# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Storry v Commissioner of Police* [2018] QCA 291 |
| PARTIES: | **STORRY, Venetia Louise**<br>(applicant)<br>**v**<br>**COMMISSIONER OF POLICE**<br>(respondent) |
| FILE NO/S: | CA No 319 of 2017<br>DC No 1344 of 2017 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave s 118 DCA (Criminal) |
| ORIGINATING COURT: | District Court at Brisbane – [2017] QDC 282 (Dearden DCJ) |
| DELIVERED ON: | 26 October 2018 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 August 2018 |
| JUDGES: | Sofronoff P and McMurdo JA and Bond J |
| ORDER: | **Application for leave to appeal dismissed, with costs.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – BY LEAVE OF COURT – where the applicant was convicted in the Magistrates Court of failure to give way at an intersection governed by a stop sign – where the applicant appealed her conviction to the District Court – where the applicant's appeal to the District Court was dismissed – where the applicant now brings an application for leave to appeal to the Court of Appeal – whether leave to appeal should be granted<br><br>*District Court of Queensland Act* 1967 (Qld), s 118(3)<br>*Justices Act* 1886 (Qld), s 222<br>*Transport Operations (Road Use Management – Road Rules) Regulation* 2009 (Qld), s 67(3)<br><br>*McDonald v Queensland Police Service* [2017] QCA 255, followed<br>*Storry v Commissioner of Police* [2017] QDC 282, related |
| COUNSEL: | The applicant appeared on her own behalf<br>J A Geary for the respondent |
| SOLICITORS: | The applicant appeared on her own behalf<br>Director of Public Prosecutions (Queensland) for the |

respondent

[1] **SOFRONOFF P:** I agree with the reasons of Bond J and the order his Honour proposes.

[2] **McMURDO JA:** I agree with Bond J.

[3] **BOND J:** The applicant was convicted in the Brisbane Magistrates Court of the offence of failure to give way at an intersection governed by a stop sign contrary to regulation 67(3) of the *Transport Operations (Road Use Management – Road Rules) Regulation* 2009 (Qld).

[4] She was convicted and fined $475 and ordered to pay court costs and witnesses expenses. She appealed her conviction to the District Court pursuant to s 222 of the *Justices Act* 1886 (Qld), and her appeal was dismissed: see *Storry v Commissioner of Police* [2017] QDC 282.

[5] The applicant now brings an application for leave to appeal to this Court pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld).

[6] The principles which apply to appeals to this Court from judgments of the District Court in its appellate jurisdiction were recently examined and then authoritatively summarised by Bowskill J (Fraser and Philippides JJA agreeing) in *McDonald v Queensland Police Service* [2017] QCA 255 at [39] as follows (footnotes omitted):

> [39] By way of summary, the following are the principles that apply, to appeals to this Court from judgments of a District Court in its appellate jurisdiction:
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> (a) the nature of the appeal is governed by ss 118 and 119 of the *District Court of Queensland Act* 1967;
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> (b) an appeal from a judgment of the District Court in its appellate jurisdiction lies only with the leave of this Court: s 118(3);
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> (c) this Court's discretion to grant or refuse leave to appeal is unfettered, exercisable according to the nature of the case, but leave to appeal will not be given lightly, given that the applicant has already had the benefit of two judicial hearings;
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> (d) the mere fact that there has been an error, or that an error can be detected in the judgment is not ordinarily, by itself, sufficient to justify the granting of leave to appeal – leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected;
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> (e) if leave is granted, the appeal is an appeal in the strict sense (cf s 118(8)), in respect of which the Court's sole duty is to determine whether error has been shown on the part of the District Court, on the basis of the material before the District Court. This Court is not engaged in a rehearing; as such, it is not this Court's task to decide where the truth lay as between the competing versions of the witnesses; and it is not for this Court to substitute its own findings for those of the District Court judge;
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> (f) a factual finding of a District Court judge, on an appeal to that court (which may be different from, or additional to those made by the Magistrate at first instance, or which may confirm the findings of the Magistrate at first instance, since the appeal to the District Court is by way of rehearing) may only be reviewed on an appeal to this Court if there is no evidence to support it, or it is shown to be unreasonable, in the sense discussed in *Hocking v Bell* in relation to findings of fact by a jury;
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> (g) on the hearing of an appeal, this Court has power to draw inferences of fact from facts found by the District Court judge, or from admitted facts or facts not disputed, *but*, except where there is no evidence on which the judge below might have reached his or her conclusions, or the conclusions are unreasonable, any

such inferences shall not be inconsistent with the findings of the District Court judge (s 119(1)); and

(h) the appeal to this Court is not limited to errors of law.

[7] The applicant, although represented at the hearing before the learned magistrate and at the appeal before the learned District Court judge, appeared for herself in this Court. The essence of the applicant's case on appeal was a challenge to factual findings by the learned District Court judge, but the challenge was not advanced in compliance with the principles identified in *McDonald v Queensland Police Service* at [39](f).

[8] First, no proper attempt was made to persuade this Court that there was no evidence to support any particular findings made by the learned District Court judge. Second, no proper attempt was made to demonstrate that any particular findings were unreasonable in the sense discussed by *Hocking v Bell*, namely that the findings were so unreasonable that no reasonable tribunal of fact might have made them.

[9] Instead the applicant's proposed grounds of appeal and her argument proceeded at a more general and imprecise level to assert that the learned District Court judge should have reached a different outcome because he should have rejected the credibility of the prosecution's evidence. The argument that there was a substantial injustice derived from that proposition.

[10] The application for leave could be dismissed on that basis alone.

[11] However, I have not taken that course. Bearing in mind that the applicant appears for herself, I have examined the reasons of the learned District Court judge and have had regard to the evidence adduced at trial – so far as it was contained in the appeal record – and have considered whether any of the matters raised by the applicant suggest the existence of any reasonable argument that there was any factual error in the requisite sense.

[12] It is necessary first to explain the way in which the learned District Court judge dealt with the appeal before him. So far as the underlying facts were concerned, it is evident from the following passage that he acted on a common ground summary of some of facts and that he also accepted the accuracy of some additional submissions which were made by the respondent. His Honour wrote:

> [3] The respondent accepted the summary of the proceedings set out at paragraphs 2-4 of the appellant's outline, subject to further observations at paragraphs 5-8 of the respondent's outline. It is useful then to recite the agreed summary prepared by the appellant and the respondent's observations.
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> [4] The appellant's outline is as follows:
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> > "2. The appellant on 28 July 2016 at 7:45am was travelling west[1] on Elizabeth Street and stopped at the intersection of Dean Street, Toowong, the intersection being controlled by a stop sign and white line for traffic travelling east-west on Elizabeth Street and vehicles travelling north-south on Dean Street having no traffic control signs or lights. Both Dean Street and Elizabeth Street are 50km/h zones.
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> > 3. The appellant was driving a Holden Sedan [registration no.] 597SUU and having stopped prior to the stop line on Elizabeth Street, remained in that position for a period of time. Witness, Jonathan David Weir, was travelling south in a Hyundai

[1] It is evident that this was a misstatement and should have been "east" because Mr Weir's evidence recorded that he was travelling south, and the other vehicle was traveling from west to the east, approaching from his right hand side, and hit the right hand side of his vehicle: AR 24. As will appear, the learned District Court judge summarised the directions of travel accurately when he wrote his conclusion.

hatchback [registration no.] 129TCC along Dean Street after having passed a pedestrian crossing and observed the appellant's vehicle 15 metres prior to the intersection. Witness Weir stated he was going 50km/h, having accelerated from the pedestrian crossing from 40km/h. The appellant at that time had commenced to enter the intersection from a hill start, accelerating from the incline of a ridge and collided at the apex of the ridge in the middle of the intersection with the driver's door of the Hyundai hatchback with the front of the appellant's Holden sedan.

4. After impact the Hyundai hatchback travelled across a traffic island that posted a keep left sign for west bound traffic, sequentially the Holden sedan post impact has travelled in a diagonal direction across the intersection and come to stop in a security awning on a veranda of [the residence at] 29 Dean Street. Police have then attended the scene and the appellant was interviewed by way of a body worn camera. During the interview the appellant admitted to being the driver of the Holden sedan and maintained that the driver of the Hyundai was speeding prior to [the point of collision]. The appellant being then issued with an infringement no. A54951699 for the offence pursuant to s 67(3) *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (TOR)."

[5] The respondent's further observations are as follows:

"5. The photographs tendered as Exhibits 1 and 5 confirm that a vehicle approaching Dean Street from Elizabeth Street must give way to vehicles on Dean Street. They show that a vehicle stopped at the intersection on Elizabeth Street should have an uninterrupted view of Dean Street to the pedestrian crossing from which Mr Weir approached. Mr Weir did not disagree with the suggestion that 'approximately 90 metres' separated the crossing and the intersection.

6. When Mr Weir first saw the appellant's vehicle, it was already entering the intersection from the western side of Elizabeth Street. He estimated he was, at that time 'about three or four car lengths... about 15 metres' from the intersection and was travelling at 'about 50km per hour'. One second elapsed before he reacted: he 'blasted the horn', tried to 'swerve' around the appellant and brake.

7. The appellant's vehicle impacted the driver's side of Mr Weir's vehicle. His vehicle 'was pushed' over a traffic island at the eastern side of the intersection and came to rest. The appellant's vehicle veered into a fence of a house on the south-east corner of the intersection. Photographs of the damaged vehicles were tendered [Exhibit 1 and 2].

8. The appellant did not give or call evidence at her trial. In a recorded conversation with police at the scene, she said she entered the intersection when she 'thought it was safe to go', having 'waited for a long time'. She said 'all of a sudden, I saw that car coming out of – it seemed to go very fast... I think that he was going very fast'. She said she first saw Mr Weir's vehicle when she was 'crossing the road'. She said 'I think I felt it, I turned to my right[2] and there it was, and then I swerved to stop it from going any further'."

[13] There was no error involved in acting on the agreed summary of facts. Save in one irrelevant respect,[3] the summary was, in any event, justified by evidence which had been received at trial. And each of the respondent's further observations, which the learned District Court judge evidently accepted, was also justified by evidence which had been received at trial.

[14] The learned District Court judge then recorded, correctly, that on the appeal he was required to conduct a real review of the trial, and the learned magistrate's reasons, and make his own determination of relevant facts in issue from the evidence, giving

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[2] As the appellant submitted to this Court, it was apparent that the appellant must have misspoken here. She must have meant left, because she was travelling west to east, Mr Weir was travelling south, and the damage to his car was on the right-hand or driver's side. See also footnote 1.

[3] See footnote 1.

due deference and attaching a good deal of weight to the learned magistrate's view, but that, nevertheless, in order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error.

[15] To explain the way in which the learned District Court judge made his own determination based on the evidence, it is necessary to refer only to two passages from his reasons.

[16] First, at [19] to [20], having explained, correctly, why in the present circumstances the appellant's obligation to "give way" meant that she was obliged to remain stationary until it was safe to proceed, and that question had to be resolved by consideration of all relevant facts, the learned District Court judge went on to reason as follows:

> [19] On the uncontroverted evidence, the appellant collided with Mr Weir's vehicle in the intersection, she having been stopped prior to the collision in her vehicle at a stop sign on Elizabeth Street, driving east. During the course of her record of interview with police officer Constable Axon the appellant was asked:
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> > Q: "So um, when did you first see the vehicle?"
> >
> > A: "I first saw the vehicle when I was actually crossing the road, like so when I was actually on the road."
> >
> > Q: "Yep?"
> >
> > A: "I turned to my right,[4] I think I felt it and I turned to my right, and there it was, and then I swerved to stop it going any further…but I did watch for some time, so I certainly wasn't just carelessly driving past, because this is a frequent spot for accidents."
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> [20] The relevant question then is whether it was "safe to proceed". With respect, on the evidence, it clearly was not. The appellant's rationalisation in her record of interview (noting that the appellant did not give evidence at the trial) was that the driver of the other vehicle must have been speeding, because she didn't see his vehicle until she collided with it. However, his undisputed evidence was that he was driving at the speed limit (50km/h). In those circumstances, whether because the appellant failed to look, failed to look properly, was looking elsewhere or for some other unidentified reason, she clearly proceeded when it was not safe to do so, and collided with Mr Weir's vehicle (in other words the appellant failed to give way to Mr Weir's vehicle on the intersection). Neither at the trial, nor on appeal, has the appellant sought to raise any relevant defence which would have required the prosecution to negative any such defence beyond reasonable doubt.

[17] The only sworn evidence of speed given at the trial was that of Mr Weir, whose evidence is accurately summarized. Mr Weir rejected suggestions made in cross-examination that he was travelling at 60km/h or faster. There was no sworn evidence disputing Mr Weir's evidence. The learned District Court judge (as did the learned magistrate) plainly accepted the sworn evidence of Mr Weir over the unsworn statements of the appellant in her record of interview. It was reasonably open for them to do this. Moreover, treating the appellant's statement made in the record of interview as a rationalization was also something which was reasonably open to both judicial officers. The point was elaborated upon by the learned District Court judge when he dismissed the proposition that the learned magistrate erred by failing to take into account the appellant's "defence" that Mr Weir's vehicle was speeding and that caused the collision, in these terms:

> [22] The appellant in her recorded interview said "I think it [the other vehicle] was going very fast". However, the appellant subsequently says that she "first saw the vehicle when I was actually crossing the road" and that she "turned to my right, I think I felt it and I turned to

[4] See footnotes 1 and 2.

> my right and there it was".[5] With respect, it would be impossible for the appellant to have formed any view about the speed of the Hyundai if she only saw it at or immediately before the point of collision. Regardless of any evidence (by way of her record of interview) that the appellant provided as to her (unfounded) belief that Mr Weir's vehicle was speeding, it is clear that the appellant proceeded into the intersection when it was unsafe to do so. Ground 2 must fail.

[18] Second, the learned District Court judge summarized his conclusion in this passage:

> [27] I have reviewed all of the evidence given at the trial. That evidence, in my view, leads inexorably to the following conclusions:
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> (a) The appellant was stopped at the stop sign at Elizabeth Street, driving east.
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> (b) Mr Weir was driving from the south in his vehicle.
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> (c) The appellant drove onto the intersection and collided with Mr Weir's vehicle (i.e. failed to give way) in circumstances where, on her own record of interview, she first saw Mr Weir's vehicle when her vehicle was actually crossing the road.
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> (d) Whatever the explanation might be for the appellant failing to see Mr Weir's vehicle, it is clear that she has driven her vehicle into the intersection when it was not "safe to proceed".
>
> (e) The appellant has not raised any defence which the prosecution is required to exclude beyond reasonable doubt, either before the learned magistrate or on appeal to the District Court.

[19] There was evidence at trial from which all of those conclusions could be supported rationally by the evidence. Nothing emanating from the applicant before this Court gainsaid that proposition.

[20] Most of the applicant's complaints are necessarily encompassed by the foregoing discussion. It is appropriate to deal specifically with only the following matters.

[21] First, a contention that the learned District Court judge erred by rejecting an application to adduce fresh evidence. As to this:

(a) The so-called "fresh" evidence was opinion evidence from a traffic engineer which did not comply with the procedural requirements for expert opinion evidence. Moreover, there was no demonstrated reason why it could not have been available at trial. And, finally, apparently its purpose was to demonstrate the irrelevant proposition that the road down which Mr Weir had driven was not an arterial road, contrary to a remark which the learned magistrate had made in argument (but not recorded in her reasons).

(b) The learned District Court judge was right to reject this evidence on the basis that it was neither fresh nor relevant.

(c) No error is demonstrated.

[22] Second, there was a submission that there was some error in relation to the way in which the learned magistrate dealt with witness testimony of Senior Constable Wilson (who had attended the scene after the collision), the effect of which seemed to be that a proper appreciation of his evidence would have demonstrated that Mr Weir should not have been treated as a witness of credit. As to this:

(a) SC Wilson accepted that he had written "speed – 60km" at the bottom of the page of his official notebook in which he had recorded some details that Mr Weir had given him in a conversation after the collision. The applicant's

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[5] See footnotes 1 and 2. The appellant's confusion between left and right was irrelevant however to the learned District Court judge's reasoning.

contention seemed to be that that evidence must have demonstrated that Mr Weir's earlier evidence that he was travelling at 50km/h must have been false, because he had made a previous inconsistent statement to SC Wilson, namely that he was travelling at 60km/h.

(b) But that proposition was contrary to the evidence of SC Wilson and no other evidence adduced at trial supported it.

(c) SC Wilson's evidence was that he wrote 60km down because that was what he had thought was the speed limit in the area. He had since learned it was 50km/h. In cross-examination he rejected the suggestion that Mr Weir had told him that his speed was 60km/h. SC Wilson did say that he had a recollection of Mr Weir telling him that he (Mr Weir) was doing less than 60km/h, although he acknowledged that there was no reference to that in a statement he (SC Wilson) had previously given.

(d) The learned magistrate accepted the evidence of SC Wilson except in relation to his evidence that Mr Weir had told him that he was doing "less than 60km/h". She thought that evidence was a recent invention by SC Wilson. There is no reason to regard the approach taken by the learned magistrate as unreasonable. The result is that there was no evidence of Mr Weir having made a previous statement to anyone inconsistent with his evidence that he had been travelling at 50km/h.

(e) No error is demonstrated.

[23] Third, a contention that the learned District Court judge erred by proceeding to make a determination without having access to exhibit 6 which had been tendered at trial. As to this:

(a) The proposition that the learned District Court judge erred in stating in his reasons that he had "reviewed all of the evidence given at the trial" was not demonstrated to be false. The applicant's contention seemed to be an inference which the applicant had drawn by reference to searches she had done, but those inferences were not compelling.

(b) But even if the contention was true, that would not demonstrate a reviewable error for two reasons. First, exhibit 6 was a digital recording by SC Wilson of a conversation he had with Mr Weir at the scene which was played during his testimony, but no basis on which it would properly be regarded to have been admissible was identified. Second, the applicant did not identify that the recording contained anything which was material to her attempt to demonstrate reviewable error. If it had contained evidence of a previous inconsistent oral statement by Mr Weir as to the speed he was travelling, then that point would have been made at trial during the cross-examination of SC Wilson, but that did not occur, so presumably there was nothing in it to that effect.

(c) No error is demonstrated.

[24] Fourth, a contention that the learned magistrate improperly took into account photographic evidence of the damage sustained by the vehicles involved, to determine whether Mr Weir's vehicle was speeding before the accident. As to this:

(a) The learned magistrate had specifically accepted Mr Weir as a witness of truth, save in one irrelevant respect. She accepted the truth of his evidence concerning speed. She also later made the observation that, having examined

the photographs "if speed had been an issue for Mr Weir, the accident would've had a greater impact with greater property damage and a greater impact with potential for injury".

(b) The learned District Court judge correctly observed that the learned magistrate was entitled to draw inferences as to speed from the damage sustained to the vehicles. His Honour also correctly observed that no such inferences had any effect on the outcome of the learned magistrate's decision. That was because the observation concerning photographs was essentially additional support for a conclusion which had been made because Mr Weir was accepted as a witness of truth.

(c) No error is demonstrated.

[25] Finally, a contention that there was error involved in the learned District Court judge upholding the learned magistrate's decision "in disallowing evidence of Emily Hutchinson when clearly written by her as a Statutory Declaration close to the time would have been fresh in her memory and had given similar testimony to the police on the same morning of the collision". As to this:

(a) What actually happened was that counsel for the applicant cross-examined Constable Axon about a conversation he had out of court with a potential witness, Ms Hutchinson. Counsel was permitted, without objection (although the answers were plainly inadmissible hearsay), to elicit from the police constable that he had spoken to Ms Hutchinson after the collision. She told him she had been parked behind the applicant before the applicant entered the intersection and the collision occurred. She told him that she had observed that the applicant's vehicle had "waited for a period of time" before entering the intersection.

(b) Having elicited that testimony, the applicant's counsel then sought to cross-examine the police constable by reference to an affidavit which had apparently been obtained from Ms Hutchinson. The learned magistrate, correctly, did not permit cross-examination to proceed in that way, because it would have been unfair.

(c) Although the police prosecutor said that he had no objection to the affidavit being tendered, and although the learned magistrate was permitted to examine the affidavit, counsel for the applicant did not seek to tender it. And, when subsequently the prosecution case closed, the applicant determined not to adduce any evidence. No attempt was made at that time to tender the affidavit of Ms Hutchinson.

(d) During the course of argument before the learned District Court judge, counsel for the applicant submitted that the document would have been admissible, and the learned District Court judge disagreed. However, there was there no ground of appeal before the learned District Court judge which raised any complaint about this point and no coherent contention was made that the decision of the learned magistrate was flawed by virtue of the manner in which she dealt with the attempt to use the affidavit of Ms Hutchinson. Accordingly the subject was not canvassed in the reasons of the learned District Court judge.

(e) No error is demonstrated.

[26] For the foregoing reasons, I conclude that the applicant has not identified any reasonable argument that there was a factual error which should be corrected. There being no reasonable argument as to the existence of such error, the applicant cannot establish her contention that there was a substantial injustice. The application for leave to appeal should be dismissed, with costs.