# SUPREME COURT OF QUEENSLAND

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| CITATION: | *McKinlay v Commissioner of Police* [2011] QCA 356 |
| PARTIES: | **McKINLAY, Peter Darrell**<br>(applicant)<br>**v**<br>**COMMISSIONER OF POLICE**<br>(respondent) |
| FILE NO/S: | CA No 238 of 2011<br>MC No 15866 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Extension of Time (Conviction) |
| ORIGINATING COURT: | Magistrates Court at Southport |
| DELIVERED ON: | 9 December 2011 |
| DELIVERED AT: | Brisbane |
| HEARD ON: | 23 November 2011 |
| JUDGES: | Chesterman JA and Margaret Wilson AJA and Mullins J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Application for an extension of time refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – POWER TO BRING APPEAL – where the applicant was charged with the unlawful assault of a man aged 60 years or more – where the charge was dealt with summarily before a Magistrates Court – where the applicant was represented by a solicitor – where the matter was proceeded on as a plea of guilty – where the applicant was sentenced to 18 months' probation and ordered to pay $500 compensation – where a conviction was recorded – where the applicant applied for an extension of time for filing a notice of appeal to the District Court pursuant to s 222 of the *Justices Act* 1886 (Qld) – where a District Court judge made an order striking out the appeal – where the applicant made another extension of time application – where the same judge struck it out on the basis that the applicant pleaded guilty and it was the second application – where the applicant seeks an extension of time within which to appeal from the Magistrates Court decision directly to the Court of Appeal – whether the Court has jurisdiction to entertain the application<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – GENERAL |

PRINCIPLES – where counsel for the applicant said that the matter could proceed by way of a plea of guilty – whether the plea entered against the applicant at the hearing was valid – whether "the substance of the complaint" was stated to the applicant at the hearing

*Criminal Code* 1899 (Qld), s 340, s 552A, s 651, s 659, s 668D
*District Court of Queensland Act* 1967 (Qld), s 118
*Justices Act* 1886 (Qld), s 3, s 145, s 146A, s 222, s 224

*Collier v Director of Public Prosecutions (NSW)* [2011] NSWCA 202, considered
*Ex parte Dunn* (1904) 4 SR (NSW) 486, considered
*Project Blue Sky Inc v Australian Broadcasting Authority*, (1998) 194 CLR 355; [1998] HCA 28; cited
*R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, cited
*R v Wakefield Justices, ex parte Butterworth* [1970] 1 All ER 1181, cited

COUNSEL: The applicant appeared on his own behalf
S P Vasta for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHESTERMAN JA:** I agree that the application should be dismissed for the reasons given by Margaret Wilson AJA.

[2] **MARGARET WILSON AJA**: The applicant was charged with the unlawful assault of a man aged 60 years or more, which was an indictable offence pursuant to s 340(1)(g) of the *Criminal Code* 1899 (Qld).

[3] On 7 February 2011 the charge was dealt with summarily before a Magistrates Court.[1] The applicant was then represented by a solicitor. It proceeded as on a plea of guilty, and the applicant was sentenced to 18 months' probation and ordered to pay $500 compensation. A conviction was recorded.

[4] This application, which was filed on 29 August 2011, is for an extension of time within which to appeal to this court against the conviction.

[5] Counsel for the respondent has submitted that the application should be dismissed, because this court does not have jurisdiction to hear and determine the proposed appeal. I agree with that submission.

**Appeal to District Court: *Justices Act* s 222**

[6] The applicant was charged with an indictable offence, which was dealt with summarily in a Magistrates Court. The conviction was deemed to be a conviction of a simple offence only,[2] and the only avenue of appeal from the magistrate's decision was to the District Court, pursuant to s 222 of the *Justices Act* 1886 (Qld).

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1 *Criminal Code* 1899 (Qld) s 552A(1)(a).
2 *Criminal Code* 1899 (Qld) s 659.

[7] So far as presently relevant, s 222 of the *Justices Act* provides –

> "**222 Appeal to a single judge**
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> (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—
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> ...
>
> (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."

[8] The applicant made two applications to the District Court.

[9] On 2 June 2011 he filed an application for an extension of time for filing a notice of appeal. The respondent relied on s 222(2)(c) of the *Justices Act.* On 17 June 2011 a judge made an order striking out the appeal.

[10] On 24 June 2011 the applicant filed another application for an extension of time. On 4 August 2011 the same judge made an order striking out the application. His Honour gave two reasons for doing so – that the court had no jurisdiction to hear and determine an appeal against conviction where the applicant pleaded guilty, and that the court had no jurisdiction to deal with a second appeal filed in respect of the same matter.

[11] Although this is not an application for leave to appeal against the determination of those applications, I make the following observations.

[12] The two proceedings which came before the judge were not appeals, but applications for an extension of time in which to appeal. His Honour had a discretionary power to extend the time for appeal.[3] Relevant to the exercise of the discretion to extend time were –

(a) whether there was a good reason for the delay; and

(b) whether it was in the interests of justice to grant the extension.[4]

[13] His Honour was correct in saying that the District Court had no jurisdiction to hear and determine an appeal against conviction by an offender who pleaded guilty before a Magistrates Court. To refuse an extension of time to appeal in such circumstances would be a principled exercise of discretion.

[14] On the first application the appropriate order would have been one refusing the extension of time rather than one striking out the appeal.

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3 *Justices Act* 1886 (Qld) s 224(1)(a).

4 *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304.

[15] Because the matters before his Honour were applications for an extension of time, the principle that the court had no jurisdiction to deal with a second appeal filed in respect of the same matter had no application. There was no legal impediment to the making of a second application for an extension of time, although a second application would be unlikely to succeed if the material and the submissions in support of it were the same as those in support of the first application. In any event, nothing turns on this.

**Proposed appeal to the Court of Appeal**

[16] The applicant is now seeking an extension of time in which to appeal from the Magistrates Court decision directly to the Court of Appeal. This court does not have jurisdiction to entertain such an appeal. Appeals are creatures of statute, and there is no legislative provision for such an appeal, whether as of right or by leave. Accordingly, there would be no point in granting an extension of time.

[17] For completeness, I mention that there is a limited category of case where this court has jurisdiction to hear and determine an appeal against a summary conviction. Where an indictment is presented against a person before the District Court or the Supreme Court, that court may also hear and decide summarily any charge of a summary offence laid against the person, pursuant to s 651 of the *Criminal Code*. Then there may be an appeal against conviction to this court.[5] This is not such a case for two reasons: (1) the charge was of an indictable offence; and (2) it was heard and determined by a Magistrates Court.

[18] The application for an extension of time in which to appeal to this court should be refused.

**The plea of guilty**

[19] The charge arose out of a tenancy dispute. The applicant vacated a room which he had rented. The complainant removed some of the applicant's personal property from the room and put it in the garage. When the applicant returned to the premises he saw his property. An argument ensued between him and the complainant, a 63 year old man, in which, it was alleged, the applicant assaulted the complainant.

[20] According to the applicant, the police failed to provide him with all of the material in the police brief.

[21] The complaint was listed before the Magistrates Court on 7 February 2011. The applicant expected a full hearing and was present in court. The police prosecutor thought the matter was simply to be mentioned, and as a result no witnesses were available. Before the matter was called on, there was some discussion between the applicant's solicitor and the prosecutor.

[22] According to the transcript in the appeal record, at the commencement of the hearing before the Magistrates Court, the following occurred –

> "BENCH: Yes. I'll get you to announce your appearance, Mr Wicking.
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> MR WICKING: Your Honour, for the record, Wicking, W-I-C-K-I-N-G, initials J E, solicitor with Moloney MacCallum Lawyers. Appearing on behalf of Mr McKinlay this morning.

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5 *Criminal Code* 1899 (Qld) s 668D.

BENCH: Yes. **A charge of serious assault**.

MR WICKING: Yes, your Honour. The matter was listed for a contested hearing this morning. I had some discussion with my friend this morning. For some reason, their office only had it listed as a mention. As such, no witnesses are available today. We had had some discussion as to the facts and the matter has resolved. **It can now proceed by way of a plea of guilty**.

BENCH: All right then.

MR WICKING: I have those-----

BENCH: Summary election?

MR WICKING: Yes, your Honour.

BENCH: Thank you."[6] (Emphasis added.)

[23] This Court drew the parties' attention to s 145 of the *Justices Act* 1886 (Qld), and received submissions upon whether its requirements had been met. The applicant seemed to dispute that an unequivocal and valid plea of guilty had been entered.

[24] Section 145 provides –

"**145 Defendant to be asked to plead**

(1) When the defendant is present at the hearing the substance of the complaint shall be stated to the defendant and the defendant shall be asked how he or she pleads.

(2) If the defendant pleads guilty, the Magistrates Court shall convict the defendant or make an order against the defendant or deal with the defendant in any other manner authorised by law."

Section 4 contains a definition of "defendant", which so far as presently relevant is in these terms –

"***defendant –***

(a) ….
(b) …. means a person complained against before a Magistrates Court or before justices for a simple offence, breach of duty or an indictable offence."

[25] Two questions arose – whether "the substance of the complaint" was "stated to the applicant" and whether it was open to the magistrate to treat his solicitor's statement that it could proceed by way of a plea of guilty as a plea of guilty.

[26] *Ex parte Dunn*[7] was a decision of the Full Court of the Supreme Court of New South Wales. At a hearing before a magistrate, the defendant was not present but represented by counsel. The charge was not read, and its substance was not stated in court as required by s 78 of the *Justices Act* 1902 (NSW). Counsel entered a plea

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6 Appeal record page 5.
7 (1904) 4 SR (NSW) 486.

of not guilty. The magistrate found the offence proved. The defendant then sought prohibition, *inter alia* on the ground that the substance of the charge had not been stated as required by s 78. The Full Court held that in the circumstances the defendant had waived his right to have the substance of the charge stated to him.

[27] In the New South Wales case of *Collier v Director of Public Prosecutions (NSW)*[8] the plaintiff Mrs Collier was charged with six traffic offences, proceedings against her in a Local Court having been commenced by Court Attendance Notices detailing the offences. Her ex-husband sent an email in her name to the Local Court registrar stating that she intended to plead guilty "with an excuse" and asking for the proceedings to be transferred to the Local Court at Gulgong, which was closer to where she lived. She was advised by letter that the proceedings had been adjourned to the Local Court at Gulgong "for plea". The matter was then mentioned before the court on a number of occasions. On none of those occasions was the substance of the offences charged stated to the plaintiff, but indications that she would be pleading guilty were given by her or on her behalf. The matter was finally dealt with on 7 April 2010, when her solicitor told the magistrate he was instructed to enter a plea of guilty. She was convicted and sentenced that day.

[28] Section 192 of the *Criminal Procedure Act* 1986 (NSW) provided –

> "(2) The court must state the substance of the offence to the accused person and ask the accused person if the accused person pleads guilty or not guilty."

By s 3 of the act "accused person" was defined in this way –

> "*accused person* includes, in relation to summary offences, a defendant and, in relation to all offences (where the subject-matter or context allows or requires), an Australian legal practitioner representing an accused person."

[29] Mrs Collier appealed against conviction to the District Court, claiming that she had not pleaded guilty and in the alternative seeking leave to withdraw the pleas. The primary judge found that she had pleaded guilty and that she should not be given leave to withdraw her pleas. She then sought an order in the nature of certiorari quashing the judgment of the District Court and consequential relief. The claim was put on the basis of error of law on the face of the record, denial of procedural fairness and denial of natural justice.

[30] The Court of Appeal determined that there had been an effective plea of guilty. Hodgson JA, with whom Campbell JA and Latham J agreed, said –

> "[52] I am not sure, however, whether a procedure required by a statute can simply be "waived". I think the more appropriate enquiry is whether or not s 192(2) of the *CP Act* is prescribing something that *must* occur before the power (and perhaps obligation) to convict can be exercised, and/or whether or not it was a purpose of the legislation that an act done in breach of the provision should be invalid: *Project Blue Sky Inc v Australian Broadcasting Authority*."[9]

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8 [2011] NSWCA 202.

9 (1998) 194 CLR 355 at [41], [91]–[93]; [1998] HCA 28.

His Honour identified the purpose of s 192(2) as being –

> "[53] ...to ensure that, to the knowledge of the court, an accused person adequately understands what it is to which he/she is to plead guilty or not guilty, and understands that his/her response will count as such a plea."

He continued –

> "[54] But for the definition of "accused person" in s 3, one would read s 192(2) as requiring that the stating of the offence charged be to the accused person himself/herself; and one might then quite readily consider that this requirement was appropriately selected by the legislature as something that had to happen, in order to ensure, to the knowledge of the court, that the accused person does understand these things. One might then find that the purpose of the provision was to invalidate purported pleas of guilty entered into in the absence of such statements. This appears to have been the position in the United Kingdom under statutory provisions there, which do require the stating of the charge to the accused person himself/herself: *R v Wakefield Justices, ex parte Butterworth*.[10]
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> [55] However, in my opinion the definition of "accused person" in s 3 makes an important difference. In the light of that definition, the statement in s 192(2) can be made to a legal practitioner, and the legal practitioner may enter the plea. It is clear that in those circumstances what I have identified as the purpose of s 192(2) could be achieved readily and sometimes much more efficiently in other ways; for example, by the court directing the attention of the legal practitioner to an identified document in which the charge or charges are set out. In a busy Local Court list it may be highly inconvenient that multiple charges be individually stated in court; and the identification of charges could more effectively, as well as more conveniently, be done by drawing attention to an identified document. I think this suggests that, consistently with the purpose of s 192(2), it was not the purpose of the legislation to invalidate pleas or convictions if that section was not complied with."

His Honour referred to s 182, which allowed a written plea by a person who was not arrested but served with a Court Attendance Notice.[11] He went on –

> "[58] In my opinion, apart from any effect of s 192, for an effective plea of guilty it must be appropriately conveyed to the court that the accused person (personally or by a legal practitioner) understands what is charged against him/her and unequivocally pleads guilty to that charge: that is, unequivocally acknowledges guilt in such a way as to

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10 [1970] 1 All ER 1181.

11 In Queensland there is an analogous provision in s 146A of the *Justices Act* 1886 (Qld): it is inapplicable to an offence that is also triable on indictment.

> authorise the court to convict him/her of the particular charge and sentence him/her accordingly. This means that, even if non-compliance with s 192 does not of itself invalidate a guilty plea, such non-compliance may result in invalidity, just because in the circumstances of non-compliance there has not been the necessary unequivocal acknowledgment.
>
> [59] Having regard to all the considerations set out above, and to the authority of *Dunn*, which this Court should respect, in my opinion the better view is that the stating by the court of the substance of the offence is not of itself a condition precedent to the validity of a plea of guilty, and it was not the purpose of ss 192 and 193 that the power to convict not arise unless there has been such a stating. However, generally in the case of an unrepresented accused, the considerations set out in the previous paragraph would require that, for validity of a plea, s 192(2) be explicitly followed (and, in the case of multiple charges, that separate pleas be taken to each charge). In the case of a represented accused, the legal representative should as a matter of practice at least have attention drawn to the Court Attendance Notice and the offence stated in the Court Attendance Notice: I am inclined to the view that, at least in the case of a represented accused, this would be a substantial if not exact compliance with s 192(2)."

[31] Here the applicant attended the hearing before the magistrate, when he was formally represented by a solicitor. On that occasion the complaint was referred to by its generic description as "a charge of serious assault". No particulars of the complaint were recited before the solicitor purported to enter a plea on the applicant's behalf. The applicant had previously been served with the complaint which described the charge as follows –

> "Details : Charge 1 of 1 –
>
> **CRIMINAL CODE 340(1)(G) SERIOUS ASSAULT – PERSON 60 YEARS AND OVER**
>
> That on the 25th day of July 2009 at Nerang in the State of Queensland one Peter Darrel MCKINLAY unlawfully assaulted one Kenneth Thomas LUBACH a person 60 years or more."

[32] The *Justices Act* 1886 (Qld) is relevantly different from the *Criminal Procedure Act* 1986 (NSW) in that the definition of "defendant" in s 3 of the *Justices Act* does not include that person's lawyer. It is arguable that a plea entered against a defendant who is present at the hearing will not be valid unless "the substance of the complaint" is stated to him at the hearing and he personally responds to the question how he pleads.

[33] Because I would dismiss the application that is now before the court, I do not express concluded views on these questions. Nor do I express any view on what counsel informed this court is a common practice in Magistrates Courts – for a lawyer to use a form of words such as –

> "My client appears and takes the charge as read, pleads guilty and elects summary jurisdiction."

**Outcome**

[34] The application for an extension of time within which to appeal to the Court of Appeal should be refused.

[35] **MULLINS J**: I agree with Margaret Wilson AJA that the application for an extension of time in which to appeal to this Court should be refused.