SUPREME COURT OF QUEENSLAND

CITATION:	*Koomans v Muller* [2005] QCA 37
PARTIES:	**KOOMANS, Robert Clive** **(applicant)** **v** **MULLER, Mark** **(respondent)**
FILE NO/S:	CA No 343 of 2004 DC No 356 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2005
JUDGES:	de Jersey CJ, Jerrard JA, Mackenzie J Separate reasons for judgment of each member of the Court, de Jersey CJ and Mackenzie J concurring as to the order made, Jerrard JA dissenting
ORDER:	**Leave to appeal against Conviction refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – POWER TO DISMISS APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – GENERAL PRINCIPLES – application for leave to appeal - where applicant convicted by Magistrate of driving without due care and attention – where appeal to District Court unsuccessful – where grounds for appeal to District Court concerned factual issues – whether there has been a miscarriage of justice warranting a further appeal *Derrick v Cheung* (2001) 181 ALR 301, cited *Devries v Australian National Railways Commission* (1993) 177 CLR 472, cited *M v R* (1994) 181 CLR 487, cited
COUNSEL:	The applicant appeared on his own behalf M J Copley for the respondent
SOLICITORS:	The applicant appeared on his own behalf

Director of Public Prosecutions (Queensland) for the respondent

[1] **dE JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Mackenzie J with which I agree.

[2] This is an application for leave to appeal, brought under s 118 of the *District Court of Queensland Act* 1967 (Qld). Of the range of circumstances justifying a grant of leave, only two could arguably be relevant here – that the judgment of the District Court was wrong, or that there is a substantial risk that justice has miscarried. In my view, neither of those situations arises.

[3] The applicant, who appeared unrepresented before this court, essentially urged that on the evidence of the witnesses called for the prosecution, the collision could not have occurred in the manner for which the prosecution contended – that is, with Ms Wilson's vehicle having been stationary and protruding onto the carriageway for an appreciable period before the collision. In advancing his own version, which was that Ms Wilson turned right in front of his vehicle when it was only two or three car lengths away, as being the only acceptable account, the applicant relied heavily on time, distance and speed estimations. The judgment of the Magistrate depended more, however, on the witnesses' descriptions of the relative positions of the vehicles and their behaviour, and to the extent that such estimates may not have sat comfortably with the Magistrate's conclusion, she is to be taken to have attributed them correspondingly less weight. Such estimates are not necessarily reliable, and the Magistrate would have been alive to that. The Magistrate was entitled to accept the account given by Mr Simpson, and that account gained support from other prosecution evidence.

[4] As to whether the applicant was entitled to assume that Mr Simpson would continue on into the driveway, the issue raised in the reasons for judgment of Jerrard JA, my view is that once the Magistrate found that Mr Simpson's vehicle was stationary for some appreciable period prior to the collision, it followed that an observant approaching motorist would have noted that circumstance and proceeded with increased caution.

[5] I agree with Mackenzie J that the application for leave to appeal should be refused.

[6] **JERRARD JA:** In this application I have read and respectfully differ from the reasons for judgment and order proposed by Mackenzie J, and would instead grant Mr Koomans leave to appeal. That is because in my opinion the judgments below demonstrate that there is a serious risk that a miscarriage of justice has occurred.

[7] I gratefully adopt the statement of relevant facts which appears in the judgment of Mackenzie J. Those described the evidence on which Mr Koomans was convicted of driving without due care and attention. The Magistrate found that he was travelling at a slow speed, although it is not clear if the Magistrate meant that Mr Koomans was travelling at a slow speed at all times, or when his vehicle was sliding out of control on the wet road surface after he had braked and just prior to colliding with Ms Wilson's car. The latter seems likely, because the Magistrate also found that Mr Koomans may have been travelling at or a bit higher than 40 kilometres per

hour but certainly not at 25 kilometres per hour. That finding was open on the evidence.

[8] The Magistrate also found that the collision occurred because Mr Koomans was travelling at a speed where it was difficult for him to stop in the wet weather, and that he was travelling at a speed where he could not control his vehicle properly. I respectfully consider that those findings do describe driving without due care and attention, but that they are ones which were not open to the learned Magistrate to find on the evidence presented. That is because I consider that in this matter those findings are inextricably interwoven with the Magistrate's further finding, expressed to be of satisfaction that Mr Koomans made an inadvertent error of judgment, which was that he inadvertently wrongly presumed that Ms Wilson's car was going to immediately leave the roadway and that when it did not do so, he was unable to stop his car.

[9] That last finding does not describe any error of judgment by Mr Koomans. It was rational for him to presume that Ms Wilson's vehicle would immediately leave the roadway. That is what she expected she would do. It would only be negligent for Mr Koomans to assume she would do that if he either was, or should have been, able to see that Ms Wilson's further progress into the driveway was blocked by the other vehicle, or otherwise learn that it was blocked. There was no evidence from which that could safely be inferred against him.

[10] Instead, what the evidence showed was that by the time he realised her vehicle was not going to do what he expected it would, and what she wanted it to do, it was too late for him to be able to bring his vehicle safely to a stop in the wet conditions then applying. I do not see how the Magistrate could find, nor how the District Court judge could uphold the conclusion, that he had driven without due care and attention without a finding that he realised, or should have realised, that Ms Wilson's path into the driveway was blocked while he still had sufficient time to avoid the collision. Until the moment occurred when he could see or infer that her pathway was blocked, the last thing he would expect would be that a portion of her vehicle would remain obstructing the carriageway. It would not be until that moment occurred that a driver exercising due care would realise a collision was inevitable unless that driver took evasive action, including braking. To say that he should have slowed down earlier and before he could or should have seen she was obstructed would be to require a degree of defensive driving which would usually be unnecessary and would tend to bring traffic to a standstill.[1]

[11] In *Derrick v Cheung* (2001) 181 ALR 301 the joint judgment in the High Court held at [13]:

> "Even if the inference which the trial judge drew, that if the appellant's speed had been slower by a few kilometres per hour she would have been able to avoid the collision, was more than mere speculation, it is still not an inference upon which a finding of negligence could be based. Few occurrences in human affairs, in retrospect, can be said to have been, in absolute terms, inevitable. Different conduct on the part of those involved in them almost always would have produced a different result. But the possibility of

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[1] An expression used by Clarke JA in *Government Insurance Office of New South Wales v Ergul* (1993) Aust Torts Reports 81-252 at 62,640

> a different result is not the issue and does not represent the proper test for negligence. That test remains whether the plaintiff has proved that the defendant, who owed a duty of care, has not acted in accordance with reasonable care."

[12] Until obstruction or driver fault by Ms Wilson was apparent, the possibility that Ms Wilson's car would remain on the roadway was a remote one against which it would have been unreasonable to take precautions, provided that Mr Koomans had not been alerted to the fact of her being obstructed. The evidence did not demonstrate that and Mr Koomans is clearly distressed by a conviction which I agree is unjust and I would accordingly grant leave to appeal and allow the appeal.

[13] **MACKENZIE J:** This is an application for leave to appeal under s 118 of the *District Court of Queensland Act* 1967 (Qld) from a decision of a District Court Judge who dismissed an appeal against a decision of a Magistrate. The applicant was charged with driving without due care and attention. He was convicted and fined $300 and ordered to pay costs and witness expenses amounting to about $190.

[14] When the applicant's vehicle was travelling along Glenala Road, Durack, it collided with the rear of a vehicle driven by Ms Wilson. It is common ground that Ms Wilson was attempting to enter an off street parking area and that the rear of her vehicle was protruding slightly onto the roadway at the time of the collision. Her evidence was that she was in that situation because entry to the car park had been blocked by a van which unexpectedly attempted to exit while Ms Wilson was trying to enter.

[15] She had just dropped her child at school across the road. One critical issue before the Magistrate was whether, as the applicant claimed, Ms Wilson suddenly turned right into the driveway in front of his vehicle when he was only two or three car lengths from her or whether, as Ms Wilson claimed, she had turned right when there was no danger and had been stationary with the rear of her vehicle protruding onto the roadway for some seconds before the collision occurred. She gave evidence that she had, before the collision, blown the horn of her vehicle after it had become stationary and that she had gesticulated at the van driver. Ms Wilson's version of how she performed the manoeuvre of pulling out from where she had been parked and turning right into the driveway was supported by Mr Simpson, the driver of a four wheel drive that had been parked on the same side of the road as she had been parked when letting her child out. He also heard her blow the horn. Another witness saw her waving her hands about after her vehicle had become stationary.

[16] There were other witnesses whose attention had been attracted by the screeching of tyres of the applicant's vehicle. The Magistrate observed that their evidence was limited to the time just immediately prior to the collision. By the time they began observing it, the incident was "in more than mid-swing".

[17] There was also evidence from Ms Wilson that the applicant immediately made statements after the incident that were inconsistent with his evidence. In particular she gave evidence that she said to him "Why didn't you go around me or stop?". He replied "I thought you were going to pull into the driveway". She also said that he had said to her "Why were you just sitting in the driveway?". The Magistrate noted Ms Wilson's observation that he did not say "Why did you pull out in front of me?". Another witness, Ms Robinson, gave evidence that the applicant said, at the

scene "It's alright. It's my fault, but I've only got minor damage, a couple of broken lights. There's not much damage and I've got insurance". The applicant denies that he admitted liability at the scene. There is no express finding by the Magistrate that she accepted one version in preference to another on this issue.

[18] In her reasons the Magistrate said that she accepted the evidence of Ms Wilson and Mr Simpson that Ms Wilson had been stationary for some time with just the back quarter of her car in the roadway. She said she did not accept the applicant's version that Ms Wilson pulled out about two and a half car lengths ahead of him and that this caused the collision. She criticised Ms Wilson for making the manoeuvre but found that she had been stationary for at least five seconds and that the collision occurred because the applicant was travelling at a speed where it was difficult for him to stop in the wet conditions then prevailing. She did not accept his evidence that he was travelling at 25 kilometres per hour, on the basis of observations of eyewitnesses as to the behaviour of the vehicle after the brakes had been applied. The applicant had sought to discredit the evidence about speed and braking distances by mathematical and graphical means.

[19] The critical finding of fact was that the applicant had in effect, failed to avoid the vehicle driven by Ms Wilson which was protruding into the roadway. He did not brake in time to avoid colliding with it. Once it was accepted that Ms Wilson's vehicle had been stationary for an appreciable time, it is difficult to avoid the conclusion that what the Magistrate characterised as an inadvertent error of judgment consisting of a mistaken assumption that Ms Wilson's vehicle would proceed off the road and into the parking area which persisted until it was too late to stop, was a failure to drive without due care and attention.

[20] As the conclusion is dependent on a finding of fact which involved credibility, the appellant had a difficult task if he was to succeed in his appeal to the District Court. Where credibility is the critical issue and the Magistrate has made findings based on credibility an appellant cannot succeed unless it can be shown that the Magistrate has failed to use or has misused her advantage in seeing the witnesses or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or made a finding that was glaringly improbable (*Devries v Australian National Railways Commission* (1993) 177 CLR 472).

[21] On appeal to the District Court, where the applicant conducted his own case, as he had in the Magistrates Court, he alleged that the Magistrate had erred in a number of respects set out in detail in the notice of appeal and the outline of argument which appear in the record. (These were repeated and amplified in the written submissions before this court). The ground of appeal taken by him was that the Magistrate had, in all the circumstances and based upon the available evidence, erred in finding that he was guilty beyond reasonable doubt of driving without due care and attention. The District Court Judge accepted that the appropriate legal test was in accordance with *Devries v Australian National Railways Commission*.

[22] With regard to the evidence concerning speed, the District Court Judge recited the evidence and observed that it was imprecise. However, she said that it was not necessary that there be a finding of excessive speed before the appellant could be convicted of the charge. She said that the finding central to the conviction was that Ms Wilson's vehicle was stationary in the driveway for a considerable time before the collision and that that finding was open on the evidence. She also said that the

finding that the applicant had made an inadvertent error of judgment in that, "by the time he realised Ms Wilson's path into the driveway was blocked and that she was unable to proceed, he did not have sufficient time to avoid the collision" was open to the Magistrate and was not a finding that was inconsistent with facts incontrovertibly established by the evidence or glaringly improbable.

[23] Attribution to the applicant of a realisation that Ms Wilson's path into the driveway was blocked overstates both what the evidence establishes and what the Magistrate found. The Magistrate had put it no higher than that, as a matter of fact rather than knowledge by him, Ms Wilson could not move forward because her path was blocked. However, this is not a fatal inaccuracy. Even on the Magistrate's findings, which were open to her for reasons stated earlier, there was a basis for finding the charge proved.

[24] The District Court Judge also referred to a number of matters of detail challenged by the applicant on appeal before her. She concluded by saying that, in addition to considering each of the specific arguments raised by the appellant, she had read the transcript of the proceedings in the Magistrates Court in order to answer the question whether on the whole of the evidence before the Court it was open to the Magistrate to be satisfied beyond reasonable doubt as to the appellant's guilt. That formulation echoes the test laid down in *M v R* (1994) 181 CLR 487. She said that, having done that exercise, she was satisfied that the Magistrate could have been satisfied beyond reasonable doubt as to the applicant's guilt.

[25] The difficulty facing the applicant in this court is that he has had an unsuccessful appeal to the District Court on issues which are essentially factual issues. It is not a case where any important principle of law is involved. Nor is it otherwise of a character where there are grounds to be concerned that there has been a miscarriage of justice. Accordingly I would refuse leave to appeal.