[2019] QCA 70

COURT OF APPEAL

SOFRONOFF P

CA No 155 of 2018
DC No 3601 of 2017

MILLAR, Andrew John **Applicant**

v

QUEENSLAND POLICE SERVICE **Respondent**

BRISBANE

MONDAY, 29 APRIL 2019

JUDGMENT

SOFRONOFF P: This is an application for leave to issue a subpoena. The applicant was convicted of one charge of entering premises with intent to commit an indictable offence, and with a second charge of entering premises and committing an offence therein, namely stealing. The applicant appealed to the District Court, pursuant to s 222 of the *Justices Act*. Judge Ryrie dismissed the appeal on 28 March 2018. On 20 June 2018, the applicant filed an application for an extension of time, within which to seek leave to appeal, and that extension of time was granted on 10 October 2018, so that the application that the applicant had by then made, on 26 June 2018, became a valid application. The applicant now wishes the Court to issue a subpoena to compel an insurer to produce documents evidencing claims made by the complainant for recovery of indemnity under policies of insurance in respect of her stolen

property, or at least as it was the case before the Magistrate, property she claimed had been stolen from her.

The facts of the case were these, in summary. The charges concerned the applicant's entry into the common garage of a block of units on Coronation Drive. When he was in the common area, according to the prosecution case, he then entered the particular garage premises that was occupied by the complainant, and stole from that garage unit, a table and a piano stool. CCTV recordings were tendered in the Magistrates Court that showed the applicant entering the general garage premises, and also showed him leaving those premises, carrying what appeared to be a table and a piano stool. In the Magistrates Court, the complainant identified those two items seen in the CCTV recording as her stolen property.

The applicant gave evidence at the trial and explained his presence on the premises in a way that, if his evidence had been accepted, would have been consistent with his innocence. The Magistrate disbelieved him and believed the complainant, and as a result, convicted the applicant of both charges. As I have said, the applicant then appealed to the District Court, pursuant to s 222 of the *Justices Act*. The appeal was heard by Judge Ryrie. Her Honour made a detailed and careful review of the evidence in the case and dismissed the appeal.

As I have said, the applicant now seeks the issue of a subpoena to compel the complainant's insurer to produce documents showing the claim she had made under her policy. He hopes, by that means, to show that the complainant made no claim under her policy in respect of the piano stool. He says that her credit was a vital issue in the Magistrates Court, and that submission must be accepted. He points to several ways in which her credit had been affected by evidence in cross-examination in the Magistrates Court, and he submits that if the subpoenaed documents show that no such claim was made in respect to the piano stool, that would have had – that would have had two effects upon her credit. First, it would have shown that she was lying when she said she had made such a claim. Secondly, would tend to show that she was not actually the owner of the piano stool. It must be accepted that if those two

things were shown, they would have had the forensic effect in the Magistrates Court for which the applicant contends.

In order to obtain leave to appeal to the Court of Appeal from a District Court judge's decision on an appeal under s 222 of the *Justices Act*, the applicant must show that there has been a substantial injustice occasioned to him in the District Court. Leave is not lightly granted after there have been two hearings of a matter, once in the Magistrates Court, and once in the District Court. Particularly, leave is not readily granted when there have been concurrent findings of fact by a Magistrate and by District Court judge. The time when this evidence should have been sought and tendered was before the Magistrates Court. At the latest, the time within which this evidence would have been material to have been tendered and considered, was upon the full review that was conducted by Judge Ryrie.

The applicant has not led any evidence to suggest that he sought, and was unsuccessful in obtaining, the issue of a subpoena in either of those two jurisdictions, or that he even raised this point below. For that reason, there is no reason to think that there is any kind of an argument that the provision of the insurance documents could now assist the applicant in his application for leave to appeal. Unless it is likely that the Court of Appeal would not admit those documents on the application for leave to appeal, no such evidence having been sought to be led in the Magistrates Court or in the District Court, it is highly unlikely, to put it at its highest, that the material – that the subpoena could serve any practical purpose.

Indeed, even if no claim had been made by the complainant in respect of the piano stool, that does not entirely contradict the prosecution case. The prosecution case depended, also, upon CCTV footage and the stealing of the table. In his oral submissions this morning, the applicant accepted that he put his case upon the basis that if no claim had been made for the piano stool, then it would have been difficult for the conviction to have happened. As I have said, that might be so, but that is not a matter that could likely be of relevance on this application for leave to appeal. For those reasons, I direct the registry not to issue the subpoena, a draft of which was filed on 2 November 2018.