SUPREME COURT OF QUEENSLAND

CITATION:	*Labaj v Brown & Anor* [2005] QCA 54
PARTIES:	**JOHN LABAJ** (appellant/applicant) **v** **MARK BROWN** (first respondent/respondent) **BRISBANE CITY COUNCIL** (first respondent/first respondent)
FILE NO/S:	Appeal No 403 of 2004 DC No 2001 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	7 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2004
JUDGES:	McMurdo P, Keane JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal dismissed with costs to be assessed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – where applicant elected to contest infringement notice given under local law in Magistrates Court – where Magistrate imposed additional penalty for bringing matter to court – where appeal to District Court dismissed – where contends he was subjected to double punishment – where contends that sentence is manifestly excessive – whether leave to appeal should be granted *Brisbane City Local Law (Keeping and Control of Animals)* 1997, s 4, s 27 (1)
COUNSEL:	B P Marais for the applicant P Smith for the respondent

SOLICITORS: The applicant appeared on his own behalf
Brisbane City Legal Practice for the respondent

THE PRESIDENT: On 30 July 2003, Mr Labaj was walking his dog in Wynnum. The dog was not on a lead. Mr Mark Farmer, a Local Laws Officer, approached Mr Labaj at about 8.35 a.m. Mr Labaj was five or 10 metres away from the dog. Mr Labaj admitted the dog was his and said that he thought it was unnecessary to have the dog on a leash if the dog was near him. The road was not a designated off-leash area.

Mr Farmer issued a prescribed infringement notice under the Local Law. It is an offence under s 27(1), Div 1, Pt 3 of the Local Law (Keeping And Control of Animals) 1997 to bring or permit an animal to be brought into a public place unless the animal is under the keeper's effective control. Under s 4 of the Local Law a dog is under effective control only if, relevantly, a person who is physically able to control the dog is holding the dog by a leash or chain not more than two metres long. The Brisbane City Council has power to make local laws under s 27 *Local Government Act* 1993 (Qld).

Mr Labaj contested the infringement notice and the matter was heard in the Magistrates Court. In submissions to the magistrate, Mr Labaj, who was self-represented, stated that he elected to have the matter brought before court and to contest it. In his submissions after the close of evidence he contended that he had performed part of a 12 hour community service order under enforcement order number 6349563 issued on

1 December 2003 requiring him to perform 12 hours of community service issued under the *State Penalties Enforcement Act* 1999 (Qld) ("SPER") so that he had already completed three hours of that community service which was relevant to a penalty for the offence under the Local Law relating to his dog. Mr Labaj argued that he should not be convicted, first, because he had not committed an offence under the Local Law and, second, because he had already been punished having completed three of a 12 hour community service order in respect of it.

The magistrate rejected both contentions. He found on the first claim that the undisputed facts constituted an offence against the Local Law. On the second contention, he found that, on the evidence before him, Mr Labaj had not been previously punished for the offence, because, on his own evidence, from the time he was charged with the offence, he had elected to dispute it. The magistrate said he was prepared to accept Mr Labaj may have done an additional three hours community service and he took that into account in determining the sentence. He also noted that he was entitled to impose an additional penalty because Mr Labaj elected to bring the matter to court. The magistrate convicted and fined Mr Labaj $200 and ordered him to pay $66 costs of court and $1,000 professional costs, in default 20 days imprisonment with 12 months to pay.

Mr Labaj appealed to the District Court under s 222 *Justices Act* 1886 (Qld) on the grounds that, first, he was put in double jeopardy and had been twice punished for the same

offence and, second, that the sentence was manifestly excessive. His appeal was dismissed but no order was made as to costs.

He now applies for leave under s 118 *District Court Act* 1967 (Qld) to appeal from the District Court decision dismissing his appeal. He contends that the primary judge failed to address all his grounds of appeal, that he erred in interpreting points of law, particularly s 17 of the *Criminal Code*, erred in interpreting facts and that the judge failed to give him procedural fairness and natural justice.

He is today represented by Mr Marais of counsel and pursues only the grounds of appeal concerning, first, the prohibition on double punishment under s 16 *Criminal Code* and, second, that the judge erred in not finding the sentence imposed by the magistrate was manifestly excessive. In developing the second ground, Mr Marais contends that the magistrate wrongly imposed a heavier penalty because Mr Labaj elected to bring the matter to court and further erred in taking into account the three hours of community service in determining the sentence.

There was no evidence in the Magistrates Court proceedings that Mr Labaj completed community service work under SPER in respect of the offence against the Local Law. The learned primary judge in hearing the appeal allowed the issue to be raised for the first time on the appeal and to hear further evidence on it. An affidavit from Mr Heffernan, the community

corrections officer assigned to Mr Labaj at relevant times, was filed. He was assigned to supervise Mr Labaj's performance of community service for a fine option order for a speeding offence and for a fine issued by the Brisbane City Council ("the dog fine"). He met with Mr Labaj on 28 January 2004. Mr Labaj was adamant that he would not perform any community service for the dog fine as he was going to fight that matter in court. Mr Labaj indicated that he wished to comply with the fine option order for the speeding offence. Mr Heffernan drafted a community service work instruction for the speeding fine but did not do so for the fine option order for the dog fine. An exhibit tendered before the District Court judge showed that the fine option order for the dog fine matter was administratively cancelled. Mr Heffernan also gave oral evidence to this effect at the District Court appeal. Mr Labaj also gave evidence.

The learned primary judge accepted Mr Heffernan's version of events and found that the community service performed by Mr Labaj was carried out only in relation to the speeding fine and not for the dog fine. His Honour also found that any additional community service hours worked by Mr Labaj were not in respect of the dog fine but were completed by him voluntarily. His Honour concluded that Mr Labaj had not been twice punished for the same offence and that the sentence imposed of a $200 fine with costs was not manifestly excessive.

His Honour's finding that Mr Labaj has not done community service on the dog fine was plainly open on the evidence. It follows that he has not been twice punished for the same criminal acts. Mr Labaj has no real prospects of succeeding on any appeal on that basis.

I turn now to Mr Marais' contention that the judge should have found the sentence manifestly excessive. Mr Marais states that the learned judge should have found the magistrate erred in taking into account the three hours of community service and for that reason the application for leave to appeal should be allowed. The magistrate did not find as a fact that the community service was done as formal punishment for this offence but took it into account in a general way in determining the sentence imposed. This was not necessarily an error and in any case can only have favoured Mr Labaj.

His Honour specifically disavowed the concept stated by the magistrate that someone should be additionally punished for exercising their right to go to trial but, in any case, found that the sentence imposed by the magistrate was not manifestly excessive. That was plainly correct.

Neither of the points raised by Mr Marais as to the grounds of appeal that the sentence was manifestly excessive and the District Court judge erred in not setting it aside and imposing a lesser penalty have merit.

As none of the points raised by Mr Marais give rise to arguable grounds of appeal the application for leave to appeal should be dismissed with costs to be assessed.

KEANE JA: I agree with the orders proposed by the learned President for the reasons which she has given.

DOUGLAS J: I also agree.

THE PRESIDENT: That is the order of the Court.
