SUPREME COURT OF QUEENSLAND

CITATION:	*Teelow v Commissioner of Police* [2009] QCA 84
PARTIES:	**TEELOW, Scott Douglas** (appellant/applicant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	CA No 262 of 2008 DC No 612 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s118 DCA (Criminal)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	9 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	30 March 2009
JUDGES:	Muir and Fraser JJA, Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal dismissed.**
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 applicant was convicted after a plea of guilty in the Magistrates Court of a charge of unlawful possession of methylamphetamine – where the applicant was fined $900 and a conviction was recorded – where applicant's appeal to the District Court against the recording of the conviction was dismissed – where a technical failure prevented magistrate's reasons for decision from being recorded – whether District Court judge erred in failing to conduct the appeal by way of rehearing as prescribed by s 223(1) *Justices Act* 1986 (Qld) APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – FAILURE TO GIVE REASONS – EXTENT OF OBLIGATION TO GIVE REASONS – GENERALLY – where a technical failure

prevented magistrate's reasons for decision from being recorded – where evidence of the magistrate's reasons was not put before the District Court judge in the appeal – whether failure to provide a transcript of reasons constituted an error of law – whether the District Court judge should have exercised the sentencing discretion afresh

District Court of Queensland Act 1967 (Qld), s 118
Justices Act 1886 (Qld), s 223(1)
Recording of Evidence Act 1962 (Qld), s 10

Allesch v Maunz (2000) 203 CLR 172; [2000] HCA 40, cited
Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430, cited
Byrne v St George Bank Ltd [1996] ANZ ConvR 405, considered
Carlson v King (1947) 64 WN (NSW) 65, cited
Cook v Blackburn [1989] VR 35, considered
Cypressvale Pty Ltd v Retail Shop Leases Tribunal [1996] 2 Qd R 462;[1995] QCA 187, cited
Day Ford Pty Ltd v Sciacca [1990] 2 Qd R 209, considered
Drew v Makita (Australia) P/L [2009] QCA 66, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Pickering v McArthur [2005] QCA 294, cited
Savanoff v Re-Carr Pty Limited [1983] 2 Qd R 219, considered
Scrivener v DPP (2001) 125 A Crim R 279; [2001] QCA 454, cited
Sims v Wilson [1946] 2 All ER 261, cited
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, cited
The Public Service Board (NSW) v Osmond (1986) 159 CLR 656; [1986] HCA 7, cited
Waterways Authority v Fitzgibbon (2005) 221 ALR 402; [2005] HCA 57, cited

COUNSEL: J R Hunter SC for the applicant
M J Copely SC for the respondent

SOLICITORS: Guest Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

MUIR JA:

Introduction

[1] The applicant was convicted after a plea of guilty on 3 December 2007 in the Magistrates Court at Southport of a charge of unlawful possession of methylamphetamine. He was fined $900 and in default of the payment ordered to serve 15 days imprisonment. A conviction was recorded. The applicant appealed to the District Court only against the recording of the conviction. That appeal, which was heard on 18 September 2008, was dismissed by the learned District Court

judge. The applicant applied for leave to appeal to this Court under s 118 of the *District Court of Queensland Act* 1967 on the ground that the judge erred in failing to conduct the appeal by way of a rehearing as prescribed by s 223(1) of the *Justices Act* 1886.

The original ground of appeal

[2] Section 223 of the *Justices Act* 1886 provides:

> "**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.
>
> (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 —
>
> (a) by way of rehearing on the original evidence; and
>
> (b) on the new evidence adduced."

[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*,[1] McPherson JA, referring to an appeal "by way of rehearing" under r 765(1) of the *Uniform Civil Procedure Rules* 1999, observed:

> "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) …"

[4] It is a normal attribute of an appeal by way of rehearing that "the powers of the appellate court are exercisable only where 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."[2] On an appeal by way of rehearing an appellate

---

1 (2001) 125 A Crim R 279.

2 *Allesch v Maunz* (2000) 203 CLR 172 at 180 – 181.

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.[3]

[5] The original ground of appeal appeared to assume that an appeal by way of rehearing is of the nature of a new trial in which fresh evidence may be led as of right. This assumption was wrong. The applicant was represented in the District Court appeal by his solicitor. He did not seek leave to adduce fresh, additional or substituted evidence. Consequently, as was appropriate, the appeal in the District Court was by reference to the evidence before the magistrate. That observation needs qualification in this respect, due to a technical recording problem there was no transcript of those proceedings. That being the case, it was incumbent on the applicant's legal representative to place any material matters upon which he intended to rely before the judge. But, in any case, there was no suggestion by the applicant's legal representative on the hearing of the appeal that he wanted to adduce evidence of the magistrate's reasons or of any aspect of the proceedings before the magistrate.

The new ground of appeal and counsel's submissions in that regard

[6] There was no error in the way in which the District Court appeal was conducted. No doubt, in recognition of the matters just discussed, the applicant's counsel sought leave, which was granted, to amend the notice of appeal by adding the ground that the judge erred in concluding that there had not been an error in the exercise of discretion by the magistrate.

[7] This ground did not do full justice to the argument advanced by the applicant's counsel. It was to the following effect. It is the duty of a court at first instance, from which an appeal lies to a higher court, to make, or cause to be made, a note of everything necessary to enable the case to be made properly and sufficiently before the appellate court in the event of an appeal.[4] The applicant's solicitor was entitled to assume that a transcript of the proceedings before the magistrate would be available on the hearing of any appeal. Failure to give reasons amounts to an error of law.[5]

[8] The unavailability of reasons at the hearing of the appeal in the District Court is analogous to the situation which exists when a tribunal fails to give adequate reasons. The absence of the transcript of the magistrate's reasons substantially impaired the applicant's ability to mount an appeal. Consequently, the judge should have concluded that the magistrate's decision was "infected with error" and exercised the sentencing discretion afresh. Had the judge done so, he would have exercised the discretion in favour of not recording a conviction.

[9] It was argued that the matters which would have informed the exercise of the discretion were: the small quantity of the drug involved; the circumstances of the applicant's possession; the fact that the applicant's prior conviction for a drug offence was in 1999; not recording the conviction would not have had the effect of concealing the applicant's criminal history from the Queensland College of Teachers; the recording of the conviction would have the effect of suggesting to the Queensland College of Teachers that the offence was more serious than it in fact

---

3 *Allesch v Maunz* at 181.

4 *Carlson v King* (1947) 64 WN (NSW) 65 per Jordan CJ at 66 and *The Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 per Gibbs CJ at 666.

5 *Drew v Makita (Australia) Pty Ltd* [2009] QCA 66.

was and the recording of the conviction could impact upon the applicant's security of employment as a teacher and/or chances of finding employment in that profession.

[10] The submissions before the judge as to the effect of the recording of a conviction on the applicant's employment prospects were rather vaguer. No mention was made of the Queensland College of Teachers, its attitudes or its disclosure requirements.

Consideration of the additional ground of appeal

[11] In *Carlson v King*[6] Jordan CJ said:

> "It has long been established that it is the duty of a Court of first instance, from which an appeal lies to a higher Court, to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate Court if there should be an appeal. This includes not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision. The duty is incumbent, not only upon magistrates, *Ex parte Powter*; *Re Powter*,[7] and District Courts, but also upon this Court, from which an appeal lies to the High Court and the Privy Council: *Ex parte Reid*; *Re Lynch*.[8] In the case of District Courts, it is expressly provided by s. 144 of the District Courts Act, 1912, that at the hearing of an action 'the judge, at the request of a party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his final decision in the action.' "

[12] It was not suggested that there was a failure to record the evidence and a record was made of the magistrate's order. The complaint therefore is in respect of the reasons. It may be accepted that, as a general principle, a court must give reasons for its decisions and those reasons must be adequate.[9]

[13] The principle underlying the obligation to give reasons has been said, variously, to be necessary:[10]

> "… to avoid leaving the losing party with 'a justifiable sense of grievance'[11] through not knowing or understanding why that party lost;[12] [as necessary] to facilitate or not frustrate a right of appeal;[13] as an attribute or incident of the judicial process;[14] to afford natural

---

6 (1947) 64 WN (NSW) 65 at 66.

7 (1945) 46 SR 1 at 4 – 5.

8 (1943) 43 SR 207 at 212.

9 See e.g., *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 270, 279 – 280; *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 431; *Crystal Dawn Pty Ltd & Taylor v Redruth Pty Ltd* [1998] QCA 373; *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462; *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666 – 667.

10 *Drew v Makita (Australia) Pty Ltd* [2009] QCA 66 at [58].

11 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 431.

12 *Beale v Government Insurance Office of NSW* at 442.

13 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259, 271; *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 666 – 667 per Gibbs CJ; *Waterways Authority v Fitzgibbon* (2005) 221 ALR 402 at [129].

14 *Soulemezis v Dudley (Holdings) Pty Ltd* at 257, 269, 273, 279.

> justice or procedural fairness;[15] to provide 'the foundation for the acceptability of the decision by the parties and the public' and to further 'judicial accountability'.[16]"

[14] The authorities, not surprisingly, are concerned with the substance of the reasons given rather than with their form. The adequacy of reasons must be gauged by their content, not by reference to the manner in which they were recorded or even whether they were unrecorded.

[15] Jordan CJ's observations in *Carlson* were not directed to circumstances in which reasons were given in the normal way with a view to their being duly recorded but were unrecorded due to failure of the recording system or process. There was no suggestion by the applicant's solicitor before the judge that the absence of a written record of the magistrate's reasons prejudiced the applicant or that satisfactory evidence of the reasons could not be adduced.

[16] I am unable to accept the proposition that the failure to bring a transcript into existence was tantamount to a failure to give reasons. Reasons were given. The content of those reasons could have been deposed to and probably would have been if reliance was to be placed on what was said or omitted to be said by the magistrate. There was thus no error of law requiring the judge to exercise the sentencing discretion afresh.

[17] By virtue of s 118(3) of the *District Court of Queensland Act* 1967, the applicant's right of appeal to this Court is dependent on his obtaining leave to appeal. In *Pickering v McArthur*,[17] Keane JA, with whose reasons the other members of the Court agreed, said of leave under that section: "… 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." (footnotes deleted)

[18] This appeal concerns, ultimately, an attack on the magistrate's exercise of his discretion. The District Court judge carefully considered the submissions made by the applicant's legal representative concerning the alleged error by the magistrate and said in that regard:

> "Having regard to all the circumstances of the case, it was, in my view, at least open to the learned Magistrate to exercise the discretion in the way that he did, and I am not persuaded to interfere with his Honour's exercise of discretion."

[19] In so concluding, his Honour no doubt had regard to the applicant's age (29), his prior conviction for a drug related offence and his more recent conviction (unrecorded) for behaving in a disorderly manner.

---

15 *Soulemezis v Dudley (Holdings) Pty Ltd* at 279; *Flannery v Halifax Estate Agencies* [2001] 1 WLR 377 at 381 – 382; *Waterways Authority v Fitzgibbon* (2005) 221 ALR 402 at [129]; *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462 at 475, 476.

16 *Soulemezis v Dudley (Holdings) Pty Ltd* at 279.

17 [2005] QCA 294.

[20] In *House v The King*,[18] the principles governing appeals against the exercise of discretion were stated as follows:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

[21] No such error in the judge's reasons was identified. There was no injustice, substantial or otherwise. Accordingly, I would dismiss the application for leave to appeal.

FRASER JA:

[22] The essence of the applicant's main argument was that the District Court judge ought to have allowed the appeal against the recording of a conviction ordered by the magistrate because there was no transcript of the magistrate's reasons for that order. The magistrate no doubt reasonably relied upon the reasons being recorded electronically and then transcribed if required, but it appears that there was a technical fault in the recording equipment. The applicant contends that leave to appeal should be granted on this ground, even though it was not put to the District Court judge.

[23] I agree that this and the applicant's other arguments should be rejected for the reasons given by Muir JA. I propose merely to add some brief observations.

[24] In an appeal, the evidence given in a proceeding and the reasons for the decision appealed against may be established by production of a certified transcription of a record made under the *Recording of Evidence Act* 1962. By s 10 of that Act, a certified transcription (like the record itself) is to be received by a court or "a judicial person" as evidence of anything recorded in it; but neither under the earlier form of s 10[19] (under which a certified transcript was "prima facie" evidence of anything recorded) nor under the present form of s 10[20] (under which the certified transcript is to be received "as evidence") has production of such a transcript been regarded as constituting the exclusive mode of bringing before the appeal court a record of the evidence given in the court whose decision is under appeal.

---

18 (1936) 55 CLR 499 at 504 – 505. See also *Logan v Woongarra Shire Council* [1983] 2 Qd R 689 at 690 – 691.

19 See *Savanoff v Re-Car Pty Ltd* [1983] 2 Qd R 219 at 230.

20 See *R v Morex Meat Australia Pty Ltd & Doube* [1996] 1 Qd R 418 at 434.

[25] *Savanoff v Re-Car Pty Ltd* concerned an appeal in which part of the record of evidence made by a shorthand reporter under the *Recording of Evidence Act* 1962 had been irretrievably lost. The appeal was from a judge of the Supreme Court to the Full Court, which O 70, r 1 of the *Rules of the Supreme Court* provided was to be by way of rehearing: in that respect the nature of the appeal was not relevantly distinguishable from the appeal from the magistrate to the District Court in this case. Campbell CJ[21] (with whose reasons Kelly J agreed) and McPherson J[22] approved the following statement by the Master of the Rolls, Greene MR, in *Bradford Third Equitable Benefit Building Society v Borders (No 2)*:[23]

> "Of course, in an appeal raising issues of fact, it is for the appellant to satisfy this court that the decision of the court below was wrong, and, if the materials supplied to this court are insufficient to enable it to act, the result will be that the appeal will be unsuccessful."

[26] In *Savanoff v Re-Car Pty Ltd* the Court allowed the admission of affidavit evidence to overcome the gap in the record. In that respect, Campbell CJ referred to the *Recording of Evidence Act* 1962 and said:[24]

> "I do not consider that those provisions are of assistance in this case. Where part of the evidence has been mislaid the parties are at liberty to supplement it (see *Parkinson v Parkinson* (1947) 63 TLR 438), although: 'The normal practice is that, save in the most exceptional circumstances, if this court is asked to look at something other than the shorthand note or the judge's note, it usually will look only at an agreed note of the evidence. Whether it be taken by solicitor or counsel seems to me to be immaterial.' *per* Salmon LJ (with whose reasons Winn LJ agreed) in *Thompson v. Andrews* [1968] 1 WLR 777, at p 780."

[27] Similarly, in *Day Ford Pty Ltd v Sciacca*[25] Macrossan CJ (with whose reasons Kelly SPJ and Ambrose J agreed) concluded that where the transcript of the evidence had been mislaid and the trial judge's notebook did not record the relevant evidence, the appellant was at liberty to supplement that deficiency in the record: and where the appellant did not do so, the appeal must fail.

[28] The same approach was adopted by the Full Court of the Supreme Court of Victoria in *Cook v Blackburn*,[26] in which there was no transcript of the trial and the judge's notes contained no reference to the cross-examination of any of the witnesses or to much of the evidence. Gray J and Tadgell J (with each of whose reasons Fullagar J agreed) held that the trial judge had failed to carry out the judicial duty of making a note of the evidence but that, the appellant having failed to take the available course of proving what evidence had been adduced, the appeal must be dismissed.

[29] Those decisions concerned situations in which a record of the evidence, rather than the reasons for decision, was missing or deficient, but other authorities suggest that (at least in some circumstances) a similar approach may be adopted where the court

---

21 [1983] 2 Qd R 219 at 223.
22 [1983] 2 Qd R 219 at 231.
23 [1939] 3 All ER 611 at 612.
24 [1983] 2 Qd R 219 at 223
25 [1990] 2 Qd R 209 at 212.
26 [1989] VR 35.

is unable to provide a record of its reasons for decision and where the appellant fails to produce an available and reliable record of the reasons.

[30] For example, in *Sims v Wilson*,[27] in a statement subsequently adopted by Tadgell J in *Hills v Sklivas*,[28] Morton LJ (with whose reasons Somervell and Asquith LJJ agreed) referred with approval to a statement some years earlier by Scott LJ:[29]

> "It is the duty of counsel to take a note of the judgment in the court below, and if no note of the judgment is taken by the judge for the purpose of an appeal, counsel's note should be available for the use of the Court of Appeal in addition to the judge's note of evidence."

[31] Morton LJ added that where the parties were represented by solicitors the solicitors should take a note of the reasons, and that an endeavour should be made to have an agreed note for the use of the Court of Appeal if the judge's own notes did not contain the reasons.

[32] Similarly, in *Byrne v St George Bank Ltd*[30] Hayne JA referred to the duty of counsel, in a case in which there was no transcript taken of the judge's reasons for judgment, to take a note of the reasons that were given. His Honour referred to a practice under which an agreed note of the reasons might be submitted to the judge for settling within a relatively short time of the decision, whilst memories of the matter were fresh.

[33] Accepting that the decisions to which I have referred are not directly on point, they nevertheless support the proposition that, in the absence of a record of a magistrate's reasons for decision under the *Recording of Evidence Act* 1962 or in the magistrate's own notes, a District Court judge hearing an appeal under s 222 of the *Justices Act* 1886 might in some circumstances receive and act upon reliable, extrinsic evidence of the contents of the magistrate's reasons.

[34] It is not appropriate here to attempt to define the circumstances in which that would be appropriate, even if it were practicable to do so, because the point sought to be agitated in the proposed appeal to this Court was not made in the District Court. But where it was not submitted that the appellant in the District Court could not have supplemented the deficiency in the record, where the deficiency was a result of an unanticipated technical recording problem, and where the essential ground of the magistrate's decision was in any event apparent in light of the narrow bounds of the contest and the relevant facts, the absence of any record of the magistrate's reasons for decision is plainly an insufficient basis for the grant of leave to appeal to this Court.

[35] The application should be refused.

MULLINS J:

[36] I agree with Muir JA.

---

27 [1946] 2 All ER 261.
28 [1995] 1 VR 599 at 601.
29 *Practice Note*, [1943] WN 80(2).
30 [1996] ANZ ConvR 405.