SUPREME COURT OF QUEENSLAND

CITATION:	*Parsons v Raby* [2007] QCA 98
PARTIES:	**PARSONS, Keiran James** (applicant/appellant) v **RABY, Brendan John** (respondent)
FILE NO/S:	CA No 346 of 2006 DC No 1278 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 March 2007
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2007
JUDGES:	Jerrard JA, Muir and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application allowed** **2. Appeal allowed** **3. Conviction for public nuisance quashed** **3. The respondent pay the appellant's costs of the appeal to this Court and to the District Court**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – NATURE OF RIGHT – APPEALS IN THE STRICT SENSE AND APPEALS BY WAY OF REHEARING – APPEALS BY WAY OF REHEARING – SCOPE AND EFFECT OF REHEARING – where the applicant was convicted by a Magistrate of public nuisance – where the applicant appealed to the District Court – whether the District Court conducted a proper re-hearing *Justices Act 1886* (Qld), s 222 *Summary Offences Act 2005* (Qld), s 6 *Fox v Percy* (2003) 214 CLR 118, applied *Stevenson v Yasso* [2006] QCA 40, Appeal No 96 of 2005, 24 February 2006, applied
COUNSEL:	P Callaghan SC, with S Gordon, for the applicant

R J Pointing for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **JERRARD JA**: This matter is an application for leave to appeal under s 118 of the *District Court Act 1967* (Qld). The applicant Keiran Parsons wants to overturn a decision by a District Court judge given 20 November 2006, dismissing Mr Parsons' appeal against a conviction incurred on 11 April 2006 in the Caboolture Magistrates Court. As amended, the ground of appeal is a complaint that the learned District Court judge did not conduct a rehearing on the evidence, as the judge was required to do.

[2] Mr Parsons had been convicted of an offence of s 6 *Summary Offences Act 2005* (Qld), namely that on 14 October 2005 at Morayfield in the Magistrates Court District of Caboolture in the State of Queensland, he committed a public nuisance offence. No particulars of that offence were sought or provided at the hearing, but the prosecution case was that Mr Parsons had participated in a fight with a person named Joseph Williams in a public car park adjacent to Morayfield Road.

[3] Fighting in a public place does not per se constitute the offence of committing a public nuisance. Section 6 of the *Summary Offences Act 2005* provides:

> "(1) A person must not commit a public nuisance offence.
> ...
> (2) A person commits a public nuisance offence if –
> (a) the person behaves in –
> (i) a disorderly way; or
> (ii) an offensive way; or
> (iii) a threatening way; or
> (iv) a violent way; and
> (b) the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public."

The prosecution evidence

[4] The evidence led by the prosecution came entirely from the two police officers who attended at the scene. The evidence of the respondent, Senior Constable Brendan Raby, was that he went to that car park at about 11.10 pm and saw a large number of people milling about. As the police vehicle drove in Mr Raby saw Mr Parsons and another male person fighting at the northern end of that car park. Other people were standing behind the parked vehicles closest to the shops, on the footpath in front of the shops, and a number were standing about in the car park itself.

[5] Mr Raby interrupted the fight, on his evidence, and he understood the two participants were a Mr Parsons and a Mr Joseph Williams. He said that as soon as the police got out of their vehicle, Mr Williams approached them and began apologising to Mr Raby for fighting. Mr Parsons, on the other hand, began walking away, and despite requests from the two police officers, refused to stop. He used some obscene language, and attempted to keep walking, and Officer Raby arrested him. Mr Raby's evidence included that Mr Parsons said, in the police vehicle when being conveyed to the Caboolture Police Station, that he had received a text message from Joseph Williams to meet him at that car park regarding having a fight, and that Mr Raby had said:

> "Do you think that was sensible?"

Mr Parsons made no reply.

[6] The other police officer described seeing Mr Parsons fighting in the car park with a male whom that officer now knew as Joseph Williams, and that the second officer had seen a group of people gathered around the two men fighting. That second officer saw Mr Williams approach Senior Constable Raby, and begin speaking with him, and also saw Mr Parsons start to walk away. After the latter used obscene language, he was arrested.

[7] The ex tempore reasons given by the learned Magistrate included at their commencement the statement that:

> "The public nuisance alleged is that he participated in a fight with one Joseph Williams. That fight occurred at approximately 11:10 on that evening in the car park associated with Chandlers, on Morayfield Road."[1]

On the evidence of the two police officers, they had seen the fight which the learned Magistrate regarded as the basis of the public nuisance charge. 11:10 pm was when the two police officers saw Mr Parsons fighting another man.

[8] Participating in a fight in a public place is not a description of the full offence of public nuisance, which required a finding that the fighting interfered, or was likely to interfere, with the peaceful passage through, or enjoyment of, that public place by a member of the public. That latter conclusion was certainly open, if Mr Parsons was behaving in a disorderly or violent way in fighting Mr Williams.

[9] However, evidence given by Mr Parsons, and a witness whom he called, Jordan Parker, strongly suggested that the police had in fact seen Mr Parsons fighting with a man Scott Brown, with whom Mr Parsons had been engaged in a fight almost immediately upon ceasing his fight with Joseph Williams. The relevance of the identity of the opponent is that the learned Magistrate was satisfied on the evidence that Mr Parsons was entitled to a successful plea of self-defence regarding the fight between himself and Mr Brown, but not entitled to plead self-defence regarding his fight with Mr Williams. It also

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1 At AR 84.

appears that the learned Magistrate accepted the evidence given by Mr Parsons and by Mr Parker about there having been two fights.

[10] The Magistrate's findings imply, because of the reference to 11:10 pm, that the conviction for committing a public nuisance offence was based on the fight the police thought they had witnessed, between Mr Parsons and Mr Williams, which fighting the Magistrate did regard as disorderly behaviour by Mr Parsons. The Magistrate would have been entitled to convict Mr Parsons on evidence of conduct constituting a public nuisance offence and not witnessed by police, and established independently of the evidence of police witnesses, such as by the evidence from Mr Parsons. But that is not what the learned Magistrate apparently intended to do, judging by the reference in the reasons for judgment to 11:10 pm.

The defence evidence

[11] Mr Parsons swore he had known Mr Williams for three years, and thought they had a good relationship. On 14 October 2005, which was the day before Mr Parson's birthday, he went with friends to Sizzlers at Morayfield to celebrate. Afterwards they went to Mooloolaba, and then drove back towards Morayfield, so that Mr Parsons could meet a friend at the car park at the Auto Barn. That was a regular meeting place among his social circle, and he was travelling there that night for that purpose.

[12] As he travelled to Morayfield, Mr Parsons received a call on his mobile phone from Mr Williams, who appeared angry, and who said that Mr Parsons had been:

"Saying stuff about me".[2]

The evidence of Mr Parsons was that he thought Mr Williams was affected by alcohol, and he did not understand what Mr Williams was complaining about. His intention was just to celebrate his birthday. He went to the car park, and Mr Williams arrived some five to 10 minutes later. Mr Parsons went over to him and asked:

"Oi, mate, what's your problem?"

and Mr Williams replied aggressively to the effect that Mr Parsons had been saying:

"Shit about me, cunt."[3]

Mr Williams then pushed Mr Parsons, who punched Mr Williams, and a fight ensued. Mr Parsons said:

"I didn't think, I just reacted."

[13] Mr Parsons thought the fight lasted some 13 or 14 punches (apparently by each), and perhaps four to five minutes. Mr Parsons' friend Jordan Parker broke up the fight, and as Mr Williams was walking away from it, he was

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2 At AR 30.

3 At AR 34.

punched from behind by Scott Brown, whose reasons for intervening are unclear. Mr Parsons responded by punching Mr Brown, who then retaliated. That fight was the one happening when the police "showed up"[4], and that was a fight from which he was walking away when stopped by the police. His evidence was:

> "I was fighting Scott Brown at the time the police had arrived."[5]

[14] He also said in his evidence-in-chief that he had not gone to the car park to fight Mr Williams, and that he had had no intention of doing that. In cross-examination of him, the point was made that he approached Mr Williams in the first instance, when the latter had arrived. In answer to a quite lengthy series of questions from the learned Magistrate, Mr Parsons insisted that the anger expressed by Mr Williams had come as a complete surprise, and that he still did not know what that was about. He denied to the Magistrate that he knew Mr Williams was actually going to arrive at the car park, but agreed that Mr Williams:

> "Knew where to find me, yeah";

and

> "He knew where I'd be, yeah."[6]

[15] That questioning by the Magistrate lasted for some six pages of transcript, and it concentrated on the fight with Mr Williams. Mr Parsons had repeated in cross-examination (by the prosecutor) that he was fighting Scott Brown when the police arrived, and he swore the reason the police spoke with Mr Williams was because:

> "Joe was running around, 'I'm sorry, I've caused this incident. I caused this incident.'"

[16] That was the thrust of the evidence that Jordan Parker gave as well. He had been with Mr Parsons that night, and he described the confrontation and fight between Mr Parsons and Mr Williams, saying it lasted for some 10 to 15 minutes, and that then Scott Brown had punched Mr Parsons. He described how:

> "The police car pulled up behind in the back of Scott Brown's car and they got out and Joe went straight up to – I think it was the male officer and – female officer, sorry, and started telling her that it was all his fault, he was drunk, and just then that over and over again very loudly."[7]

[17] On Parker's evidence, Scott Brown did not say anything to the police. Neither Mr Williams nor Mr Brown gave evidence. The Magistrate also asked Mr Parker a number of questions, again focusing on the fight between Mr Williams and Mr Parsons, and why there were some 20 to 30 people at the car park. The

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4 At AR 38.
5 At AR 39.
6 At AR 54.
7 At AR 60-61.

learned Magistrate then gave the ex-tempore reasons for judgment, after the conclusion of submissions, which concluded:

> "The only question is this, whether, by persisting with his admitted intentions of going to this car park to see his other friend, Matthew, Mr Parsons has inevitably engaged in a fight by a conscious or deliberate course of conduct. At some point the initial fight ceased and another fight between the defendant and Scott Brown commenced. In relation to the contest between Mr Brown and Mr Parsons, which on all of the evidence available to me was unexpected and unexplained and a surprise to Mr Parsons, he cannot hope to have known that that would occur. Accordingly, I would say he has the benefit of all of the self-defence provisions in respect of that disputation.
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> It is, however, my view that by a deliberate and conscious course of conduct the defendant had gone to this place expecting to be engaged in a fight with Mr Williams and with almost absolute certainty knowing that it would occur. Accordingly, I find him guilty as charged."

[18] Although the learned Magistrate did not say so, it should follow from those reasons that the Magistrate rejected Mr Parsons' evidence denying that he expected Mr Williams to arrive at the car park, and also Mr Parsons' evidence that he had gone to the car park for peaceful purposes. The Magistrate must also be assumed to have made, by implication, the necessary findings about obstruction or likely obstruction from a member of the public.

[19] However, when imposing a penalty, the Magistrate remarked:

> "I essentially decided this matter on your evidence because there is no material in which I have found against you on a matter of fact. There are several things that the police obviously did not see or have mistaken but the bottom line here is that you have gone to see a person you must have known was likely to be a problem, putting it at its very lowest."

Mr Callaghan SC submitted for the applicant that it followed that the Magistrate had not rejected Mr Parsons' evidence of his having not intended or wanted to fight with Mr Williams, and that seems accurate. Mr Callaghan SC also submitted that the critical decision of fact for the Magistrate, and on a re-hearing by the District Court, was whether the push that Mr Parsons said Mr Williams gave him – to which Mr Parsons responded with a punch – was an unlawful assault on Mr Williams. Mr Callaghan SC submitted that neither the Magistrate nor the learned District Court judge had considered that issue and accordingly neither had properly considered whether Mr Parsons' responses were lawful. The Magistrate may have intended to deal with that argument by the finding that Mr Parsons had inevitably engaged in a fight by going to the car park, expecting to engage in one with Mr Williams, and that accordingly he had consented to the force used by Mr Williams. The Magistrate did not express it that way, and even in an ex tempore judgment it was necessary to explain why Mr Parsons was acting unlawfully.

[20] The Magistrate obviously accepted there was a second fight, between Mr Parsons and Scott Brown. The fight which was occurring at approximately 11:10 pm that evening, witnessed by the police, was – on the evidence and the Magistrate's finding – the one with Scott Brown, and the Magistrate considered Mr Parsons was acting lawfully at that time.

[21] The Magistrate's remarks when passing sentence suggest that the Magistrate had realised the police had not seen the fight with Joseph Williams. But the Magistrate did not advert to that when convicting Mr Parsons of a public nuisance offence constituted by a fight at 11:10 pm. If that conviction depended entirely on Mr Parsons' description of why and how he fought Mr Williams, the Magistrate needed to make findings establishing that what Mr Parsons did was unlawful. Going to the car park – even knowing Mr Williams would probably arrive angry and wanting to assault Mr Parsons - did not per se establish consent or negative self defence or provocation.

The appeal to the District Court

[22] On the appeal to the District Court, the learned District Court judge considered the various grounds of appeal argued before that judge, and concluded, inter alia, that the Magistrate had not accepted Mr Parsons' version of events, namely that he had no intention of engaging in a fight with Williams in the car park. The learned judge did not recite the evidence given, but did refer to some significant parts of it, when concluding that there was sufficient evidence to sustain the Magistrate's findings about the fight with Mr Williams. The judge did not refer to the further remarks the Magistrate made when passing sentence.

[23] The argument on this appeal was that the Magistrate had overlooked that the appeal under s 222 of the *Justices Act 1886* (Qld) was by way of re-hearing, and that the task of a judge hearing one of those appeals was described by the President, in *Stevenson v Yasso* (2006) QCA 40 in the following terms:

> "His Honour was required to make his own determination of the issues on the evidence, giving due deference and attaching a good deal of weight to the Magistrate's view." (Citations omitted)[8]

Mr Callaghan SC referred to the joint judgment in *Fox v Percy* (2003) 214 CLR 118 at [25], where their Honours wrote that an appellate court is obliged to conduct a real review of the trial, while bearing in mind the appellate court has neither seen nor heard the witnesses, and should make due allowance in that respect. He did not press a suggestion that there might be some inconsistency between that part of the joint judgment in *Fox v Percy* and the description of the task confronting the District Court judge given by the President in *Stevenson v Yasso*.

[24] I do not consider there is any inconsistency; the obligation to give due deference and weight to the Magistrate's views are because the Magistrate has seen the witnesses. That advantage adds strength to findings of fact based on

[8] At [36] of the reasons for judgment of the President.

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. The learned judge hearing this appeal did not descend to that detailed an approach.

[25] The learned District Court judge would have been less vulnerable to criticism in this matter if the judge had considered more of the evidence, when conducting the judge's own determination of it. The judge did give appropriate deference and a good deal of weight to what the judge considered were the Magistrate's express and implicit findings about Mr Parsons' credibility, but was required to do more. This was not an appeal against the exercise of a discretion, and the learned judge was required to examine both the evidence and the Magistrate's reasons, not simply the latter. That was particularly so where there was an apparent inconsistency between the reasons for conviction and the sentencing remarks.

[26] Had the learned judge considered the evidence in more detail, it would have become apparent that the Magistrate had imposed a conviction in respect of a fight occurring at a time when Mr Parsons was lawfully defending himself against Mr Brown's assault, not when engaged immediately before in a possibly consensual fight with Mr Williams. The learned judge did not consider whether the evidence established that the fight not witnessed by the police satisfied the provisions of s 6 of the *Summary Offences Act*, and did not conduct a re-hearing sufficient to identify the confusion in the evidence and conviction as to which fight constituted the disorderly conduct, and as to whether the conviction could nevertheless be upheld.

[27] In the circumstances I would grant leave to appeal and allow the appeal, set aside the order made by the District Court on 20 November 2006 dismissing the appeal against the conviction on 11 April 2006 in the Caboolture Magistrates Court for committing a public nuisance offence, and order instead that that conviction be quashed.

[28] I would order that the respondent pay the appellant's costs of the appeal to this Court and to the District Court, to be assessed on the standard basis.

[29] **MUIR J**: I agree with the reason of Jerrard JA and Douglas J, and with the proposed orders of Jerrard JA.

[30] **DOUGLAS J**: I agree with the reasons of Jerrard JA and the orders proposed by his Honour. In my view, also, the evidence relevant to the reasons why Mr Parsons was fighting Mr Williams before the arrival of the police was not so clear as to establish that Mr Parsons was committing a public nuisance by engaging in a consensual fight likely to interfere with the peaceful passage of people through, or enjoyment of, a public place. An equably plausible inference is that Mr Parsons went to the scene knowing of Mr Williams' attitude to the possibility of a fight, did not share that attitude, but reacted, when punched, to

defend himself, as the Magistrate accepted he did when attacked by Mr Brown. Where the offence needs to be proved beyond a reasonable doubt and Mr Williams and Mr Brown did not give evidence I do not accept that the offence was proved to the necessary standard even if the fight with Mr Williams were to be treated as the relevant one for the purposes of the offence that was charged.