# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Gibb* [2017] QCA 280 |
| PARTIES: | **R**<br>**v**<br>**GIBB, Margo Jane**<br>**(appellant)** |
| FILE NO/S: | CA No 276 of 2016<br>DC No 513 of 2016 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Mention – Appeal against Conviction and Sentence |
| ORIGINATING COURT: | District Court at Southport – Date of Conviction & Sentence: 8 September 2016 (Kent QC DCJ) |
| DELIVERED EX TEMPORE ON: | 15 November 2017 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 November 2017 |
| JUDGE: | Sofronoff P |
| ORDERS: | **Delivered ex tempore 15 November 2017:**<br>**1. The Registrar is directed not to issue the subpoenas requested by the appellant until the Court makes a further direction, except for the subpoena directed to Vanessa Brookes of the West Moreton Hospital and Health Service.**<br>**2. The question whether the remainder of the subpoenas should issue will be directed to the Court that is to hear the appeal.**<br>**3. The appellant's application for bail is to be heard on 21 November 2017.**<br>**4. The Registrar is to issue the subpoena to Vanessa Brookes of the West Moreton Hospital and Health Service for the application for bail to be heard on 21 November 2017.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE – IN GENERAL – where the appellant has brought an appeal against conviction and sentence – where the appeal is yet to be heard – where the appellant has requested the Registrar to issue 33 subpoenas in relation to her appeal – where some of these subpoenas are directed to the production of documents and some are directed to compel the attendance of witnesses – whether the Registrar should issue these subpoenas before |

the Court hearing the substantive appeal has decided whether or not it will grant leave to adduce further evidence

*Criminal Code* (Qld), s 671B
*Criminal Practice Rules* 1999 (Qld), r 29, r 108, r 109
*Criminal Practice Rules of 1900* (Qld), order VIA(1), r 37
*Uniform Civil Procedure Rules* 1999 (Qld), r 3, r 414, r 982

*R v Mead* [2017] QCA 229, cited
*R v Spina* [2012] QCA 179, cited

COUNSEL: The appellant appeared on her own behalf
D C Boyle for the respondent

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

[1] **SOFRONOFF P:** On 8 September 2016 the appellant was convicted in the District Court on one count of entering a dwelling with intent at night while armed and in company and one count of robbery while armed or pretending to be armed. She has appealed against her convictions and sentence. Her appeal is listed for hearing in a week's time.

[2] In support of her appeal the appellant has requested the Registrar to issue 33 subpoenas. Some of these are directed to the production of documents. Some are directed to compel the attendance of witnesses. The appellant has also applied for leave to adduce evidence on her appeal.

[3] From time to time the Registrar is requested to issue subpoenas in criminal appeals or in the other applications to the Court of Appeal. The test to determine whether new evidence will be admitted on appeal is not an easy one to satisfy: see *R v Spina*[1] and *R v Mead*.[2] In many cases, perhaps in most, leave to adduce evidence will be refused.

[4] Some applications to issue a subpoena may appear, on their face, to be potentially an abuse of process. Some may appear to be premature having regard to the need to seek leave to adduce evidence before it can be called.

[5] The *Criminal Practice Rules* 1999 provide rules for the criminal jurisdiction of the Supreme Court.

[6] Rule 29 concerns subpoenas in aid of proceedings including appeals. The rule itself confers no power upon the Registrar to issue subpoenas but assumes that such a power exists and it provides that an appellant may, by such a subpoena, compel a person to give evidence or to produce a document or other forms of evidence. The rule imposes duties on a witness who has been served with a subpoena and provides for other procedural matters.

[7] When provision was first made for subpoenas to be issued in aid of criminal trials, before there was any right of appeal, order VIA(1) of the *Criminal Practice Rules of 1900* provided that the Crown or accused person may compel attendance of witnesses or the production of evidence by a subpoena "issued in accordance with the practice of the Court".

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1 [2012] QCA 179 at [34].
2 [2017] QCA 229.

[8] At the same time, the *Supreme Court Rules* that had also been promulgated in 1900 made provision in materially identical terms for the issue of subpoenas to compel the attendance of witnesses to give evidence or to produce documents in civil proceedings.

[9] Neither set of Rules expressly conferred a power on the Registrar to issue these subpoenas. As the *Criminal Practice Rule* stated, that was an issue left to the "practice of the Court".[3]

[10] Rule 3 of the *Uniform Civil Procedure Rules* ("*UCPR*") which operate today provides that, unless the rules otherwise expressly provide, the rules apply to civil proceedings in the Supreme Court.

[11] Rule 414 of the *UCPR* expressly confers power upon the Registrar to issue subpoenas to witnesses to give evidence or to produce documents. The Registrar has a discretion whether or not to issue the subpoena: r 414(4). There is no other express source of power to issue a subpoena.

[12] It may be argued that, while an appeal against conviction or sentence is without doubt a proceeding in the Court's criminal jurisdiction, the issue of a subpoena and matters associated with a subpoena, constitute "civil proceedings" in aid of the Court's criminal jurisdiction so that the *UCPR* can be relied upon for such purposes. It may also be argued that the *Criminal Practice Rule* implies the existence of a power in the Registrar to issue a subpoena "in accordance with the practice of the Court".[4] The existence of such a power is beyond any doubt.

[13] Section 671B of the *Criminal Code* confers a power upon the Court of Appeal to order the production of documents or things connected with the proceedings and to order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court. The section was enacted when the right of appeal in criminal matters was first created in 1913. It does not refer to subpoenas. However, the *Criminal Practice Rule of 1900* provided in r 37 for the issue of an Order, for which a form was provided, that was to be served upon such a witness to compel attendance. That Rule was replicated in r 109 of the current Rules made in 1999. The Rule imposes a duty on the Registrar to "ensure a copy of the order is served" on the witness, perhaps upon the reasonable assumption that the appellant might be incarcerated and unrepresented.

[14] Rule 108 of the *Criminal Practice Rules* 1999 provides that an appellant who wishes to adduce evidence on appeal must apply to the Court for leave. Rule 108(2) requires such an applicant to file an affidavit of the "witness giving or producing the evidence" and sub-rule (3) requires such an affidavit to state "what the evidence is" and, as to documents, "the nature of the evidence".

[15] The rule assumes that the appellant can get such an affidavit. Absent such ability, a subpoena or an order of the Court would be required to compel the giving of evidence on the application if it was thought essential that the actual witness to be called should give an affidavit. The rule requiring an affidavit deposing to direct evidence must be regarded as merely permissive and as providing for the ideal case. In other cases, the application ought to be supported by an affidavit of the appellant, or the appellant's legal representative, or some other relevant witness, explaining the nature of the evidence sought to be led. The Court's jurisdiction to consider

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3 *Criminal Practice Rules of 1900* (Qld), order VIA(1).

4 *ibid*.

whether to grant leave to adduce evidence on appeal cannot be circumscribed by a requirement that such an application be supported only by an affidavit of the proposed witness. The essential matter is that the Court should be reliably informed about the nature of the actual evidence that the appellant proposes to call in the appeal if permitted to do so. The form of the evidence on such an interlocutory application is secondary. If leave is granted, then the ordinary rules of evidence applicable in non-interlocutory matters will apply.

[16] Nor does it matter whether the basis for r 29 is the power to issue subpoenas under the *UCPR*, the Court's power under s 671B of the *Criminal Code* to compel the attendance of witnesses and the production of evidence or the Court's inherent power to make such orders as are reasonably necessary for it to perform its functions. In any case, the appropriate process would be for the Registrar, as the auxiliary of the Court in matters of administration and the execution of its orders and directions, to receive an application for a subpoena, to consider the application, and either to issue the subpoena or, in cases of doubt or for some other good reason, to refer the matter to the Court for direction.

[17] Rule 982 of the *UCPR* confers a right upon the Registrar to refer any matter to a judge if the Registrar considers that the decision is one appropriate to be referred. That rule must be regarded as merely declaratory for it is undoubtedly open to the Registrar, having regard to the Registrar's status and function, to seek the direction of the Court whenever he or she thinks it appropriate to do so in both civil and in criminal jurisdiction.

[18] The Registrar has accordingly referred the appellant's request for the issue of subpoenas for the Court's consideration.

[19] Because of the requirement to obtain the Court's leave before evidence can be called on an appeal, the actual marshalling of the evidence to be called and the calling of witnesses and tendering of evidence in the usual case need not occur until or unless the Court grants leave under r 108 of the *Criminal Practice Rules* 1999.

[20] For that reason, the issue of subpoenas will, in most cases, be premature until such leave is given. In some appeals, perhaps in most appeals, the issue whether a subpoena should issue should be referred to the Court of Appeal as a matter to be determined before the hearing of the appeal proper. Although in the ordinary case the question of leave to adduce evidence will be decided by the Court that is constituted to hear the appeal itself, subpoenas should not be issued in anticipation of leave being granted unless the Registrar, for good reason, thinks it right to do so or the Court makes a direction to that effect. To do otherwise may result only in inconvenience, disruption, waste of time and cost to parties with no interest in the proceeding.

[21] As a result, when an appellant applies to the Registrar for the issue of a subpoena in anticipation of an application to adduce evidence on appeal, the Registrar should consider whether to issue the subpoena or whether the application should be referred to the Court for direction. In the latter case, the Court might give a direction to the Registrar to issue the subpoena immediately or it might refer the matter for determination by the Court that has been constituted to hear the application to adduce evidence. In some cases it will be appropriate to issue subpoenas in advance of the substantive application to adduce evidence, particularly if the evidence sought is tightly confined; in others, the better course will be to let the issue abide the hearing of the application or the application and the appeal together.

[22] In any case, the fate of the requested subpoena does not relieve the appellant from the obligation to put forward the necessary affidavits to support an application to adduce evidence nor should it constrain the appellant from being able to do so.

[23] In this particular case the appellant, as I have said, has applied for the issue of 33 subpoenas, some to compel the attendance of witnesses to give evidence and some to compel the production of documents and other forms of evidence. It would be premature and unnecessary to issue subpoenas to compel the attendance of so many people when it is not yet known whether the evidence that they can give will be admitted or not.

[24] The appellant has helpfully, and usefully, listed the actual evidence that she seeks and has summarised the relevance of much of the proposed evidence in the materials that she has filed. This will be considered by the Court constituted to hear the matter. If the Court's view is that the evidence should be led, then steps will have to be taken to permit that to happen.

[25] I direct the Registrar not to issue the subpoenas requested by the appellant until the Court makes a further direction, with the exception of the subpoena to be directed to Vanessa Brookes of the West Moreton Hospital and Health Service**,** which the Registrar is at liberty to issue. That subpoena is directed to the production of documents which the appellant says she requires for her imminent application for bail.

[26] The question whether the remaining 32 subpoenas should issue is referred to the Court that is to hear this appeal.