SUPREME COURT OF QUEENSLAND

CITATION:	*DBX v TAT & Anor* [2021] QCA 242
PARTIES:	**DBX** (applicant) **v** **TAT** (first respondent) **WBO** (second respondent)
FILE NO/S:	CA No 112 of 2021 DC No 1281 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Criminal
ORIGINATING COURTS:	District Court at Brisbane – [2021] QDC 23 (Reid DCJ) Court of Appeal at Brisbane – Unreported, 29 April 2021 (Sofronoff P)
DELIVERED ON:	12 November 2021
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2021
JUDGES:	McMurdo JA and Boddice and Henry JJ
ORDER:	**Application for leave to appeal refused, with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – INCOMPETENCE – where the applicant alleges his elderly mother, who died in hospital, was killed by a doctor and hospital administrator – where the applicant initiated a private prosecution under the *Justices Act 1886* (Qld) against the doctor and administrator alleging five counts of murder and nine other related offences – where a Magistrate ordered the applicant to provide particulars under s 102B(2) *Justices Act* – where the Magistrate made a strike out order under s 102B(3) *Justices Act* – where the Magistrate ordered the applicant provide security for costs under s 102C(2) *Justices Act* – where the Magistrate made an interlocutory order dismissing the application to disqualify defence counsel from acting in the matter – where the Magistrate made an interlocutory order dismissing an application to cross-examine the respondents' solicitor on the content of her affidavits – where the applicant filed an appeal to the District Court pursuant to s 222 *Justices Act* to appeal each of these orders – where the District Court Judge found each of the appeals incompetent – where the applicant sought leave

pursuant to s 118(3) *District Court of Queensland Act 1967* (Qld) to appeal the District Court decision – where a single judge of the Court of Appeal refused such leave, concluding the District Court Judge was right to find the appeals incompetent – where the applicant applied for a rehearing of his application for leave to appeal – whether it is appropriate for the court to grant leave to appeal the District Court decision – whether the appeal to the District Court was incompetent

Criminal Practice Rules 1999 (Qld), r 104, r 106(1)
District Court of Queensland Act 1967 (Qld), s 118(3), s 118(7)
Justices Act 1886 (Qld), s 102B(2), s 102B(3), s 102C(1), s 102C(2), s 102D(1), s 102D(5), s 222

Schneider v Curtis [1967] Qd R 300, cited

COUNSEL: The applicant appeared on his own behalf
J R Hunter QC for the respondents

SOLICITORS: The applicant appeared on his own behalf
Minter Ellison for the respondents

[1] **McMURDO JA:** I agree with Henry J.

[2] **BODDICE J:** I agree with Henry J.

[3] **HENRY J:** At the outset of the listed hearing of this application for leave to appeal, the applicant announced he was formally advising the court he would not go ahead with his application. He explained the application would be rendered unnecessary by other action he was going to take. When pressed as to whether he was proceeding with his application he requested that it be stayed. The court refused to stay the application, for reasons given at the hearing. The application thus remained before the court to be disposed of and the court reserved its decision on the application.

[4] The applicant alleges his elderly mother, who died in hospital, was killed by a doctor and hospital administrator. He chose to pursue this allegation by initiating a private complaint under the *Justices Act 1886* (Qld) in the Magistrates Court against the doctor and administrator. The complaint before the Magistrates Court alleged 14 offences, namely five of murder and one each of conspiracy to murder, manslaughter, deprivation of liberty, threats, negligent acts causing harm, administering poison with intent to harm, torture, accessory after the fact of murder and fail to supply the necessaries of life.

[5] On 21 February 2020 the respondents applied for an order pursuant to s 102B(2) *Justices Act* that the applicant furnish particulars of the charges in the complaint and the Magistrate so ordered.[1]

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1 AR p 17.

[6] On 8 April 2020 the presiding Magistrate decided such particulars as had been provided were not sufficient and struck out the private complaint.[2] That order was made pursuant to s 102B(3) *Justices Act*, which provides:

> "If, forthwith upon the making of an order under subsection (2) or within 14 days of the day on which the order is made or within such further time as may be allowed by justices in a particular case, the complainant does not furnish in writing to the defendant particulars that in the justices' opinion are sufficient, the justices shall order that the private complaint be struck out and may award to the defendant such costs as to them seem just."

[7] Section 102B(3) is evidently designed to ensure fairness to defendants of private prosecutions so that they may know from the outset what acts or omissions by them are said to constitute the offences alleged against them. This information will not only assist defendants in preparing to defend a private prosecution. It may also expose a private prosecution as misconceived, laying the foundation for an early application to dismiss it as an abuse of process, frivolous or vexatious.

[8] Section 102B(3) invokes a remedy by which the complaint is "struck out" if the private complainant fails to sufficiently identify the particulars of offences alleged. It is a distinct form of relief from that in s 102C(1) which allows a charge to be "dismissed" on the grounds that it is an abuse of process, frivolous or vexatious. It is a distinction which matters to rights of appeal. A person aggrieved by a dismissal of or failure to dismiss a complaint as an abuse of process, frivolous or vexatious pursuant to s 102C(1) is given a right of appeal by 102D(1). However, s 102D(5) otherwise precludes rights of appeal against orders under ss 102B and 102C, providing:

> "Save as is prescribed by this section no appeal shall lie in respect of any order made in any proceeding relating to a private complaint pursuant to section 102B or s 102C or this section." (emphasis added)

[9] The legislature evidently considered a complainant in a private prosecution who will not sufficiently expose the particulars of the alleged charges to scrutiny, should be met with a power to strike out the complaint without any right of appeal. The applicant complains this is unjust, depriving him of the opportunity to argue before a superior court that the presiding Magistrate was wrong in concluding the particulars were insufficient. Minds may differ about whether s 102D(5)'s exclusion of appeal rights is unjust given it is open to the applicant to complain of the offences he alleges to agencies of the executive branch of government invested with the power to investigate, charge and prosecute complaints of criminal offences. In any event appeals are a creature of statute and s 102D(5) excludes a right of appeal against the Magistrate's strike out order.

[10] The applicant filed an appeal to the District Court pursuant to s 222 *Justices Act*. The record contains some anomalies as to the mix of Magistrate's orders which were purportedly under appeal[3] but at its most favourable to the applicant they were:

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2 AR p 19.

3 AR pp 71-72, 76-77.

(1) an order requiring the provision of particulars (the particulars order);

(2) the strike out order;

(3) an order dismissing the applicant's application to disqualify defence counsel from acting in the matter (the refusal to disqualify order);

(4) an order requiring the giving of security for costs (the security for costs order); and

(5) an order dismissing an application to cross-examine the respondents' solicitor on the content of her affidavits (the affidavits order).

[11] The particulars order was made under s 102B(2). The strike out order was made under s 102B(3). The security for costs order was made under s 102C(2). Section 102D(5), by its words, "Save as prescribed by this section no appeal shall lie", precluded any right of appeal against those three orders. Putting it differently, those words exclude the application of s 222 to such orders.

[12] This leaves the refusal to disqualify order and the affidavits order. They were interlocutory orders. Section 222 only confers a right of appeal against an order it describes as "an order made … in a summary way on a complaint". It is well established those words relate to an order disposing of the complaint itself, for example by dismissal or conviction, and do not relate to interlocutory orders – see *Schneider v Curtis*.[4] This reasoning therefore excludes the refusal to disqualify order and the affidavits order from the reach of s 222. The applicant argues such reasoning would not exclude the strike out order because that order had the effect of disposing of the complaint. The force of that argument is doubtful given there was no determination of guilt or innocence and there persists the power of the Police Service or Director of Public Prosecutions to prosecute the complained of offences should they consider such offences have been committed. However, it is unnecessary to resolve the argument because, as already explained, an appeal against that order is specifically excluded by s 102D(5).

[13] The learned District Court Judge was right to find the appeals incompetent, that is, without a legal basis.

[14] The applicant sought the leave of this court, pursuant to s 118(3) *District Court of Queensland Act 1967* (Qld), to appeal the District Court decision. Section 118(7) provides a single judge of the Court of Appeal may grant or refuse such leave. A single judge of the Court of Appeal, the President, heard the application. On 29 April 2021 his Honour refused such leave, concluding the District Court Judge was right to find the appeals incompetent.

[15] The applicant now purports by a notice of appeal filed 26 May 2021 to appeal the President's decision. The application before the President was an application mentioned in r 104 *Criminal Practice Rules 1999* (Qld). Rule 106(1) provides that where such an application is refused the applicant "may apply to the court for the application to be reheard by the court". His notice of appeal should therefore be regarded as an application for a rehearing of his application for leave to appeal.

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4 [1967] Qd R 300.

[16] The issue then is not whether the applicant can establish any error in the President's reasons but whether it is appropriate in the circumstances of this case for this court to grant leave to appeal the District Court decision. Leave to appeal should be refused because the appeal would be doomed to fail for the same reason that the applicant failed in the District Court - the appeal to the District Court was incompetent.

[17] That conclusion makes it unnecessary to resolve an issue as to whether the application is out of time and an extension of time should be given. It also makes it unnecessary to address other matters which the applicant sought to raise using the platform of his continued pursuit of a right of appeal which he has been repeatedly told is not allowed by law. The respondents should not have been put to the cost of having to respond to this futile application and should have their costs.

[18] I would order:

Application for leave to appeal refused, with costs.