SUPREME COURT OF QUEENSLAND

CITATION:	*Costigan v Marshall* [2010] QCA 344
PARTIES:	**COSTIGAN, Paul Aliki** (appellant/respondent) **v** **MARSHALL, Grant** (respondent/applicant)
FILE NO/S:	CA No 200 of 2010 DC No 8 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	Orders delivered ex tempore on 26 November 2010 Reasons delivered on 10 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2010
JUDGES:	Muir and Chesterman JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 26 November 2010:** **1. Leave to appeal be granted.** **2. The appeal be allowed.** **3. The order be varied only to the extent that the order vacating the guilty plea be set aside.** **4. The applicant pay the respondent's costs to be assessed on the standard basis.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – PARTICULAR CASES – where the respondent entered a plea of guilty in the Magistrates Court to a charge of dangerous operation of a vehicle whilst adversely affected by an intoxicating substance – where the respondent filed a notice of appeal pursuant to s 222 of the *Justices Act* 1886 (Qld) asserting that the sentence imposed was manifestly excessive – where District Court judge concluded that the basis of the plea was unclear and ordered that the respondent's plea of guilty be vacated – where applicant applied for leave to appeal under s 118 *District Court of Queensland Act* 1967 (Qld) – whether the applicant should be granted leave to appeal – whether the District Court judge erred in vacating the plea of guilty

District Court of Queensland Act 1967 (Qld), s 118
Justices Act 1886 (Qld), s 222

Ajax v Bird [2010] QCA 2, applied
Long v Spivey [2004] QCA 118, cited
Smith v Ash [2010] QCA 112, applied

COUNSEL: M B Lehane for the applicant
L K Ackerman for the respondent

SOLICITORS: Director of Public Prosecutions (Qld) for the applicant
Robertson O'Gorman for the respondent

[1] **MUIR JA:** I agree with the reasons of Philippides J.

[2] **CHESTERMAN JA:** I agree with the reasons of Philippides J.

[3] **PHILIPPIDES J:**

Background

On 29 April 2010, the respondent entered a plea of guilty in the Gladstone Magistrates Court to a charge of dangerous operation of a vehicle whilst adversely affected by an intoxicating substance. He was sentenced to 12 months' imprisonment suspended after three months for an operational period of two years. The respondent was also disqualified from holding or obtaining a driver's licence for two years.

[4] The respondent filed a notice of appeal pursuant to s 222 of the *Justices Act* 1886 (Qld) asserting that the sentence imposed was manifestly excessive in all of the circumstances. That remained the sole ground pursued by the respondent when the matter came before the District Court judge on 28 July 2010. It was the respondent's contention that the learned Magistrate had misconceived the basis of the plea, believing the dangerous driving extended over a much greater period and that that error had led to a manifestly excessive sentence. The learned District Court judge concluded that the basis of the plea was unclear because of an absence of particulars in respect to the charge.

[5] In those circumstances, his Honour set aside the sentence and orders made by the Magistrate, remitted the matter back to the Magistrates Court for rehearing and determination by a different Magistrate and ordered that particulars of the charge be provided. The learned District Court judge concluded his remarks by adding, "So as to avoid doubt, the defendant's plea of guilty is vacated". Neither party however had sought such an order.

[6] The applicant seeks leave, pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) to appeal against the order of the District Court judge vacating the respondent's plea of guilty on the basis that the order was *ultra vires*.

[7] At the conclusion of the hearing of the appeal on 26 November 2010, upon counsel for the applicant intimating that the applicant would not oppose an order for costs in favour of the respondent, the Court ordered that:

1. Leave to appeal be granted.
2. The appeal be allowed.
3. The order be varied only to the extent that the order vacating the guilty plea be set aside.
4. The applicant pay the respondent's costs on the standard basis.

[8] The parties were informed that the reasons would be delivered later. My reasons are as follows.

The application for leave

[9] The criteria with respect to the granting of leave was recently summarised by Fraser JA in *Smith v Ash* [2010] QCA 112 at [50]:

> "In *ACI Operations Pty Ltd v Bawden* McPherson JA said that the criteria in the previous form of s 118 of the *District Court of Queensland Act* 1967 (Qld) of an important point of law or question of general public importance 'remains a sufficient, but not a necessary, prerequisite to a grant of leave to appeal' under the present enactment. In other cases it has been said that 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. It is to be emphasised though that, whilst the Court exercises the discretion on a principled basis and those tests provide very useful guidance, s 118(3) confers a general discretion on this Court to grant or refuse leave to appeal which is exercisable according to the nature of the case."

[10] The point raised by the applicant is of short compass. Without inviting submissions from either party, the District Court judge, on an appeal pursuant to s 222 of the *Justices Act*, set aside the respondent's unequivocal plea of guilty to a charge which had been dealt with summarily in the Magistrates Court.

[11] I note however that the respondent's counsel has indicated that the respondent maintains his plea of guilty.

[12] The applicant contended that the order made was contrary to authority and *ultra vires.* The applicant submitted that he is entitled, according to law, to have the respondent held to his previous guilty plea. It is contended that the error should be corrected so as to avoid what would otherwise be a substantial injustice. Additionally, the applicant submitted that it is a matter of general public importance that appellate judges should act within their jurisdictional limits. The decision creates a precedent that is wrong in law and may lead others into error. In that regard, the matter is one of importance and I accept the applicant's submission that leave ought to be accorded.

Appeals pursuant to s 222 of the *Justices Act* 1886

[13] The appeal to the District Court, being from summary orders made in the Magistrates Court, was governed by s 222 of the *Justices Act* 1886 which provides as follows:

> "(1) If a person 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, the person may appeal within 1 month after the date of the order to a District Court judge.
>
> (2) However, the following exceptions apply –
>
> (a) a person may not appeal under this section against a conviction or order made in a summary way under the Criminal Code, section 651;
>
> (b) 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;
>
> (c) 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."

[14] Section 222 was considered in *Long v Spivey* [2004] QCA 118 where the Court held that the clear language of the section precluded an appeal against conviction in circumstances where a defendant has entered a guilty plea. That decision has been reaffirmed in a line of authority as the Court stated in *Ajax v Bird* [2010] QCA 2 at [4], observing:

> "In a decision cited by the applicant, *Long v Spivey* [2004] QCA 118 this Court held that this provision (then in s 222(2)(e)) bears its literal meaning. *Long v Spivey* was followed in *Dore & Ors v Penny* [2005] QCA 150 and *Phillips v Spencer & Anor* [2005] QCA 317. It is 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."

[15] It is patently clear that, given that the respondent had no right to institute an appeal against conviction, the District Court judge had no jurisdiction to set aside the plea and the order vacating the plea was *ultra vires*.

[16] As mentioned, the applicant indicated that it would not oppose an order for costs in favour of the respondent. Clearly, it is appropriate that such a costs order be made, notwithstanding the applicant's success. The respondent did not seek the order made by the District Court judge, nor did he resile from his plea, and the application and appeal were only of importance to the applicant.