SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of Police v James* [2013] QCA 403
PARTIES:	**COMMISSIONER OF POLICE** (applicant) **v** **JAMES, Anthony William** (respondent)
FILE NO/S:	CA No 88 of 2013 DC No 3095 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	25 September 2013
JUDGES:	Margaret McMurdo P and Fraser JA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal limited to the first ground of appeal.** **2. Allow the appeal.** **3. Vary the orders made in the District Court only to the extent of setting aside the orders that the pleas of guilty be set aside and that the respondent be discharged for the 15 offences of forgery under s 488(1)(a) of the *Criminal Code* and the 15 offences of uttering registration documents under s 488(1)(b) of the *Criminal Code*.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – JURISDICTION – GENERALLY – where the respondent pleaded guilty in the Magistrates Court to 59 charges of making a false statement for the purposes of registering births, deaths and marriages, 15 counts of forgery and 15 counts of uttering a registration document – where the matter was dealt with summarily pursuant to s 552BA(4)(b) of the *Criminal Code* and the respondent was sentenced to 12 months imprisonment wholly suspended for two years – where the applicant appealed to the District Court against the sentence pursuant to s 222 of the *Justices Act* 1886 (Qld) – where the District Court judge varied the sentence imposed in

the Magistrates Court to a term of two years imprisonment wholly suspended for an operational period of three years and ordered that the pleas of guilty be set aside and the respondent be discharged for the forgery and uttering offences – whether the District Court judge had jurisdiction under s 222 of the *Justices Act* 1886 (Qld) to set aside those convictions

Criminal Code 1899 (Qld), s 552BA(4)(b)
Justices Act 1886 (Qld), s 222

Ajax v Bird [2010] QCA 2, considered
Costigan v Marshall [2010] QCA 344, considered
Dore & Ors v Penny [2005] QCA 150, cited
Long v Spivey [2004] QCA 118, cited
Phillips v Spencer & Anor [2006] 2 Qd R 47; [2005] QCA 317, considered
R v Hennessy; Hennessy v Vojvodic [2010] QCA 345, considered

COUNSEL: B G Campbell for the applicant
No appearance for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the applicant
No appearance for the respondent

[1] **MARGARET McMURDO P:** I agree with Fraser JA's reasons and proposed orders.

[2] **FRASER JA:** The applicant applies for leave to appeal pursuant to s 118 of the *District Court of Queensland Act* 1967 against orders made in the District Court that the respondent's pleas of guilty to 30 of 89 indictable offences heard summarily in the Magistrates Court be set aside and the respondent be discharged in respect of those 30 matters.

Background

[3] The respondent pleaded guilty in the Magistrates Court to 89 counts in all, comprising 59 charges of making a false statement for the purposes of registering Births, Deaths and Marriages, (s 501 of the *Criminal Code*), 15 counts of forgery, and 15 counts of uttering a registration document (s 488 of the *Criminal Code*). The matter proceeded summarily pursuant to s 552BA(4)(b) of the *Criminal Code*. The respondent was sentenced to 12 months imprisonment wholly suspended for two years.

[4] The applicant appealed to the District Court against the sentence pursuant to s 222 of the *Justices Act* 1886 on the ground that, because the Magistrate failed to consider the elements of "intent" and "intent to defraud" when imposing the sentence, and formed a view that the respondent did not intend to be deceitful, the sentence was manifestly inadequate in all the circumstances. During the hearing of that appeal, the judge raised the question whether the respondent's pleas of guilty to the 30 forgery and uttering charges should be set aside on the ground that the submission in mitigation of penalty made by the respondent's counsel in the

Magistrates Court, that the respondent acted stupidly but without any advantage to him, was inconsistent with the element of those offences that the respondent acted with an intent to defraud. That submission was not contradicted by the prosecutor.

[5] The respondent's counsel endorsed the proposition that the 30 convictions on those charges should be set aside on that ground. The ultimate submission for the applicant upon that issue was that the respondent should have been held to his pleas of guilty; as it was put in the applicant's outline of submissions, "… the entry of a plea of guilt is prima facie acceptance of all constituent elements of the offence", the explanation of the respondent's conduct made by his counsel in the Magistrates Court "should not, at least in the absence of sworn evidence confirming it, have been accepted by the Magistrate", and the Magistrate's failure to mention the element of an intent to defraud and her characterisation of the respondent's "conduct as 'stupid' rather than dishonest is indicative of appellable error entering into the sentencing discretion."

[6] The District Court judge upheld the applicant's appeal and varied the sentence imposed in the Magistrates Court to a term of two years imprisonment, to be wholly suspended with an operational period of three years for each of the 59 charges of making a false statement under s 501 of the *Criminal Code*. Relevantly to the present application, the District Court judge ordered that the pleas of guilty be set aside and the respondent be discharged for the 15 offences of forgery and the 15 offences of uttering of which the respondent had been convicted in the Magistrates Court on his pleas of guilty.

Consideration

[7] The applicant does not seek any variation of the sentence imposed in the District Court. The purpose of the application in this Court is to obtain the reinstatement of the respondent's convictions on his pleas of guilty to the forging and uttering offences. The grounds of the application are that the order was ultra vires and that the District Court judge erred in finding that there was no evidence to make out the element of "intent to defraud". The respondent informed the registry that he would not appear at the hearing of the application, the registry having confirmed with the respondent that the applicant was not seeking to vary the sentence.

[8] The second ground appeared to have some substance in the evidence but it raises no issue of principle. For that reason, and because the applicant does not seek any variation of the sentence, it would not be appropriate to grant leave to appeal on that ground. However, the first ground raises a question of general public importance which justifies the Court in granting leave to appeal: see *Costigan v Marshall* [2010] QCA 344 at [12]. The resolution of this ground turns upon the construction of provisions of the *Justices Act* 1886.

[9] Section 222(1) of that Act confers a right of appeal to a District Court judge upon a person who "feels aggrieved as complainant, defendant or otherwise by an order made by justices or a justice in a summary way on a complaint for an offence or breach of duty …". Section 222(2)(b) specifies the exception that "if the order the subject of the proposed appeal is an order of justices dealing summarily with an indictable offence, a complainant aggrieved by the decision may appeal under this section only against sentence or an order for costs". A further exception is specified in s 222(2)(c) that "if a defendant pleads guilty or admits the truth of a complaint,

a person may only appeal under this section on the sole ground that a fine, penalty, forfeiture or punishment was excessive or inadequate." Thus a defendant who pleads not guilty and is convicted after a summary trial has a right of appeal against conviction under s 222(1) but a defendant who "pleads guilty or admits the truth of a complaint" within the meaning of s 222(2)(c) has no right of appeal against conviction.

[10] The exception in s 222(2)(b) applied because the Magistrate was dealing summarily with an indictable offence. Thus the applicant's right of appeal was confined to an appeal against sentence or an order for costs. Consistently with that provision, the applicant in fact appealed to the District Court only against the sentence.

[11] Because the respondent did not seek to appeal to the District Court against his convictions, it is not necessary to decide whether the exception in s 222(2)(c) precluded such an appeal. It should be noted, however, as was observed in *Ajax v Bird* [2010] QCA 2 at [4] that the decisions in *Long v Spivey* [2004] QCA 118, *Dore & Ors v Penny* [2005] QCA 150, and *Phillips v Spencer* [2006] 2 Qd R 47 make it "quite clear that where a defendant enters an unequivocal plea of guilty that person has no right of appeal against conviction under s 222 of the *Justices Act* 1886".

[12] The applicant directed the Court's attention to a decision which arguably suggests that such an appeal does lie in some cases where a defendant has effectively entered an unequivocal plea of guilty, *R v Hennessy; Hennessy v Vojvodic* [2010] QCA 345. The Court there granted leave to appeal and allowed an appeal against a decision of the District Court refusing to extend time within which to appeal against convictions in the Magistrates Court. It is arguable that the ground of the decision was merely that there was a miscarriage of justice because the applicant had pleaded guilty without appreciating that he had an arguable defence to the offences charged against him, but the Court also referred with approval to the respondent's concession in that case that the District Court judge "would have jurisdiction in an appropriate case to consider whether the plea was an unequivocal plea of guilty." In the latter case an appeal to the District Court may be authorised by s 222(1) on the footing that an equivocal plea of guilty should not be regarded as a plea of guilty or an admission of the kind referred to in s 222(2)(c). An alternative remedy in some such cases may be an application under Part 5 of the *Judicial Review Act* 1991 to quash a conviction which should not have been entered by the Magistrate (see *Phillips v Spencer* [2006] 2 Qd R 47 at [10], [20], and [35] – [36]), or an application in the Magistrates Court to set aside a plea of guilty within 28 days after the conviction or within such further time as that court allows (see *Justices Act* 1886 (Qld), s 147A(2), and *Phillips v Spencer* at [21], but see also [11] and [37]).

[13] Because the respondent did not seek to appeal to the District Court or to pursue any alternative remedy to set aside his pleas of guilty, those issues do not arise in this application and it is not necessary to consider them further. The question whether the respondent's convictions of the forgery and uttering offences should be set aside was not and could not be in issue in the applicant's appeal to the District Court, which was the only proceeding in that court. The District Court judge therefore acted outside jurisdiction in setting aside those convictions. The appeal should be allowed on that ground.

Proposed orders

[14] The following orders are appropriate:

1. Grant leave to appeal limited to the first ground of appeal.
2. Allow the appeal.
3. Vary the orders made in the District Court only to the extent of setting aside the orders that the pleas of guilty be set aside and that the respondent be discharged for the 15 offences of forgery under s 488(1)(a) of the *Criminal Code* and the 15 offences of uttering registration documents under s 488(1)(b) of the *Criminal Code*.

[15] **HENRY J:** I have read the reasons of Fraser JA. I agree with those reasons and the orders proposed.