SUPREME COURT OF QUEENSLAND

CITATION:	*ACP v Queensland Police Service* [2019] QCA 9
PARTIES:	**ACP** (applicant) **v** **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	CA No 4 of 2018 DC No 99 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Ipswich – [2017] QDC 292 (Horneman-Wren SC DCJ)
DELIVERED ON:	5 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2018
JUDGES:	Philippides and McMurdo JJA and Jackson J
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPLICATION FOR LEAVE TO APPEAL – ERRORS IN FACTUAL FINDINGS IN COURT BELOW – where the applicant was convicted of common assault – where a central issue at trial concerned whether the applicant's assault was justified or excused by reason of his using reasonable domestic discipline pursuant to s 280 of the *Criminal Code* (Qld) – where the proposed grounds of appeal alleged error in finding that the evidence of the complainant was not inconsistent or exaggerated such that the magistrate would take that into account in considering the credibility and reliability of the complainant's evidence – where the applicant alleged error in finding that the complainant sustained injury – where error alleged as to consideration of delay in reporting the matter to police – where the applicant alleged error in finding that no error had been demonstrated in the magistrate's decision – whether an appeal is necessary to correct a substantial injustice to the applicant – whether there is a reasonable argument that there is an error to be corrected *District Court of Queensland Act* 1967 (Qld), s 118 *McDonald v Queensland Police Service* [2017] QCA 255, applied

COUNSEL:	The applicant appeared on his own behalf S J Bain for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

PHILIPPIDES JA:

[1] On 16 November 2016, after a summary trial in the Magistrates Court, the applicant was convicted of common assault committed on 25 October 2015 against the complainant, his then 14 year old stepson. The applicant was fined $1,800 and a conviction was entered. The applicant's appeal to the District Court, pursuant to s 222 of the *Justices Act* 1886 (Qld), was dismissed by Horneman-Wren DCJ.[1] The applicant now seeks leave to appeal that decision pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld).

[2] The applicant submitted that leave should be granted to appeal because "a verdict [had] been reached that is clearly mistaken" and there had been a miscarriage of justice and "there [was] insufficient evidence to establish beyond a reasonable doubt that [the applicant] committed common assault".[2]

[3] A central issue at trial concerned whether the applicant's assault was justified or excused by law by reason of his using reasonable domestic discipline pursuant to s 280 of the *Criminal Code* (Qld) (the Code). A key contention by the applicant was that the prosecution did not discharge the onus on it to disprove that the assault on the complainant was "lawful" by virtue of s 280 of the Code. The applicant contended that his conduct was performed in his role as a parent to discipline his stepson, who he described as having had behavioural problems.

Background

[4] On the afternoon of 25 October 2015, in response to a call from the complainant's mother, police attended a house where the complainant lived with his mother and the applicant.[3]

[5] Subsequently, on 13 January 2016, the complainant participated in an interview with police, pursuant to s 93A of the *Evidence Act* 1977 (Qld),[4] which was tendered as evidence at the summary trial. He was also cross examined. His evidence was to the effect that at about 8.30 am on the day in question he was woken by the applicant and dragged out of bed. He was dragged outside by the hair and ears and thrown to the ground. The complainant fell to the ground and the applicant started kicking him in the chest while he was wearing steel cap boots. The applicant kicked him in the chest twice with his boots.[5] A photograph of the complainant's chest (taken by the police who attended the house on 25 October 2015) was tendered (ex 2). The complainant described the applicant chasing him. The complainant only had his underwear on. He sprinted away and ran across a ploughed paddock with no shoes on. The applicant was yelling at him to get the cattle in, which he did.

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[1] ACP v Queensland Police Service (No 1) [2017] QDC 292 (Reasons).
[2] Notice of Appeal, filed 8 January 2018, page 3.
[3] By the time of Magistrates Court hearing the complainant's mother and the applicant had separated.
[4] AB at 70.
[5] AB at 72 and 80.

[6] The complainant's mother gave evidence consistent with that of the complainant. She said that she woke to yelling by the applicant who was slapping the complainant. She described seeing the applicant hitting the complainant about the head, shoulders, neck, shoving him and slapping him.[6] The complainant fell to the ground and the applicant kicked him twice with his steel capped boots. The complainant was cowering and she yelled at the applicant to stop. She also said that the complainant was in his underwear and barefoot and directed to attend to a task which she identified as doing the fencing.

[7] The applicant gave evidence in his defence. He admitted waking the complainant by shaking him and pressing his ear and that he walked him out of the house by holding the underside of his arm.[7] He accepted he slapped the complainant three times.[8] He said that the complainant pulled away from him and fell down.[9] The applicant then "nudged" him with his foot in the chest twice.[10] The applicant's evidence was that he wanted to talk to the complainant to tell him "to pull up his socks" and that the complainant was ignoring him and that he was disciplining the complainant.

[8] The learned magistrate found that the prosecution had discharged the onus on it of disproving the application of s 280 of the Code. The magistrate accepted the complainant's evidence of what had occurred and rejected the applicant's version, commenting:

> "How any parent could possibly think that it was appropriate to nudge a child, as [the applicant] would put it 'euphemistically', in the chest with steel capped boots on with, perhaps, a view of encouraging him not to lie on the ground thinking he was safe is just – well, beggars belief. It is quite breathtaking in its absence of insight. And the fact that Exhibit 2 clearly shows a mark on [the complainant's] chest and [the applicant] has, in no way, disputed that mark was potentially caused by his actions, and even on his own version of events, he accepts that [the complainant] would have been in pain or would have been hurt, but that he would not have been injured. I am not quite sure what the fine distinction is in his mind about that. But clearly, his behaviour was unjustified and totally unlawful."

[9] Before the learned District Court judge, the applicant argued, amongst other matters, that he had been denied natural justice, that he had only used "light force" on the complainant, and raised inconsistencies and exaggeration in the evidence given by the complainant and the delay in the applicant giving his s 93A statement. In considering the s 222 of the *Justices Act* appeal conducted by way of rehearing, his Honour, after dismissing the complaint of denial of natural justice, determined as follows:

> "[77] As to the second ground, that the level of force used was only 'light', [the applicant] sought to rely upon his own evidence in that regard, and the description of the events included in the police application for a domestic violence order. Whilst it is true that the police did describe [the applicant] as having kicked [the complainant] 'lightly in the chest twice', as was pointed out to [the applicant] in the course of the hearing of the appeal, and

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[6] AB at 26.
[7] AB at 39-40.
[8] AB at 40.27.
[9] AB at 40.38.
[10] AB at 40.41-40.45.

which he acknowledged and accepted, the description by police also included:

> 'At about 7.20am, [the applicant] has awoken the named 14-year-old … by dragging the 14-year-old from his bed. [The applicant] has dragged [the complainant] from the house along the floor by his hair. [The applicant] has pulled the named [the complainant] by the hair and ears and has pushed [the complainant] to the ground in the rear yard. [The applicant] has slapped [the complainant] around in head and torso twice and has then kicked [the complainant], lightly in the chest twice.'

[25] In the hearing before her Honour, [the applicant] did not contest that he slapped [the complainant] two or three times and that he kicked him twice; the second time with greater force than the first. He readily accepted that this would have caused [the complainant] pain, but seeks to distinguish that from causing injury. In the absence of injury to the child, [the applicant] seems unable to accept that the discipline could be unreasonable. He refers to the presence of a red mark rather than a dark bruise as being demonstrative of that. He does not seem to accept that the red mark is itself an injury.

[26] I have no doubt, having read carefully the record and having heard [the applicant's] submissions on appeal, that this is his genuinely held view of the discipline. But that is not the test. It was for her Honour to determine, on all the facts and in all of the circumstances as she found them to be, whether what [the applicant] did at the time was reasonable.[11] If the prosecution satisfied her Honour beyond reasonable doubt that the force used was not reasonable, in her assessment of reasonableness in all the circumstances, then the defence was not available.

[27] Her Honour clearly, and entirely understandably in my respectful opinion, was satisfied by the prosecution that the force used by [the applicant], described by him as "light" was not reasonable. There was no error made in that finding. That ground must fail.

[28] The ground that there were inconsistencies in [the complainant's] evidence, and that he exaggerated to secure [the applicant's] conviction, relates to a very small part of [the complainant's] evidence in his interview with police when describing the area of the property that he was running across. [The complainant] said:

> 'We call it the flats and I ran about 200m out into that, [the applicant] stopped and he started yelling at me, telling me what to do and that sort of stuff and I had to go through a ploughed paddock, a ripped up paddock in bare feet and it hurt a lot too, it was about 200m through the ploughed paddock and I had to open up the gate to get the

[11] R v DBG [2013] QCA 370 at [21] and [31].

> cattle out and then rearrange the stuff on the side of the road for later that day.'

[29] [The applicant] says that this relates to [the complainant] claiming to have moved and set up 25 to 30 portable cattle panels. However, the only suggestion that it does relate to that comes from [the applicant] in the further material which he filed in the appeal. In the trial before the learned magistrate, the only evidence of this matter given by [the applicant] was in cross-examination. It was put to him by the prosecutor that:

> 'And he's sent across a paddock for hundreds of metres in nothing but his underwear to do fencing with you, isn't he?'

[30] To this, [the applicant] answered:

> 'No. He never did any fencing, not one bit. Nothing.'

[31] When it was again put to [the applicant] that [the complainant] did fencing he answered:

> 'No. He did go out in his underwear, but there was no fencing.'

[32] That was the full extent of his evidence on that issue. As already noted, he was not re-examined. In my view, there is no basis to assert on the appeal that, on the evidence before the learned magistrate, the evidence of [the complainant] was demonstrated to be inconsistent or exaggerated such that her Honour would take those matters into account in considering the credibility or reliability of his evidence. There is no merit in this ground.

[33] The fourth ground concerns the delay between the incident on 25 October 2015 and [the complainant's] complaint to police on 13 January 2016. [The applicant's] particular concerns in that regard are that [the complainant's mother] had said that she had not had time, whereas he asserts that she did have time, and that what really motivated the complaint in January was the breakdown of their relationship.

[34] [The complainant's mother] was cross-examined about that delay. The relevant exchange was as follows:

> 'Q: One last question: why was there a delay in reporting this to the police? It was on 25 October 2015, but a statement wasn't provided by [the complainant] until January of the following year. Was there any reason for that that you're aware of?
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> A: Well, because what happened, the events that happened on the 25th, the police ended up coming and putting on a domestic violence protection order, and we were going through court. And in between October and November, when I had an accident on the farm with cattle, which resulted in

> me going to hospital for three weeks in Brisbane, we were living on the same farm. I was in the house, but he was supposed to be in the granny flat. But he was moving to and from. But, anyway, we were trying to live separately on the same farm because we were broke. But it essentially didn't work, and I had to leave in November to get medical attention, so I took the kids with me. And, of course, we weren't local, so every time the police tried to come around, talk and say, you know, do you want to press charges, whatever, we weren't there. And then Christmas came, and there was holidays and things and – and then eventually, obviously, in January they caught up with us, and I said, look, well, I'm in hospital, but the kids are in Brisbane with my parents. And it went from there. So that's yes, the delay.
>
> Q: Okay. So you weren't aware on any confusion on [the complainant's] part as to whether he wished to continue with the matter?
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> A: ---No.'

[35] The reference to confusion on [the complainant's] part was a reference to his evidence in that regard.

[36] The delay was a collateral issue. Having obtained that explanation in cross-examination, there was no basis upon which that could have been challenged in the way [the applicant] suggests it ought to have been in the trial, and which he seeks to do on the appeal.

[37] In any event, the delay is entirely irrelevant. This is not a case in which the learned magistrate was being asked to consider whether an incident the subject of the complaint happened at all, given the delay in complaining about it. Nor was it a case in which the reliability of the accounts of [the complainant] and [the complainant's mother] were challenged on the basis of lengthy delay. It was a case in which it was common ground that an incident had occurred. [The applicant's] account of that incident was not substantially different to that of [the complainant]. The real issue was whether what occurred gave rise to the defence of domestic discipline. As such, the delay of a few months was irrelevant.

[38] Even if a subsequent breakdown of the relationship was the true motivation for making the complaint, it in no way altered or affected the substance of it.

Conclusion

[39] No error has been demonstrated in the learned magistrate's decision. A full review of the evidence and proceedings before her Honour clearly establishes that in all of the circumstances

> of this case, her Honour's conclusion that the prosecution had proven beyond reasonable doubt that the defence of domestic discipline did not render this assault lawful was not only open, but the only conclusion open."

Proposed grounds of appeal

[10] The applicant's proposed grounds of appeal challenge the factual findings of the District Court judge in paras [78] to [91] of the Reasons. In particular, the grounds allege that his Honour:

1. erred in finding at [85] of the Reasons that the evidence of the complainant was not inconsistent or exaggerated such that the magistrate would take that into account in considering the credibility and reliability of his evidence.
2. erred in finding at [78] of the Reasons that the applicant did not accept that the red mark on the complainant was itself an injury.[12]
3. erred in considering at [90] of the Reasons that the delay in reporting the matter to police was irrelevant.
4. erred in finding at [91] that even if the breakdown of the relationship between the applicant and the complainant's mother motivated the complaint being made to police, it did not alter or affect the substance of it.[13]
5. erred in finding at [92] that no error had been demonstrated in the magistrate's decision.

Relevant principles

[11] The principles relevant to appeals from the District Court in its appellate jurisdiction were set out in *McDonald v Queensland Police Service*.[14] In summary, this Court's discretion to grant or refuse leave to appeal, while unfettered, will not be granted lightly, since the applicant will already have had the benefit of two judicial hearings. Ordinarily, mere error alone is insufficient to justify the granting of leave; it is usually necessary to show both that an appeal is necessary to correct a substantial injustice to the applicant and that there is a reasonable argument that there is an error to be corrected. If leave is granted, the appeal being an appeal in the strict sense, this Court's sole duty is to determine whether, on the basis of the material before the District Court, error has been shown. A factual finding of a District Court judge may only be reviewed if there is no evidence to support it, or it is shown to be unreasonable, but it is not for this Court to substitute its own findings of fact for those of the District Court judge. This Court may draw inferences of fact from facts as found by the District Court judge or admitted or undisputed, provided such inferences are not inconsistent with the findings of the District Court judge.

Grounds argued

[12] It is convenient to consider the matters raised in grounds 1, 3 and 4 before the issues raised in grounds 2 and 5.

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[12] Reasons at [78].
[13] Reasons at [7]-[12] and [91].
[14] [2017] QCA 255 at [39].

Ground 1 – quality of the complainant's evidence

[13] The District Court judge at [85] of the Reasons considered the inconsistencies in the complainant's evidence as relied upon by the applicant and found that they were not such as would affect his credibility or reliability. The inconsistencies referred to by the applicant related to the nature of the force used by the applicant and the complainant's claims as to what tasks he was required to undertake upon being woken up.

[14] In the proposed notice of appeal, the applicant made the following additional contentions in support of ground 1 concerning the nature of the force used by him:

> "[The complainant] stated in his evidence that [the applicant] *'kicked'* him several times wearing steel capped boots. There is no evidence to suggest that [the complainant] was kicked. A red mark on [the complainant's] chest is not evidence of being kicked in the manner that is being suggested. It is unreasonable to conclude that without the presence of significant contusions, that [the complainant] had been kicked in any illegally excessive way. Further, being kicked several times on bare skin, it is reasonable to conclude that there would have been more than one red mark and that any red marks would have been more significant contusions at the very least. That the language used by [the complainant], e.g. *'kicks me while I'm down'* is a gross embellishment of what actually happened and is catchphrase language commonly known to carry a certain implication."

[15] The respondent submitted that there was very little dispute as between the complainant and the applicant in their evidence as to the circumstances giving rise to the assault and that no error was demonstrated in accepting the complainant's evidence of the assault.

[16] As his Honour recorded, the applicant admitted that he slapped the complainant two or three times and that he "nudged" him with his foot to get up. He also accepted that it was when the complainant ignored him that he "escalated" the force to that of a "nudge".[15] In oral submissions, the applicant reiterated the admission that he "nudged" the complainant with his boot but argued that there was no supporting evidence of the complainant being dragged along the ground. In the applicant's extensive written submissions, he accepted that he "used [his] foot" but contended he did not use enough force to bruise, repeating the argument made before the District Court judge that, had he used more than light force, the photographic evidence would have revealed dark bruising. That argument lacks merit, as do other arguments raised, such as the difference in the evidence of the complainant that he was forced to attend to the cattle panels compared with that of his mother that he attended to fencing. Such arguments are of an inconsequential nature.

[17] It was open to the District Court judge on the rehearing of the evidence to find that the complainant's account was supported by the evidence and to conclude that what the applicant referred to as a "nudge" was in fact a kick which caused pain and involved force. Further, his Honour did not err in finding, as the magistrate had done, that the complainant's credibility and reliability was not demonstrated to have been undermined by inconstancy and exaggeration.

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[15] AB at 40.43.

Ground 3 - delay

[18] The District Court judge found that the delay in the complainant reporting to police was a collateral issue,[16] but that, in any event, the delay was "entirely irrelevant" because it was common ground that an incident had occurred.[17] In respect of the issue of delay, the applicant referred to the explanation by the complainant's mother as recorded by the District Court judge in [87] of the Reasons and submitted:

> "[The complainant's mother's] statement does not stand up to scrutiny. [The complainant's mother] claimed that due to an event causing her significant injury, the police domestic violence protection order, and Christmas, there was not enough time after the alleged assault to report the alleged assault to the police. The fact of the matter is, the alleged assault was reported to the police on the day it allegedly occurred. The DV Protection order the police initiated on the day, was a direct result of the police visit to the family home on the day of the alleged assault. The police took the photograph of [the complainant's] red mark on the day of the alleged assault. Further, [the complainant's mother] had from 25 October to 25 November 2015 (1 month) with which to file for assault, during which time, life is proceeding as normal except for [the applicant] residing in the granny flat save for spending some time in the main house. In her statement, [the complainant's mother] admits that the living arrangements were not working from her perspective. It is known publically and to the judiciary that filing for domestic violence, abuse, or assault is one of the ways used by parties to family law matters to gain an advantage in such proceedings. [The applicant] asserts that [the complainant's mother] is using the assault charge against for such purposes. Further, new evidence in the form of a document co-written by [the applicant and the complainant's mother] circa 9 November 2015, that states that [the complainant's mother] wanted the police to withdraw the police initiated domestic violence application relating to the alleged assault and that their relationship was worth saving. It is unreasonable to conclude that [the complainant's mother] had time to try to save the relationship, but no time to file a complaint for assault."

[19] Additional submissions along these lines were made in the written submissions.

[20] The District Court judge was correct to find that, in the circumstances of this case, the delay in making the complaint was irrelevant to a determination of whether the force used was reasonable and that that finding was open in light of the way in which the trial was run. That is the applicant did not dispute the fact of the kicks, which he described as nudges, only the degree of force used. It followed that whether there was a delay in the complaint being made and the reasons for that delay did not bear on a consideration of the reasonableness of the discipline.

Ground 4 – motivation for complaint

[21] As mentioned, the District Court judge considered that, even if the breakdown of the relationship between the appellant and the complainant's mother was the true

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[16] Reasons at [89].
[17] Reasons at [90].

motivation for the complaint, that did not affect the substance of the complaint. The applicant submitted that more weight ought to have been attributed to the motivation behind the complaint, contending that neither the police nor the complainant's mother apparently considered the assault serious enough to warrant prosecution at the time.

[22] However, as submitted by the respondent, whatever the motivation for making the complaint, that did not affect the central issue of the reasonableness of the applicant's conduct in disciplining the complainant. The District Court judge was not in error in considering this to be of no weight.

Ground 2 and 5 – application of s 280 of the Code

[23] By his second ground of appeal, which centred on [78] of the Reasons, the applicant accepted that "a mark is in itself an injury" but argued, referring to exhibit 2, that it did "not evidence physical force worthy of conviction of common assault" and that the application of force within s 280 of the Code "during a disciplinary event of a child is likely to cause a red mark such as found on [the complainant]".

[24] By ground 5, the applicant argued that, taking into account the inconsistencies in the statements of the complainant and his mother, together with the "misinterpretation of those statements in relation to the single red mark on [the complainant's] chest insofar as the red mark being inconsistent with being kicked with force at least twice, that the complaint should have been dismissed" and asserted that the events in question fall under s 280 of the Code, being domestic discipline.

[25] This raised the real issue in the trial, being whether the conduct of the applicant in disciplining the complainant was proven to be unreasonable. In arguing in oral submissions that s 280 was not disproved beyond reasonable doubt, the applicant reiterated his submissions below that the complainant was a "challenging" child, who had not been forthright in his evidence to the Court.

[26] In determining that matter, his Honour was required to consider all of the facts and circumstances, including the nature of the assault, which involved kicking the complainant who had fallen to the ground with his steel capped boot. As the respondent submitted, while his Honour accepted that the applicant genuinely held the view that the discipline he applied was not unreasonable, it was open to the magistrate and the District Court judge to be satisfied beyond reasonable doubt that the degree of force used by the applicant by way of discipline was unreasonable. The applicant's own views as to the appropriateness of the discipline he used were irrelevant to a consideration of whether the force used in domestic discipline was objectively reasonable. When regard is had to the evidence, it is evident that, irrespective of any genuinely held view of the applicant, the conclusion that the force used was not reasonable was unimpeachable.[18] The finding of the District Court judge and the magistrate that the degree of force used by the applicant in the course of domestic discipline was not objectively reasonable was open on the evidence and was, as stated by the District Court judge, "the only conclusion open".[19]

Other matters

[27] Although not a proposed ground of appeal, the applicant's affidavit material seemed to proceed on the basis of a challenge to the District Court judge's rejection of the

[18] Reasons at [80].
[19] Reasons at [92].

proposition that there was a denial of natural justice. It also appeared to raise bias by the magistrate. An example is the contention in the applicant's affidavit that the magistrate bullied him by sending him to the corner of the courtroom and that she was a "mean, shallow narrow-minded person as [he] could see the distain and disgust in her expression". The respondent submitted in respect of that contention that the applicant was simply required by the magistrate to move so that the closed circuit television cameras could focus on the person asking the witness questions. That and similar contentions are entirely lacking in substance.

Order

[28] The application lacks merit. No reasonable argument is raised demonstrating any error to be corrected. The application for leave to appeal should be refused.

[29] **McMURDO JA:** I agree with Philippides JA.

[30] **JACKSON J:** I agree with Philippides JA.