SUPREME COURT OF QUEENSLAND

CITATION:	*Kosteska v Commissioner of Police* [2012] QCA 219
PARTIES:	**KOSTESKA, Lille** (applicant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	CA No 78 of 2012 DC No 2857 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	22 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2012
JUDGES:	Muir and Fraser JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Orders delivered ex tempore on 22 August 2012:** **1. Leave to read and file affidavit of Mr Skyring refused.** **2. Leave to appeal granted.** **3. Appeal dismissed.**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – MAGISTRATES COURTS – APPEAL – FROM WHAT DECISIONS AND ON WHAT GROUNDS – where applicant had been disqualified from holding or obtaining a driver's licence for a period of two years on 26 June 2009 – where applicant obtained a licence on 22 July 2010 – where applicant intercepted by police whilst driving on 28 January 2011 and charged with driving without a licence whilst disqualified by a court order – where applicant convicted after trial – where Magistrate rejected possible defence under s 24 of the *Criminal Code* – where applicant appealed to the District Court – where applicant failed to appear at appeal – where appeal struck out – where applicant submitted she did not receive the requisite 10 days notice of the appeal listing – whether applicant should be given leave to appeal – whether appeal should be granted *Criminal Code* 1899 (Qld), s 24 *District Court of Queensland Act* 1967 (Qld), s 118 *Justices Act* 1886 (Qld), s 229(3)

Commissioner of Police v Toomer [2011] QCA 233, considered
Smith v Ash [2011] 2 Qd R 175; [2010] QCA 112, considered

COUNSEL: The applicant appeared on her own behalf
M R Byrne SC for the respondent

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

[1] **MUIR JA:** On 28 January 2011, the applicant was driving a motor vehicle on a public road when intercepted by police officers. The applicant produced a driver's licence which had been issued on 22 July 2010.

[2] Searches conducted by police officers reveal that the applicant had been convicted in the Beenleigh Magistrates Court on 26 June 2009 of driving without a licence on 18 October 2008. It had been ordered that the applicant be disqualified from holding or obtaining a driver's licence for a period of 24 months from 26 June 2009. The order stated that Queensland Transport would provide written notice of the disqualification end dates.

[3] The applicant was charged with driving a motor vehicle on a road whilst not holding a driver's licence and whilst disqualified by a Court order from holding or obtaining one. She was convicted of the offence after a trial in the Magistrates Court at Brisbane on 27 July 2011. Two police officers who had been present at the time of the applicant's apprehension on 28 January 2011 gave evidence, as did the applicant.

[4] In her ex tempore reasons, the Magistrate, after considering a possible defence of mistake under s 24 of the *Criminal Code*, did not accept that the applicant did any relevant act "under an honest and reasonable but mistaken belief that she had a valid licence".

[5] The applicant appealed to the District Court on the following grounds:

> "Fundamental miscarriage of process in the manner in which the proceedings were conducted generally, but particularly in regard to the basis invoked for holding that current legislation relating to Road transport operations was legally valid. i.e. DCQ judgment per White DCJ in Hubner v Erbacher and Hubner v Morely paras 11 & 12, which contained errors of law not stated therein Particulars will be given in due course in Defendant's Submissions to DCQ."

[6] A 21 page written submission filed by the applicant in the District Court on 16 August 2011 did not challenge any of the Magistrate's relevant findings of fact, nor did it identify any arguable error of law. When the applicant's appeal was called on for hearing in the District Court on 19 March 2012, the applicant failed to appear. The transcript of the proceedings indicates that the Judge, purporting to act pursuant to s 229(3) of the *Justices Act*, ordered that the appeal be struck out. The applicant filed an application for leave to appeal to this Court under s 118 of the *District Court of Queensland Act* 1967 on 16 April 2012. The grounds of appeal, in substance, were:

1. The appellant was improperly denied the opportunity to present her argument in support of her appeal in that she was not given the requisite 10 days notice of the listing of the appeal for hearing, not having received a letter from the District Court Registry notifying her of the hearing date;

2. The appeal was set down for hearing before an application for special leave to the High Court of Australia from a decision of the Court of Appeal in other unrelated proceedings had been filed and heard; and

3. The "massive miscarriage of process" resulting from "improper" action within the High Court Registry compounded by the listing of the District Court appeal for hearing.

[7] The reason for the grant of leave was stated in the application as:

> "The over-riding importance for the administration of justice (not only in Queensland in this case but throughout the Commonwealth of Australia generally), of the matters raised in the special leave to appeal application to the High Court of Australia".

[8] Justice Fraser in *Smith v Ash*[1] discussed principles relevant to the exercise of the Court's discretion under s 118(3) of the *District Court of Queensland Act*, but it is unnecessary to go in to what his Honour had to say at paragraph 50 of his reasons for reasons which will shortly become apparent. I mention simply that his Honour remarked that the existence of an important point of law or question of general public importance "remains a sufficient, but not a necessary, prerequisite to a grant of leave" and further observe that leave will usually only be granted when it is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected.

[9] Section 229(3) of the *Justices Act* under which the District Court Judge purported to act provides that

> "[I]f the appellant fails to appear on a day the appeal is to be heard, the judge may strike out the appeal on proof that notice of the hearing, informing the appellant the appeal may be struck out if the appellant fails to appear, was sent to the appellant's address for service at least 10 days before the date of the hearing."

[10] Counsel for the respondent properly conceded that the notice of hearing given by the registry to the applicant did not enliven the application of s 229(3): there was no warning that the appeal may be struck out in the event of a failure to appear.

[11] Although the appeal was struck out erroneously, at least under s 229(3) of the *Justices Act*, and I note that no submissions were made as to whether the striking-out could be sustained on another ground or grounds, it would be unfortunate if this matter were to be permitted to proceed to another hearing in another court. The applicant has no prospects of success. Her only possible defence lies in establishing a defence under s 24 of the *Criminal Code*, but the Magistrate found against her on the facts in that regard. These findings are strongly supported by the evidence. Although the applicant asserted that at the time of making her application for a licence in July 2010 she was unsure whether the period of suspension ordered on

[1] [2010] QCA 112 at [50].

26 June 2009 had expired, she accepted that it was likely that she was in Court when the order was made.

[12] She admitted in cross-examination that she thought that a two year penalty was "a really harsh penalty". She claimed, rather improbably, that she thought, when in Beenleigh applying for a replacement licence, the period of suspension "must've finished last year". That, of course, was the year in which the "really harsh" suspension order was made. The applicant has been unable to identify any facts or considerations which might tend to show that the Magistrate's findings were affected by error, nor have I.

[13] In support of her application, the applicant advanced many arguments which, when intelligible, were singularly misguided. The submissions remonstrate against the inadequacies of the Australian legal system, query whether the *Transport Operations (Road Use Management) Act* 1995 had a commencement date, as none is explicitly stated within the Act itself, appear at times to be directed to proceedings other than those under consideration, concern themselves with actions within the High Court Registry which appear to relate to the refusal of the registry to accept documents which the applicant attempted to file, allege the existence of political intrigues and conspiracies and advert to the vicissitudes of litigation in the Supreme Court of Queensland, the Federal Court of Australia and the High Court affecting a "friend" of the applicant.

[14] The applicant sought to rely on an affidavit sworn by Alan George Skyring on 23 July 2012. Mr Skyring swore that he was the "friend" referred to in the applicant's submissions. His affidavit commences with a brief discussion of his observations of proceedings in the District Court on the day that the applicant's appeal was struck out. There was no issue on this application about those matters. Mr Skyring had warmed to the task of attempting to shed doubt on the validity of various statutes, both State and Federal, and of identifying a rather vague "state of affairs" affecting the legal system "to its very core". If there is anything relevant or admissible in the affidavit, I was unable to detect it. I would refuse leave to read and file the affidavit.

[15] The principles applicable to challenging on appeal the findings of fact of a Tribunal of first instance are discussed at some length in *Commissioner of Police v Toomer*[2]. There is no need to restate those principles. It is sufficient for present purposes to say that there is nothing in the material before this Court which suggests that the applicant would have any realistic prospects of disturbing the Magistrate's findings.

[16] The applicant has asserted that she received no notice of the hearing date in the District Court. I am prepared to proceed on the basis of acceptance of the applicant's unsworn assertion in this regard.

[17] Consequently, the applicant should be given leave to appeal. However, having considered the matter on the merits, I have concluded, for the reasons given earlier, that the appeal in the District Court, if it had gone ahead on the date set down, could not have succeeded and there would be no point in allowing the appeal so that a further District Court hearing could take place. That course would be equally fruitless for the reasons I have given. It is in the best interests of the applicant that this matter go no further.

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[2] [2011] QCA 233.

[18] Accordingly, the orders I would make are that leave to appeal be granted and that the appeal be dismissed.

[19] **FRASER JA:** I agree.

[20] **NORTH J:** I agree.

[21] **MUIR JA:** Those are the orders.