[2017] QCA 230

COURT OF APPEAL

SOFRONOFF P
MORRISON JA
BODDICE J

CA No 115 of 2017
DC No 138 of 2016

KRISTON, Daniel Bronek **Applicant**

v

COMMISSIONER OF POLICE **Respondent**

BRISBANE

WEDNESDAY, 11 OCTOBER 2017

JUDGMENT

SOFRONOFF P: In the early morning hours of 11 July 2015, the applicant was evicted from a bar in Maroochydore. Two police officers intercepted him on the pavement outside the bar. They took his identification. He swore at them, and called them cunts. One of the police officers gave him a move-on direction, or rather attempted to give him such a direction. The applicant continued to call police cunts. He was told that he was under arrest for public nuisance. The two police officers in attendance took hold of him and moved the applicant to a railing, which separated the pavement from the street, and bent him over it while attempting to place handcuffs

on him. He continued to resist their efforts. This constituted the charge of obstructing police in the execution of their duty, of which he was convicted.

All of this behaviour was recorded by two CCTV cameras. The police officers who arrested the applicant gave evidence in the Magistrates Court about these events. Senior Constable McKie gave evidence that the swearing was, in his view, offensive, and that the defendant was being disorderly and was disrupting the peaceful passage of people. The video evidence confirms the last part of that evidence. Senior Constable Barclay said in evidence that when his colleague, Senior Constable Hoffman, started to direct the applicant to move on, the applicant was repeatedly saying "pack of cunts" to the police officers. He kept interrupting the giving of the direction. This evidence was confirmed by that of Senior Constable Hoffman, who also gave evidence.

In short, their evidence, which is entirely confirmed by the video recording, was that the applicant was behaving in a disorderly manner, was shouting foul abuse at police officers and was being a public nuisance. There can be no doubt that the arrest was justified, as the learned Magistrate found, and the applicant on this application does not contend to the contrary.

At the trial, the defence called no evidence. The point raised by the applicant at his trial was that he had not been given any opportunity to comply with the statement that he was under arrest and that as a consequence the use of force to take him to the railing and to handcuff him was unreasonable. He maintains this argument on this application. In support of that argument, it had been submitted to the learned Magistrate that the applicant had offered no physical violence to anybody; that much was true. The learned Magistrate found that the applicant had refused, and continued to refuse, to heed police warnings to stop using obscene language. He was drunk. He did not listen to the move-on direction and kept interrupting police with his foul abuse while they were attempting to do their duty. The learned Magistrate accepted the evidence of these police officers that the arrest had been effected in order to stop an escalation in the applicant's disorderly behaviour.

The applicant appealed against his conviction for obstructing police to the District Court, pursuant to s 222 of the *Justices Act*. Robertson DCJ dismissed the appeal. His Honour said that he had read the whole of the transcript of the evidence at the trial, had read the learned Magistrate's decision and the outlines relied upon and had also viewed the video evidence. After comprehensively setting out the evidence, his Honour addressed the applicant's argument that the force used in effecting the arrest had not been reasonably necessary because the applicant had not used, or threatened to use, any violence towards police or any member of the public. His Honour correctly said that the task for the learned Magistrate was to determine, as a matter of fact, whether the force used was reasonably necessary or not. His Honour concluded that the learned Magistrate was correct in her rejection of the applicant's submission.

The applicant now seeks leave to appeal to this Court from the District Court. His application is based upon the following grounds: first, that the learned Magistrate erred in finding that the force used by the police officers was reasonably necessary to effect the arrest of the applicant in the circumstances, when this finding was attended by an error of law as to what constitutes an arrest, cannot be supported having regard to the evidence and was unreasonable as it was made without reference to an objective standard. Further, it follows from that ground that Senior Constable Mackay was not acting in the performance of his duties when handcuffing the applicant.

In addition, the applicant raises as a ground for leave to appeal that the District Court Judge erred in conflating the lawfulness of the power to arrest with the lawfulness of the power to effect an arrest and in failing to consider that the degree of force used to effect the arrest is part of the objective test of what is 'reasonably necessary force' to effect an arrest. Finally, the applicant contends that the District Court Judge did not conduct a real review of the evidence, drawing his own inferences and conclusions, as he was required to do.

The applicant contends that there are significant questions to be addressed regarding the extent of the force that police can use that is reasonably necessary to effect an arrest in nonviolent

circumstances and which are in the public interest to resolve. The applicant also contends that a substantial injustice has been caused to him, rendering an appeal necessary.

The applicant was represented in this Court by Mr van der Weegen of counsel who, with his instructing solicitor, has appeared pro bono. The Court is grateful for their assistance which has allowed the real issues to be defined and for the appeal to be dealt with efficiently. An appeal to this Court is by leave, pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld). Since the appeal to this Court is from the District Court exercising its appellate jurisdiction, any resulting appeal to this Court would be an appeal in the strict sense. Relevantly, such an appeal is not an appeal by way of rehearing and it would not be open to this Court to substitute its own view of the facts for the facts as found by the District Court.

An application for leave to appeal will, in general, only be granted when the decision appealed from has occasioned a substantial injustice to the applicant and where there is a reasonable argument in favour of the appeal. It follows that the applicant must be able to identify an arguable error of law in the decision from which an appeal is sought. The applicant must be able to demonstrate that the correction of this legal error by the Court would correct the substantial injustice. In this Court, the applicant maintained in oral argument that the force used was unreasonable; that submission does not amount to a submission that there has been an error of law.

The suggestion that the learned District Court Judge conflated the concept of power with the force used to exercise the power is misconceived. At paragraph 39 of the learned Judge's reasons, his Honour identified the task that the Magistrate had set for herself as one to decide if the force used by the police officers to arrest the appellant was "reasonably necessary". In coming to his own conclusions, at paragraph 42, his Honour identified the issue as whether what had been done by police was "reasonably necessary force to effect the arrest". There is therefore nothing in the submission that the Judge, or indeed the Magistrate, had conflated the question of

whether an arrest had been justified with the question of whether the degree of force used in effecting that arrest was or was not reasonable. In each case, the Magistrate and the District Court Judge respectively addressed the correct issue.

In his argument on this appeal, the applicant also contends that the learned District Court Judge did not conduct a real review of the evidence. As I have said, the learned District Court Judge said that he had read the transcript of evidence at the trial, had read the Magistrate's reasons, the outlines of argument and had also viewed the video evidence. In his reasons, he comprehensively summarised that evidence and accurately recorded the applicant's main argument. Having done so, his Honour concluded, correctly, in my respectful view, that the Magistrate had reached the correct conclusion upon the evidence before her. There is no basis to this additional ground for the application.

In my opinion, this was a case that turned entirely upon its facts and raises no general question of law, which is, in any event, a matter of statute, laid down by s 615 of the *Police Powers and Responsibilities Act* 2000 (Qld). It cannot possibly be said that any substantial injustice has been suffered by the applicant. He was a drunken nuisance who refused to accept directions from police. He persisted in his foul abuse of these officers, even while they were giving him an opportunity to be dealt with as leniently as possible by moving on. He demonstrated beyond any doubt that short of physical restraint, he would not cease his objectionable conduct. I would refuse leave to appeal.

MORRISON JA: I agree, and would add only this: that on an appeal to this Court under s 118(3), where the District Court has already exercised its appellate jurisdiction under s 222 of the *Justices Act*, there is still a debate as to whether such an appeal, being a strict appeal, is limited to questions of law, or might also include questions of fact. This is not the occasion to resolve that issue, as, for the reasons given by the President, there is no definable ground on which leave should be given.

BODDICE J: I agree with the reasons and orders proposed by the President.

SOFRONOFF P: The order of the Court is that the application is refused.