SUPREME COURT OF QUEENSLAND

CITATION:	*Shaw v Esk SC* [2005] QCA 279
PARTIES:	**IAN SHAW** (appellant/applicant/appellant) v **ESK SHIRE COUNCIL** (respondent/respondent)
FILE NO/S:	CA No 95 of 2005 DC No 1 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Ipswich
DELIVERED EX TEMPORE ON:	11 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	11 August 2005
JUDGES:	McMurdo P, Jerrard JA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application to adduce further evidence granted** **2. Application for leave to appeal granted** **3. Appeal allowed with costs to be assessed** **4. The order of the Ipswich District Court of 16 March 2005 dismissing the appeal under s 222 *Justices Act* 1886 (Qld) with costs to be assessed is vacated. Instead, that appeal is allowed with costs fixed at $2,090.88** **5. The convictions, penalties and costs orders entered in the Ipswich Magistrates Court are set aside. It is ordered instead that the complaints are dismissed. The Esk Shire Council must pay Mr Shaw's costs of the Magistrates Court hearing fixed at $4,191.80**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - OBJECTIONS AND POINTS NOT RAISED IN THE COURT BELOW - OTHER MATTERS - appellant charged under local law with two complaints of keeping excess dogs on property - pleaded not guilty in Magistrates Court contending local laws were invalid - convicted and

fined $800 and ordered to pay $2,062.10 costs in respect of each complaint - appellant appealed to District Court contending local laws were invalid - appeal to District Court dismissed with costs - appellant applied to Court of Appeal for leave to appeal and to adduce further evidence - further evidence established local laws were never validly made - respondent concedes appeal should be allowed

COSTS - RECOVERY OF COSTS - respondent contends as appellant did not raise point on which he was successful in the Court of Appeal in the Magistrates Court or the District Court the appellant should only get his costs in the Magistrates Court - appellant contends he should get all costs orders made in his favour - whether appellant should be liable to pay any costs resulting from his unlawful prosecution under an invalid law even though he only discovered proof of the invalidity at a late stage

Local Government Act 1993 (Qld), s 871(b), s 873(1)

COUNSEL:	J P Murphy for the applicant/appellant J A Logan SC, with S M Ure, for the respondent
SOLICITORS:	No appearance for the applicant/appellant King & Company for the respondent

THE PRESIDENT: The applicant, Mr Shaw, lives in the Esk Shire in land zoned Rural A. He keeps and breeds Kangal dogs. On 14 October 2002 the respondent, Esk Shire Council, issued two complaints against him charging that on 7 June 2002 contrary to Esk Shire Council Local Law No 2 (Keeping and Control of Animals) 2000 ("Local Law No 2") and Subordinate Local Law No 2 (Keeping and Control of Animals) ("Subordinate Local Law No 2"), he first kept more than four dogs without obtaining a kennel permit as required under the local laws, and second, kept five animals without holding any current receipt of registration as required under the local laws.

It is common ground that at the time the complaints were issued Mr Shaw had five dogs on his property none of which

were farm-working animals and he had neither registration papers nor a kennel permit. His case was heard initially in the Ipswich Magistrates Court. Mr Shaw pleaded not guilty arguing that the local laws were invalid. He was convicted and fined $500 for failing to have his dogs registered and convicted and fined $300 for failing to have a kennel permit. In respect of each complaint he was ordered to pay $2,062.10 costs. He appealed from that decision under s 222 *Justices Act* 1886 (Qld) to the District Court at Ipswich, again contending that the local laws under which he had been convicted were invalid. The learned District Court judge rejected Mr Shaw's arguments and dismissed his appeal with costs. This application is for leave to appeal from that decision.

Mr Shaw contends that leave to appeal should be granted because the application raises important matters of law in that Local Law No 2 was never made and Subordinate Local Law No 2 could not be made because its authorising Local Law No 2 was never made.

He seeks to adduce fresh evidence. The respondent does not now oppose the adducing of that further evidence and concedes that leave to appeal should be granted and the appeal allowed. This is because the undisputed fresh evidence, Minutes of the Esk Shire Council meetings obtained by Mr Shaw only after his District Court Appeal, establishes that Local Law No 2 and Subordinate Local Law No 2 were never validly made.

It seems that under s 871(b) *Local Government Act* 1993 (Qld) ("the Act") the respondent Council resolved to proceed with making the relevant local law in the form amended but through oversight did not actually resolve to make the law as amended under s 873(1) of the Act. Because the Local Law No 2 was not validly made, it follows that the Subordinate Local Law No 2 could have no effect and was not validly enacted. It further follows that the complaints made against Mr Shaw on 14 October 2002 were not charged under a valid law. The respondent's concessions appear plainly right in the light of the further evidence now produced to this Court.

The only dispute between the parties now relates to costs. The Esk Shire Council argues that the point upon which Mr Shaw is now successful was not raised at the Magistrates Court hearing or at the District Court appeal and that the appropriate order as to costs is to make only one order as to costs in favour of the applicant for all these proceedings. The Council suggests there should be no order as to the costs of the application for leave to appeal and appeal in this Court or the District Court but that an order for costs in the Magistrates Court in Mr Shaw's favour is appropriate. Mr Shaw on the other hand understandably wants all costs orders made in his favour.

The further evidence received by this Court relates directly to the legality of a penal law, Local Law No 2 and Subordinate Local Law No 2. We now know that Mr Shaw was charged and convicted under an invalid law. In those circumstances Mr

Shaw should not be liable to pay any costs resulting from his unlawful prosecution. He should recover all his costs in defending that prosecution, even though he only discovered proof of the invalidity of the law under which he was prosecuted and was ultimately successful, at this late stage.

I would allow the applicant to adduce further evidence, grant the application for leave to appeal and allow the appeal with costs to be assessed. The order of the Ipswich District Court of 16 March 2005 dismissing the appeal under s 222 *Justices Act* 1886 (Qld) with costs to be assessed is vacated. Instead, that appeal is allowed with costs fixed at $2,090.88. The convictions penalties and cost orders entered in the Ipswich Magistrates Court are set aside. It is ordered instead that the complaints are dismissed. The Esk Shire Council must pay Mr Shaw's costs of the Magistrates Court hearing fixed at $4,191.80.

JERRARD JA: I agree with the reasons for judgment and orders proposed by the President.

DUTNEY J: And I also agree.

THE PRESIDENT: That is the order of the Court.
