

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Winchester* [2011] QCA 247

PARTIES: **R**  
**v**  
**WINCHESTER, Barry David**  
(applicant/appellant)

FILE NOS: CA No 6 of 2011  
CA No 74 of 2011  
DC No 1231 of 2010  
DC No 2641 of 2010

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Criminal

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 22 September 2011

DELIVERED AT: Brisbane

HEARING DATE: 22 September 2011

JUDGES: Muir and Chesterman JJA and Fryberg J  
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Delivered ex tempore on 22 September 2011:**  
**Application for an adjournment refused.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – ADMISSION OF FURTHER EVIDENCE – OTHER MATTERS – where the appellant sought to adduce further evidence on appeal – where the appellant requested an adjournment to prepare further affidavit evidence – where the appellant sought to adduce further evidence of a refusal made by a judge at a pre-trial hearing to grant leave to cross-examine the complainant – where the court files revealed that no application was made to the court – where the appellant sought to rely on a statement made by his wife to the effect that she had only seen the complainant once at the appellant’s house – where the statement was not led at trial on the advice of the appellant’s legal representatives – where the appellant sought to adduce further photographic and Facebook evidence which was said to bear on the complainant’s character – where the photographs were taken and the Facebook entries were made after the trial – where other evidence was led at the trial as to the complainant’s character – whether the appellant should be

granted leave to adduce further evidence on appeal – whether the application for an adjournment should be granted

**COUNSEL:** The applicant/appellant appeared on his own behalf  
B J Power for the respondent

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

**MUIR JA:** The application to adjourn, in order to adduce further evidence, will then be refused. I'll give reasons for that refusal shortly.

...

**MUIR JA:** The appellant, having been informed that this Court would decide the appeal only by evidence properly before it, requested an adjournment for the purpose of obtaining and/or preparing affidavits with a view to relying on them at a later hearing of his appeal.

The matters in respect of which he wishes to adduce further evidence are:

1. The refusal of leave on a pre-trial application by the defence to further cross-examine the complainant.
2. The circumstances of the failure to call the appellant's wife to give evidence.
3. Photographs taken of the complainant at a strip club some time after the trial and Facebook pages, also seemingly brought into existence after the trial, which are said to bear upon the claimant's character and morals.

In relation to the first matter, a search of relevant files has failed to reveal the existence of any such application. No such application was adverted to by counsel or the trial judge when the possibility of the complainant's being recalled was briefly touched upon in argument during the trial.

It appears from a statement signed by the appellant's wife that she would give evidence that she spent three months in Australia with the appellant between 29 April and 24 July 2008, and that she didn't see the complainant at the appellant's house, at his work place or

elsewhere, except on 14 June 2008 when she saw the complainant in front of the appellant's house.

According to the appellant this evidence was not lead on the trial on the advice of his legal representatives, lest his wife, a resident of the Philippines, say something which might jeopardise her Australian residency status. There was no allegation of any misconduct on the part of the wife and this explanation seems improbable. There is nothing to suggest that any decision made in respect of the wife's evidence was not properly made by the appellant's counsel. The appellant does not suggest that he did not accept his counsel's advice at the time. An adjournment should not been given on this ground as leave would not be given to adduce the further evidence.

The third category of evidence could not have been lead on the trial as it then did not exist and is irrelevant. In any event, Mr Tidmarsh gave uncontradicted evidence of being told by the complainant that she worked at a topless car wash and a strip joint. There was other evidence lead as to her character: The evidence of her mother that she was a liar and a thief. Additionally, there was evidence that she had stolen some riding gear.

For these reasons, I would refuse the request for an adjournment.

**CHESTERMAN JA:** I agree.

**FRYBERG J:** I also agree.