SUPREME COURT OF QUEENSLAND

CITATION:	*Gobus v Queensland Police Service* [2013] QCA 172
PARTIES:	**GOBUS, Henry Hubert** (applicant) **v** **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO:	CA No 180 of 2012 DC No 192 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	9 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	2 May 2013
JUDGES:	Holmes and Fraser JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where applicant was found guilty in the Magistrates Court of wilful damage – where in October 2010 the applicant filed a notice to appeal under s 222 of the *Justices Act* 1886 (Qld) – where the appeal was dismissed – where the applicant applied to this Court for leave to appeal – where in October 2011 leave was granted and the matter was remitted to the District Court for determination – where the appeal was reheard in the District Court at Cairns in March 2012 – where the appeal was dismissed – nature of application for leave to appeal from a re-hearing in the appellate jurisdiction of the District Court – whether leave to appeal should be granted under s 118(3) of the *District Court of Queensland Act* 1967 (Qld) *District Court of Queensland Act* 1967 (Qld), s 118, s 119 *Justices Act* 1886 (Qld), s 222 *Penalties and Sentences Act* 1992 (Qld), s 19(1)(b) *Commissioner of Police v Stehbens* [2013] QCA 81, cited *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, cited *Gobus v Queensland Police Service* [2011] QCA 283, cited

Merrin v Commissioner of Police [2012] QCA 181, cited
Parsons v Raby [2007] QCA 98, cited
Pickering v McArthur [2005] QCA 294, cited
R v Ruthven [2013] QCA 142, cited
Rowe v Kemper [2009] 1 Qd R 247; [2008] QCA 175, cited
Smith v Woodward [2009] QCA 119, cited
Tsigounis v Medical Board of Queensland [2006] QCA 295, cited

COUNSEL: The applicant appeared on his own behalf
R Griffith 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 North J and the order he proposes.

[2] **FRASER JA:** I have had the advantage of reading in draft the reasons for judgment of North J. I respectfully agree with those reasons and would add only a reference to the statutory provisions which govern the proposed appeal to this court.

[3] Under the *District Court of Queensland Act* 1967 an appeal to this court from the District Court in its original jurisdiction under s 118(3) is an appeal by way of rehearing: s 118(8). In this case, however, the District Court was exercising appellate jurisdiction. In relation to appeals under s 118, s 119(1) provides that "…the Court of Appeal shall have power to draw inferences of fact from facts found by the judge or jury, or from admitted facts or facts not disputed provided that where the appeal is not by way of rehearing such inferences shall not be inconsistent with the findings of the judge or jury."

[4] That proviso does not preclude this court from reconsidering afresh an appeal to the District Court in a case in which the District Court judge failed to conduct the re-hearing of the appeal from the magistrate required by s 222 of the *Justices Act* 1886 (see *Rowe v Kemper* [2009] 1 Qd R 247 at [5]), but that is not this case. As North J's reasons demonstrate, the judge conducted a thorough re-hearing, substantially adopted the magistrate's findings of fact, and upheld the ultimate conclusion of guilt beyond reasonable doubt. The real substance of the applicant's arguments was that the judge erred in fact by endorsing the magistrate's findings of fact. However, as also appears from North J's reasons, those findings were at least open on the evidence. Accordingly, the judge did not err in law.

[5] On the authority of *Tsigounis v Medical Board of Queensland* [2006] QCA 295 at [14] – [15], that conclusion would require refusal of the application. It was there held that appeals to this court from decisions of the District Court in its appellate jurisdiction are limited to errors of law for the reason that they are "strict appeals" rather than appeals by way of rehearing; see also *Commissioner of Police v Stehbens* [2013] QCA 81. In *R v Ruthven* [2013] QCA 142 at pp 4 -5, this reasoning was adverted to but not applied. It is also not necessary to apply it in this case because this application must be refused on the more straightforward ground that the express terms of the proviso in s 119(1) preclude this court from drawing the inferences necessary for the applicant to succeed in his proposed appeal.

[6] **NORTH J:** The applicant seeks leave to appeal a judgment of the District Court in its appellate jurisdiction.[1] Accordingly, the applicant may only appeal with leave under s 118(3) of the *District Court of Queensland Act* 1967 (Qld) ("the Act"). Of such an appeal in *Pickering v McArthur*[2] Keane JA said[3]:

> "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."[4]

[7] This statement of the Court's practice is well established. It applies in circumstances where an applicant has already received two hearings, at trial and on appeal, and is designed to prevent excessive demands being made by those who insist upon a "right" to be heard and reheard.[5]

[8] The applicant was found guilty after a one day trial on 11 May 2010 in the Magistrates Court at Cairns of wilful damage of a glass window on 4 January 2010 at Bayview Heights, Cairns. He was self-represented at the trial. He was sentenced to a good behaviour bond under s 19(1)(b) *Penalties and Sentences Act* 1992 (Qld) in the sum of $350 for six months with no conviction recorded. He was also ordered to make restitution of $897 which was referred to the State Penalties Enforcement Registry.

[9] The applicant appealed the conviction in the District Court at Cairns on 26 May 2011. The appeal was dismissed. The applicant successfully applied for leave to appeal that decision in this Court when orders were made granting leave to appeal, allowing the appeal and remitting the matter to the District Court for determination.[6]

[10] The appeal was reheard in the District Court at Cairns on 8 March 2012 and it is from the dismissal of that appeal[7] that the applicant now seeks leave to appeal.

[11] The complainant and the applicant separated after a 15 year marriage and 20 year relationship. On the evening in question the applicant, by a prior arrangement, was to collect their two children from the complainant's residence. When the applicant arrived a dispute arose between the complainant and the applicant in the course of which the complainant alleged that the applicant damaged the window in question. The complainant, the applicant and the complainant's brother, Mr Downing, gave evidence at the trial. They were present on the occasion and were able to give evidence of their observations and recollection. Two police officers also gave evidence which was largely limited to their observations upon arrival at the premises after the incident and concerning the information they obtained in the course of their investigation of the complaint.

[12] When the magistrate gave his reasons for his findings and conviction of the applicant he said[8]:

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1 *Justices Act* 1886 (Qld) s 222. See reasons for judgment at AR204 in *Gobus v Queensland Police Service*, file number 192 of 2010, District Court Cairns, delivered 21 June 2012.

2 [2005] QCA 294.

3 *Pickering v McArthur* [2005] QCA 294 at [3].

4 See also *Teelow v Commissioner of Police* [2009] QCA 84 at [17] per Muir JA.

5 See *Smith v Woodward* [2009] QCA 119 at [16] – [20]. See also *Merrin v Commissioner of Police* [2012] QCA 181 at [19] – [20].

6 See *Gobus v Queensland Police Service* [2011] QCA 283.

7 Reasons delivered 21 June 2012.

8 AR 107 l 1 – 108 l 8.

> "I accept the evidence of Mr Downing. He had a clear recollection of the events. I found him entirely reliable and consistent, there being no reason [not] to accept the veracity of his evidence. It was consistent with the evidence of Mrs Gobus, who I also accept as an honest and reliable witness.
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> Although the events would have been stressful and disturbing, she gave her evidence in a straightforward manner without any exaggeration, and [was] generally a credible witness.
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> The evidence of Mr Downing and Mrs Gobus was consistent with the evidence of Constable Mackee and Constable Fletcher and their observations when they arrived at the residence. Any discrepancies were minor and are not unusual in a situation which was highly emotional at the time. Indeed, the discrepancies tend to show that Mrs Gobus and Mr Downing were being forthright and honest in their recollection and description of the events.
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> The evidence of Mr Gobus was self-serving and, in my view, unbelievable. He painted a picture of events which were calm and uneventful. He even struggled, I suggest, in cross-examination of Mr Downing that he, "Let him in through the sliding door without incident", contrary to the evidence of Mr Downing. His version of events of what occurred inside the residence was completely at odds with that of Mrs Gobus. His version of any conversations taking place was only when he was leaving and he said to Mr Downing, "She's trying to relive her past". The focus of his evidence was more on whether he was an aggressive and matters concerning his dispute concerning the hand-over of the children. I therefore reject his evidence."

[13] In the notice of appeal to the District Court the applicant specified four grounds of appeal[9]:

> "1. That the magistrate erred to find the prosecution evidence consistent;
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> 2. That the magistrate erred to find the defendant's evidence self-serving;
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> 3. That the magistrate erred by rejecting evidence produced by the defendant;
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> 4. That the magistrate erred to find that the prosecution proved their case beyond a reasonable doubt."

When the appeal was reargued before the learned District Court Judge the applicant was represented by a solicitor. At that hearing, the applicant's solicitor abandoned ground 3.[10] Further, the contention in the outline of submissions filed on behalf of the applicant in support of the appeal that the magistrate had exhibited or had been

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9 AR 133.

10 AR 122 l 39 – 47.

actuated by bias against the applicant (as part of the content of ground 4) was abandoned.[11] Those abandonments were expressly adverted to by his Honour in his reasons.[12] His Honour reserved his decision and when he pronounced his order dismissing the appeal he published his reasons.

[14] In *Teelow v Commissioner of Police*[13] Muir JA, speaking of the appeal to the District Court under s 222 of the *Justices Act* 1886 said:[14]

> "**The original ground of appeal**
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> [2] Section 223 of the *Justices Act* 1886 provides:
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> **"Appeal generally a rehearing on the evidence**
>
> (1) An appeal under section 222 is by way of rehearing on the evidence (***original evidence***) given in the proceeding before the justices.
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> (2) However, the District Court may give leave to adduce fresh, additional or substituted evidence (***new evidence***) if the court is satisfied there are special grounds for giving leave.
>
> (3) If the court gives leave under subsection (2), the appeal is –
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> (a) by way of rehearing on the original evidence; and
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> (b) on the new evidence adduced.
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> [3] A characteristic of an appeal "by way of rehearing" is that the appellate court, subject to its powers to admit fresh evidence, rehears the matter on the record of the court from which the appeal comes. In *Scrivener v Director of Public Prosecutions*, McPherson JA, referring to an appeal "by way of rehearing" under r 765(1) of the *Uniform Civil Procedure Rules* 1999, observed:
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> "It is well settled that a provision that characterises an appeal to this Court as a "rehearing" ordinarily refers to a rehearing on the record, and not to what is sometimes called a rehearing *de novo*: see *Powell v Streatham Manor Nursing Home* [1935] AC 243, 263. On such a rehearing the appellate court has power to draw inferences from primary facts, including facts found and facts not disputed, which is as complete as that of the primary judge: see *Warren v Coombes* (1979) 142 CLR 531, 537-541. On the other hand, an appeal under that form of procedure does not involve a rehearing of witnesses … Further evidence may be received on appeal, but only on special grounds: see r 766(1)(c) …"

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11 AR 123 l 30 – 40.

12 Reasons at para [30]; AR 229.

13 [2009] QCA 84.

14 *Teelow v Commissioner of Police* [2009] QCA 84 at [2] – [4].

> [4] It is a normal attribute of an appeal by way of rehearing that "the powers of the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error … At least that is so unless, in the case of an appeal by way of rehearing, there is some statutory provision which indicates that the powers may be exercised whether or not there was error at first instance." On an appeal by way of rehearing an appellate court can substitute its own decision based on the facts and the law as they stand at the date of the decision of the appeal."
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> (Footnotes omitted.)

[15] At the rehearing his Honour had available to him not only a transcript of the proceedings below of the relevant evidence but also an outline of argument prepared by the applicant addressing the matters raised by the Notice of Appeal. Further, as I have noted the applicant had the benefit of representation by a solicitor. In his reasons his Honour noted that the appeal to him was by way of re-hearing.[15] Such an appeal obliged the appellate Court to conduct a review of the trial consistently with the principles mentioned,[16] bearing in mind the appellate Court has neither seen or heard witnesses[17] but nevertheless is obliged to give due deference and weight to the trial Court's views concerning the credibility or reliability of witnesses because;

> "…the Magistrate has seen the witnesses. That advantage adds strength to findings of fact based on the evidence of the witnesses. On a re-hearing, a court would normally examine the evidence and the findings made on it, giving weight to findings which that evidence could support, including ones which reflected opinions on credibility and the like."[18]

[16] His Honour reviewed and thoroughly summarised the evidence of the witnesses at the trial.[19] His Honour then turned to a consideration of the decision of the Magistrate, including his findings[20] and then addressed the grounds for appeal and the submissions made in support before him.[21] In this latter task his Honour identified the respects in which it was said there were discrepancies between the evidence of Mr Downing and the complainant[22]:-

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- The appellant's case was that he did not break the glass
- That it was not encumbent [sic] upon him to show who did, that it was encumbent [sic] upon the prosecution to prove beyond reasonable doubt that he did.

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15 Reasons for judgment at [6], AR 205.
16 See para [9] above.
17 *Fox v Percy* (2003) 214 CLR 118 at [25].
18 See *Parsons v Raby* [2007] QCA 98 at [24] per Jerrard JA.
19 Reasons for judgment [9] – [24] AR 205-227.
20 Reasons for judgment [25] – [27] AR 228-229.
21 Reasons for judgment [28] – [31] AR 229-230.
22 Reasons for judgment [31], AR 230.

- I was referred to the passage in cross-examination of Downing at the top of p 66 of the transcript to the effect that his first impression was that his sister was in trouble and that the appellant had thrown her into the glass door. It was argued that that evidence could not be reconciled with the subsequent evidence that he saw the appellant's foot wriggling through the glass door. As I indicated to Mr Mellick at the time it did not appear to me that the two statements were necessarily inconsistent. The appellant never took the matter any further in cross-examination but it is not as though the witness said that he actually saw the head, he merely said that he thought this is what is must have been and that is not necessarily inconsistent with him then seeing the foot in the door.
- I was reminded of the evidence in relation to the number of bangs, particularly the evidence of the complainant to the effect that she had said that there were six or seven loud bangs, whereas the evidence of Downing was to the effect that after he heard the appellant say something there was a smash. He did not refer to any loud bangs. This was an inconsistency which I identified in my earlier reasons on 26 May 2011.
- Reliance was also placed on some discrepancies in the evidence as to whether or not Sammy was distressed when he was taken from the premises. Certainly, the complainant gave evidence of some distress on his part whereas Mr Downing agreed with the propositions that he was calm and not distressed. Again, I dealt with this discrepancy and accepted there was a discrepancy in my decision on 26 May 2011.
- In essence, Mr Mellick argued that these discrepancies, whilst on their own, may not mean much when looked at their entirety meant that a tribunal could not be satisfied beyond reasonable doubt that he had committed the offence even if it was possible to conclude on the balance of probabilities that he had."

[17] When considering the appeal in light of the discrepancies advanced on behalf of the applicant his Honour described the case against the applicant as "overwhelming."[23] Then, referring to the magistrate's findings,[24] his Honour said[25]:-

> "[35] On any view of the evidence the damage to the glass panels was done almost immediately after [the complainant] shut the main front door in circumstances when [the appellant] was the only other person present.
>
> [36] The Magistrate was entitled to accept the evidence of the complainant and her brother, Matthew Downing. He had the benefit of seeing the three main witnesses in the witness box. Appeal courts will not lightly interfere with findings of credit and there is nothing on the evidence here to suggest that that finding should be interfered with.
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> [37] I do not believe that the discrepancies identified at both stages of this appeal are so significant as to justify this Court interfering with those findings of credit. The Magistrate has not made any error of law nor does he appear to have made any findings which are inconsistent with the facts.

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23 Reasons for judgment [32], AR 230.

24 See para [7] above.

25 Reasons for judgment [35] - [37] AR 231.

[18] The sole ground of appeal in the notice of application for leave to appeal to this Court is:

> "That having regard to the various inconsistencies in the evidence, as identified in paragraph 31 on page 27 of the Judgment 21/03/12, the Learned Hearing Judge erred in finding that a Tribunal of Fact could be satisfied beyond reasonable doubt that I committed the offence."[26]

[19] In argument before the Court the applicant referred to a number of the asserted inconsistencies between the evidence of the complainant and Mr Dowling that were pressed upon the learned District Court Judge below[27] and also contended that the complainant's evidence of damage to a screen door caused in the circumstances she described as highly improbable.[28]

[20] In my view his Honour conducted the appeal before him in accordance with his obligations under the Act. He carefully reviewed the evidence in accordance with established authority.[29] His Honour weighed the evidence and considered whether the magistrate below had erred having regard to the advantage the magistrate had in seeing and observing the witnesses when they gave evidence before him in reaching his conclusions with respect to credibility and making his findings.[30] I can detect no error in the way in which his Honour approached his task nor in the conclusions he reached nor the reasons he gave for them. There was no injustice to the applicant at trial or on appeal to the District Court nor has any error on the part of the magistrate or his Honour been demonstrated.[31]

[21] One matter might be noted in passing. In his written outline of submissions in support of the application for leave to appeal to this Court the applicant made repeated allegations of bias against the magistrate at first instance.[32]

[22] I have read with care the written submissions originally lodged with the registry in support of the application for leave to appeal and reviewed the transcript of the hearing. In large measure the contention of bias flows from the use by the magistrate of the term "we" when the magistrate suggested to the police prosecutor that the applicant be given "a bit of leeway."[33] When read in context it is doubtful that the magistrate exhibited bias, actual or apprehended; he was suggesting to the prosecutor that the applicant be allowed some latitude in the circumstance that he was representing himself.[34] It is unnecessary to consider that matter further, as the allegation of bias was abandoned during the appeal before his Honour below and was neither a ground of the application to appeal nor argued at the hearing.

[23] The application for leave to appeal should be refused with costs.

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26 AR 232.

27 See para [11] above.

28 His Honour referred to and summarised this evidence in his reasons for judgment, AR 212.

29 See para [9] above.

30 See *Fox v Percy* (2003) 214 CLR 118 at [25] and paras [9] and [10] above.

31 Refer para [1] above.

32 It should be recalled that the allegation of bias was specifically withdrawn and abandoned at the hearing of the appeal before his Honour below and was neither a ground of the application for leave nor mentioned at the hearing.

33 AR 22 l 11.

34 See further AR 37 l 24-33 although it is moot whether the applicant was unfamiliar with trial practice (see *Gobus v Queensland Police Service* [2011] QCA 283, pg 2).