

# SUPREME COURT OF QUEENSLAND

CITATION: *Grubert v Sheret* [2010] QCA 16

PARTIES: **GRUBERT, Josef**  
(appellant/applicant)  
v  
**SHERET, Olina Viktorivna**  
(respondent)

FILE NO/S: CA No 186 of 2009  
DC No 5 of 2009

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 12 February 2010

DELIVERED AT: Brisbane

HEARING DATE: 5 February 2010

JUDGES: McMurdo P, Muir 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.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL –  
APPEAL – PRACTICE AND PROCEDURE –  
QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF  
COURT – when by virtue of s 118(3) of the *District Court of  
Queensland Act 1967* (Qld) the applicant required leave of  
the Court before his appeal – where the applicant was found  
guilty of assaulting the complainant in the Magistrates Court  
– where the applicant appealed to the District Court – where  
the District Court judge dismissed the applicant’s appeal to  
that Court – where the applicant alleged that the decision of  
the District Court was occasioned by several errors – whether  
leave to appeal should be granted

CRIMINAL LAW – PROCEDURE – POWERS AND  
DUTIES OF PROSECUTION AS TO CALLING OF  
WITNESSES AND PRESENTING EVIDENCE – NOTICE  
AND DISCLOSURE TO ACCUSED – where the  
prosecution did not disclose the criminal history and medical  
records of the complainant – whether an appeal is necessary  
to correct a substantial injustice to the applicant

COUNSEL: The applicant appeared on his own behalf  
M B Lehane for the respondent

SOLICITORS: The applicant appeared on his own behalf  
Director of Public Prosecutions (Queensland) for the  
respondent

- [1] **McMURDO P:** The applicant has not demonstrated any reason why this Court should grant leave to appeal. I agree with the reasons of Douglas J. The application for leave to appeal should be dismissed.
- [2] **MUIR JA:** I agree with the reasons of Douglas J and with his proposed order.
- [3] **DOUGLAS J:** This is an application for leave to appeal from a decision of the District Court exercising its jurisdiction to hear an appeal from a decision of the Magistrates Court pursuant to s 222 of the *Justices Act 1886* (Qld).
- [4] In the Magistrates Court the applicant had been found guilty of assault. No conviction was recorded but he was placed on a recognisance in the sum of \$500 to be of good behaviour for three months and ordered to pay the complainant the sum of \$100 by way of compensation.
- [5] It is clear that there was evidence available to the magistrate permitting her to find the applicant guilty of the offence of which he had been charged. The learned magistrate also considered the possible defences available to the applicant and formed the view that none of them applied.
- [6] The evidence accepted was that the complainant was cutting grass with a line trimmer or whipper snipper near a creek at Milton Street, Norman Park on land which belonged to the Brisbane City Council. The applicant had three boats moored in the creek and approached the complainant at a pace that was faster than walking pace, grabbing hold of the whipper snipper with such force that the complainant fell backwards, landing with his back on the ground. The applicant fell over with the complainant and was subsequently positioned on top of him with his knees on the complainant's chest. Both men were still holding the whipper snipper. A struggle ensued and the whipper snipper was moved across the complainant's face and torso in the course of the struggle causing scratching and lacerations to him.
- [7] The learned District Court judge hearing the appeal considered the evidence carefully and the submissions made by the applicant. They included arguments that the magistrate's decision was not reasonably open, that the magistrate was biased in favour of the prosecution, that the police had not made adequate disclosure to him, that the prosecution failed to provide him with a fair trial and that there was no prima facie case against him because of conflicts in statements made by the complainant. He also contended that a forensic expert should have been called by the prosecution and raised an issue as to whether the complainant had consented to the assault.
- [8] His Honour considered those arguments having reviewed the entire transcript and the lengthy submissions of the appellant. He dismissed the appeal. In particular he noted that, in his view, on his perusal of the transcript, the learned magistrate

endeavoured to assist the appellant in the conduct of his case to the extent to which she could. From my perusal of the transcript that appears to be the case also.

- [9] The main argument relating to the alleged lack of disclosure by the prosecution related to the criminal history of the complainant. That material was not provided to him. It has been provided to this court and reveals that he was convicted and fined \$15 for disorderly behaviour in December 1972 and was ordered to serve 100 hours community service without the recording of a conviction for the production of a dangerous drug and what appeared to be associated similar offences in August 1994 for events occurring on 8 June 1994.
- [10] There was no cross-examination by the applicant of the complainant as to his character as it might have been revealed by his criminal history. The applicant also admitted that he approached the complainant and grabbed the whipper snipper because of concerns he had about soil erosion; see R123 1.7 and R194 1.5. In other words the essential facts relevant to the charge of assault were not seriously disputed. The availability of some potential defences and the origin of the complainant's injuries appear to have been the main issues discussed. In the circumstances the complainant's credibility was not a significant issue. The failure of the prosecution to disclose his criminal record would not have had an effect on the decision of those issues. There was also a complaint that some of the complainant's medical records had not been disclosed. It was not clear to what extent the prosecution was in a position to disclose those records but their absence again was not shown to have been likely to have made any significant difference to the evidence that was led.
- [11] It can be seen, therefore, that the issues both before the learned magistrate and the learned District Court judge were essentially ones of fact where it was open to the trial court to decide the case against the applicant on the available evidence. There is no reasonable argument on an analysis of the case that there is an error to be corrected nor is an appeal necessary to correct a substantial injustice to the applicant. Accordingly I would dismiss the application.