SUPREME COURT OF QUEENSLAND

CITATION:	*Long v Spivey* [2004] QCA 118
PARTIES:	**LONG, John Jacob** (appellant/respondent) v **SPIVEY, Jason** (respondent/applicant)
FILE NO/S:	CA No 400 of 2003 DC No 644 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2004
JUDGES:	Davies and Williams JJA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal from the orders and direction of the District Court of 17 November 2003 granted** **2. Appeal allowed** **3. Set aside the orders made in the District Court on 17 November 2003** **4. In lieu, dismiss the appeal to the District Court**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - PLEAS - GENERAL PLEAS - PLEA OF GUILTY - OTHER CASES - where there was an application for leave to appeal against a District Court judgment which set aside convictions against the respondent for disorderly behaviour and assaulting a police officer imposed in the Magistrates Court - where the applicant submitted that the appeal to the District Court was incompetent pursuant to s 222(2)(e) *Justices Act* 1886 because the respondent had pleaded guilty in the Magistrates Court - whether the plea of guilty was a genuine plea in the circumstances *Justices Act* 1886 (Qld), s 222(2)(e) *Meissner v The Queen* (1995) 184 CLR 132, applied

R v Boag (1994) 73 ACrimR 35, cited
R v The Justices at Cloncurry; ex parte Ryan [1978] QdR 213, cited

COUNSEL: M J Copley for applicant
A Vasta QC, with P E Smith, for respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for applicant
Queensland Aboriginal and Torres Strait Islanders Legal Services Secretariat Limited for respondent

[1] **DAVIES JA:** This is an application for leave to appeal against a judgment of the District Court setting aside convictions against the respondent imposed in the Magistrates Court on 27 January 2003. Those convictions were for disorderly behaviour and assaulting a police officer. Leave to appeal against that judgment is necessary under s 118(3) of the *District Court Act*. The following are the grounds of this application:

1. the orders of the learned appeal judge were ultra vires in that:
   (a) the appeal against the convictions following pleas of guilty in the Magistrates Court was incompetent: s 222(2)(e) *Justices Act* 1886; and
   (b) the learned appeal judge had no power to remit the matter back to the Magistrates Court.
2. The finding of the learned appeal judge that the plea of guilty to assault of a police officer was equivocal was unreasonable.
3. The learned appeal judge erred in determining that there were grounds for setting aside the conviction for disorderly conduct.

[2] The respondent has submitted that only ground 1 raised an important question of law and that consequently that if it fails leave should not be granted. Whether or not that is correct it is, I think, appropriate to consider that ground first.

Ground 1(a): the appeal to the District Court was incompetent

[3] Section 222 of the Act, in the form in which it was at the time of the respondent's convictions, was relevantly as follows:

> "(1) When any person feels aggrieved as complainant, defendant, or otherwise by any order made by any justices or justice in a summary manner upon a complaint for an offence or breach of duty such person may appeal as hereinafter provided to a District Court judge.
>
> …
>
> (2) Every such appeal shall be made under and subject to the following rules and conditions-
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> …
>
> (e) except where the sole ground of appeal is that the fine penalty forfeiture or punishment is excessive or inadequate, as the case may be–no appeal shall lie under this section where the defendant pleaded guilty or admitted the truth of the complaint."

There does not seem to be any doubt that the appeal to the District Court was purportedly under that section. The essential question in this application is whether in each case, the respondent pleaded guilty.

What occurred in the Magistrates Court

[4] After some adjournments because of the respondent's failure to appear, he finally appeared in the Magistrates Court on 27 January 2003 to answer the above charges. The magistrate then addressed him in the following terms:

> "Mr Long. There are two charges before the Court. 31st of December 2002 at Brisbane, the Central Division of the Brisbane Magistrate's [sic] Court in a public place, Stanley Street, you behaved in a disorderly manner and secondly that you assaulted police officer in the performance of the officer's duty. In relation to these charges, are you asking for any adjournment to have a solicitor present? Do you wish to see a solicitor about the matters before we proceed? No?"

[5] It may be reasonably assumed from the learned magistrate's two questions and his final "No" that the respondent indicated that he was not asking for any adjournment to have a solicitor present and that he did not wish to see a solicitor about the matters before the court proceeded. The following exchange then occurred:

> "In relation to these two charges how do you wish to plead?
>
> DEFENDANT: Guilty.
>
> BENCH: Is anyone forcing you to plead guilty? Will you sit down now. We'll hear from the Prosecutor."

Again it may be inferred from the learned magistrate's last question and him then asking the respondent to sit down that the respondent indicated that no-one was forcing him to plead guilty.

[6] The prosecutor then recited the facts giving rise to disorderly behaviour on 31 December 2002. He then proceeded to relate the facts constituting the assault in the following terms:

> "In relation to the assault police charge on that same date, your Worship, as previously outlined the defendant was being arrested in relation to another matter. Police were having a conversation with the defendant in relation to that matter when the defendant leant forward and spat in the direction of Senior Constable Spivey causing the police officer to take evasive action.
>
> The spray from the spittle landed on the police officer's shirt. He was then placed in the rear of the police vehicle and conveyed to the Brisbane Watch-house where he was formally charged in relation to both matters before the Court."

[7] The following exchange then occurred:

> "BENCH: Mr Long if you stand up. I'll hear from you now. Have you got anything you wish to say about those facts, anything at all?
>
> DEFENDANT: I don't recall spitting on the police [indistinct]"

[8] I should add that, in reciting the facts with respect to the charge of behaving in a disorderly manner, the prosecutor said that the respondent was observed to be yelling out at the crowd of people entering Southbank Parklands, bumping into people and pushing his way through the crowd. He was observed to be affected by alcohol. His breath smelt strongly of intoxicating liquor and his eyes were glazed and bloodshot. However the police apparently formed the opinion that he was not drunk. Then as police escorted him out of the Parklands and into Stanley Street he

pushed some pedestrians out of the way and moved or fell heavily into other pedestrians.

The contentions of the parties

[9] The respondent submits in this Court that, on those facts, he did not plead guilty to the charge of assaulting a police officer; alternatively that the circumstances which emerged after his purported plea cast some doubt upon it; and in either case he was entitled to appeal to the District Court as he did. He no longer appears to submit that he did not plead guilty to disorderly behaviour. The applicant submits that, on the above facts there were pleas of guilty to both charges and that consequently, the appeal to the District Court was incompetent.

[10] Plainly if the first of the respondent's alternative contentions are correct, s 222(2) would have no application. For reasons which I shall explain later, I do not think that it would have no application in the second of them.

[11] The respondent could not have contended that he did not plead guilty to disorderly behaviour because of his statement in par 23 of his affidavit, set out below, that he did plead guilty to that charge. It follows that, unless some odd interpretation is given to s 222(2)(e), the respondent had no right of appeal to the District Court against that conviction. However he submitted that, if there was no plea of guilty to the charge of assaulting a police officer, and consequently no conviction and sentence on that charge, he should have received a lower sentence than that which he in fact received on the disorderly behaviour charge and that he should now be entitled to appeal to the District Court against his sentence on that charge.

Further evidence in the District Court

[12] On the purported appeal to the District Court the respondent filed two affidavits, one by his brother, the other by him. The brother's affidavit is irrelevant to this question.

[13] In his affidavit, filed on 21 May 2003, the respondent swore that he never spat at the police officer but admitted that, when he had had a few drinks, he had a habit of spitting on the ground. He said that, when he appeared at Court on 27 January 2003 he thought that the only charge he had to answer was behaving in a disorderly manner.

[14] He then swore:

> "Until the matter was mentioned before the Magistrate I did not realise that I had also been charged with assaulting a Policeman."

[15] He said that, during the hearing he recalled the magistrate saying:

> '"Have you got anything that you wish to say about those facts anything at all?'"

to which he replied:

> '"No, I don't recall spitting on a police officer'."

[16] Then follow these paragraphs which should be set out in full:

> "20. Until then I did not also realise that the assault Police charge related to an allegation that I spat in the direction of a Senior Constable Spivey such that the spray from the spittle landed on his shirt.

> 21. I say that I was at a disadvantage in representing myself in the said Magistrate court at Cleveland as I had no legal representation at court acting for me and the Magistrate did not give me the opportunity to change my plea from guilty to not guilty after I said to him 'No', I don't recall spitting on a Police Officer'.
>
> …
>
> 23. I further say that the reason I pleaded guilty to the Disorderly Conduct charge was to get it over and dealt with quickly even though I believed I was not intentionally behaving in a disorderly manner."

[17] The affidavit is carefully drawn, plainly by a solicitor or barrister. For that reason it is important as much for what it omits as for what it contains. And in it the respondent does not swear that, when he purported to plead guilty to the charge of assaulting a police officer, he did not intend to.

[18] Moreover the affidavit is misleading in an important respect; as to when the respondent first realized he was charged with assaulting a police officer. As already appears, he said, in para 17:

> "Until the matter was mentioned before the Magistrate I did not realise that I had also been charged with assaulting a Policeman."

[19] Then in par 20 he said:

> "Until then I did not also realise that the assault Police charge related to an allegation that I spat in the direction of a Senior Constable Spivey … ."

Read in the context of the affidavit the phrase "until then" could mean until he said that he didn't recall spitting on a police officer. But that seems most unlikely. It is more likely that, as appears from par 17, he realized when the charge was read out to him that he was charged with assaulting a police officer; though he may not have realized that that was by spitting on him until the facts were read out by the prosecutor.

The probable inference from this

[20] The probable inference from all this, in my opinion, is that, when he pleaded guilty to assaulting a police officer, he intended to do so. Why he did so remains unclear. It may have been, as he said in respect of the disorderly behaviour charge, that it was to get it over and dealt with quickly even though he thought he was not guilty. Or it may have been because he had no real recollection of what had happened. But it is unnecessary to speculate upon this.

The relevant principles

[21] A court is entitled to act on a plea of guilty "when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea".[1] A plea of guilty will not ordinarily be set aside unless "the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence".[2] But the question here is arguably a narrower one than was considered in

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1 *Meissner v The Queen* (1995) 184 CLR 132 at 141.

2 Ibid at 157.

those statements. It is not whether a miscarriage occurred in accepting the plea; it is whether there was a plea of guilty at all.

[22] What appears on its face to have been a plea of guilty to an offence will be shown, in reality, not to have been such a plea only if, in my opinion, it was not entered by the accused in the exercise of a free choice. It does not matter why he exercised it in that way for, as Dawson J pointed out in *Meissner*,[3] a person may do so "for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty". In my opinion it has not been shown by any of the material adduced by the respondent that he did not enter a plea of guilty to the offence of assaulting a police officer in the exercise of a free choice. I would therefore conclude on the evidence in this case that the respondent pleaded guilty to assaulting a police officer.

[23] I mentioned earlier the respondent's alternative contention that the circumstances in which the plea was made cast doubt on whether it was a genuine plea. Implicit in that contention is one that, in determining whether there was a plea of guilty for the purpose of s 222(2)(e), the onus was upon the applicant to prove beyond doubt or beyond reasonable doubt that it was a genuine plea. I do not think that that is correct. In order to have a right to appeal pursuant to s 222, the respondent was required to prove either that his appeal in respect of the charge of assaulting a police officer was only on the ground that the punishment was excessive; or that he had not pleaded guilty or admitted to the truth of the complaint. Accordingly this alternative contention of the respondent must fail.

[24] It follows also, in my opinion, that this application must succeed and the judgment of the District Court set aside unless either s 222(2)(e) has some meaning other than its plain meaning; or the respondent had exercised some right to appeal to the District Court against his conviction on the charge of assaulting a police officer, other than pursuant to s 222(2)(e).

The right of appeal

[25] A right of appeal, and any restrictions to it, are statutory. There is no common law right of appeal.[4] Moreover such a right cannot be conferred by implication. It must be conferred in clear words by a statutory provision.

[26] The relevant history of the *Justices Act* is as follows. Until 1949 it provided three means of appeal or review; an order to show cause under s 209, a case stated under s 226 and an appeal to a District Court under s 237. In none of these was there a prohibition against relief where the appellant or applicant had pleaded guilty.

[27] Then by the *Justices Acts Amendment Act* of 1949 a new Part 9 was substituted for the previous Part 9 which had contained the above provisions. The new Part 9 conferred a right to an order to review under s 209 and an appeal to a judge of the Supreme Court under s 222. Section 209 did not contain the limitation contained, at

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3 Ibid at 157.

4 *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 553; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 108; *CDJ v VAJ* (1998) 197 CLR 172 at 197.

the relevant time, in s 222(2)(e).[5] However the powers of the Full Court on review under that provision were limited.[6] Section 222, in the form in which it was then, contained a provision in terms identical to those in s 222(2)(e).[7] That limitation has remained in s 222 ever since.

[28] Section 209 was repealed by s 61 of the *Courts Reform Amendment Act* 1997.[8] The repeal of s 209 left, as the only possible avenues of appeal or review from a conviction for a summary offence in the Magistrates Court, appeal under s 222 and, possibly, a certiorari order under Part 5 of the *Judicial Review Act* 1991. However it is unnecessary to consider the latter because no such relief was sought here. And unless s 222 is given some meaning other than its plain meaning, the argument of the respondent is correct, the application must succeed, the appeal must be allowed and the judgment of the learned District Court judge must be set aside.

[29] I do not think that s 222(2)(e) is in any way ambiguous. On the contrary its meaning, in my view, is plain and there is no basis for giving it a meaning other than that plain meaning. It follows that the purported appeal to the District Court, being upon pleas of guilty to each charge, was incompetent.

[30] The following orders should therefore be made:

1. application for leave to appeal from the orders and direction of the District Court of 17 November 2003 granted.
2. Appeal allowed.
3. Set aside the orders made in the District Court on 17 November 2003.
4. In lieu, dismiss the appeal to the District Court.

[31] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Davies JA and I agree with what he has said.

[32] As pointed out therein, the critical question in this case is whether or not a plea of guilty was entered to the charges. The answer to that question determines the issue of jurisdiction raised by s 222(2)(e) of the *Justices Act* 1886.

[33] The present case is to be distinguished from that where a defendant seeks to set aside a plea on the ground that a miscarriage of justice occurred. In that situation the onus is on the defendant to establish on the balance of probabilities that such a miscarriage has occurred; *Boag* (1994) 73 A Crim R 35. It must also be remembered, as stated by Brennan, Toohey and McHugh JJ in *Meissner* (1995) 184 CLR 132 at 141, that necessarily there "is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence." That is because of the considerations enumerated by Dawson J in the passage from his judgment in *Meissner* quoted by Davies JA.

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5 See now s 222(2)(c).

6 See *Bayne v Bayne; Ex parte Bayne* [1962] QdR 561.

7 Section 222(2)(vi).

8 By the repeal of Division 1 of Part 9 of the *Justices Act*. The same Act also, in s 14, repealed s 673 of the *Criminal Code*, which provided for appeal against summary convictions for indictable offences and, instead, by s 62, inserted subsection (1A) in s 222 of the *Justices Act*, limiting such appeals to appeals against sentence or order for costs. However we are not concerned here with summary conviction for an indictable offence.

[34] Prior to the repeal of s 209 of the *Justices Act* a defendant could seek to have a plea of guilty set aside by relying on that procedure; but prior to the enactment of the *Judicial Review Act* 1991 the writ of certiorari was also available. *R v The Justices at Cloncurry; ex parte Ryan* [1978] Qd R 213 is a good example of the latter procedure being used in order to have a conviction and sentence quashed by writ of certiorari where the court was satisfied that the original plea was equivocal. In my view since 1991 such relief could be obtained under Part 5 of the *Judicial Review Act* which replaced the jurisdiction formerly exercised by the Supreme Court by way of the prerogative writs.

[35] I agree with the orders proposed by Davies JA.

[36] **HOLMES J:** I agree with the reasons of both Davies and Williams JJA and with the orders proposed by Davies JA.