SUPREME COURT OF QUEENSLAND

CITATION:	*Tierney v Commissioner of Police* [2011] QCA 327
PARTIES:	**TIERNEY, James Victor** (applicant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	CA No 150 of 2011 DC No 137 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	18 November 2011
DELIVERED AT:	Brisbane
HEARD ON THE PAPERS ON:	18 October 2011
JUDGES:	Margaret McMurdo P and Chesterman JA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – GENERAL PRINCIPLES – where the applicant was found guilty after a trial in the Magistrates Court of a common assault – where the applicant had one month within which to appeal against the magistrate's decision as of right pursuant to s 222 *Justices Act* 1886 (Qld) – where the magistrate's decision turned on his assessment of the credibility of the applicant, the complainant and various witnesses – where the applicant filed an application in the District Court seeking an extension of time within which to appeal against his conviction – where the applicant argued that the verdict was unsafe as there were inconsistencies in the evidence – where the applicant argued that the magistrate ignored evidence of his disability and denied him a fair trial – where the District Court judge exercised his discretion to refuse application to extend time pursuant to s 224(1)(a) – where the applicant applies to this Court for leave to appeal the refusal to grant an extension of time – where it must be shown that the judge erred in the exercise of discretion – whether error was demonstrated

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – POWERS OF COURT ON APPEAL – TO CONSIDER FRESH EVIDENCE – where the applicant sought to rely on an affidavit sworn by his wife Judith Tierney to show that he was disabled by brain damage – where evidence was not adduced below – whether sufficient basis was shown for allowing the applicant to read his wife's affidavit

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – where the applicant contended that the magistrate erred in ignoring evidence of his brain injury – where the applicant agued that the magistrate denied him a fair trial by failing to investigate that evidence and to make necessary accommodation for his disability – whether the District Court judge erred in concluding that this ground of appeal was without merit

District Court of Queensland Act 1967 (Qld), s 118
Justices Act 1886 (Qld), s 146, s 222, s 223, s 224, s 225

ACI Operations Pty Ltd v Bawden [2002] QCA 286, cited
Allesch v Maunz (2000) 203 CLR 172; [2000] HCA 40, cited
Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd [2008] QCA 100, cited
Brunskill v Sovereign Marine & General Insurance Co Ltd (1985) 59 ALJR 842; [1985] HCA 61, cited
CDJ v VAJ (1998) 197 CLR 172; [1998] HCA 67, cited
Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; [2000] HCA 47, cited
Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, considered
Eastman v The Queen (2000) 203 CLR 1; [2000] HCA 29, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Kesavarajah v The Queen (1994) 181 CLR 230; [1994] HCA 41, cited
Pickering v McArthur [2005] QCA 294, cited
R v M [2002] QCA 464, cited
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, considered
Rowe v Kemper [2009] 1 Qd R 247; [2008] QCA 175, cited
Scrivener v DPP (2001) 125 A Crim R 279; [2001] QCA 454, cited
Smith v Ash (2010) 200 A Crim R 115; [2010] QCA 112, considered
Tierney v Commissioner of Police [2011] QCA 293, cited
Walker & Anor v Davlyn Homes P/L [2003] QCA 565, cited

COUNSEL:	No appearance for the applicant, the applicant's submissions were heard on the papers S J Farnden for the respondent
SOLICITORS:	No appearance for the applicant, the applicant's submissions were heard on the papers Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Margaret Wilson AJA's reasons for refusing this application for leave to appeal and with the order proposed.

[2] **CHESTERMAN JA**: I agree that the application for leave to appeal should be refused for the reasons given by Margaret Wilson AJA.

[3] **MARGARET WILSON AJA**: On 10 August 2009, in the Magistrates Court at Cairns, the applicant was found guilty of a common assault committed on 12 October 2007. No conviction was recorded. He was placed on a good behaviour bond for three months, with a recognisance in the sum of $250.

[4] The applicant had one month in which to appeal against the magistrate's decision as of right pursuant to s 222 of the *Justices Act* 1886 (Qld).

[5] On 19 July 2010, he filed an application in the District Court seeking an extension of time in which to appeal against his conviction. That application was refused, and he now seeks leave to appeal against the District Court decision pursuant to s 118(3) of the *District Court of Queensland Act* 1967.

[6] Mr Russell Mathews, who is not a lawyer, sought to represent the applicant before this Court. The court refused applications to adjourn the application for leave for Mr Mathews to appear, the application for leave for him to appear and an application that Mr Mathews be joined as a party to the appeal.[1] Arrangements had been made for the applicant to telephone the Court so that he could personally be present by telephone, but he failed to do so.

[7] Written submissions had been filed on behalf of both parties. The applicant not having appeared, and counsel for the respondent not wishing to supplement her written submissions, the Court proceeded to hear the application on the basis of written submissions already made by the parties.

The case at trial

[8] The applicant was represented at trial by counsel and an instructing solicitor.

[9] The applicant was a licensed boxing trainer. At the time of the incident in question he was aged 61.

[10] The complainant was an amateur boxer aged about 18. He had been the State boxing champion for his age and weight the previous year.

[11] The incident occurred at a boxing tournament at the Townsville PCYC. The applicant was present with three boxers whom he had trained. The complainant, who was to compete in the tournament, was in a queue waiting for the "weigh in" and "medical" when the incident occurred.

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1 *Tierney v Commissioner of Police* [2011] QCA 293.

[12] The prosecution case was that the applicant applied force to the complainant by striking him to the back of his head.

[13] The complainant gave evidence that he was standing in the queue, when the applicant came up and stood in front of him, stepped on his foot and put his forehead up against his, saying, "Give me my money," and calling him a "Jew cunt" twice, to which he responded, "I don't owe you any money". The complainant said the applicant walked away, and came back 10 to 15 minutes later, approaching him as he faced the wall and threatening him again. He said the applicant stopped talking for five seconds, and then hit him on the back of the head with a strong blow of his elbow.

[14] Eye-witnesses gave different accounts of both the assault, and the sequence of events of leading up to it.

(a) A prosecution witness, Erickson, said that he did not know the complainant prior to the incident. He said he was standing a metre or two in front of the complainant, waiting in line for a medical examination. He observed the applicant and the complainant having a disagreement. The applicant was standing about a metre from and half-facing the complainant. The applicant struck the back of the complainant's head with an open palm. He said he never heard the expression "Jew cunt" being used.

(b) Another prosecution witness, Geary, who is Aboriginal, said that he was standing about three metres from the complainant. He observed the applicant standing slightly behind the complainant or slightly to the left of him. He said the applicant was whispering in the complainant's ear for about two minutes, and the complainant was non-responsive. Geary said that he witnessed the applicant strike the back of the complainant's head with an elbow.

[15] The applicant's version of events differed from that of the complainant and of the prosecution witnesses. The applicant said that he went to speak to the complainant, who owed money to him and his wife. He said that he stood behind the complainant and said, "I want my money back". He said that the three boxers he had coached for the tournament, Morgan, Lawag and Abbott, were standing to his left and approximately a metre away from him as he approached the complainant. He denied ever hitting the complainant.

[16] The three boxers also gave evidence that they saw the applicant having a conversation with the complainant. All three of them said they did not see the applicant assault the complainant, although Lawag and Abbott conceded that there was a period of seconds when they were not looking at the applicant. Morgan, Lawag and Abbott each said that they took notes on the day of the assault, but none of them was able to produce his notes to the Court.

[17] During the trial the applicant's counsel told the magistrate that he "suffer[ed] from a medical condition" and, without objection by the prosecutor, he tendered a report outlining the conditions from which his client then suffered. The report was not formally made an exhibit, and is not on the court file. The applicant's counsel also mentioned that his client had received two corneal transplants, and the applicant was given leave to wear sunglasses in court. The applicant told the magistrate that

he had a number of medical problems, including post-traumatic stress disorder which caused him to stay at home, major depression and short-term memory loss. He said he took medication such as amitriptyline, zoloft and xanax and sometimes diazepam. He said –

> "I also suffer brain damage, while I was – I wasn't breathing for 30 minutes."

[18] The applicant participated in a record of interview with Senior Constable Paul Stanley on 30 January 2008. In that interview, the applicant mentioned Morgan and Abbott's names, but the police officer was unable to contact them.

The magistrate's findings on credibility

[19] The magistrate's decision turned on his assessment of the credibility of the applicant, the complainant and various witnesses – that is, his assessment of their truthfulness and reliability.

[20] In his reasons the magistrate acknowledged the differences in the accounts given by the complainant and the eyewitnesses. His Honour said -

> "Although there is some inconsistency between the evidence or the versions of Erickson and Geary about how the alleged assault took place, the inconsistency, in my view, can be explained by different positions the witnesses were standing in, the angle of the observations by the witnesses, and the fact that the movement was a quick motion. However, both Erickson and Geary state the defendant used his forearm to inflict a blow and the force of the blow to the head caused the complainant to stumble forward.
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> In my view, the witness Erickson was the most independent witness to give evidence at the trial. Prior to the alleged incident he had not any previous dealings with either the defendant or the complainant. Erickson was in line to see the doctor when his attention was drawn to the defendant and the complainant who were arguing behind him. Erickson's view was unobstructed. When he observed the defendant use an open palm to strike the complainant in the back of the head, Erickson stated that he was going to step in. However, Geary's trainer came over and sorted things out.
>
> Under cross-examination it was put to Erickson by Mr Sheridan that he was mistaken about the defendant hitting the complainant, to which he replied, 'Yeah, he did it. I seen it.' Erickson was steadfast in his cross-examination and could not be swayed in any way. Erickson, in my view, was a reliable and credible witness. His evidence was given in a calm and honest manner and I find that he had a good recollection of the events.
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> Geary gave evidence that he did not know the defendant prior to the alleged assault. Geary stated that he observed the defendant whispering into the complainant's ear and the complainant was non-responsive. Geary stated that he was about to leave when he observed the defendant elbow the complainant in the back of the head. Geary stated that he then went over to the defendant and the

> complainant. The evidence is consistent with Erickson's account and with the defence witnesses stating that they saw an Aboriginal man run over to the defendant and the complainant. Although Geary's version of events is different to Erickson's in some small aspects, Geary was most adamant about witnessing the defendant assault the complainant and could not be swayed."

[21] The magistrate found the applicant to be an unreliable witness. His Honour said –

> "The defendant outlined to the Court on a number of medical issues he suffered from, including post-traumatic disorder, major depression and short-term memory loss. He was asked how the Court could be sure his recollection of events was accurate, to which he replied, 'Because I weigh 130 kilo. If I touched you at the back of the elbow with my hand I'll kill you.' This line of reasoning in my view quite clearly does not make any sense and certainly does not answer the question.
>
> The defendant was then asked if any motion he made with his elbow or arm to anyone's head would result in death, to which he replied, 'Possible.' The defendant was then asked if he was capable of tapping someone on the back of the head to get their attention, to which he replied, 'Certainly not. That's why I'm a martial artist. That's where I get discipline from.'"

[22] The magistrate found that the applicant raised matters of religion or race in an attempt to evade questioning in his interview with Snr Const Stanley. In his Honour's view, the applicant was an easily flustered, deliberately evasive and a generally unbelievable witness. He found his evidence to be inconsistent and somewhat nonsensical.

[23] His Honour also found the defence witnesses unreliable, in light of their evidence of having taken notes about an incident that they said did not occur. His Honour considered that Lawag's statement regarding the alleged assault, "It's not in Jim's thing to – to do that to anybody," indicated his lack of objectivity and allegiance to the defendant.

The application to the District Court

[24] The applicant listed numerous grounds of appeal in his proposed notice of appeal to the District Court.[2] He asserted, *inter alia*, that the charge was vexatious and an abuse of process and that the conviction was unsafe and not supported by evidence. He claimed to have acquired brain damage as a result of medical incompetence, to be disabled thereby and to have reduced concentration and capacity to make intellectual decisions. He claimed to have been discriminated against on account of his disability and that his rights under the *United Nations Convention on the Rights of Persons with Disabilities*[3] had been violated. He asserted that the Magistrates Court was corrupt.

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2 The applicant's application for an extension of time for filing a notice of appeal was in the same terms as the notice of appeal.

3 GA Res 61/106, UN GAOR, 61st Sess, UN Doc A/RES/61/106 (13 December 2006).

[25] The District Court judge had a discretionary power to extend the time for appeal.[4] Relevant to the exercise of the discretion to extend time were:

(a) whether there was a good reason for the delay; and

(b) whether it was in the interests of justice to grant the extension, which might involve some assessment of whether the appeal appeared to be a viable one.[5]

[26] An appeal from a Magistrates Court to the District Court pursuant to s 222 of the *Justices Act* 1886 (Qld) is a rehearing on the evidence given at trial and any new evidence adduced by leave.[6] In other words, it involves a review of the record of proceedings below, subject to the District Court's power to admit new evidence. To succeed, an appellant needs to show some legal, factual or discretionary error.[7]

[27] Mr Mathews was given leave to appear for the applicant before the District Court.

[28] After referring to this Court's discussion of the factors relevant to the exercise of the discretion to extend time for appeal in *R v Tait*,[8] the judge dealt first with whether there was any reasonable explanation for the delay. His Honour said –

> "Here, the matters advanced in support of the lengthy delay of in excess of 10 months related to a disability on the part of the applicant which has been referred to in submissions as brain damage. Certainly, he gave evidence of certain conditions in the hearing before the Magistrate to the effect at one stage that he had post-traumatic stress disorder, that at another stage he was suffering from major depression, and at another stage that he had suffered brain damage which was caused through medical negligence.
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> There were not, however, any reports placed before the Magistrate, nor was any attempt made to place any reports before this Court as to the effect that that would have had on him, either in giving evidence on the trial or in terms of appreciating his right to appeal.
>
> I note that he was found guilty by the Magistrate; that at that stage he was represented by counsel and solicitor; and he would have had ample opportunity to discuss any potential appeal with them, if that is what he was considering doing.
>
> The effect of his application is that he did not become aware until he met Mr Matthews (sic), who I have given him leave to appear as a disability advocate on behalf of the applicant, that he became aware of his rights.

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4 *Justices Act* 1886 (Qld) s 224(1)(a).

5 *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304.

6 *Justices Act* 1886 (Qld) s 223. That it is truly an appeal by rehearing is confirmed by analysis of the function and powers of the Magistrates Court, as to which see s 146 of the *Justices Act*, and those of the District Court, as to which see s 225 as well as s 223 of the *Justices Act*.

7 *CDJ v VAJ* (1998) 197 CLR 172 at 201-202; [1998] HCA 67; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [13] – [14]; [2000] HCA 47; *Allesch v Maunz* (2000) 203 CLR 172 at 180; [2000] HCA 40; *Scrivener v DPP* (2001) 125 A Crim R 279; [2001] QCA 454; *Walker & Anor v Davlyn Homes P/L* [2003] QCA 565 at [9].

8 [1999] 2 Qd R 667; [1998] QCA 304.

> In the circumstances, in the absence of any real evidence as to what his condition is, it is fairly difficult to determine that issue in his favour in terms of any satisfactory excuse for the delay. It is more helpful in a case like this, however, to consider the viability of the appeal in accordance with the test in Tait."

[29] Mr Mathews made two principal submissions to the judge –

> (i) Disability. Upon the applicant telling the magistrate he had brain damage, fairness demanded that his Honour make inquiries, which would have revealed his special needs as a disabled person. It was unfair for the trial to proceed in the way it did. The magistrate's finding that he was evasive was based (in part, at least) on the way he gave evidence, and that could have been attributable to his brain damage.
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> (ii) Inconsistencies in the evidence: "…one of the prosecution witnesses gave evidence of a push and one gave evidence of an elbow." Mr Mathews argued that this meant the applicant faced, in effect, two sets of particulars, and that he had to provide defences in relation to both. That was unfair.

[30] The judge said this about the disability argument –

> "Again, there was no evidence of this placed before the Magistrate and I fail to see how there is any duty cast on him in those circumstances to personally investigate the matter further to see whether or not there are any special needs that have to be met. I invited Mr Matthews [sic] to provide any authorities in that regard and he was unable to do so.
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> It seems to me that if this is a matter that someone is going to raise on trial, and that they are trying to explain the manner in which someone gave evidence, that the best way to do that would be by way of medical evidence, either through a report admitted by consent or a report, coupled with giving the opportunity to the other side to cross-examine the person who provided the report. No attempt was made to do that and he was represented by counsel on trial.
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> So I fail to see how there is any merit in that substantive ground in the absence of clear authority to the effect that the Magistrate should have gone further that what he did."

[31] His Honour said this about the submission based on inconsistencies –

> "On my reading of the transcript it appears as though the applicant and his witnesses were saying that the incident did not occur at all, so it doesn't seem to me as though there is any particular defence that was excluded by means of this approach.
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> As I explained to Mr Matthews (sic) during the course of argument, a tribunal of fact, as the Magistrate was here, has to determine factual matters, and the tribunal can accept whatever evidence it decides to accept and can reject whatever evidence it decides to reject. Before an appellate Court will interfere, the Court has to be satisfied that the

> Magistrate erred in law or in fact in arriving at its conclusion and, even though in this case the findings were against the applicant, I fail to see how it can be established that the Magistrate here did err in law or in fact in making the necessary findings in relation to credibility."

[32] His Honour explained, too, that there was no basis for an appeal against sentence.

[33] He concluded that there was no reasonable explanation for the delay and that the appeal was not a viable one. It was not in the interests of justice for the matter to go any further.

The application to the Court of Appeal

[34] In *Smith v Ash*[9] Fraser JA discussed principles relevant to the exercise of this Court's power to grant leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act*. His Honour said –

> "In *ACI Operations Pty Ltd v Bawden*[10] McPherson JA said that the criteria in the previous form of s 118 of the *District Court of Queensland Act* 1967 (Qld) of an important point of law or question of general or public importance 'remains a sufficient, but not a necessary, prerequisite to a grant of leave to appeal' under the present enactment. In other cases it has been said 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.[11] It is to be emphasised though that, whilst the Court exercises the discretion on a principled basis and those tests provide very useful guidance, s 118(3) confers a general discretion on this Court to grant or refuse leave to appeal which is exercisable according to the nature of the case.[12]"

[35] The District Court decision against which the applicant wishes to appeal was not a decision on an appeal under s 222 of the *Justices Act* 1886 (Qld), but rather a decision against a discretionary refusal to grant an extension of time under s 224(1)(a). Accordingly, if leave to appeal were granted, to succeed on the appeal the applicant would have to show error in the exercise of that discretion.[13]

[36] The written submissions filed on behalf of the applicant were apparently prepared by Mr Mathews. In essence they dealt with the two principal issues ventilated before the District Court – disability and inconsistencies in the evidence.

Application to adduce further evidence

[37] The applicant sought to rely on an affidavit sworn by his wife, Judith Tierney (evidence which was not adduced below) to show that he was disabled by brain damage. Mr Mathews read the affidavit in support of his unsuccessful application

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9 (2010) 200 A Crim R 115; [2010] QCA 112 at [50].

10 [2002] QCA 286.

11 *Pickering v McArthur* [2005] QCA 294 per Keane JA at [3], McMurdo P and Dutney J agreeing.

12 See *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100 at [5] per Fraser JA, McMurdo P and Lyons J agreeing.

13 *House v The King* (1936) 55 CLR 499; [1936] HCA 40.

to appear on Mr Tierney's behalf. The respondent opposed the applicant's being given leave to rely on it in his application for leave to appeal.

[38] Mrs Tierney deposed to being a New South Wales registered nurse with over 30 years' experience in mental health fields in Australia and overseas and to being the applicant's full-time carer.

[39] She went on to relate that the applicant was the victim of hospital malpractice in 1993: admitted to hospital for day surgery, he was given incorrect dosages of drugs, suffered a cardiac arrest and was resuscitated. He suffered brain damage and post traumatic stress disorder, as well as depression, memory distortions, problems with balance and lack of confidence. This evidence was inadmissible. It was a mix of hearsay in relation to which no source of information was disclosed and non-expert opinion evidence. Moreover, there was nothing to suggest that admissible evidence of these conditions and their effects (ie evidence of duly qualified medical practitioners) could not have been obtained before the trial. Nor was there any explanation for the applicant's not having done so.

[40] In my respectful opinion, no sufficient basis has been shown for allowing the applicant to read his wife's affidavit in this application.

Disability

[41] The applicant contended that the magistrate erred in ignoring evidence of his brain injury. Specifically, he argued, the magistrate denied him a fair trial by failing to investigate that evidence and to make necessary accommodation for his disability. He argued that the magistrate erred in treating symptoms of his brain damage as indications of untruthfulness. Further, the applicant argued, the prosecutor deliberately tried to confuse him in cross-examination - and, in the context of his disability, the magistrate erred in not intervening to stop this.

[42] The magistrate was not under a duty to inquire about the applicant's condition because he said he had sustained brain damage. There was no medical evidence before his Honour that he had sustained brain damage or that he had sustained brain damage which might impact upon his capacity to participate in the trial. He was represented by counsel and solicitor. There is nothing to suggest that the applicant could not have brought his condition to their notice. They could have been expected to raise any concern about his mental state, and if they thought it necessary, to seek an adjournment so that medical evidence could be obtained.

[43] All that the magistrate had before him were the applicant's statements that he suffered from brain damage, post traumatic stress disorder, depression and short term memory deficits and that he had been prescribed a variety of medications. As in *Eastman's* case,[14] the question of fitness to plead or fitness for trial did not arise for examination.

[44] Sometimes defendants suffer from physical and or other disabilities which do not meet the criteria of unfitness for trial, but which nevertheless make participation in court proceedings difficult for them. In the fair conduct of a proceeding, the presiding judicial officer can be expected to make reasonable procedural

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[14] *Eastman v The Queen* (2000) 203 CLR 1; [2000] HCA 29. See also *Kesavarajah v The Queen* (1994) 181 CLR 230; [1994] HCA 41; *R v M* [2002] QCA 464, [13].

allowances. For example, if someone has a back condition which results in his suffering pain if he sits for a long time, the presiding judicial officer can be expected to ensure that there are rest breaks as required. Similarly, if someone's first language is not English, but he is nevertheless able to understand and converse in English, albeit when the vocabulary and sentence structures used are kept simple, the presiding judicial officer can be expected to ensure that that is done. Again, if someone suffers from anxiety or panic attacks (for which there is medical evidence which the presiding judicial officer accepts) the presiding judicial officer can be expected to take appropriate steps to ensure he is not unduly harassed or put under pressure. In making procedural allowances the presiding judicial officer needs to be ever mindful of his or her fundamental obligation to ensure that the trial is conducted fairly to both sides: this may involve judicious balancing of the special needs of the defendant against the right of opposing counsel to cross-examine meaningfully and, if appropriate, quite robustly.

[45] A perusal of the transcript shows that the applicant did not in fact suffer any disadvantage. He gave evidence fluently, and was able to remember precisely the words he said to the complainant and what happened after the alleged assault. The transcript reveals that the prosecutor was courteous to him in the course of cross-examination, and that he did not overstep the mark, despite the applicant's asking him, "Are you here in Court today not getting paid?" In the absence of any properly raised issue regarding the applicant's medical conditions, there was no obligation on the prosecutor to take any special measures in cross-examination. In the circumstances there was no basis upon which the magistrate could have properly intervened in the cross-examination, let alone any obligation on his Honour to do so.

[46] The District Court judge did not err in concluding that this ground of appeal was without merit.

Inconsistencies

[47] The magistrate preferred the complainant's account of the assault, which was corroborated in certain key respects by Erikson and Geary, and found that the inconsistencies in the accounts could be explained by the differences in position of the witnesses and the fact that it was a quick action. His Honour placed little value on the evidence of the defence witnesses, given their allegiance to the applicant, their failure to return calls from the investigating police officer after the applicant's apprehension, and their behaviour in taking notes in relation to an incident which they said did not occur.

[48] In some cases a challenged finding of fact may be affected by identified error of principle or demonstrated mistake or misapprehension about relevant facts. This was not such a case.

[49] In *Brunskill v Sovereign Marine & General Insurance Co Ltd*[15] the High Court said –

> "The authorities have made clear the distinction which exists between an appeal on a question of fact which depends upon a view taken of conflicting testimony, and an appeal which depends on inferences from uncontroverted facts."

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15 (1985) 59 ALJR 842 at 844; [1985] HCA 61.

[50] Where a finding of fact depends on an inference from facts found or admitted, an appellate court is in as good a position as the trial court to decide on the proper inference to be drawn.[16] In this regard, findings of fact by a trial court are not to be accorded any special deference. So –

(a) on an appeal by rehearing, an appellate court cannot interfere with the decision below unless an error is demonstrated;

(b) if, in the opinion of the appellate court, the proper inference to be drawn is different from that drawn by the trial court, error has been demonstrated.

[51] In *Devries v Australian National Railways Commission*[17] Brennan, Gaudron and McHugh JJ said –

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against — even strongly against — that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his [or her] advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'." (footnotes omitted).

[52] Thus, where a finding of fact depends on a view taken of conflicting testimony, error is established only –

(a) where the trial court failed to use or palpably misused its advantage; or

(b) where incontrovertible facts or uncontested testimony demonstrate that the trial court's conclusions were erroneous; or

(c) where the appellate court concludes that the decision at trial was glaringly improbable or contrary to compelling inferences.

[53] In *Fox v Percy*[18] the High Court made it plain that where a finding of fact depends on a view taken of conflicting testimony, it is the duty of the appellate court to conduct a "real review" of the evidence; it is obliged to accord respect to the decision of the trial court and to bear in mind any advantage the trial court had in seeing and hearing the witnesses give their evidence; it is to weigh conflicting evidence and draw its own inferences and conclusions. If, after doing this, the appellate court concludes that an error has been shown, then it is entitled and obliged to exercise its powers on appeal.

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16 *Warren v Coombes* (1979) 142 CLR 531 at 551; [1979] HCA 9.

17 (1993) 177 CLR 472 at 479; [1993] HCA 78.

18 (2003) 214 CLR 118 at 124-129; [2003] HCA 22.

[54] In appeals pursuant to s 222 of the *Justices Act* 1886 (Qld), this Court has consistently applied what the High Court said in *Fox v Percy* in determining whether a magistrate erred in making findings of fact based on assessment of the credibility of witnesses. See, for example, *Rowe v Kemper*.[19]

[55] In his consideration of the applicant's ground of appeal based on inconsistencies in the evidence, the judge rejected Mr Mathews' submissions that the prosecution case involved inconsistent scenarios, that the applicant was facing two sets of particulars, and that for him to provide defences in relation to both was unfair. His Honour noted that both the defence witnesses and the applicant asserted that the incident did not occur, and that no particular defence was excluded by means of this approach.

[56] On the application for an extension of time in which to appeal the judge properly considered the applicant's prospects of success on the proposed appeal. In doing so his Honour was obliged merely to make some preliminary assessment of the merits of the appeal; he was not obliged to undertake the thorough analysis of the facts that would be necessary on an appeal against findings of fact based on credibility.

[57] I have reviewed the transcript of proceedings in the Magistrates Court, and I am satisfied that it was open to the judge to conclude that there was no error in the magistrate's fact finding. The findings were based on assessment of the credibility of witnesses, and there is no basis upon which it might be concluded that the magistrate failed to use or palpably misused his advantage, or that he acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or that his decision was glaringly improbable or contrary to compelling inferences.

Conclusion

[58] As the proposed appeal under s 222 of the *Justices Act* 1886 (Qld) had no realistic prospect of success, the District Court judge did not err in dismissing the application for an extension of time.

[59] This application for leave to appeal against the District Court decision should be refused.

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19 [2009] 1 Qd R 246 at 253; [2008] QCA 175 at [3].