# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Andrews v Henderson* [2004] QCA 145 |
| PARTIES: | **MARK GREGORY ANDREWS**<br>(appellant/respondent)<br>**v**<br>**JOHN WILLIAM HENDERSON**<br>(respondent/applicant) |
| FILE NO/S: | CA No 378 of 2003<br>DC No 591 of 2002 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for leave s 118 DCA (Criminal) |
| ORIGINATING COURT: | District Court at Cairns |
| DELIVERED ON: | 7 May 2004 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 21 April 2004 |
| JUDGES: | McMurdo P, McPherson JA and Williams JA<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Application for leave to appeal against the order of the District Court made on 30 October 2003 convicting the applicant of the third offence charged in the complaint dated 7 May 2002 dismissed** |
| CATCHWORDS: | APPEALS TO DISTRICT COURT – where magistrate dismissed summary charge against applicant of possession of tainted property after making interlocutory ruling that key evidence obtained from searches inadmissible – whether subsequent appeal to District Court challenging evidentiary ruling was from a final order or not<br><br>CRIMINAL LAW – EVIDENCE – PROOF – where after evidence from searches ruled inadmissible prosecutor did not call evidence of another police officer who had questioned applicant – whether prosecutor on whom onus of proof rested was entitled to choose which parts of available evidence to call in order to prove case<br><br>*Justices Act* 1886 (Qld), s 222<br><br>*Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, applied |

*Hesselman v Reid* [1973] Tas SR 93, considered
*Hesselman v Reid* (No 2) [1974] Tas SR 1, cited
*Paulger v Hall* [2003] 2 Qd R 294, considered, applied
*R v His Honour Judge Dodds, ex parte Smith and Graham* [1990] 2 Qd R 80, cited
*Reid v Hesselman* [1975] Tas SR 95, cited
*Schneider v Curtis* [1967] Qd R 300, cited

COUNSEL: A Boe (sol) for the applicant
B G Campbell for the respondent

SOLICITORS: Boe Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with McPherson JA that the application for leave to appeal should be dismissed for the reasons he gives.

[2] **McPHERSON JA:** At about 1.10 pm on 20 April 2002, Det Snr Const M G Andrews, who is the respondent to this application and the complainant in the magistrates court, went with other police officers to unit 241 at the Reef Palm Hotel at Cairns. They were making inquiries about a robbery which had recently taken place and had an "interest" in a Mr Prem Welch, who was staying in unit 241. They knocked on the door and were admitted by the female occupant. On entering the unit they saw cannabis and equipment for using or smoking it. In the ensuing search, they also located 39.1g of pure cocaine and some $3,100 in cash. Welch was later charged and convicted of possession of that drug on an indictment to which he pleaded guilty: *R v Welch* [2004] QCA 108.

[3] While the search was taking place, Welch arrived at the unit together with the applicant Henderson and another person. When the applicant saw the police there he turned aside as if to go away. However, another police officer Det Snr Const Michelle Clarke, who had been posted to watch for the arrival of Welch, asked the applicant to step inside the unit, which he did. He was asked if he had any money on him and produced a "bumbag" containing a bundle of $100 and $50 notes amounting in all to $5,350 together with a further $350 in cash from his person.

[4] Detective Clarke had earlier seen the group of three men arrive at the motel in a Toyota sedan driven by the applicant, who is a resident of Victoria. When questioned he claimed they had walked there, but Clarke's evidence on this point was later accepted by the learned judge, who characterised the applicant's assertion to the contrary as "a deliberate lie". The police went on to search the car, a procedure which was at first held up by the need to locate the key. It was found in the applicant's possession. In the boot of the vehicle, the police discovered a backpack bag, inside which was a smaller overnight bag. In it was a quantity of Australian currency amounting in total to $592,600. The applicant later suggested that the amount of money in the car had been larger, but in the end he specifically disclaimed any suggestion that the police had taken the shortfall. If true, it would only have served to increase the total amount in his possession.

[5] In addition to the money, some cannabis was also found in the boot of the car, together with utensils or "paraphernalia" associated with it. The applicant was in due course charged on a complaint by Det Andrews in the magistrates court at Cairns with offences in respect of all three of these items. It is, however, only with the third charge that we are concerned here. The details given in the bench charge sheet dated 7 May 2002 for that charge are "Possession etc of property suspected of being tainted property" under s 92(1) of *Crimes (Confiscation) Act 1989*.

[6] The provisions of s 92 of the Act will be considered later in these reasons. What is of immediate concern is the course of events that followed when this third charge of possession of tainted property came before the magistrates court at Cairns on 6 November 2002. On that occasion Sgt Lake appeared for the complainant and Mr McCreanor of counsel for the defendant Henderson, who is now the applicant in this Court. Mr McCreanor explained that he was proposing to object to the admission of prosecution evidence about the search of the car on the basis that in certain respects the provisions of the *Police Powers and Responsibilities Act 2000* had not been complied with, rendering the evidence inadmissible. There had evidently been some earlier discussion between the two legal representatives about the course to be followed, because Sgt Lake said he was concerned that, if the search of the vehicle was ruled out, it might also affect the evidence about the search and discoveries in the motel unit.

[7] Without rehearsing all of the submissions before the magistrate, the upshot was that something "in the nature of a voir dire" was conducted. The prosecutor called his witnesses and they were cross-examined by Mr McCreanor for the defence. Submissions were heard, after which the magistrate gave reasons for ruling that the evidence of the searches at the motel room and of the car should be excluded under the *Police Powers Act*. That being the case, Sgt Lake announced that:

> "an essential element of possession is unable to be established by the prosecution. I'm forced to offer no further evidence in respect of the matter, as it currently stands."

Mr McCreanor thereupon asked that the complaint be dismissed, and on 13 November 2002 the magistrate so ordered.

[8] From that decision, the complainant Det Andrews appealed to the District Court at Cairns pursuant to s 222 of the *Justices Act 1886*. The appeal came before his Honour Judge White, who on 16 May 2003 gave his decision after hearing submissions on the evidence as it stood before the magistrate to the effect that there had been an error of law; and that the magistrate should have admitted all relevant evidence against Henderson. On the hearing of the application before this Court, his Honour's decision on that issue has not been challenged by Henderson. After considering his worship's order dismissing the charge, his Honour decided that it should be set aside. Because of deficiencies in the provisions of the *Justices Act* relating to appeals under s 222, this Court in *R v His Honour Judge Dodds, ex p Smith and Graham* [1990] 2 Qd R 80, has held that in circumstances like those there is no procedure for remitting the complaint to the magistrates court. It must accordingly be heard and determined by the District Court itself in a rehearing on the original evidence, and also, if appropriate, on any new evidence adduced under s 223. See also *Paulger v Hall* [2003] 2 Qd R 294, 304-305. The necessity of having to follow that course was criticised by Holmes J in the latter case. If I may respectfully say so, her Honour's strictures on that aspect of the procedure in its

present form are plainly justified, and it is to be hoped that the legislature will take steps to rectify the omission.

[9] However that may be, his Honour Judge White then heard all the evidence tendered at the proceedings before him. On 30 October 2003 he gave his reasons for finding the applicant Henderson guilty of the third of the offences (possession of tainted property) charged against him in the bench charge sheet of 7 May 2002.

[10] Against that decision Henderson has now applied for leave to appeal to this Court under s 118(3) of the *District Court Act 1967*. The principal proposition urged by Mr Boe in support of the application is that the appeal to the District Court was incompetent, being as he submitted simply an appeal, or more accurately, an attempt to appeal, against what was really no more than an interlocutory ruling of the magistrate in the course of hearing the complaint in the primary court. The same or a similar submission had been advanced by Mr McCreanor of counsel in the appeal in the District Court before Judge White. His Honour rejected it in his reasons given on 15 May 2003 saying that the magistrate had made an order dismissing the complaint, which had had the effect of finally disposing of it. He held it was that order that was now the subject of the appeal to the District Court under s 222 of the *Justices Act 1886*, adding:

> "… there can be no doubt that the appellant seeks to have his worship's ruling as to the admissibility of evidence overturned; but in my view that is more properly characterised as a ground of appeal rather than the order appealed against."

[11] In my respectful opinion, his Honour's conclusion was correct. Section 222(1) of the *Justices Act* confers a right of appeal to the District Court on any person who:

> "… feels aggrieved as complainant ... by any order made by any justice … in a summary manner upon a complaint for an offence ...".

Reading s 222(1) with or even apart from the definition of "order" in s 4 of the *Justices Act*, it is plain that an appeal against an order that dismisses a complaint is authorised by s 222. It is also true that that would not have been so if it had been sought simply to appeal against the magistrate's ruling excluding the police evidence of the search for and discovery of the money in the boot of the car, or the amount found on Henderson in the motel room. At the stage at which that ruling was made, it was no more than an interlocutory ruling on an incidental question arising in the course of the hearing of the complaint. Despite the presence of some wide expressions in the definition of the word "order" in s 4 of the *Justices Act*, it has been held not to include an order on an application made during the course of the proceedings instituted by the complaint. See *Schneider v Curtis* [1967] Qd R 300, 305. It was an unsuccessful attempt to appeal under s 222 against a magistrate's ruling, given at the close of the complainant's case, that there was a case for the defendant to answer, which was held not to be an order disposing of the complaint, and therefore not an order "made … upon a complaint" within the meaning of s 222(1) of the *Justices Act* ([1967] Qd R 300, 306). The result might have been different if, following the magistrate's ruling and having elected to call no evidence, the defendant there had sustained a conviction on the evidence so far adduced in the magistrate's court. He might then have claimed to be a person aggrieved as defendant by his conviction "upon a complaint" for that offence. However, the appeal in that instance was instituted before the complaint had been disposed of by dismissing it or otherwise.

[12] The distinction between the two classes of case is neatly illustrated by the series of decisions in the Tasmanian Supreme Court associated with *Hesselman v Reid* [1973] Tas SR 93. In affiliation proceedings in the magistrates court, the complainant alleged that the defendant was the father of her child. At the request of the parties the magistrate ruled as a preliminary point on the question whether or not evidence was admissible of acts of sexual intercourse between the parties at a time when the male defendant was under 14 years of age. On the strength of s 18(3) of the Tasmanian Criminal Code (corresponding to the now repealed last sentence of s 29 of the Queensland Criminal Code), and, in the absence of evidence from the complainant, the magistrate dismissed the complaint. On appeal, the application to review was refused because, as Crawford J held ([1973] Tas SR 93 at 95), the order sought to be reviewed was not the magistrate's order dismissing the complaint; but only the evidentiary ruling of the magistrate. Nothing daunted, the complainant returned with a fresh application seeking a review of the order dismissing her complaint. On this occasion her application succeeded before Crawford J, who held that the application of s 18(3) of the Code was limited to criminal proceedings for sexual offences involving carnal knowledge, and did not extend to civil proceedings for maintenance of the child: see *Hesselman v Reid (No 2)* [1974] Tas SR 1, which was affirmed on appeal to the Full Court in *Reid v Hesselman* [1975] Tas SR 95.

[13] It might perhaps be said that if the magistrate's ruling in *Hesselman v Reid* had been correct, there would in law simply have been no evidence at all that could have been called in the complainant's case to prove her complaint that the defendant was the father of her child. He was, because of his age, irrebuttably presumed to be incapable of having had sexual intercourse with anyone. A case which more closely resembles the present is *Paulger v Hall* [2003] 2 Qd R 294, in which, after the magistrate had refused leave to amend the complaint for variance from the evidence adduced, the complainant called no further evidence and the complaint was dismissed. On an application to appeal, this Court upheld the decision of the District Court that the magistrate's discretion in refusing the amendment had miscarried, and rejected a submission that the appeal was simply an attempt to circumvent the prohibition on appealing against a ruling on an interlocutory matter in the course of hearing the complaint. Holmes J, with whose reasons McMurdo P agreed and Mackenzie J delivered concurring reasons, said it was central to her conclusion that at the time the complaint was dismissed a prima facie case had been made out of an offence under the relevant statutory provisions ([2003] 2 Qd R 294, 301).

[14] The same is true in the present matter. Had it not been for the magistrate's incorrect ruling that the evidence of the police search and seizure of the money and drugs in Henderson's car and of the money produced by him in the motel, the complainant here would have succeeded in establishing a prima facie case against him before the magistrate. Mr Boe, perhaps rather faintly, submitted that White DCJ was not justified in being satisfied beyond reasonable doubt that, leaving aside the sum of $375 in notes found on Henderson's person, it was reasonable to suspect that the whole of the amount of $597,950 was intended for use by Henderson in connection with the supply of cocaine in a trafficable quantity, and that the amount of $5,350 in the bumbag had originally been part of the total sum found in the boot of the car. It was within his Honour's power under s 119 of the *District Court Act* to draw such inferences on the appeal before him, and there was evidence on that hearing which plainly supported a conclusion to that effect. There was no explanation at any time of why the applicant should have had such a large sum in

cash in his possession apart from the inevitable and reasonable suspicion that it was being used to purchase drugs.

[15] There is nothing in the submissions on this issue of fact to persuade me that leave should be granted to appeal in order to challenge those findings. It was nevertheless submitted that at the hearing of the complaint before his Honour that some of the evidence on which those inferences were drawn had not been presented at the magistrate's court hearing even though it had been available to the prosecution at the time of that hearing. This, it was submitted, went to demonstrate that what the complainant had been seeking before White DCJ was to pursue an appeal against an incidental ruling that the evidence of the police search and seizure was inadmissible. The submission by Mr McCreanor to his Honour that the appeal was incompetent ought therefore to have succeeded. The appeal to the District Court under s 222 was, it was said, only competent if there was no other evidence available to the prosecution on the element of possession, and, in electing not to call that evidence before the magistrate, the position taken up by the police prosecutor therefore meant that there was no evidence available to support the charge. The magistrate's order dismissing the complaint was therefore correct.

[16] The evidence in question was that of Inspector Straatemeier and consisted of a statement or statements made to him by Henderson in the course of his later investigation of Henderson's complaint that the amount of money found in the boot of the car had originally been larger than $592,600 and that the balance was not accounted for. The fact, however, that the prosecution had other evidence that might or might not perhaps have sufficed to support the complaint did not deprive the complainant of the right to adduce the substantial evidence which he did have to prove that issue beyond reasonable doubt. The party upon whom the onus of proof lies is entitled to choose from the available evidence those parts of it as are best adapted to proving it, and, if that evidence is properly admissible, is not obliged to run the risk of relying on lesser or other proof of his case. Had the police prosecutor contented himself with adducing Inspector Straatemeier's testimony in place of the cogent evidence of search, finding and seizure in the car and in the motel unit, he might, for all we know, have failed to prove it. Moreover, in those circumstances, there having been a hearing on the merits, the defendant might reasonably have expected to obtain a certificate of dismissal of the complaint under s 700(1) of the Criminal Code, which under s 700(2) would be a bar to further prosecution of the same cause. In view of the uncertainties affecting the application of s 17 of the Code to offences prosecuted otherwise than on indictment (as to which, see Kennedy Allen's *Justices Acts (Queensland)*, 3rd ed, at 384-386), the prosecutor might reasonably not have wished to take the risk of calling only Inspector Straatemeier's testimony. A dismissal of the complaint on that evidence would have amounted to a dismissal on the merits inviting a certificate barring a further prosecution for that offence.

[17] It is, in any event, not necessary to pursue that question on this occasion. For I am satisfied that Mr Boe's submission on the point is misconceived. The basic rule is that, on a final judgment (which dismissal of the complaint in this instance was), all points raised in the course of the case are open to the unsuccessful party, and any interlocutory order can be challenged on an appeal against that final judgment. In approving this proposition in *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, 483, Gaudron, McHugh and Hayne JJ added only the qualification that the interlocutory order sought to be corrected on appeal must be one that "affected the

final result". The final result here was the dismissal of the complaint, which was an order that was made on the application of Mr McCreanor for the defendant Henderson.

[18] It is not a function of this Court to undertake the task of attempting to decide whether there was evidence available to the prosecution which, if it had been adduced, might successfully have filled the gap in proof created by the erroneous ruling on inadmissibility; nor is it a function of the Court to try to analyse the reasons why that evidence might not have been adduced before the magistrate after the critical ruling was made. In many, perhaps most, cases an appellate court would not and could not be sufficiently possessed of all the facts needed to make any such assessment. The only reason it now has some of them in the present case is because of the deficiency earlier mentioned in the provisions of s 222 which, unlike the former procedure by way of order to review under the now repealed s 209 of the *Justices Act*, does not authorise the court on allowing the appeal to remit it to the magistrate's court for hearing and determination according to law. Until that deficiency is cured by legislative amendment, the sanctions that exist against any potential for abuse occasioned by the prosecution suffering its complaint to be dismissed after an adverse interlocutory ruling, and then appealing under s 222, is the risk that on appeal it may fail to show that the ruling was wrong in law or that it affected the final result; and also that a certificate of dismissal may be issued under s 700 of the Code, which would put an end to all possibility of further proceedings for the same offence. That, for the reasons given, is not the case here.

[19] In my opinion, the application for leave to appeal against the order of the District Court made on 30 October 2003 convicting the applicant of the third offence charged in the complaint dated 7 May 2002 should be dismissed.

[20] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of McPherson JA and there is nothing I wish to add thereto. I agree that for those reasons the application for leave to appeal should be dismissed.