SUPREME COURT OF QUEENSLAND

CITATION:	*Alvarez v Lancaster* [2011] QCA 23
PARTIES:	**ALVAREZ, Elizabeth** (applicant) **v** **LANCASTER, Cheryl Ann** (respondent)
FILE NO/S:	CA No 239 of 2010 DC No 3251 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	18 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	18 February 2011
JUDGES:	Muir and Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal is refused with costs on the indemnity basis.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where applicant sought leave of the Court to appeal against decision of District Court judge – where applicant failed to show how the reasoning of the primary judge was wrong – whether leave to appeal should be granted *Justices Act* 1886 (Qld), s 222 *Peace and Good Behaviour Act* 1982 (Qld), s 4, s 6, s 8 *Smith v Woodward* [2009] QCA 119, applied
COUNSEL:	The applicant appeared on her own behalf M J Rinaudo Lewis for the respondent
SOLICITORS:	The applicant appeared on her own behalf Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd for the respondent

CHESTERMAN JA: Section 4 of the *Peace and Good Behaviour Act* 1982, which I'll call the *P and G B Act*, provides that a person, a complainant, may complain to a Justice of the Peace that another person has threatened to assault or do some bodily injury to the complainant or destroy or damage the complainant's property, and the complainant is in fear of the other person.

By subsection 2A, if the Justice of the Peace to whom the complaint is made considers it reasonable in the circumstances that the complainant should be in fear, the Justice may issue a summons requiring the other person to appear before the Magistrates Court. By s 6 of the *P and G B Act* the Magistrate who hears and determines the complaint may make an order, "that the defendant shall keep the peace and be of good behaviour for such time, specified in the order, as the Court thinks fit."

The respondent to the application, Mrs Lancaster, made a complaint in accordance with the *P and G B Act* against the applicant alleging that she had threatened her life, made false accusations to the police and that she engaged in criminal activities which led to the police searching her home, damaged the front door of her home and vandalised her motor vehicles. The applicant retaliated by issuing a complaint of her own. Both complainants were heard before the Magistrates Court on 21 October 2009. The Magistrate dismissed the applicant's complaint but made an order on the respondent's complaint that for 12 months the applicant be of good behaviour towards Mrs Lancaster and keep the peace; that she not threaten her or damage her property; and not come within 100 metres of the respondent's residence. As well, the applicant was ordered to pay the respondent's costs fixed at $1,900.

That order, according to its terms, expired on 21 October 2010.

The complaints had their origin in personal animosity and acrimony that developed between the two women both of whom were residents of public housing home units in Enoggera. The Magistrate described both applicant and respondent as suffering, to some degree, from mental illness. It has appeared to cause disruption to other tenants of the units so that officers from the Department of Housing relocated the applicant to another suburb.

Nevertheless, the Magistrate, having heard the evidence, thought it appropriate to protect Mrs Lancaster by the order. Her Honour heard evidence from the parties and four other witnesses, one in support of the respondent, and three for the applicant. The complaints involve disputes of fact depending upon the credibility of the witnesses. The Magistrate gave substantial reasons for preferring the evidence of the respondent. A judgment based on such considerations is notoriously difficult to overturn.

Notwithstanding that difficulty, the applicant appealed to a judge of the District Court pursuant to s 222 of the *Justices Act*, the proceedings of which were made applicable by s 8 of the *P and G B Act*. It is not clear from the Notice of Appeal or the applicant's written submissions to the District Court whether she appealed against the dismissal of her complaint or only against the order made against her on Mrs Lancaster's complaint. The grounds of appeal consisted, mostly, of argumentative criticisms of the detail of the Magistrate's findings and assertions of fact contrary to those findings. It was, without more, inevitable that the appeal to the District Court would fail as it did. Judge Rafter dismissed the appeal on 13 September 2010.

The applicant did seek to make some points which, if accepted, may have resulted in a rehearing despite the Magistrate's findings of fact and credibility.

The first was that the Magistrate refused to adjourn the proceedings to allow the applicant to direct a subpoena to Telstra to produce documents, the relevance of which was not shown. The learned judge's review of the record showed that the applicant had not, in fact, asked for an adjournment. She now says, in any event, that the subpoena should have been directed to Optus not to Telstra.

The second point was that the Magistrate refused to allow the respondent's criminal history into evidence. The Magistrate declined to accept it because the most recent entry predated the subject matter of the complaints by 13 years and the *Criminal Law (Rehabilitation of Offenders) Act* 1986 made the history inadmissible.

The next point taken was that the Magistrate wrongly regarded the evidence of the applicant's witnesses as irrelevant. The Magistrate ruled their testimony did not touch upon the subject matter of the complaints. The applicant did not adduce any evidence to cast doubt upon that conclusion.

Lastly, there were some miscellaneous complaints that the Magistrate had not given the applicant a fair hearing or allowed her, properly, to present her case. The complaints were not expressed with particularity or coherence. Having made a careful perusal of the transcript of the hearing, Judge Rafter concluded that the complaints were groundless.

His Honour dismissed the appeal and ordered the applicant to pay the respondent's costs fixed at $1,500.

The applicant now seeks leave to appeal to this Court and the order to the District Court dismissing her appeal. This Court noted, in a very similar case, *Smith v Woodward* [2009]

QCA 119, "The requirement of leave to appeal in s 118(3) of the *District Court Act* is intended to limit the extent to which litigants, who have already received two full hearings within the judicial system, may make further claims on that system. In order to warrant a grant of leave to appeal under s 118(3) of the *District Court Act*, an applicant should at least “come to grips … with the task of showing how” the reasoning of the District Court judge is wrong."

The applicant's outline of argument raises two grounds set out in the form of questions. The first is whether the Magistrate failed to observe the rules of natural justice and so did not give the applicant a fair hearing. Twelve particulars of the failure are given, some of which are new, most of which repeat points made to the District Court and some raise assertions of fact unsupported by affidavit.

The second ground is a complaint that the Magistrate erred by rejecting the applicant's evidence and preferring the respondents.

An applicant for leave to appeal must show some arguable ground for concluding the judgment against which leave is sought to appeal was wrong and that there will be injustice to the applicant if the erroneous judgment is left uncorrected. The second consideration will not be satisfied if the orders sought will not benefit the applicant.

The applicant, here, fails both requirements. There is nothing in the repetition of her complaints to indicate the slightest doubt about the justice of the order made by the Magistrate, or the dismissal of the appeal from that judgment to the District Court. The complaints raise disputes of fact and credit which the Magistrate determined by an assessment of the witnesses. The applicant advances no rational criticism of the decision. Her subjective refusal to accept the Magistrate's assessment is not a ground of appeal.

The District Court Judge was satisfied that there was no substance in the complaints of unfairness in the proceedings before the Magistrates Court. The applicant has not produced any material to show that his Honour's assessment was wrong.

There is, however, an even more fundamental point. It is that any appeal would be futile. The order which the applicant wishes to have set aside has expired. Its 12 month duration came to an end on 21 October last year. An appeal would serve no purpose.

That same consideration was significant in leading the Court to refuse leave to appeal in *Smith v Woodward* and the Court said, "It is the practice of this Court to grant leave to appeal under s 118(3) of the *District Court Act* in order to remedy substantial injustices. It is difficult to see that the mere making of an order to keep the peace and be of good behaviour constitutes a form of substantial injustice. And, in any event, in this case, by reason of the effluxion of time since the orders were made by the Magistrate, the order has expired. The only practical effect of a successful challenge now would relate to the matter of costs. A claim to be allowed to continue to dispute the costs of disputing smacks of self-indulgence. Only in the most exceptional of cases would this Court regard a wish to dispute a liability for costs incurred in the pursuit of an earlier appeal as warranting the grant of leave to appeal pursuant to s 118(3) of the *District Court Act*. This is not a case where the evident merits of the case warrant taking such an exceptional course."

In my opinion, those remarks are entirely apposite to this application. I would refuse leave to appeal and would order the applicant to pay the respondent's costs on the indemnity basis, the respondent being vexed by having to retain lawyers through these groundless applications. I note that that order was made in *Smith v Woodward*.

MUIR JA: I agree.

FRASER JA: I agree.

MUIR JA: The order of the Court is that propounded by Justice Chesterman.