

COURT OF APPEAL

DAVIES JA
JERRARD JA
HELMAN J

Appeal No 5975 of 2002

JERRY PRUS-BUTWILOWICZ

Applicant/Appellant

And

NEIL L MOXEY trading as
NOM AUTO SERVICE

Respondent/Respondent

BRISBANE

..DATE 03/10/2002

JUDGMENT

MR A F MAHER (instructed by Odens, Lawyers) for the applicant
MR S J ENGLISH (directly instructed) for the respondent

DAVIES JA: This is an application for an adjournment of an application for leave to appeal from a decision of a District Court judge given on 23 May this year. The application for the adjournment was filed in this Court only yesterday and no material was filed to support that application until material was filed and read by leave today.

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The application is based, it seems, on a failure to serve the respondent. It does, as Mr Maher frankly concedes, appear to be a misconceived basis for the application, and it also appears from what we have been told by Mr English, that through the Court Registry the respondent obtained copies of all relevant documents. Notwithstanding the application, Mr English indicated that he is prepared to proceed with the substantive application today if an adjournment was not granted.

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The decision from which leave to appeal is sought was one in turn on appeal by leave from the Magistrates Court. The order of the learned District Court judge was that the appeal from the Magistrates Court be refused.

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The history of the matter briefly goes as follows. On 7 December 2001 an acting magistrate granted an application by the present respondent to set aside a judgment by default

obtained by the applicant. It was an appeal from this judgment which the learned District Court judge dismissed.

There were two reasons why the acting magistrate set aside the judgment by default. The first was that it was irregularly obtained and that therefore the respondent was entitled to have it set aside *ex debito justitiae*. And the second reason was that, contrary to the applicant's submissions, the respondent established a *prima facie* defence on the merits.

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On the appeal the learned District Court judge said that he was not persuaded that the acting magistrate's conclusion that the circumstances in which the judgment was entered were irregular, and that it should therefore be set aside *ex debito justitiae*, involved a wrongful exercise of discretion. As to the second, his Honour concluded that, even if the judgment was regularly entered, he was not persuaded that the acting magistrate was in error in accepting that a *prima facie* case on the merits had been established.

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There were thus, it seems, two quite separate reasons why the learned District Court judge gave his decision, either of which were sufficient in his opinion to justify dismissal of the appeal to that Court. It is only the second of these which the applicant contends raises an important question sufficient to justify leave being granted to appeal to this Court. That being so, it is plain that for that reason alone

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that is not a sufficient reason to justify the granting of leave and that leave should be refused.

I do not mean to imply from what I have just said that, if the second were the sole ground on which leave was sought, I think it should be granted. The Court has, more than once, expressed its reluctance to grant leave in matters involving practice and procedure which generally should be determined, only once, by a primary Court. Here it has already been subject to one extensive and thorough review by a District Court judge and, on the face of it, his Honour's judgment leads me to think that it was probably right.

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Although this matter was listed for hearing today, and has been for some time, as I already indicated the application for the adjournment was made very late indeed. It seems to me in the circumstances that this Court should not only dispose of the application for adjournment against the applicant but also dispose of the application for leave to appeal against sentence.

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I would therefore refuse the application for adjournment and refuse the application for leave to appeal against the decision of the District Court judge of 23 May 2002.

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JERRARD JA: I agree.

HELMAN J: I agree.

DAVIES JA: The orders are as I have indicated.

MR ENGLISH: Your Honour, I seek an order for costs please.

DAVIES JA: You can't say anything about that, can you, Mr
Maher?

MR MAHER: Not really, your Honour, except that with the lack
of service one didn't expect an appearance today from the
other side, however I can't take it further than that.

DAVIES JA: No, all right. With costs.
