# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Shambayati v Commissioner of Police* [2013] QCA 57 |
| PARTIES: | **SHAMBAYATI, Sasan**<br>(applicant)<br>**v**<br>**COMMISSIONER OF POLICE**<br>(respondent) |
| FILE NO/S: | CA No 178 of 2012<br>DC No 544 of 2012 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave s 118 DCA (Criminal) |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 26 March 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 March 2013 |
| JUDGES: | Holmes and Muir JJA and Margaret Wilson J<br>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: | APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the applicant was convicted in the Magistrates Court of unlawfully assaulting the complainant – where the applicant was sentenced to four months imprisonment wholly suspended with an operational period of 12 months – where the applicant's appeal against his conviction and sentence to the District Court was dismissed – where the applicant's version of events was rather different to that of the complainant – where the magistrate accepted the evidence of the complainant – where the District Court judge was obliged to weigh the conflicting evidence and draw his own inferences and conclusions – where the applicant applied for leave to appeal pursuant to s 118(3) *District Court of Queensland Act* 1967 (Qld) – where leave will only be granted where an appeal is necessary to correct a substantial injustice to the applicant or there is reasonable argument that there is an error to be corrected – whether leave to appeal should be granted<br><br>*District Court of Queensland Act* 1967 (Qld), s 118(3) |

*Allesch v Maunz* (2000) 203 CLR 172; [2000] HCA 40, cited
*CDJ v VAJ* (1998) 197 CLR 172; [1998] HCA 67; [1998] HCA 76, 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
*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, cited
*Mbuzi v Torcetti* [2008] QCA 231, cited
*Parsons v Raby* [2007] QCA 98, cited
*Pickering v McArthur* [2005] QCA 294, cited
*Robert Bax & Associates v Cavenham Pty Ltd* [2012] QCA 177, cited
*Rowe v Kemper* [2009] 1 Qd R 247; [2008] QCA 175, cited
*Scrivener v DPP* (2001) A Crim R 115; [2001] QCA 454, cited
*Stevenson v Yasso* [2006] 2 Qd R 150; [2006] QCA 40, cited
*The Pilbara Infrastructure Pty ltd v Australian Competition Tribunal* (2012) 86 ALJR 1126; [2012] HCA 36, cited
*Walker & Anor v Davlyn Homes P/L* [2003] QCA 565, cited
*Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505, cited
*Zuvela v Cosmarnan Concrete Pty Ltd* (1996) 71 ALJR 29; [1996] HCA 30, cited

COUNSEL: The applicant appeared on his own behalf
G P Cash for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the order he proposes.

[2] **MUIR JA**: The applicant was convicted on 31 January 2012 after a trial in the Magistrates Court of unlawfully assaulting the complainant on 20 November 2010 and sentenced to four months imprisonment wholly suspended with an operational period of 12 months. An appeal against his conviction and sentence to the District Court was dismissed on 18 June 2012. The applicant applies to this Court for leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld).

[3] The principal prosecution witnesses on the trial were the complainant (a taxi driver) and a police officer, Constable Wheatley, who interviewed the complainant in the early hours of the morning of 20 November 2010. The applicant gave evidence as did a friend of his, Mr Azemikhah who was a passenger in his car at the time of the offending conduct.

[4] The complainant's evidence was to this effect. He was driving a taxi, in which he had a fare-paying passenger, southbound on the freeway at about Greenslopes or Holland Park, when he came behind a vehicle driven by the applicant. It was in the middle of the three southbound lanes travelling slowly and weaving in and out of its

lane. The complainant sounded his car horn and eventually managed to overtake the applicant. The applicant then drove up behind him sounding his horn and flashing his headlights.

[5] The applicant's vehicle kept behind his on the freeway and followed him off the freeway at the Mains Road exit. Shortly after exiting the freeway, the applicant's car came up parallel to his and then pulled over in front of him and stopped. The complainant had to brake hard in order to stop a short distance behind the applicant's car. The applicant and his passenger alighted immediately and came up to the complainant's vehicle. The applicant punched the car window and then opened the door and punched the complainant in the mouth. Without saying anything, he then swore and yelled at the complainant who was bleeding from the mouth. His shirt was "full of blood" as were his handkerchief and various tissues given to him by his passenger. Two or three taxis pulled up and the applicant ran off. The complainant's seatbelt remained fastened throughout.

[6] Constable Wheatley saw the complainant at the Upper Mount Gravatt police station early on the morning of 20 November 2010 where he complained of an assault. The constable noticed a "fair bit of blood" on "the hankie" and a small amount of blood on his shirt. When the complainant moved his hand and handkerchief away from his face, she also saw blood there.

[7] The applicant's version of events was rather different to that of the complainant. In his evidence-in-chief he swore that the complainant followed his vehicle on the freeway, flashing his lights. The applicant could not tell why the complainant was following his car. After the complainant slowed at the freeway exit, he shone his spotlight in the applicant's eyes. The applicant and his passenger thought that the complainant "definitely … need[ed] help". As a former taxi driver who knew what taxi drivers went through, he stopped to help. At the time, he thought that the driver of the car could have been Zabi, a taxi driver known to him and his passenger.

[8] After the complainant's taxi stopped, he got out of his car, went towards the taxi and tried to look through the beam of the spotlight into the car to see what was happening. The complainant opened the door and started swearing and carrying on. He tried to close it on the complainant and left.

[9] The taxi had two closed circuit cameras in it which took still photographs at approximately one second intervals. Some of these were in evidence.

[10] The applicant argued, at first instance and before this Court, that no photograph of the complainant showed the injuries which would have been expected to exist if he had been punched in the face. Also, there was no sign of blood in the photos. In cross-examination, the applicant repeated that the complainant was flashing his headlights at him on the freeway before overtaking him. He said he did not hear the complainant sound his horn. He denied seeing his passenger, Mr Azemikhah, get out of the car. Questioned by the magistrate, he accepted that his understanding was that the complainant was chasing him on the freeway and he said that he only went past the complainant's vehicle on the ramp off the freeway. He said that when the complainant stopped, he stopped his car, jumped out of it and went to look at "what [was] happening, with [the complainant's] spotlight in [his] face".

[11] The applicant put to the complainant that he had his high beam on "all the way from the Holland Park freeway exit to the Mains Road exit" and that he also had his side spotlight on "all the way".

[12] The evidence of the applicant's passenger was a bit more dramatic. In evidence-in-chief, he said that the complainant beeped his horn, tailgated the applicant's vehicle and flashed his headlights. He said, "… we were that close to having an accident … 'cause of what … the taxi driver done (sic)". In cross-examination he said that the complainant was "like going crazy, like, he didn't care about the road rules, like, he was going - tailgating us trying to hit us in the back - high beam". He later said that the complainant put his side high beam on and flashed it in his and the applicant's faces. He denied that the applicant opened the taxi door or struck the complainant. He agreed that the applicant got to the taxi before him.

[13] The magistrate accepted the submission of the prosecutor that the applicant was evasive in giving his evidence and that his explanation for being at the driver's side of the taxi was unsatisfactory. The magistrate observed that he "should be cautious in accepting any" of Mr Azemikhah's evidence but that he found the complainant's evidence "in the main, consistent, believable and reliable". He found that the applicant had assaulted the complainant by striking him in the "mouth region".

[14] The magistrate's findings were plainly supported by the evidence. For the applicant to have been believed, the magistrate would have needed to have found that, after something of a contretemps on the freeway between the complainant and the applicant, in which the complainant, following closely behind the applicant, flashed his lights at him and (according to the complainant and Mr Azemikhah) sounded his horn, the applicant somehow concluded that his friend, Zabi, was driving the taxi and was in difficulty. He would also have to have found that the applicant remained of this belief even though the complainant was shining the spotlight at the applicant and his vehicle before and after it stopped.

[15] Photographs taken by the taxi's cameras do not show the injuries complained of by the complainant and the complainant's assertion that his shirt was "full of blood" would appear to have been a gross exaggeration. One of the photographs, however, does show the complainant holding a handkerchief over his mouth. Others show the applicant approaching and at the door of the taxi with an aggressive stance.

[16] The magistrate was entitled to accept the evidence of Constable Wheatley. She had no interest in the outcome of the case and her evidence on the point was quite clear. Photographs, taken a day or so after the incident, show a distinct injury to the inside of the complainant's lip. It would also seem odd for the complainant taxi driver, who had been carrying a passenger, to go to the trouble of making a false complaint in the early hours of the morning if he was not disturbed about the incident. The complainant's passenger was unable to be present at the hearing.

[17] The District Court judge carefully reviewed the evidence and the magistrate's findings and said:

> "… reviewing the evidence, I have come to the conclusion that it was open to the learned Magistrate to make the findings that he made. As they were findings on credibility, they should stand in all the circumstances."

[18] In my respectful opinion, by so concluding it is arguable that the judge erred in that he failed to draw his own "inferences and conclusions" from the conflicting evidence, while having regard to the advantage enjoyed by the magistrate in seeing and hearing the witnesses.[1] I use the word "arguable" because earlier in his reasons the judge referred to *Fox v Percy*,[2] *Rowe v Kemper*[3] and *Mbuzi v Torcetti*[4] and identified the requirement to "weigh the conflicting evidence and draw his … own conclusions". It is thus possible that when the reasons are viewed as a whole, the judge should be seen as having drawn his own conclusions. Because this point was not raised and argued on appeal and because it does not affect the outcome of the application, there is no need to pursue it further. I raise it merely as a reminder of a judge's obligations on the hearing of appeals of the nature of the subject appeal.

[19] The general principle is that leave to appeal is normally granted in respect of applications made under s 118(3) of the *District Court of Queensland Act* 1967 where an appeal is necessary to correct a substantial injustice to the applicant or there is a reasonable argument that there is an error to be corrected.[5] No injustice or error has been identified apart from the possible error just mentioned.

[20] On the hearing of the appeal, the applicant made no submissions on sentence. In my view, the sentence could not be considered to be manifestly excessive.

[21] The findings of the magistrate are compelling and no error in his reasoning is apparent. An appeal would be pointless and, accordingly, I would refuse leave to appeal.

[22] **MARGARET WILSON J**: The application for leave to appeal should be refused. While agreeing generally with the reasons of Muir JA, I make the following observations about the matters discussed in paragraph [18] of his Honour's reasons.

[23] The appeal from the Magistrates Court to the District Court was brought pursuant to s 222 of the *Justices Act* 1886 (Qld). Section 223 of that act provides for a rehearing on the evidence given at trial and any new evidence adduced by leave.[6] In other words, it involves a "rehearing" in the technical sense of a review of the record of proceedings below rather than a completely fresh hearing. In order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error.[7]

[24] The case before the magistrate turned on findings of fact based on the view he took of conflicting oral testimony. In *Devries v Australian National Railways Commission*[8] Brennan, Gaudron and McHugh JJ said –

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1 *Fox v Percy* (2003) 214 CLR 118 at 127; *Stevenson v Yasso* [2006] 2 Qd R 150 at 162; *Parsons v Raby* [2007] QCA 98 at [23]; *Mbuzi v Torcetti* [2008] QCA 231 at [17]; *Rowe v Kemper* [2009] 1 Qd R 247 at 253–254.

2 (2003) 214 CLR 118 at 127.

3 [2009] 1 Qd R 247 at 253–254.

4 [2008] QCA 231 at [17].

5 *Pickering v McArthur* [2005] QCA 294.

6 In the present case there was no new evidence on appeal.

7 *CDJ v VAJ* (1998) 197 CLR 172 at 201-202; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [13]-[14]; *Allesch v Maunz* (2000) 203 CLR 172 at 180; *Scrivener v DPP* (2001) 125 A Crim R 279; *Walker v Davlyn Homes Pty Ltd* [2003] QCA 565 at [9]. See also *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 86 ALJR 1126 at 1138, [58]-[59].

8 (1993) 177 CLR 472 at 479. See also *Robert Bax & Associates v Cavenham Pty Ltd* [2012] QCA 177 at [83]-[88].

> "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).

[25] As I understand what the High Court said in *Fox v Percy*,[9] the District Court judge was obliged to conduct a "real review" of the evidence and, while according due respect to the advantages had by the magistrate, to weigh conflicting evidence and draw his own conclusions in order to ascertain whether there had been an error of the type described in *Devries*. He was neither obliged nor entitled to do so merely with a view to substituting his own conclusions for those of the magistrate.[10]

[26] The District Court judge conducted a thorough review of the evidence. His Honour said –

> "In this matter, the learned Magistrate has accepted the evidence of the complainant. The appellant's submissions are that the photographs did not bear out the allegations made by the complainant and, therefore, there was doubt on the whole of the evidence. In the circumstances, the learned Magistrate could not, it was submitted, be satisfied beyond reasonable doubt that the appellant had punched the complainant as the complainant alleged.
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> Regarding blood on his shirt, it is my opinion that the two photographs numbered 23 and 22 in the bundle which is Exhibit 1, may not show blood, but that is because of the quality of the photograph in the circumstances in which it was taken.
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> These photographs do show the complainant holding his face with a handkerchief. This, in my opinion, could be consistent with Constable Wheatley's evidence which the learned Magistrate accepted. Also, it does not follow merely because there was no swelling or bruising at a later stage that there was not a punch to the face. Also, this series of photographs in Exhibit 1, while they may be taken in quick succession, the appellant said 'second by second', they do not, in my view, exclude the appellant striking the complainant as the complainant alleged.
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> Further, it is my opinion that it does not follow that because the appellant was able to call another witness, that it should follow that the Magistrate should accept the appellant's evidence, or that of his witness, or have a reasonable doubt about the prosecution case. In my opinion, on the contrary, the learned Magistrate could accept the

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9 (2003) 214 CLR 118 at 124-129.

10 *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 at 506; *Zuvela v Cosmarnan Concrete Pty Ltd* (1996) 71 ALJR 29 at 31.

> evidence of the complainant and be satisfied beyond reasonable doubt that the charge was established.
>
> As the authorities that I have cited show, reviewing the evidence, I have come to the conclusion that it was open to the learned Magistrate to make the findings that he made. As they were findings on credibility, they should stand in all the circumstances."

[27] His Honour came to grips with the crux of the applicant's attack upon the magistrate's decision and adequately explained why he concluded that the findings the magistrate made were open. In short, he was not satisfied that the applicant had demonstrated error in the relevant sense. There is no reason to infer that his Honour did not do what was required of him by *Fox v Percy*, and authorities such as *Rowe v Kemper*.[11]

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[11] [2009] 1 Qd R 247 at 253.