

# SUPREME COURT OF QUEENSLAND

CITATION: *Palmgrove Holdings Pty Ltd v Sunshine Coast Regional Council*  
[2014] QCA 333

PARTIES: **PALMGROVE HOLDINGS PTY LTD**  
ACN 010 870 925  
(applicant)  
v  
**SUNSHINE COAST REGIONAL COUNCIL**  
(respondent)

FILE NOS: CA No 111 of 2014  
DC No 161 of 2012

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Maroochydore

DELIVERED ON: 16 December 2014

DELIVERED AT: Brisbane

HEARING DATE: 7 November 2014

JUDGE: Holmes and Muir JJA and McMeekin J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **Refuse the application for leave to appeal, with costs.**

CATCHWORDS: ENVIRONMENT AND PLANNING – POLLUTION – WATER POLLUTION – OFFENCES – PARTICULAR OFFENCES – where the applicant was convicted by a magistrate of an offence of unlawfully depositing a “prescribed water contaminant” in stormwater drainage, contrary to s 440ZG of the *Environmental Protection Act 1994* (Qld) – where the applicant carried out works on a construction site – where the development approval permitted the release of water from the site only where its concentration of total suspended solids did not exceed 50 milligrams per litre – where evidence indicated the water contamination at 600 milligrams per litre – where a District Court judge dismissed the applicant’s appeal against conviction – where the applicant contends that the evidence was not sufficient to exclude the possibility that the water contamination level of the sample did not accurately represent the concentration of suspended solids in the water released from the site – whether the judge had erred in not finding that there existed a rational possibility consistent with innocence – whether leave should be granted to appeal under s 118(3) of the *District Court of Queensland Act 1967* (Qld)

*District Court of Queensland Act 1967* (Qld), s 118  
*Environmental Protection Act 1994* (Qld), s 440ZE, s 440ZG,  
s 493A  
*Justices Act 1886* (Qld), s 76, s 222

*Director of Public Prosecutions v United Telecasters Sydney Ltd*  
(1990) 168 CLR 594; [1990] HCA 5, cited  
*Johnson v Queensland Police Service* [2014] QCA 195, applied

COUNSEL: S T Courtney for the applicant  
M Williamson for the respondent

SOLICITORS: Butler McDermott for the applicant  
Thomson Geer for the respondent

- [1] **HOLMES JA:** The applicant was convicted by a magistrate of an offence of unlawfully depositing a “prescribed water contaminant” in stormwater drainage, contrary to s 440ZG of the *Environmental Protection Act 1994*. It had been carrying out works on a construction site pursuant to a development approval which permitted the release of water from the site only where its concentration of total suspended solids did not exceed 50 milligrams per litre. The complaint particularised the offence as the discharge of water with a solids concentration of 600 milligrams per litre from the boundary of the land containing the site.
- [2] A District Court judge, after a re-hearing, dismissed the applicant’s appeal against the conviction. It now seeks leave under s 118 of the *District Court of Queensland Act 1967* to appeal the District Court judge’s decision on the ground that his Honour’s finding that the water released from the land contained a concentration of suspended solids in excess of the permitted level could not be supported on the evidence: there was a reasonable possibility that the water sample taken did not properly represent the composition of water leaving the land.
- [3] Leave to appeal would ordinarily be granted under s 118(3) of the *District Court Act* only where there is both a reasonable argument that there is an error to be corrected and the appeal is necessary to correct a substantial injustice to the applicant.<sup>1</sup>

*The legislation*

- [4] The relevant offence provision is s 440ZG of the *Environmental Protection Act*:  
“ A person must not -  
(a) unlawfully deposit a prescribed water contaminant – ...  
(ii) in a roadside gutter or stormwater drainage...”

A “prescribed water contaminant” is defined in the *Environmental Protection Regulation 2008*<sup>2</sup> as “a liquid containing suspended or dissolved solids”.

- [5] By s 440ZE a person is taken to deposit a contaminant in water if he or she places or releases the contaminant into the water. Section 493A renders a deposit of a contaminant mentioned in s 440ZG unlawful unless it is authorised to be done under specified forms of authority, one of which is “a development condition of a development approval.”<sup>3</sup>

<sup>1</sup> *Johnson v Queensland Police Service* [2014] QCA 195 at [29].

<sup>2</sup> Schedule 9 Item 3.

<sup>3</sup> Section 493A(2)(e).

- [6] The complaint did not allege that the s 493A exception as to the conduct's being authorised by a development approval was negated, so there was no question of any shift in the burden of proof under s 76 of the *Justices Act* 1886. Nor did the prosecutor contend that the *Environmental Protection Act* should be construed as imposing the burden on the applicant to prove on the balance of probabilities that the development approval authorised the discharge.<sup>4</sup> Instead, the prosecution was conducted on the basis that it fell to the complainant to prove that the discharge was not so authorised; that is, that it entailed a contamination level which exceeded that permitted by the development approval.

*The evidence*

- [7] A council engineer, Mr Rowlands, inspected the construction site after heavy rain had fallen, causing water to flow from a sediment basin on the site. He observed significant erosion from an area on the site which had been spread with topsoil; the resulting sediment was being carried through an open manhole and through a stormwater pipe into the sediment basin. It was draining out of the basin through two uncapped PVC pipes.
- [8] The turbid water left the PVC pipes leading from the sediment basin and entered a small channel, which also contained water emerging from a culvert. The culvert water came from an external catchment. Mr Rowlands said that the water from the culvert was a much smaller flow than that from the pipes. While it was very shallow and hard to gauge, he observed that it was slightly turbid. It was, however, much clearer than the water coming out of the pipes, which was highly turbid. The engineer took a water sample from the channel just below the culvert entrance and adjacent to the pipes leading out of the sediment basin.
- [9] Upon analysis, the sample returned a result of 600 milligrams per litre of suspended solids. Mr Rowlands said that, in his experience, it was possible to see through a bottle of water which had a concentration of about 50 milligrams per litre, sufficient to make out fingers on the other side of the bottle. The water he had sampled was highly turbid, and it was impossible to see through the bottle which contained it. He did not think it necessary to take a further sample; the one he had obtained was well-mixed and from a strongly flowing stream.
- [10] Past the point at which the sample was taken, the channel travelled through some vegetation on the site, across the property boundary and into culverts underneath the road, with the water finally being released downstream into wetlands. The distance between where the sample was taken and the roadway at the boundary of the construction site was estimated at between 60 and 80 metres. Mr Rowlands said that he saw the turbid water leaving the site, flowing from one side of the roadway to the other. He and his colleague, Mr Salt, had got out of their vehicle. There was a clear line of sight and a straight channel through the vegetation. Asked whether there was vegetation in the channel itself, he said that that could not be seen because the water was so turbid.
- [11] Mr Salt, who had taken photographs of the basins and channel on the construction site, confirmed that they had travelled out of the site and stopped on the road culvert, where they had looked back up at the flow path of turbid water travelling through the vegetation to the roadway culverts.

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<sup>4</sup> See *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 600-601 for a discussion of implied legislative intention to shift the burden of proof in relation to exceptions.

*The magistrate's conclusion*

- [12] The magistrate found that although some less turbid water had come from the culvert, the “predominant contamination of water” flowed from the sediment basin pipes. There was no evidence of any possibility of its having been contaminated from any other location on its flow from the channel through the road culverts into the adjacent wetland. It followed that the water released into the wetland was contaminated. It was not an element of the alleged offence that the contaminated water had any particular concentration of suspended solids. The charge had been proved beyond reasonable doubt.

*The appeal to the District Court*

- [13] On appeal under s 222 of the *Justices Act* 1886, the District Court judge noted that it had not been suggested that the burden of proof as to unlawfulness had shifted; but the magistrate appeared to have overlooked that it was accordingly necessary for the prosecution to prove a concentration of at least 50 milligrams per litre of solids in the water released from the boundary of the land. His Honour identified as the critical question:

“whether there was a rational possibility that the concentration of suspended solids in the water flowing in the channel, at the point at which the sample was taken (up to some 60 or 80 metres away), was so diluted or reduced by the time it reached the boundary of the land, so as to not exceed 50mg/l. That is to be at a concentration of one twelfth or less, of the water so sampled.”

- [14] Having regard to the analysis of the sample, the evidence of the topography of the channel and the appearance of the turbid water flowing to and beyond the boundary of the land, his Honour concluded that the inference could be drawn, beyond reasonable doubt, that the concentration of suspended solids in the water at its release at the boundary was greater than 50 milligrams per litre. There existed no rational possibility that the water was not contaminated at that level.

*The applicant's submissions in this Court*

- [15] The applicant submitted that the evidence was not sufficient to exclude the possibility that the sample did not represent the concentration of suspended solids in the water as released from the site and that the level was in fact less than 50 milligrams per litre. There were three features of the case which produced that result. The first was that the methodology was flawed. The taking of a single sample left uncertainty as to the composition of the water when it left the land. Secondly, the sample was taken adjacent to the culvert. There had been a significant rain event. Although not much water could be seen emerging from the culvert in the photograph taken at the time the sample was taken, it was not actually known what its composition was. Thirdly, there had been no assessment of the turbidity of the water as it was leaving the subject land. It was possible, for example, that vegetation in the channel might have reduced the concentration of suspended solids. The District Court judge had erred in not finding that there existed a rational possibility consistent with innocence.

*Discussion*

- [16] I do not think, shortly put, that the applicant has any prospect of demonstrating error in the District Court judge's conclusion. The evidence in this case was not as

comprehensive as it might have been. Plainly a water sample taken immediately before the land's boundary would have put the issues raised here beyond argument. But on the evidence which was adduced, I do not consider that any reasonable possibility consistent with innocence remained.

- [17] The limited amount of water emerging from the culvert at the time the sample was taken was described as only "slightly" turbid and certainly less turbid than the water emerging from the PVC pipes. It followed that its contribution would be limited to reducing the solids concentration in the sample, which on Mr Rowlands' evidence was well-mixed and from a strongly flowing stream. The water then flowed through the channel to the boundary of the land without interruption, highly turbid at its start and at its finish 60 to 80 metres away. There was no reasonable possibility that something had occurred in its course to reduce the concentration of suspended solids at the sample site, at 600 milligrams per litre, to below 50 milligrams per litre where the channel crossed the site's boundary.

*Conclusion*

- [18] The evidence supported the District Court judge's finding as to the water's contamination and did not leave open other rational possibilities. The proposed appeal ground cannot be made out. I would refuse the application for leave to appeal, with costs.
- [19] **MUIR JA:** I agree that the application should be refused with costs for the reasons given by Holmes JA.
- [20] **McMEEKIN J:** I agree with the reasons of Holmes JA and the orders her Honour proposes.