SUPREME COURT OF QUEENSLAND

CITATION:	*Mbuzi v Hornby* [2010] QCA 186
PARTIES:	**MBUZI, Josiyas Zifanana** (applicant) **v** **HORNBY, David John** (respondent)
FILE NO/S:	CA No 43 of 2010 DC No 2338 of 2009 MC No 35124 of 2006 MC No 161676 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2010
JUDGES:	Chief Justice and Chesterman JA and Douglas J Judgment of the Court
ORDER:	**Application refused**
CATCHWORDS:	APPEAL AND NEW TRIAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where applicant was found guilty in the Magistrates Court, following a trial, of committing a public nuisance and of contravening a police officer's direction – where the trial in the Magistrates Court commenced on 29 July 2009 and the applicant's request for adjournment was refused – where the applicant, on that same day during the luncheon adjournment, filed in the Supreme Court an application for judicial review in relation to the Magistrates Court proceeding – where the applicant returned late to the Magistrates Court and sought adjournment of the Magistrates Court trial pending determination of the Supreme Court proceeding – where the application for adjournment was refused – where the applicant failed to appear in the Magistrates Court on the following day and the Magistrate resumed the hearing in the absence of the applicant and gave judgment – where the applicant had further filed an application in the Supreme Court for an order staying the Magistrates Court proceeding – where there was no evidence that the Magistrate had any notice of that application before judgment was given – where the Supreme Court applications

were subsequently dismissed – where the applicant appealed to the District Court against conviction and penalty – where the conviction and penalties were upheld in the District Court – where applicant applies for leave to appeal from the judgment of the District Court citing error of law and miscarriage of justice – whether leave should be granted

District Court of Queensland Act 1967 (Qld), s 118
Justices Act 1886 (Qld), s 147, s 222

Mann v Doo Wee (1907) 5 CLR 592; [1907] HCA 57, applied
Rodgers v Smith [2006] QCA 353, applied

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

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

[1] **THE COURT:** The applicant was found guilty in the Magistrates Court, following a trial, of committing a public nuisance, and of contravening a police officer's direction. He was fined $500 for the nuisance offence, and $300 for the contravention offence.

[2] The applicant committed the offences while speaking with a Ms Bullock, a member of the staff at the Petrie Courthouse. The Magistrate recorded these findings:

> "…the defendant started to shout, yell, demand, harangue and talk over Ms Bullock in such a manner that it caused her significant distress and caused her to shake and withdraw from the counter.
>
> The defendant's voice was so audible, a police officer in plain-clothes, namely, Police Officer Hornby, intervened and took up with the defendant asking him to calm down. The defendant's attitude was similar to that adopted to Ms Bullock; he was belligerent, angry, resentful and defiant.
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> When asked to leave the Court or risk arrest, the defendant refused five to six times. He refused to recognise the lawful authority of Senior Constable Hornby. When formal demand was made upon him to leave the Court he again refused and at that point he was arrested."

[3] It is necessary to mention something of the course of the trial in the Magistrates Court. The trial commenced on 29 July 2009. When the prosecutor gave the applicant a set of particulars, the applicant sought an adjournment which was refused. The particulars had earlier been given, some months before. Ms Bullock gave her evidence, and the applicant cross-examined her. During the luncheon adjournment, the applicant filed in the Supreme Court an application for judicial review in relation to the Magistrates Court proceeding. Returning late to the Magistrates Court after the adjournment period, the applicant sought adjournment of the Magistrates Court trial pending determination of the Supreme Court proceeding. The Magistrate refused that application, but adjourned at 3.15 pm that day for a 9.15 am start the following day.

[4] On 30 July the applicant failed to appear in the Magistrates Court. (He complained before us that he was not given an opportunity to give evidence. That was a consequence of his voluntary non-attendance.) At 9.25 am the Magistrate resumed the hearing in the absence of the applicant, a course open to the Magistrate because of s 147 of the *Justices Act*. After further evidence, the Magistrate gave judgment at 10.23 am.

[5] In the meantime the applicant had filed an application in the Supreme Court for an order staying the Magistrates Court proceeding. There was no evidence the Magistrate had notice of that application before he gave judgment. The Supreme Court applications were subsequently dismissed.

[6] The applicant then appealed to the District Court against conviction and penalty (including the recording of convictions), under s 222 of the *Justices Act*. The learned District Court Judge identified, as his "essential complaints", "the continuation of the trial in [his] absence, the inadequacy of the evidence in support of the charges, the conduct of the hearing and the late provision of particulars".

[7] As to the continuation of the trial in the absence of the applicant, the Judge referred to s 147 of the *Justices Act* which gives a Magistrate a discretion to follow that course, and the inapplicability of s 617 of the *Criminal Code* which applies only to the trial of indictable offences (cf. *Mann v Doo Wee* (1907) 5 CLR 592). Her Honour referred to the provision of the particulars seven months before the trial (on 8 January 2009), where the circumstances of the alleged offending were in any case straight forward and uncomplicated. She said that "[n]otwithstanding his claims to the contrary, [the applicant] had been given clear notice of the nature of the prosecution case well in advance of his trial…" Her Honour rejected an assertion that the Magistrate was biased. Then having set out the elements of the offences and having canvassed the evidence in a comprehensive way, Her Honour found the evidence ample to establish the charges. (In relation to a particular point made by the applicant, the police officer's evidence was the disturbance occurred in the foyer area of the Registry, which was a public area.)

[8] Her Honour upheld the convictions and the penalties, including the recording of convictions, observing that the Magistrate "had been given no information that suggested the recording of a conviction would have any particular effect on [the applicant's] economic or social wellbeing, or chances of finding employment".

[9] It remains to note a little of the history of the prosecution. The offences occurred as long ago as 16 September 2005. The District Court Judge made these observations:

> "The matter has been before 13 Magistrates and three Supreme Court Judges. At least six Magistrates consider themselves disqualified from further involvement…[t]wo previous trials were abandoned part way through because of allegations of bias…[t]he long and complex history of this matter suggests that every Magistrate who made any adverse finding against [the applicant] was then attacked for bias."

There was, the Judge noted, "a pattern of frivolous applications intended by [the applicant] to prevent any final determination of the charges".

[10] The applicant complained about being given a substantial quantity of documents before the commencement of the hearing of the appeal, with limited time (some

20 minutes) to examine it. It appears that related to at least largely the earlier proceedings other than the instant Magistrates Court trial. It is not apparent that Her Honour had regard to evidence given at any of those other proceedings, although she may legitimately have had some recourse to them in relation to procedural aspects, for example in relation to the earlier provision of particulars.

[11] The applicant now applies for leave to appeal from the judgment of the District Court. Leave is necessary because of s 118(3) of the *District Court of Queensland Act* 1967. He filed his application for leave on 11 March 2010. He appeared before this court without legal representation.

[12] Section 118(3) provides:

> "A party who is dissatisfied with any other judgment of the District Court, whether in the court's original or appellate jurisdiction, may appeal to the Court of Appeal with the leave of that court."

[13] Such leave is not available just for the asking. A grant of leave must be justified. As said in *Rodgers v Smith* [2006] QCA 353, para 4:

> "It is well settled that 'leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant, and there is a reasonable argument that there is an error to be corrected'. The statutory restriction on appeals to this Court 'serves the purpose of ensuring that this Court's time is not taken up with appeals where no identifiable error or injustice can be articulated by those litigants whose arguments have already been fully considered at two judicial hearings'."

[14] In his application for leave to appeal, the applicant specifies these "grounds":

> "1. Error of law
> 2. Miscarriage of justice – prejudice and apprehended bias"

[15] He specifies the following "reasons why the court should grant leave for this further appeal to be brought":

> "1. Conviction was made in my absence.
> 2. Judge merely accepted Magistrate's finding.
> 3. The particulars for the offence do not constitute offences convicted of.
> 4. Decision of judge contrary to evidence on record."

[16] The learned Judge apparently carefully considered all of the points now raised. She expressed comprehensive reasons for the judgment she gave, covering as many as 16 typed pages of the record. Her Honour plainly did not simply "rubber stamp" the Magistrate's finding. Further, she explained with considerable care why the evidence was sufficient to establish all of the elements of the offences charged. It was open to the Magistrate to proceed in part in the applicant's absence, and there was no basis for any contention of apprehended bias.

[17] The allegation of bias was based on the Magistrate's going on with the hearing before him, notwithstanding an application for judicial review of his refusal of an adjournment was current: the Magistrate was the respondent to the application for judicial review. The application for adjournment was premised on the late delivery of particulars. They had been provided some eight months before, as the District Court Judge pointed out. There could be no reasonable apprehension of bias in the Magistrate's proceeding in those circumstances.

[18] As to the recording of convictions, there was nothing before the Magistrate suggesting that would be unduly prejudicial to the applicant. He referred before the Judge, as before us, to impediments to travel, but there is no reason to doubt Her Honour's conclusion there was no basis to say "these simple offences would have any oppressive impact" on the applicant.

[19] There is no basis for a grant of leave to appeal. The application is refused. The respondent made no application for an order as to costs.