the DVD. I have found that contact was made with the tail rotor and not the main rotor with vegetation staining adjacent to the dent visible in exhibit B1 - 3. I find that the accused inspected visually and physically the rear rotors. I find that if the damage to one or two rotors the accused most certainly would have been aware of it. This is not a case where one could be mistaken.

114 This passage also addressed the third core factual area concerning Mr Calandra's awareness and knowledge of such blade damage, once it was established the blade damage happened during the landing at the Fitzroy River clearing.

115 At pars 66, 67, 70 and 73, the learned magistrate rejected aspects of the evidence of the appellant. I set out aspects of these respective findings as follows.

116 At par 66 the learned magistrate said:

> What was likely was **high frequency vibration** which could have **manifested itself** in a number of forms **primarily I find** through the pilot's controls.

117 Paragraph 67:

> It is simply the case on the evidence that **if vibration was felt** through the air frame then because of its nature, **namely high frequency**, it was not something the Browns' **would necessary acknowledge as untoward**. Clearly if the accused was aware of the damage and chose to fly back then he would have been **aware of the effects spoken**

> **of**. Clearly on Alder's and Pfeiffer's evidence it was not suggested the helicopter couldn't have flown but that it was dangerous and there **would have been signs of an unpleasant degree**. (My emphasis in bold)

118 The 'signs of an unpleasant degree' above, I assess as a reference to the finding of high frequency vibration felt through the air frame and (by par 66) through the pilot's controls (I interpret the reference to be to the pilot's R44 foot pedals). Given the appellant's trial evidence he perceived no such actual vibration, the learned magistrate's conclusion, necessarily rejects this evidence on that issue. That was a course open for him.

119 At par 68 of his reasons the learned magistrate summarised certain evidence and findings he reached to that point. This concerned the Fitzroy River vegetation impacting with the tail rotor blades not the main rotor, the Browns being honest witnesses, but being essentially unqualified passenger witnesses. Lastly, he referred to the uniform expert evidence from Messrs Alder and Pfeiffer, concerning the likelihood of the photographed tail rotor blade damage generating high frequency vibration in the R44 - creating for him what he called 'strong suspicion'.

120 It is apparent from pars 68 onwards, particularly from par 70, that the learned magistrate advances from his base of 'strong suspicion'. It was the evidence from prosecution witnesses Holland and Fenton that delivered, in effect, the coup de gras to Mr Calandra's defence.

121 The learned magistrate at par 68 described Holland and Fenton's evidence as 'strong evidence'. Having related the interaction between Mr Holland and Mr Calandra following the appellant's first phone call to Mr Holland on 21 August 2008, the learned magistrate's reasons solidify from par 68, well beyond a position of strong suspicion, to his ultimate satisfaction beyond reasonable doubt. Paragraph 70 reads:

> Holland says the accused rang him and told him he had damaged the tail rotor on a stick or object of that nature. He said he offered to inspect but was told next day okay. The accused's version is that he didn't tell Holland he did anything at any time and that the accused had come over the same day to inspect but there was not discussion as to the cause of damage. With respect to the accused, the suggestion of having told Holland of the rotor damage on the afternoon of 21 August 2012 (sic 2008) and accepting there was an inspection on the same afternoon, that at no time did Holland ask, nor did he tell Holland as to how it occurred is implausible and fanciful. Common sense alone would indicate that would not occur. It was relevant to Holland in making any assessment. The accused's suggestion at no time did he make any comments as to possible causes is rejected. I find that view strongly supported by the fact of exhibit F [namely the 21 and 22 August 2008 email exchange between Mr Holland and Robinson Helicopters in America to which I have referred] in which Holland emails Robinson suggesting the damage was caused by the rotor blades striking a small branch. I find it not credible that Holland invented such an event, albeit he may have been imprecise as to what size the object. It is of great significance in my view the accused was sent a copy of such email, read it, was fully aware of the significance of the allegation, yet at no time sought that such assertion be corrected or retracted. The irresistible inference is that he acknowledged its contents and didn't take issue with it bearing in mind he now suggests it was a fundamental inaccuracy.

122 The learned magistrate also placed emphasis on the email exchange of 21 or 22 August 2008, within which reference was made by Mr Holland to the 'attached photos of a tail rotor blade that **struck a small branch**'. That 2008 email observance was obviously made far more proximately in a temporal sense to the incident under scrutiny, than what was remembered by Mr Holland at the 2012 trial as to the verbal communications between himself and Mr Calandra, four years earlier.

123 It was well open to the learned magistrate and I would assess his approach as fully in accord with contemporary trial principles as explained by the High Court in ***Fox v Percy*** to afford greater significance to a contemporaneous 2008 documentary account concerning a tail rotor blade that is said to have 'struck a small branch'. That is particularly so when the 'small branch' impact explanation is only challenged by the appellant at a trial, four years later.

124 The course taken by the learned magistrate in terms of his assimilating, evaluating and selecting for himself what trial evidence to accept or reject, and to place greater or lesser importance on the evidence as he thought appropriate, was fully open.

125 The learned magistrate briefly addressed other hypothesised alternate blade impact scenarios concerning a possible lawnmower throwing up a stone in the Broome airport area near the R44 (par 75) or a stone being thrown up during landing at Broome (par 76). Such theories were rejected, and correctly so in my view. There was no underlying foundational trial evidence to support them as credibly open.

126 The learned magistrate concluded his reasons:

> 78. Having considered all the evidence and made the above findings I conclude beyond a reasonable doubt that in the process of landing on the banks of the Fitzroy River the accused, being the pilot, allowed the tail rotors to make contact with tree foliage and within that foliage the rotor struck a small branch or twig and damage was sustained.
> 79. I find the accused was aware of that damage but made a decision, no doubt calculating risk versus economic consequence, to fly the helicopter home. The fact he was able to do so without his passengers being aware, may well be a testament to his piloting skills and the fact he made it home safely a matter of luck. I find that given the nature of the damage the helicopter was unsafe to fly and by commencing the flight he put himself and his passengers at risk.

127 From the above extracts it can be seen the learned magistrate was satisfied as to the second and third core factual areas, as regards when and how the damage to the R44's tail rotor blades occurred and, as well, that the appellant had been aware of this damage. As he observed at par 64, 'this is not a case where one could be mistaken'.

Principles of law Ground 1: Miscarriage of justice: s 8(1)(b) *Criminal Appeals Act 2004* (WA)

128 Relevantly to an appeal from a court of summary jurisdiction, s 8(1)(a) and (b) of the *Criminal Appeals Act* provides:

> **8. Grounds for appealing**
>
> (1) An appeal may be made under this Division on one or more of these grounds
>
> (a) that the court of summary jurisdiction
>
> (i) made an error of law or fact, or of both law and fact;
>
> (ii) acted without or in excess of jurisdiction;
>
> (iii) imposed a sentence that was inadequate or excessive;
>
> (b) that there has been a miscarriage of justice.

129 Reliance was placed on observations by the High Court in a leading decision ***M v The Queen*** [1994] HCA 63; (1994) 181 CLR 487, 492 495. There the plurality (Mason CJ, Deane, Dawson and Toohey JJ) were addressing s 6(1) of the *Criminal Appeals Act 1912* (NSW). That New South Wales appeal provision allowed for the review of a jury's verdict - where it was 'unreasonable' or could not be 'supported having regard to the evidence'. Section 6(1) of the New South Wales Act also recognised a distinct 'miscarriage of justice' basis of appeal. Clearly, there is some overlap, conceptually, between the two platforms of appellate challenge.

130 The plurality in ***M v The Queen*** said (492 - 493):

> Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as 'unjust or unsafe' ([see ***Davies and Cody v The King*** [1937] HCA 27; (1937) 57 CLR 170 at 180]) or 'dangerous or unsafe' ([see ***Ratten v The Queen*** (1974) 131 CLR at 515]). In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict ([see ***Raspor v The Queen*** [1958] HCA 30; (1958) 99 CLR 346 at 350-351; ***Plomp v The Queen*** [1963] HCA 44; (1963) 110 CLR 234 at 246, 250]). Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence ([***Morris v The Queen*** [1987] HCA 50; [1987] HCA 50; (1987) 163 CLR 454]) and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand' ([see ***Hayes v The Queen*** (1973) 47 ALJR 603 at 604]). But a verdict may be unsafe or unsatisfactory for reasons which lie outside the formula requiring that it not be 'unreasonable' or incapable of being 'supported having regard to the evidence'. A verdict which is unsafe or unsatisfactory for any other reason must also constitute a miscarriage of justice requiring the verdict to be set aside. In speaking of the *Criminal Appeal Act* in ***Hargan v The King*** Isaacs J said, ([[1919] HCA 45; [1919] HCA 45; (1919) 27 CLR 13 at 23]) :
>
> > 'If [the appellant] can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance.'
>
> And as the Court observed in ***Davies and Cody v The King*** [(1937) 57 CLR at 180.[, the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers:
>
> > 'not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.'
>
> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty [see ***Whitehorn v The Queen*** (1983) 152 CLR at 686; ***Chamberlain v The Queen (No 2)*** (1984) 153 CLR at 532; ***Knight v The Queen*** [1992] HCA 56; (1992) 175 CLR 495 at 504-505, 511]. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations [***Chamberlain v The Queen (No 2)*** (1984) 153 CLR at 621].

131 Those remarks preceded further observations relied on by the appellant in ***M v The Queen*** (494 - 495):

> If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to leave the court of criminal appeal to conclude that, even making full allowance

> for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a Court of Appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty ...

132 Locally, I was referred to ***Morgan v The State of Western Australia*** [2011] WASCA 185. In that case Pullin JA (with whom Hall JA agreed) addressed s 30(3)(a) of the *Criminal Appeals Act* 2004 (again in the underlying context of a jury verdict of guilt). That paragraph reads:

> (3) The Court of Appeal must allow the appeal if in its opinion -
>
> > (a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported;

133 Section 30(3)(c) is the distinct miscarriage of justice ground in the *Criminal Appeals Act*. It closely resembles s 8(1)(b) in the Western Australian Act. However, there appears to be no direct counterpart to s 30(3)(a) in s 8 as regards appeals from courts of summary jurisdiction.

134 In ***Morgan*** Pullin JA said at [94]

> Cases where the appellate court concludes that findings of fact the jury must have made were 'glaringly improbable' or contrary to 'compelling inferences' are likely to be 'extreme cases': [***Suvaal v Cessnock City Council*** [2003] HCA 41; (2003) 200 ALR 1 at] [76]. However, error will not be demonstrated merely because the jury made a choice between competing inferences which were open, being a choice that the court considers it would not have made if it had been the jury. The conclusion that error must be found is supported by the High Court in ***Libke v The Queen*** [2007] HCA 30; (2007) 230 CLR 559 where Hayne J said (Gleeson CJ & Heydon J agreeing) that:

'[T]he question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt [113].'

> If the appellate court forms the view that the jury *must* have entertained a doubt about the appellant's guilt, then it is saying in effect, that the jury erred in reaching its verdict.

135 Seeking to rely upon these principles to the present application for leave to appeal, the appellant by its written submissions contends:

10. The appellant's submission is that, upon the whole of the evidence, it was not open for the learned Magistrate to be satisfied, beyond reasonable doubt, that the appellant was guilty.
11. This translates into the submission that it was not open, upon the whole of the evidence, for the learned Magistrate to be satisfied beyond reasonable doubt, that the damage to the tail rotors occurred during the incident landing.

136 In ***M v The Queen*** Brennan (504 - 505) and McHugh JJ (525) rendered separate observations concerning the appellate court's task to reach its independent assessment of all evidence for the purpose of determining whether a jury, acting reasonably, must have entertained a reasonable doubt as to guilt.

137 In an absence of any reasons for decision and with just a bare verdict of conviction, the task of an appellate court to undertake an independent assessment of all the trial evidence is unassisted by the original decision maker. But, for circumstances where comprehensive reasons for decision have been provided by a magistrate or by a trial judge sitting without a jury - there is axiomatically greater assistance and manifestly an important extra ingredient to be weighed up in the process of the rehearing. The assistance of reasons for decision distinctly alters the appellate landscape under review to a platform that is well beyond the stand alone verdict scenario of a jury's unexplained conclusion.

138 I also bear in mind recent comments of Buss JA, with whom Martin CJ and Mazza JA agreed, in ***Ascic v Bedworth*** [2013] WASCA 174. I note they were referred to with approval by Weinberg, Whealy and Buddin AJJA in ***The State of Western Australia v Rayney*** [2013] WASCA 219 [374]:

> Where there has been a trial before a judge alone or a magistrate, the reasoning of the court which is based on a credibility determination must be distinguished from the reasoning of the court which is based on inferences drawn from facts that were undisputed or found by the court.
>
> Normally, the court's credibility-based conclusions will not be reversed on appeal unless it is demonstrated that such conclusions are flawed by reference to incontrovertible facts or uncontested testimony. However, as Kirby J observed in ***CSR Ltd v Della Maddalena*** [2006] HCA 1; (2006) 80 ALJR 458:
>
> 'Even in the case of expressed credibility findings, the statutory duty to conduct a real "rehearing" remains. It may sometimes justify reversal of a decision by a primary judge who has "failed to use or has palpably misused his advantage" or where "incontrovertible facts or uncontested testimony" demonstrates the findings to be erroneous; or where they are "glaringly improbable" and "contrary to compelling inferences" [21] (footnotes omitted).'

> Although an appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance' (***Dearman v Dearman*** [1908] HCA 84; (1908) 7 CLR 549, 561 (Isaacs J)), it must necessarily observe the 'natural limitations' that exist where the appellate court proceeds wholly or substantially on the record. See ***Dearman*** (561); ***Fox v Percy*** [2003] HCA 22; (2003) 214 CLR 118 [23] (Gleeson CJ, Gummow & Kirby JJ). In ***Dearman***, Isaacs J said:
>
> 'The mere words used by the witnesses when they appear in cold type may have a very different meaning and effect from that which they have when spoken in the witness box. A look, a gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence, will often lead a Judge to find a signification in words actually used by a witness that cannot be attributed to them as they appear in the mere reproduction in type. And therefore some of the material, and it may be, according to the nature of the particular case, some of the most important material, unrecorded material but yet most valuable in helping the judge very materially in coming to his decision, is utterly beyond the reach of the Court of Appeal (561).'
>
> In ***Fox v Percy***, Gleeson CJ, Gummow & Kirby JJ said in relation to the 'natural limitations' of an appellate court proceeding wholly or substantially on the record:
>
> 'These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole [23] (footnotes omitted).' [64] - [67]

139 There is little to be said in amplification of those reasons and the cases quoted therein. As Weinberg, Whealy and Buddin AJJA observed, the net effect of this case law is that an appellate court will accord 'appropriate deference' to the reasoned factual conclusions of the court below, particularly as regards matters of credit [420].

Ground 1: Miscarriage of justice

140 There are 18 pages of particulars which accompany this ground (see attachment 1 to these reasons).

141 I propose to focus initial attention at those particulars which seek to identify errors in the learned magistrate's reasons. Many of the particulars otherwise seem to advance legal arguments, by reference to the supposed significance of various aspects of trial evidence, all presumably aggregated on a basis that the appellate court's required review of the 'whole of the evidence' must at the end of the day arrive at a different conclusion to that reached by the learned magistrate.

142 My recounting and review of the trial evidence has effectively assimilated particulars 1.1 through 1.7 and 1.26.

143 I deal briefly with the socalled particulars (effectively subgrounds) to the learned magistrate's findings at between particulars 1.8 through 1.25 (although grounds 1.23 to 1.25 fall under the heading of Prosecution - Change In Case).

144 I would first observe on my analysis that there was no illegitimate change in the prosecution's case. During opening at trial the prosecution indicated it would seek to make something of a discernible noise apparent in the recorded sound of exhibit D, as the R44 took off from the incident site. But as the trial proceeded this noise was explained by the evidence as having an origin which was wholly benign. The learned magistrate accepted that in his reasons in due course. The noise was attributable to the effect of a window in the R44 which had just been opened at the time (see reasons par 43). The noise therefore had an innocent explanation - contrary to earlier views of the prosecution's expert, Mr Alder.

145 In the face of trial evidence emerging about a window just being opened, the prosecution, properly, did not seek to make anything of one point upon which it had opened. However, the prosecution's case had not been opened exclusively by reference to this issue. The noise was but one of a number of components of the prosecution's case (see opening by prosecution at ts 3 day one of trial).

146 This issue was properly dealt with at trial and dismissed. That did not mean that the prosecution fundamentally changed its case against Mr Calandra.

147 Next, I deal briefly with particulars 1.8 through 1.22.

Particular 1.8.

148 There was no error by the learned magistrate in terms of his observation at par 76 of the reasons concerning substantive contact being required on the landing at Broome to produce the tail rotor damage seen on the photographs which became exhibit B. There was no inconsistency in that finding. There was evidence of contact with a small branch at the incident landing zone on the banks of the Fitzroy River. There was no tangible evidence of any other impact with anything available to be assimilated concerning the R44's landing back at Broome airport on 21 August 2008.

Particular 1.9.

149 This particular raised the appellant's asserted good character and the weight of this evidence at trial. In this scheme of relevant

issues in this trial, good character alone of this pilot was a relatively minor consideration. The evidence led was that the appellant had no convictions. That, measured against the weight of the overall trial evidence, went nowhere. More significant than his character was the contention that the appellant was a pilot who by nature was cautious and risk alert. These were traits relied upon as being inconsistent with a conclusion of guilt. Certainly, that feature was a matter to be weighed. It was. On my view, this was properly weighed by the learned magistrate. Measured against the weight of other evidence against this appellant, I would agree with that assessment. There was no error.

Particular 1.10.

150 The learned magistrate's reasons at par 25 do not say, as asserted, that Mr Brown did not make an inspection of the tail rotor blade at the incident landing zone on the banks of the Fitzroy River. His conclusion had been only that Mr Brown did not 'personally' make a physical assessment of the tail rotor blade. Mr Brown had indeed observed the appellant as pilot of the helicopter do that. There was no error in the analysis.

Particular 1.11.

151 This challenge concerns the conclusion reached by the learned magistrate at par 70 of the reasons as to the implausibility of the appellant's evidence to the effect Mr Holland had not asked him how the tail rotor blade damage was caused.

152 The appellant's trial evidence was that he was not asked this by Mr Holland and had not offered any explanation for the damage to Mr Holland. Mr Holland's evidence was to the contrary. Mr Holland's evidence was confirmed by the content of exhibit F, the email to Robinson Helicopters detailing that the tail rotor had 'struck a small branch'.

153 A factual conclusion reached in the end about Mr Calandra's trial evidence by the learned magistrate was both open and logical in the presenting circumstances. I would reach the same conclusion on a review of all the evidence.

Particular 1.12

154 This particular challenges the conclusion there was damage to two tail rotor blades, not just to one blade (the blade photographed in the three photographs which became exhibits B1, B2 and B3). In light of trial evidence from Mr Holland and Mr Fenton that they saw physical damage to both blades, the view about damage to both blades was open on the evidence. There was no error by the learned magistrate in reaching a conclusion that there was damage to both blades. This was an evaluation of the trial facts, fully open to the magistrate. The matters under particular 1.12 are essentially argumentative. They seek to deflect the inconvenient finding of fact which was fully open on the trial evidence.

Particular 1.13

155 This challenge asserts error by a conclusion that the damage sustained to the rear tail rotor blades could not have been caused by coming into contact with a small branch or stick or twig. In my view, that factual finding was fully open to the learned magistrate, particularly by reference to the evidence of Mr Holland: see his cross-examination and reexamination (ts 66 - 78). I would reach the same conclusion reviewing all the trial evidence.

Particular 1.14

156 This grievance asserts error by the learned magistrate by a finding that the evidence of Mr Holland was clear and reliable. Again, it was fully open to the learned magistrate to make his assessment of Mr Holland's trial evidence, having seen and heard it and having evaluated it. This challenge is wholly misconceived.

Particular 1.15

157 This particular asserts error by the learned magistrate by wrongly concluding that the accused altered his evidence concerning whether the incident landing was the 'first' or 'second' landing.

158 By my own reading of the transcript, the learned magistrate's conclusion as to a change in the evidence was fully justified, having reviewed the trial evidence (ts 69 - 71 (day 2) and ts 18 (day 3)) particularly cross-examination. There, in effect, the question as framed concedes that the appellant had got his evidence wrong on this point and it had then been corrected it in light of Mrs Brown's earlier evidence.

Particular 1.16

159 This asserts there was a failure by the learned magistrate to consider that, even if the tail rotor blades had made contact with foliage at the incident landing site, such contact may not have caused the damage witnessed and captured under exhibits B1, B2 and B3.

160 The challenge is fanciful. There was enough trial evidence before the learned magistrate to sustain the conclusion that tail rotor blade contact with a small branch at the incident landing site, was enough to cause the blade damage.

Particular 1.17

161 The learned magistrate watched and listened to the exhibit D footage recorded by Mrs Brown. He was referred a sound heard by the three witnesses in the R44 as it had turned 180° and hovered a metre or so above ground before touching down at the

incident landing site on the banks of the Fitzroy River. It was more than open for the magistrate to describe the sound as he assessed it. Moreover, Mr Pfeiffer's expertise was as a helicopter engineer and not in the area of sound interpretation. This challenge is not made out.

Particular 1.18

162 This challenge also relates to the sound described by Mr Pfeiffer in viewing video footage of the incident landing on the banks of the Fitzroy River. Mr Pfeiffer opined that the sound was likely to be more attributable to the main rotor blades and not the tail rotor blades having 'struck some light foliage as it came in to land' (ts 26 (day 3)).

163 The learned magistrate clearly appreciated the issue as to whether or not it had been the tail rotor blades or the main rotor blades which had made contact with foliage at this landing site. His analysis was logical and open on the trial evidence.

164 Arguments based around recorded sound interpretation by Mr Pfeiffer leading to his different view was not opinion evidence the learned magistrate was obliged or compelled to accept.

165 The learned magistrate was entitled to reach his own conclusions from all the evidence, even including what he listened to when reviewing the matter afresh. Arguments predicated upon a brief detectable sound being more attributable to main rotor blades, not tail rotor blades, present as marginal, at best. There was far stronger countervailing evidence supporting the tail rotor blade contact conclusion reached, with which I concur.

Particular 1.19

166 I refer to my earlier observations concerning Mr Alder. It is argued he was biased and partial as a prosecution expert witness. I agree with that assessment.

167 However, the approach of the learned magistrate to which I have referred was, in effect, to only accept Mr Alder's evidence where it was consistent with that of Mr Calandra's trial aviation aircraft engineer expert, Mr Pfeiffer. The experts agreed in large measure on most matters.

168 In the end, the learned magistrate was not led into any error by the prosecution leading a partial expert, although that forensic course is never to be condoned.

Particular 1.20

169 This challenge is directed at par 66 of the reasons in terms of the learned magistrate rejecting evidence of Mr Alder and Mr Pfeiffer - concerning what would have been felt by passengers and the pilot within the helicopter - travelling back to Broome from the incident landing zone. The challenge is effectively ground 2. I deal with and reject ground 2 below separately.

170 There was no inconsistency in the approach or conclusion of the learned magistrate as to high frequency vibration not necessarily being discernible to lay helicopter tourist passengers, such as Mr and Mrs Brown.

171 Concerning the appellant as the pilot, the necessary finding of the learned magistrate was that Mr Calandra did experience high frequency vibration through the R44's foot pedals, thereby rejecting his negative evidence to the contrary. That rationalisation of all the evidence and his conclusion was fully open to the learned magistrate, who heard these witnesses.

Particular 1.21

172 This is essentially the same challenge as under particular 1.20, which I have rejected.

Particular 1.22

173 Effectively, this challenge advances the features of (the alleged absence of) vibration, lack of control, and the stated unlikelihood of the appellant making a longer flight back to Broome via Willie Creek, were he as pilot otherwise aware of the damage to the tail rotor. The challenge is basically just argument. All this factual evidence was fully assimilated by the learned magistrate. I have also assessed it. In the end, this argument founders against the weight of the stronger overall countervailing evidence which, on my assessment, was and is more than sufficient to sustain the eventual conclusions of guilt.

174 That completes my observations by reference to what I assess as the significant particulars to ground 1, in a context of the asserted overall miscarriage of justice.

Ground 1: Appellate evaluation conclusions

175 By my independent assessment of all the trial evidence, there was a more than ample basis to conclude that the transgressions against s 20AA(4)(c) or (d) and reg 233(1)(g) had been established. On any assessment, the trial evidence as to the events of 21 August 2008 clearly demonstrated:

(a) The appellant had been the pilot of the R44 helicopter which had flown with two passengers to Fitzroy River, returning to Broome that day.

(b) On that day some significant damage had occurred to at least one of the tail rotor blades of the R44. The damage is clearly

captured in the three photographs taken of the tail rotor by Mr Holland. These photographs became exhibits B1, B2 and B3.

(c) The appellant acknowledged seeing that very damage to the tail rotor blade when he said he inspected the tail rotor blade at about 4.30 pm at Broome airport that day.

(d) The appellant, in effect, fully accepted at trial that a tail rotor blade in the condition as depicted on exhibits B1, B2 and B3 was unsafe and further, that it would have been a dangerous and foolhardy act for any pilot to fly a helicopter with a tail rotor blade known to be in that damaged condition;

(e) A conclusion that the appellant must have been aware of this blade damage before he flew the R44 back to Broome on 21 August 2008 was open on the evidence. The appellant's trial evidence, as well as the evidence of Mr and Mrs Brown, confirmed the appellant had made a close visual and tactile inspection of the R44, including of the tail rotor and tail rotor blades, immediately after the landing at the clearing at the Fitzroy River. Mr Calandra's process of inspection included him running his hands over the leading edges of the tail rotor blades at that time. Upon doing so it would have been impossible not to encounter the type and level of physical blade damage as seen exhibit B.

(f) It is more than open on the evidence to conclude that there was an impact between the tail rotor blades (not the main rotor blades) with tree foliage during the R44's landing manoeuvre at the clearing at the Fitzroy River. The learned magistrate so concluded. I would reach the same conclusion on all the evidence.

(g) A conclusion that it was the tail rotor blades which had made contact with tree foliage at the landing site at the Fitzroy River was the logical, indeed almost overwhelming, finding of fact fully open to be reached on the trial evidence. Bearing in mind the evidence about green stains evident on the blades and the tail boom of the R44 and the largely unchallenged evidence from Mr Fenton about that issue, this finding of fact is easily reached.

(h) On all the trial evidence, no other viable explanation presents from reliable evidence to explain the undoubted physical blade damage as experienced by the R44's tail rotor blade on 21 August 2008 in terms of an overall review of that day's other events. Such a conclusion does not amount to a reversal of the onus of proof, or of an evidentiary onus (going to ground 3 of the appeal grounds). The conclusion simply evaluates the overall state of the trial evidence, in circumstances where a finding of contact as between the tail rotor blades and tree foliage at the landing site was overwhelming. Other potentialities for causing the observed damage to the tail rotor blade, such as by a stone thrown up from an (unseen) lawnmower at the Broome airport, or by a stone thrown up upon the return landing at Broome airport are just speculation. They do not manifest as reasonable conclusions open or plausible from the trial evidence.

(i) Mr Holland's 21 August 2008 email (exhibit F) to Robinson Aircraft Corporation (unchallenged, albeit seen by Mr Calandra after it was sent) and its internal reference to contact between the R44's tail rotor blades 'which struck a small branch' is damning evidence against the appellant upon the question of how the damage to the tail rotor blade came about on 21 August 2008. This was a relatively contemporaneous explanation as to cause - in terms of its attribution of the observed damage to the tail rotor blades. It points strongly to a scenario of tail rotor blade contact with a small branch of a tree that day.

176 From all the trial evidence, the only viable scenario of contact with a small tree branch that day had happened at the incident landing site at the banks of the Fitzroy River.

177 From these circumstances, it is simply not open (applying ***Libke v The Queen*** [2007] HCA 30; (2007) 230 CLR 559 [13]) to credibly contend that a primary decision maker 'must' (as opposed to 'might') have concluded that the elements of these offences were not established beyond reasonable doubt.

178 Nevertheless, the appellant assembled, both at trial and at the appeal hearing, a contrary body of largely negative evidence. This included features that:

(a) the Browns and the appellant did not notice or detect anything untoward;

(b) the flying behaviour of the R44 had presented on their evidence as perfectly normal, and

(c) the R44 ought to have been exhibiting more overt signs of a problem if its tail rotor blade or blades were in the condition of exhibits B1, B2 and B3 yet the R44 was safely flown back to Broome by the appellant.

179 Furthermore, it was argued the appellant was a person of good character, having no prior convictions and was safety conscious as a pilot. Hence reckless conduct putting his own life and the lives of his passengers at serious risk by actions which would knowingly have endangered them all would go against the grain. Such conduct it was argued is most unlikely to have been implemented by this appellant, given its sheer foolhardiness.

180 That negative evidence obviously must be weighed and assimilated. In the end, however, such essentially negative propositions and arguments of socalled logic do not for me raise any reasonable doubt when weighed against the far stronger countervailing positive evidence, and particularly the uncontradicted (at the time) reference to the tail rotor blade's contact with a 'small branch' contained in exhibit F.

181 In the circumstances, ground 1 must be dismissed.

182 Furthermore, I assess the scheduled ground 1 particulars 1, 1.8 through 1.21, in contending for, in effect, errors of fact and law by the learned magistrate, as unpersuasive.

Ground 2: Error by the learned magistrate by reference to alleged speculation

183 Ground 2 reads:

> The learned Magistrate erred in law and in fact in finding that the evidence of the experts, Mr Alder and Mr Pfeiffer, was mere speculation. [Reasons, [66].]

184 On my assessment, the ground misinterprets the learned magistrate's reasons at par 66. There he said:

> At the end of the day both Mr Alder and Mr Pfeiffer were both speculating what would be felt and by who. What was likely was high frequency vibration which could have manifested itself in a number of forms, primarily I find through the pilot's controls.

185 That observation needs to be read with what preceded it (see par 65) and also what followed (see par 67) concerning the subject matter of high frequency vibration.

186 At par 67 of his reasons the learned magistrate had said:

> It is simply the case on the evidence that if vibration was felt through the air frame then because of its nature, namely high frequency, it was not something the Browns would necessarily acknowledge as untoward. Clearly if accused was aware of the damage and chose to fly back then he would have been aware of the effects spoken of. Clearly on Alder's and Pfeiffer's evidence it was not suggested the helicopter couldn't have flown but that it was dangerous and there would have been signs of an unpleasant degree.

187 Contrary to what is suggested under ground 2, the learned magistrate did not reject the evidence of Mr Alder and Mr Pfeiffer at par 66, on a basis that their expert evidence was speculation. Correctly understood, he made what on my assessment was an appropriate observation, in circumstances where demonstrably neither expert was present aboard the R44 on 21 August 2008. Both experts were hypothesising their opinions about potential impacts of an R44 helicopter flying with a damaged tail rotor blade in a condition manifested under exhibits B1, B2 and B3.

188 The learned magistrate, correctly read, seems to have accepted Mr Pfeiffer's evidence about the R44's pilot and passengers having definitely 'felt a difference in flying characteristics' (see par 60 of the reasons). At that paragraph the learned magistrate seems to have accepted some of their expert evidence. But he rejected further expert evidence from Mr Pfeiffer that the R44's passengers, for example, that Mr and Mrs Brown, would have 'seen the damage upon inspection'. To that proposition, the learned magistrate said at par 60:

> I would suggest in relation to the passengers that is an assumption on his part.

189 As regards the pilot (appellant) the finding by the learned magistrate reached was that he had seen the blade damage upon inspection.

190 Upon the issue of feeling a difference in flying characteristics of the R44, the learned magistrate's conclusion accepts Mr Pfeiffer's expert evidence (see par 66) concerning a likely manifestation of high frequency vibration (primarily through the pilot's controls).

191 At par 67 the learned magistrate accepts evidence from Mr Pfeiffer (and Mr Alder) that flying a helicopter with tail rotor blades in such condition was 'dangerous'. He also accepts there 'would have been signs of an unpleasant degree' (a reference to the issue of high frequency vibration as is referred in the first sentence of that paragraph).

192 Subsequently, at par 73 the learned magistrate then concludes:

> The accused denies damage to the second rotor. The Browns for reasons previously stated don't assist and Alder and Pfeiffer simply make assumptions.

193 The learned magistrate was referring to whether there had been damage to more than one tail rotor blade as per the evidence of both Mr Holland and Mr Fenton. Mr Fenton was less sure of that proposition under sustained crossexamination (see par 31).

194 The learned magistrate nevertheless assimilated the evidence of Mr Pfeiffer on the issue of whether there were one or two damaged tail rotor blades, as he was entitled. His analysis of Mr Pfeiffer's evidence and the propositions put to him about that issue is seen at pars 59 and 60, see also 61.

195 None of this to my mind shows or indicates any rejection of expert evidence error by the learned magistrate.

196 Returning to par 66, it can be seen that in overall context he was dealing essentially with the issue of the Browns' apparent lack of perception in terms of any problem or the manifestation (to them) of a symptom such as vibration that would physically indicate a problem after the R44 took off from the banks of the Fitzroy River to return to Broome via Willie Creek.

197 The learned magistrate's assessment of the opinions of Mr Pfeiffer and Mr Alder regarding what a putative passenger might have felt was understandable and appropriate, bearing in mind that he also had the benefit of direct evidence from the Browns as to what they did feel.

198 Ground 2 of the appeal should be dismissed.

Ground 3: the learned magistrate erroneously reversed the burden of proof

199 Ground 3 contends the learned magistrate erroneously reversed the burden of proof, in effect, requiring the appellant to prove that 'the damage to the tail rotor blades was not caused by the manner asserted by the prosecution'. In my view, there is nothing in this ground, essentially for the reasons I have previously stated in the context of reviewing the evidence as a whole.

200 For circumstances where exhibit F was found to include the appellant himself on 28 August 2008 attributed the cause of damage to the tail rotor blade as consequent upon contact with a 'small branch', it was inevitable that this most plausible cause of damage would then be measured against the overall state of the evidence as to possible other competing causes of the damage. There were none on the evidence. In the end, there was no reversal of the onus of proof or evidentiary burden.

201 The character of this challenge calls to mind in some ways the famously destructive crossexamination of Dr Crippen in 1910 by Sir Richard Muir for the Crown at Crippen's trial for the murder of his wife. Cross-examination proceeded:

> On the morning of 1 February you were left alone in your house with your wife?---Yes.
>
> She was alive?---Yes.
>
> And well?---Yes.
>
> Do you know any person who has seen her alive since?---I do not.
>
> Do you know of any person in the world who has had a letter from her since?---I do not.
>
> Do you know of any person who can prove any fact showing that she ever left your house alive?---Absolutely not.
>
> What enquiry have you made of local tradespeople having found your wife gone?---I have made no enquiries.

202 The jury took 27 minutes to convict Dr Crippen of his wife's murder.

203 Sometimes inferences are irresistible.

204 But on my assessment, the case here went beyond inference.

205 Exhibit F effectively constituted a recorded admission against interest by the appellant concerning the true cause of the damage sustained to the rotor blade being contact with a 'small branch'. There was as well a physical inspection of the tail rotor blades by the appellant running his hands along the leading edge of the tail rotor blades, which the appellant and the Browns all said occurred at the landing site on the banks of the Fitzroy River. In end consequence, the appellant simply could not have missed the tail rotor damage as depicted in exhibit B1, B2 and B3.

206 Ground of appeal 3 also fails.

Conclusion

207 In the end, all grounds of appeal fail and the appeal is dismissed. Axiomatically, there can be no leave for grounds I have now assessed to fail.

ATTACHMENT 1

1. **Ground 1 – miscarriage of justice**

The convictions be set aside on the grounds that there has been a miscarriage of justice, in that, on the whole of the evidence it was not open to the learned magistrate to be satisfied beyond reasonable doubt that the accused was guilty of the offence.

PARTICULARS

1.1 To establish the guilt of the accused, the prosecution had to prove beyond reasonable doubt that:

1.1.1 the damage to the rear tail rotors ("the damage") was caused while landing at Fitzroy River.

1.1.2 the accused was aware of the damage prior to his departure from Fitzroy River to Broome.

1.2 On the whole of the evidence adduced, the evidence did not prove beyond reasonable doubt that the damage occurred at Fitzroy River – alternatively, gave rise to a reasonable doubt that it did.

1.3 The prosecution expert witness, Mr Alder [Exhibit "G"]:

1.3.1 stated in his report, *"The structural damage to the tail rotor blades would have severely disrupted the airflow over the blade causing turbulence, loss of lift, and a gross out of track condition resulting in severe vibration and ... in addition to the vibration, reduced tail rotor thrust and therefore reduced yaw control and effectiveness."* [Report, para 4(a)]

1.3.2 *"At the time the strike took place there would have been an immediate and significant increase in the level of vibration felt through the tail rotor pedals and perhaps via the airframe as well."* [Report, para 5(a)]

1.3.3 Mr Alder stated in his evidence that, *"That rotor blade in this condition is not flying a smooth path. It is vibrating and maybe even weaving ... its tip path plane through its rotation would not be as designed. It would not be smooth."* [TT, p23, 22/11/12]

1.3.4 *"The damage would have a very adverse effect on the controls."* [TT, p25, 22/11/12]

1.3.5 *"If both blades were damaged, vibration would be worse."* [TT, p40, 22/11/12]

1.3.6 *"Damage indicates hitting something very solid."* [TT, p39, 22/11/12]

1.3.7 *"If there was severe vibration, it was likely to be seen in the instrument panel."* [TT, p37, 22/11/12]

1.3.8 *"Visually* [commenting on Exhibit "D", complete video] *there was absolutely no difference in the way in which the aircraft was flying on the flight to Fitzroy River and return to Broome."* [TT, p36, 22/11/12]

1.3.9 *"The impact noise indicates the blade had struck something soft* [TT, p35, 22/11/12]*, leaves, twigs."*

1.3.10 *"Given the severity of the strike ... this vibration could have been felt by the passengers and was likely to be."* [TT, p35, 22/11/12]

1.3.11 *"Is there evidence (from the film video) of the helicopter impacting with a solid object? - - A: No."* [TT, p34, 22/11/12]

1.4 The defence expert witness, Pfeiffer, stated in his report [Exhibit "BB"], *"On the assumption that only one rotor blade was damaged":*

1.4.1 *"would have an adverse effect on the aerodynamic efficiency of the tail rotor system"*;

1.4.2 *"this would be felt through the airframe and the most severe trouble controlling the aircraft using higher power settings"*;

1.4.3 *"the vibration in the cabin would be seen in the gauges making them hard to read and would be felt by the passengers through the seats causing numbness n the legs and buttocks"*;

1.4.4 *"a strike that would cause that amount of damage to the tail rotor would have been heard as quite a loud crack"*;

Pfeiffer in his supplementary report [Exhibit "CC"] stated:

1.4.5 *"If the second rotor blade was damaged, this would still be noticeable by the pilot and the passengers. As a hum and a high frequency vibration through the air frame of the helicopter which would have made flight at the least very uncomfortable if not unbearably uncomfortable."*

1.4.6 *"If both blades were damaged, there would be severe vibration caused by the "out of balance", "out of track" of the tail rotor."*

1.5 Evidence of the passenger – Karen Brown [TT, 21/11/2012]:

1.5.1 Her and her husband had been passengers on a prior fishing charter in the same aircraft on 15 August 2008. [TT, p24]

1.5.2 At the time of hearing the whipper snipper noise, the witness did not *"feel any shock or shudder or any impact sensation in the aircraft". "There was no sense of a solid strike or impact with any substantial object."* [TT, p26]

1.5.3 *"It was just like cutting grass."* At the time of the noise, *"the aircraft didn't swerve or alter its position in any radical way."* [TT, p27]

1.5.4 The witness did not notice the helicopter performing differently between the noise and landing at Fitzroy River. [TT, p28]

1.5.5 The witness did not notice a difference in sound, didn't feel any vibration [TT, p28], and the pilot did not appear to have any difficulty in controlling the aircraft. [TT, p28]

1.5.6 After landing at Fitzroy River, the witness did not see any tree area that appeared to have been recently dismembered. [TT, p29]

1.5.7 The whistling noise commenced when the pilot opened the vent window. [TT, p32]

1.5.8 Felt no vibration. [TT, p33]

1.5.9 *"Saw pilot climb on top of the helicopter then I saw pilot at rear of the helicopter."* [TT, p29]

1.5.10 *"Saw my husband standing next to the pilot inspecting the rear rotor."* After the pilot had inspected the rear rotor, he said, *"There is no damage."* [TT, p29]

1.5.11 Didn't see any green residue or markings on the tail rotor or on the body of the helicopter. [TT, p30]

1.5.12 The tail rotors did not look as depicted in Exhibits "B1", "B2" and "B3".

1.5.13 The witness was looking at the tail rotors for the purpose of seeing whether there was any damage. [TT, p31]

1.5.14 The witness looked because she was concerned for her safety. [TT, p31]

1.5.15 On start-up and take-off from Fitzroy River, the witness did not notice any severe vibration or any unusual vibration.

1.5.16 The helicopter performed as usual.

1.5.17 Didn't observe the pilot having any difficulty in controlling the aircraft.

1.5.18 The whistling noise commenced when the pilot opened the vent window.

1.5.19 Felt no vibration [TT, p33], and aircraft performed as usual and no different noise from prior to the landing at Fitzroy River.

1.5.20 After take-off for return flight to Broome, pilot suggested sightseeing over Willie Creek and did so by returning to Broome via that diversion. [TT, p34]

1.5.21 The aircraft landed on small platform at Broome Airport [TT, p34], without any apparent difficulty.

1.5.22 Passenger Karen Brown was a couple of metres from her husband who was standing with the pilot who was inspecting the tail rotor. [TT, Re-XN, p37]

1.5.23 Passenger Karen Brown would not have got in the helicopter if she had seen the tail rotors

in the condition depicted in Exhibits "B1", "B2" and "B3".

1.6 Evidence of passenger – Michael Brown [TT, 21/11/2012]

1.6.1 The noise during landing at Fitzroy River was *"minor"* like a *"whipper snipper"*. [TT, p37]

1.6.2 At the time of the noise, witness did not feel any shock or shudder to any impact sensation. [TT, p41]

1.6.3 Apart from whipper snipper noise, there was no other impact noise. [TT, p41]

1.6.4 After the swishing noise there was no alteration in the way the aircraft performed during the landing process. [TT, p42]

1.6.5 Witness did not feel any vibration or observe any vibration in the aircraft. [TT, p42]

1.6.6 the pilot did not appear to have any difficulty landing the aircraft at Fitzroy River. [TT, p42]

1.6.7 The witness looked at the tail rotors while standing with the pilot and didn't see anything unusual and they did not look dented or damaged. [TT, p43]

1.6.8 On take-off from Fitzroy River, witness did not feel severe vibration [TT, pp4344], nor any vibration on the return flight to Broome via Willie Creek and the pilot did not appear to have any difficulty controlling the aircraft. [TT, p44]

1.6.9 The aircraft performed in the same manner on the flight back to Broome as it did from Broome to Fitzroy River [TT, p44], and it behaved in the same manner as the previous charter.

1.6.10 The aircraft landed on a small pad at Broome Airport and the pilot had no difficulty in landing.

1.7 Film footage:

The film of the charter flight taken by Karen Brown [Exhibit "D", complete video] depicts parts of the flight from Broome to Fitzroy River. It does not show the first landing but depicts the second landing and take-off and parts of the return flight from Fitzroy River via Willie Creek to Broome and the final landing on the pad at Broome Airport. It also showed film of the first fishing charter. The film footage establishes the following:

1.7.1 The aircraft performed in the same manner on the first charter and the second charter, in particular, after the incident landing.

1.7.2 At the time of the swishing noise heard on the second landing at Fitzroy River, there was no other impact noise and there was no other evidence indicating severe damage to the tail rotor, that is, the aircraft's flight performance was normal with no evidence of lack of control, nor was there any vibration noise or evidence of vibration in the aircraft. (During the video of both charters, the aircraft's instrument panel is seen from time to time – there is no evidence of severe vibration or of any vibration on the instruments following the swishing noise. They are clearly and easily readable.)

1.7.3 There was no evidence that the pilot had any difficulty in landing the aircraft following the swishing noise.

1.7.4 The film footage demonstrated on take-off and the return flight to Broome and the landing at Broome that the aircraft performed in the same manner as in the first charter and in the flight to the incident landing spot, that is there was no evidence of vibration or lack of control.

The learned magistrate's findings

1.8 The learned magistrate's findings that the damage did not occur on landing at Broome because *'it would require substantive contact to produce the damage seen"* [Reasons [76]], was inconsistent with his finding that the damage could not have occurred when landing at Broome because there was no evidence before the court to establish *"substantive contact with any object at the incident landing location at Fitzroy River"*.

1.9 The learned magistrate failed to have any regard to the evidence that the accused was a person of good character.

1.10. The learned magistrate erroneously found [Reasons [65]], that the passenger, Michael Brown, did not make an inspection, when his evidence was that he made an inspection of the rear tail rotors and saw no damage.

1.11 The learned magistrate erroneously found [Reasons [70]], that it was fanciful and implausible that Holland did not ask the accused how the damage occurred, when Holland did not give evidence that he did ask. The learned magistrate also erroneously concluded that it was implausible and fanciful that he accused *"did not tell Holland how it occurred"*, when the accused's evidence was he didn't know how it occurred.

1.12 The learned magistrate erroneously found that there was damage to both tail rotor blades, when the evidence was such as to give rise to a reasonable doubt that that was so, in that:

1.12.1 there was a dispute between Holland and the accused as to whether the damage should be treated as a "sudden stoppage" or a "free air strike". Holland's view was that it was sudden stoppage. Holland and the accused decided that the dispute should be decided by sending photographs of the damage to Robinson Helicopters in the United States. Holland agreed to do so. Holland only took photographs of one of the rotor blades and made no reference in the email to Robinson Helicopters that the other blade had been damaged. Holland conceded in crossexamination that, *"if it's a sudden stoppage compared to say a stone strike or some other damage wouldn't it be more likely that both blades would be damaged if it was a sudden stoppage ...?- - Yes."* [TT, p75, 21/11/12]

1.12.2 The second tail rotor was not produced in evidence by the prosecution.

1.12.3 Fenton's evidence was that Holland told him that he was going to take photographs of both blades and send them to Robinson Helicopters. [TT, p12, 22/11/12]

1.12.4 The learned magistrate found that he was *"unaware from the evidence as to when this view arose* (that is, that Holland didn't like the accused) *when Holland's evidence was that the relationship was never good and friendly."* [TT, p77, 22/12/12]

1.12.5 Fenton conceded he could have been mistaken about whether both blades were damaged. [TT, p15, 22/11/12]

1.12.6 It was clear from the evidence that Holland did not like the accused at all relevant times, that is, repair time, statement time and giving evidence time. [TT, p77]

1.13 The learned magistrate erred in finding that the damage was caused by the tail rotors coming into contact with a small branch, stick or twig, when there was no evidence adduced that the damage sustained to the rear tail rotors could have been caused by coming into contact with a small branch or stick or twig. [TT, p78]

1.14 The learned magistrate erred in finding the evidence of Holland *"clear"* and reliable.

1.15 The learned magistrate erred in finding that the accused altered his evidence under cross-examination concerning whether the incident landing was the first or second [Reasons [47]]. The accused's evidenceinchief was that the incident landing was the second landing. [TT, p70, 22/11/12]

1.16 The learned magistrate failed to consider that, even if the rear tail rotor(s) made contact with foliage on the incident landing, that contact may not have caused the damage.

1.17 The learned magistrate erred in finding that the sound of the *"contact"* was *"more of a buzz saw tone and not the intermittent ... at high speed tone."* This was contrary to the expert opinion evidence of Mr Pfeiffer which was not challenged in crossexamination. [Reasons, p29]

1.18 The learned magistrate erred in not accepting Mr Pfeiffer's opinion that the sound was *"the main rotor blades had likely struck some light foliage as it came in to land"*. [TT, p26, 23/11/12]

1.19 The opinion evidence of Mr Alder was biased by interest and partiality and where inconsistent with the opinion evidence of Mr Pfeiffer, should have been rejected as unreliable by the learned magistrate.

1.20 The learned magistrate erred in finding that Mr Alder and Mr Pfeiffer were both speculating what would be felt and by who, when both were expressing opinions based on their accepted expertise. Further, the conclusions expressed in the Reasons at [67], are inconsistent with the evidence of Mr Alder, Mr Pfeiffer and Mr & Mrs Brown.

1.21 The learned magistrate erred in not accepting the evidence of Mr Pfeiffer from his report that, *"the vibration in the cabin making the instrument hard to read and would be felt by the passengers through their seats causing numbness in the legs and buttocks."* [Exhibit "BB"]. This evidence was not challenged in crossexamination. The instrument gauges can be seen in Exhibit "D" from time to time. They are not subject to any vibration and can be easily read.

1.22 Evidence of the accused – [TT, 22/11/2012, p56]

1.22.1 Noticed no vibration or lack of control on landing at Fitzroy River, or any other change in flight performance. On landing, inspected main and tail rotors and observed no damage. Noticed no vibration or lack of control on return flight to Broome.

1.22.2 The accused made a diversionary flight to Willie Creek to show his passengers before returning to Broome. [TT, p76] (Unlikely if he was aware of major damage to the tail rotor.)

1.22.3 The area surrounding the landing pad at Broome Airport was:

(a) very dusty;

(b) the surface is not stable either on the gravel or on the bitumen;

(c) the gravel area consists of loose stones, foreign objects and debris.

Prosecution – change in case

1.23 The prosecution opened its case on the basis that the damage to the tail rotors was proved by the whistling noise readily audible on the short prosecution video [Exhibit "A"], that is, *" ... the prosecution case is that when the rotors contacted the foliage upon landing there was damage that occurred to the rotors. That damage caused the helicopter to make a different sound when it took off ... "*

1.24 Mr Alder's report [Exhibit "G"] stated, *"I noticed a change in the recorded sound made by the helicopter on the return flight when compared to the outward flight. I could detect something like a whistling (chirping noise) from the video taken on the return flight."*

1.25 In closing, the prosecution changed its case and made no reference to this allegation.

1.26 The learned magistrate correctly rejected Mr Alder's evidence because the sound was clearly audible on the video of the first and second charter flights prior to the incident landing. [Reasons [43]; Exhibit "D", complete video]

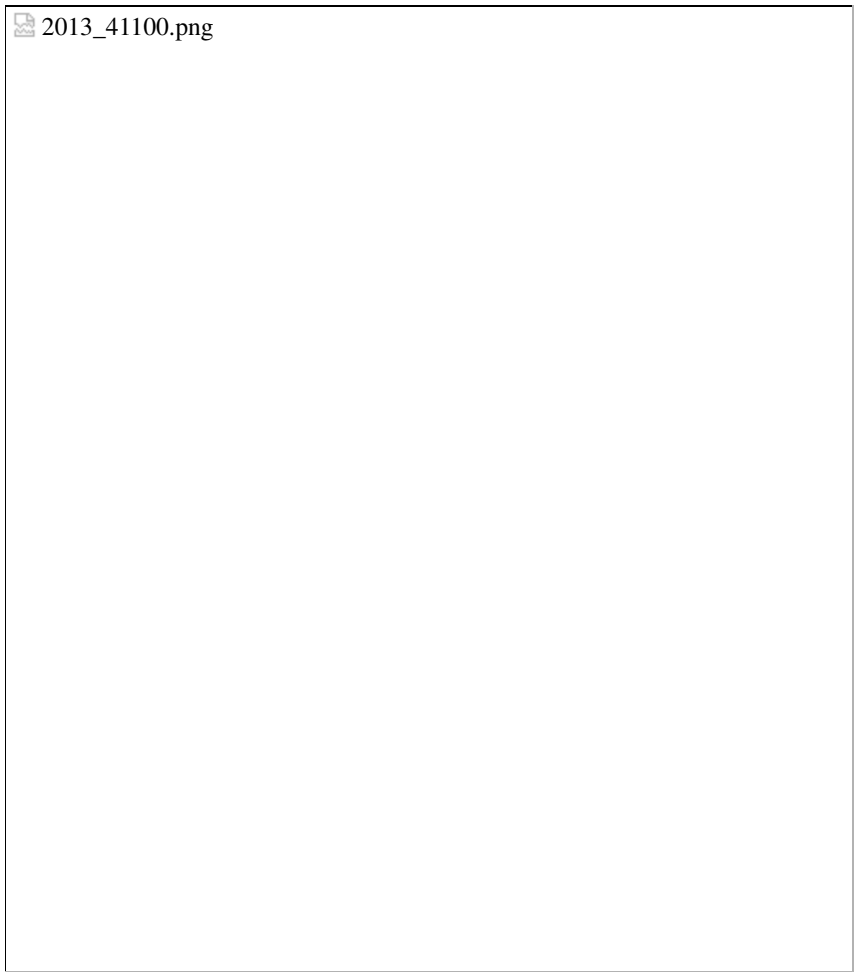
2. Ground 2 – speculation

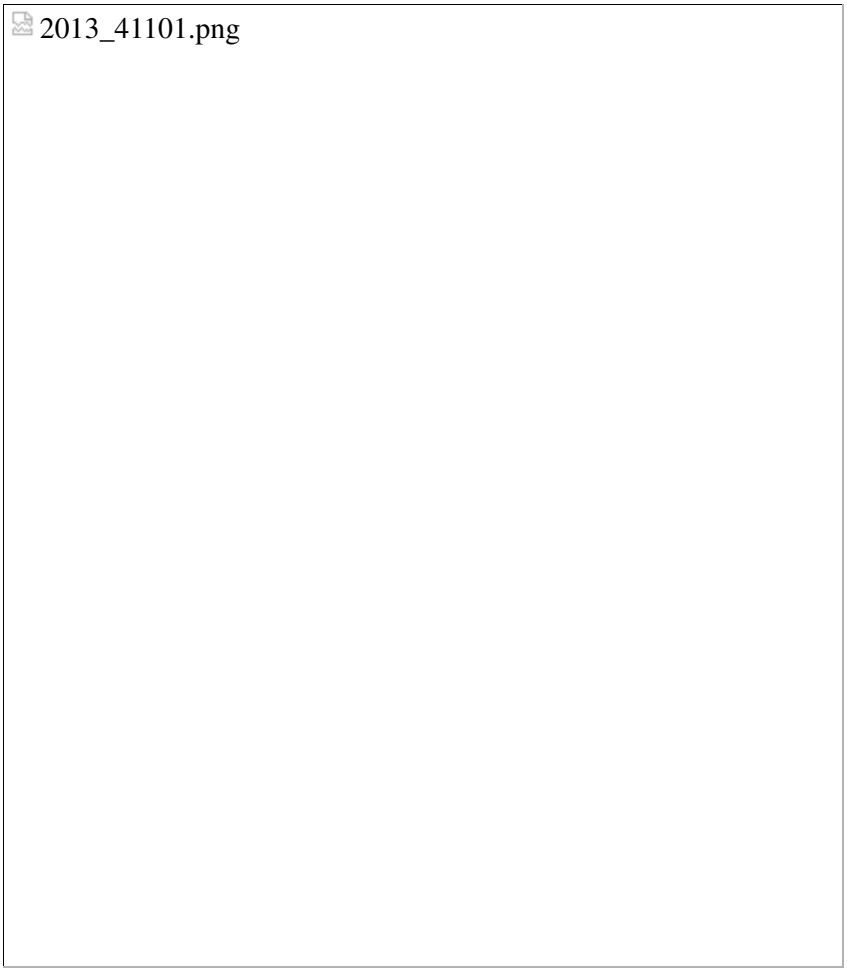
The learned magistrate erred in law and in fact in finding that the evidence of the experts, Mr Alder and Mr Pfeiffer was mere speculation. [Reasons, [66]]

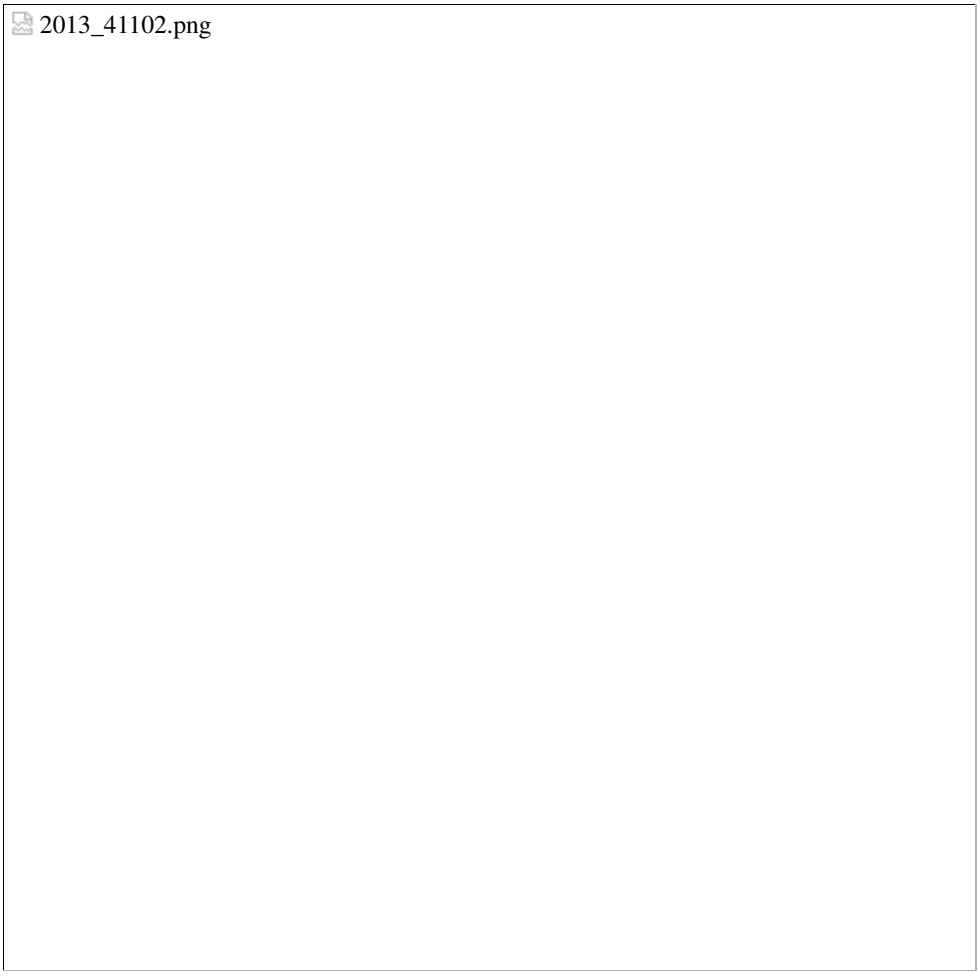
3. Ground 3 – reversal of burden of proof

The learned magistrate reversed the burden of proof by imposing both an evidentiary and a legal burden on the appellant to prove that the damage to the tail rotors was not caused by the manner asserted by the prosecution.

ATTACHMENT 2




2013_41101.png


2013_41102.png