SUPREME COURT OF QUEENSLAND

CITATION:	*Martinsen v Favero* [2005] QCA 69
PARTIES:	**JEFFREY DALE MARTINSEN** (defendant/applicant) **v** **TANYA FAVERO** (plaintiff/respondent)
FILE NO/S:	CA No 227 of 2004 DC No 4225 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	16 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	16 March 2005
JUDGES:	McPherson JA, Fryberg and Holmes JJ Separate reasons for judgement of each member of the Court, McPherson JA and Holmes J concurring as to the orders made, Fryberg J dissenting
ORDER:	**1. Application for leave to appeal dismissed.** **2. Applicant to pay the costs of and incidental to the application for leave to appeal.**
CATCHWORDS:	TRAFFIC LAW – TRANSPORT CO-ORDINATION AND REGULATION LEGISLATION – QUEENSLAND – STATE TRANSPORT ACT AND OTHER LEGISLATION – where applicant was convicted of an offence of contravening a direction given by an official traffic sign under the *Transport Management (Road Use Management) Act* 1995 (Qld), s 74 – where *Transport Management (Road Use Management) Act* 1995 (Qld), s 102 requires an official traffic sign at every road entry to the traffic area – where some road signs partly obscured by foliage - whether s 102 complied with – whether there was an offence not known to law – whether applicant received a fair trial *District Court Act of Queensland Act* 1967 (Qld), s 118 *Transport Operations (Road Use Management) Act* 1995

	(Qld), s 74, s 74A, s 102, s 124(1)(s), Schedule 4
COUNSEL:	BP Marais for the appellant AW Duffy for the respondent
SOLICITORS:	The applicant appeared on his own behalf Brisbane City Legal Practice for the respondent

HOLMES J: The applicant for leave to appeal was convicted of an offence under s 74 of the Transport Operations (Road Use Management) Act 1995 of contravening a direction given by an official traffic sign. The facts, which were not in dispute, were that he parked his vehicle for a period of three hours in Russell Street, South Brisbane.

What was at issue in the Magistrates Court was whether Russell Street was in a traffic area regulated by official traffic signs within the meaning of s 102 of the Act. Section 102(3) provides:

> "A Local Government may install an official traffic sign applying to parking throughout a traffic area only if the boundaries of the traffic area have been defined under a local law and the sign is installed on the road at every road entry to the traffic area."

The boundaries of the Brisbane central traffic area, within which Russell Street falls, have been defined by Brisbane City Council local law number 14, Parking and Control of Traffic. The issue was whether the official traffic sign applying to parking throughout that area had been installed on the road at every entry.

The Magistrate accepted the evidence of a local laws officer, Mr Campbell, that signs indicating the central traffic area were on every major and minor road leading into it. The

applicant adduced evidence to show that two of the entrance signs were obscured by foliage, that in one instance there were two such signs, of which one was facing the wrong way and that an exit sign which read "2P end" was conceivably misleading as to which direction of travel it applied to.

I will endeavour to address the points, as I understand them, which were argued here but also those which were included in the applicant's written submissions. The chief argument was that s 102(3)(b) required installation of both signs indicating entry into the Brisbane traffic area and signs indicating exit. Those are the "End 2P area" signs. The Magistrate rejected the argument, concluding that the official traffic signs which were requisite were those indicating entry.

The argument was based on passages from the Department of Main Roads Manual of Uniform Traffic Control Devices. Section 72A of the Transport Operations (Road Use Management) Act requires an official traffic sign to be installed in a way specified by the Manual. An official traffic sign is defined in schedule 4 to the Act as meaning "a sign, marking, light or device placed or erected to regulate, warn or guide traffic".

The Manual in section 5 deals with area parking control signs. Section 5 contains a general passage about area parking control signs and their purpose and goes on to say that they "operate using an entry and exit signing system which defines the boundary of a controlled area". That is in part what the

applicant relies on, as well as other parts of the manual which deal with area parking control signs.

But, in fact, section 5, in its terms observes a distinction between parking control areas at large and those which fall under the Transport Operations (Road Use Management) Act. The last paragraph of section 5.1 deals with the latter. It says this:

> "Official traffic signs must be installed on every road where the area boundary crosses it. These signs must display the name of the area, the hours and days of the week that regulated parking applies, and the maximum period of time for which a vehicle may be parked in such parking area during these hours and on those days unless otherwise signed."

Clearly enough, that is a reference to the entry signs which specify the Brisbane parking area, give the times at which parking may occur and stipulate the maximum period of parking time. It is self-evident that the "End 2P" signs do not meet that description.

There was a question as to whether the existence of foliage in front of two of the signs meant that they did not display the required features. I would not be inclined to the view that the mere existence of some foliage in the way of reading the sign actually meant that the sign itself did not display what was required, but whatever view one takes of that, it is hardly a question which would warrant the granting of leave to appeal.

Returning for a moment to the question of whether the "End 2P" signs were required, construction of s 102 itself indicates to the contrary. Those signs can hardly be described as official traffic signs indicating how parking is regulated, much less one applying to parking through a traffic area. The "End 2P" sign is nothing more than a sign placed for the convenience and information of motorists. There is nothing in that point which would warrant leave being given.

There was another point raised on behalf of the applicant, that the complainant had not shown that the signs were repaired, maintained, managed and controlled, and that was essential to installation. That comes from the definition in s 67 of "install" which is said to mean "construct, make, mark, place or erect or affix to or paint on any structure, and repair, maintain, manage and control".

In my view, that is a misconstruction of the definition which, in fact, contains a series of alternatives. My view is that each of those activities amounts to installing, so that what Local Government may do under s 102 extends to all of them. It does not follow that each of them must be undertaken before installation has taken place. Patently once a sign is up it is installed, whether there has yet been any occasion for repair, maintenance, management or control. As the learned District Court Judge observed, a construction which would mean that the central traffic area came and went with the whim of graffiti artists is an absurd one, which reinforces me in the view I take of the definition section.

Even if that were not so, there still remains an argument about whether the failure to cut foliage was a failure to maintain, but even if one assumes a failure to maintain, it is not, again, a matter on which leave ought to be granted here for an appeal.

The learned District Court Judge, in my view, correctly concluded that the Magistrate's finding that there had been compliance with s 102(3)(b) of the Act was supported by the evidence. The Magistrate was clearly entitled to rely on the evidence of Mr Campbell in that regard.

The learned Judge referred in his judgment to s 124(1)(s) which, among other things, makes an allegation in a complaint that a sign is an official traffic sign prima facie evidence. He did nothing more than make that reference and there was no error in that. What he said was entirely correct. It does not seem to have any bearing on the correctness of the Magistrate's decision.

There was an argument that the complaint contained an offence not known to the law because it was alleged that he contravened a direction given by a traffic sign while s 74 refers to an indication. "Indication" is defined in schedule 4 to the Act as including a direction on an official traffic sign. Again, I am inclined to the view that the signs do, in fact, give a direction about the parking arrangements for the area but, in any event, there is in my view, nothing in this point which would warrant appeal.

And there was a contention as to whether the applicant received a fair trial. The complaint seems to be that because the Magistrate, at the end of the Crown case, informed him there was a case to answer without inviting submissions on the point, and then went on to explain there was an option to give evidence, that he was forced into giving evidence and thus being cross-examined. At some point the applicant described himself as unaware that the prosecution would examine him. That does, as the District Court Judge said in his judgment, seem a bit hard to fathom given that he had undertaken cross-examination.

But the only thing that seems to arise out of that is that in the course of cross-examination it emerged that he had not entered the Brisbane traffic area by any route which took him past a misleading sign. It was suggested that that caused the Magistrate to focus on the subjective effect of the sign, as did the District Court Judge. In fact, both the Magistrate and the District Court Judge observed that the alleged deficiencies had not contributed to the applicant's commission of the offence, and that was perfectly correct, but neither suggested that it bore on whether the offence could be made out, and both dealt properly with the issues of whether the central traffic area was properly signed, whether the charge was properly drawn and so on.

There was a question raised about the costs in the Magistrates Court and the District Court. Nothing has been pointed to which would warrant anything other than the usual orders being

made in both Courts. I would dismiss the appeal for leave to appeal.

McPHERSON JA: I agree.

FRYBERG J: The argument on this application raises one point of sufficient general importance in my judgment to warrant the grant of leave. That is, whether and to what extent there is non-compliance with section 102(3)(b) of the Transport Operations (Road Use Management) Act 1995 by reason of the failure of a local government to maintain a sign.

Whether or not the word "and" means "or" in the definition of "install" in section 67 of that Act, it is very arguable that the meaning "maintain" can be read into sections 102(3)(b) and 72A of that Act.

If that is so it may follow that a sign is not properly maintained if it is obscured. That is because section 72A requires a sign to be installed, that is, maintained, in accordance with the Manual of Uniform Traffic Control Devices. That, in turn, requires that signs display various matters. Allowing a sign to be obscured may mean it does not display the information as required.

In my judgment that point is of sufficient importance to warrant the grant of leave. Otherwise, I agree with what Justice Holmes has said.

McPHERSON JA: That application for leave to appeal is refused.

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McPHERSON JA: The order will be that the applicant in this Court is to pay the costs of and incidental to the application for leave to appeal.
