DISTRICT COURT OF QUEENSLAND

CITATION:	*Lynch v Commissioner of Police* [2019] QDC 99
PARTIES:	**DEBRA LYNCH** (appellant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	D1920/18
DIVISION:	Appeal
PROCEEDING:	Appeal pursuant to s 222 *Justices Act 1886* (Qld)
ORIGINATING COURT:	Magistrates Court at Beenleigh
DELIVERED ON:	21 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	7 June 2019. Further written submissions by the parties.
JUDGE:	Smith DCJA
ORDER:	**1. The appeal is dismissed.** **2. I make no order as to costs.**
CATCHWORDS:	MAGISTRATES – appeal pursuant to the Justices Act – whether appeal permitted where interlocutory order has been made rather than final order
	Criminal Code 1899 (Qld) ss 25,31 *Drugs Misuse Act 1986* (Qld) s 127 *Criminal Practice Rules 1999* (Qld) r 5 *Justices Act 1886* (Qld) ss 78, 83, 222 *Criminal Practice Rules 1999* (Qld) r 33 *Attorney-General (NSW) v Chidgey* (2008) 182 A Crim R 536; [2008] NSWCCA 65 *Commissioner of Police v Spencer* [2014] 2 Qd R 23; [2013] QSC 202 *Coulter v Ryan* [2007] 2 Qd R 302; [2006] QCA 567 *Darcey v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497 *Kosteska v Phillips* [2011] QCA 266 *Mathews v Commissioner of Police* [2012] HCASL 64; [2011] QCA 368; [2011] QDC 246 *Owen v Cannavan & Anor* [1995] QCA 324 *Paulger v Hall* [2003] 2 Qd R 294; [2002] QCA 353 *R v Gibb* [2017] QCA 280 *R v Quayle* [2006] 1 All ER 988; [2005] 1 WLR 3642; [2005] EWCA Crim 1415

Sankey v Whitlam (1978) 142 CLR 1; [1978] HCA 43
Schneider v Curtis [1967] Qd R 300

COUNSEL: The appellant appeared on her own behalf
Ms E Duncan for the respondent

SOLICITORS: The appellant appeared on her own behalf
Director of Public Prosecutions for the respondent

Introduction

[1] This is an appeal against a decision of a magistrate to set aside subpoenas issued by the appellant.

Background

[2] The appellant has been charged with four offences, namely producing a dangerous drug (cannabis); possessing a dangerous drug (cannabis); possessing equipment; and possessing utensils or pipes. The alleged offences occurred on 19 June 2017. The appellant was issued with a notice to appear on 11 July 2017. During the course of the criminal proceedings in the Magistrates Court, the appellant issued four subpoenas to the following individuals (the individuals):

(a) Gregory Perry (Medical Cannabis Team at Queensland Health);
(b) Dr Susan Ballantyne (Medical Cannabis Team at Queensland Health);
(c) Dr Jeanette Young (Chief Health Officer at Queensland Health); and
(d) Michael Walsh (Director General at Queensland Health).

[3] The matter came on for hearing concerning the subpoenas on 23 March 2018. On 24 April 2018, a magistrate ordered the subpoenas be set aside.

Submissions below

[4] In the Magistrates Court the individuals submitted to the court[1] that pursuant to r 33(1)(a) of the *Criminal Practice Rules 1999* (Qld) the subpoenas served should be set aside. It was submitted that on a date or dates unknown the appellant caused the Beenleigh Magistrates Court to issue documents headed "Subpoena for Production and to Give Evidence" on each of the individuals named. Each of the individuals was required to attend a hearing at the Beenleigh Magistrates Court on 30 November 2017. The individuals submitted that a subpoena could be set aside if it was concluded there was no legitimate forensic purpose supporting the subpoena or what was sought was not relevant or it would be oppressive to require the person named to comply with it. The onus was on the person who caused the subpoena to be issued to demonstrate a legitimate forensic purpose and to demonstrate relevance.[2] In respect of whether the documents are relevant, the court is not to be concerned with unreal, fanciful or speculate possibilities that the evidence or documents may have a bearing.[3] It was submitted by the individuals that there was an absence of legitimate forensic purpose and that the material and testimony sought

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1 The individuals' submissions are at pages 25 to 31 of the Affidavit of the Appellant dated 18 September 2018- Exhibit 5.
2 *Attorney-General (NSW) v Chidgey* (2008) 182 A Crim R 536; [2008] NSWCCA 65 at [5].
3 *Darcey v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497.

would have no relevance to the matters in issue at the trial. It was further submitted it would be oppressive to require the applicants below to examine all documents held by the Medical Cannabis Team.

[5] On the other hand, the appellant submitted to the magistrate that the documents were relevant to her defences concerning the charges. She argued that she only resorted to possessing and producing the cannabis and possessing the utensils because she had exhausted all legal avenues for obtaining the cannabis she required for her alleged terminal medical condition. She argued that the doctors mentioned in the subpoenas had for a number of reasons blocked her from successfully obtaining authorisation to use medical cannabis. She submitted that she was excused by law by virtue of sections 25 and 31 of the *Criminal Code 1899 (Qld)* for committing the acts the subject of the charges.

Magistrate's decision

[6] The magistrate on 24 April 2018 set aside the subpoenas.[4] The magistrate referred to the arguments by both parties and determined that the material sought in the subpoenas was not relevant to matters at the trial, or alternatively that they were far too wide and therefore in the circumstances set aside the subpoenas

Appeal

[7] The appellant appealed this decision on 23 May 2018. The appellant relies on a number of grounds including:

(a) The magistrate failed to have regard to the oral submissions made on 24 November 2017;
(b) The magistrate erred in failing to give the appellant a fair hearing including referring to a decision of *R v Quayle*[5] without giving the appellant notice of that decision;
(c) Pre-determining the case and being biased;
(d) Erred in conducting an assessment and review into the defences;
(e) Erred in failing to correctly interpret the term "unlawfully";
(f) Failing to properly consider sections 25 and 31 of the *Criminal Code* 1899 (Qld);
(g) Failing to interpret the connection between Commonwealth and Queensland laws concerning the control of cannabis;
(h) Failing to properly consider relevant defences available to the appellant;
(i) Erring in fact and law.

[8] Also the appellant sought to adduce fresh evidence at the hearing of the appeal.

Appellant's submissions

[9] The appellant has filed an outline of argument dated 20 June 2018.[6] In the outline of argument the appellant ultimately submits that she had a justification and/or excuse for the commission of the alleged offences because she needed to use cannabis due to terminal and life-threatening medical conditions. She submits that

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4 Reasons for judgment are Exhibit 2.
5 [2006] 1 All ER 988; [2005] 1 WLR 3642; [2005] EWCA Crim 1415.
6 Exhibit 3.

sections 25 and 31 of the *Criminal Code 1899 (Qld)* are available defences and submits that the documents and evidence sought by way of subpoena were relevant to the issues and there were legitimate forensic purposes for the evidence. She further submits there was bias and a denial of procedural fairness and refers to a number of authorities on that point. She also makes further submissions supporting the contentions raised in the outline of submissions.

[10] At the hearing of the appeal she filed further documents[7] and ultimately submits that the subpoenas were issued under the *Uniform Civil Procedure Rules 1999 (Qld)* (UCPR) and that various cases relied on by the respondent are not relevant to the determination of the appeal.

[11] In further written submissions[8] the appellant submits:

(a) The cases relied upon by the respondent may be distinguished.
(b) Heavily relies on the dissenting judgment of Fryberg J in *Coulter v Ryan.*[9]
(c) Submits that the order made by the Magistrate was an "order" within the meaning of that term in s 222 of the *Justices Act 1886 (Qld).*
(d) The respondents should actually be the individuals not the Queensland Police Service.

[12] In a reply to the respondent's submissions[10] the appellant submitted:

(a) The respondent Commissioner does not have standing as a respondent in the present appeal.
(b) The individuals should be parties to the appeal.
(c) The appellant did not name the Queensland Police Service as a respondent in the second notice of appeal.
(d) The appellant relies on her affidavit dated 18 September 2018.[11]
(e) The appellant says that McGill SC DCJ adjourned the matter until 7 June 2019.
(f) The case of *R v Gibb*[12] is authority for the proposition that the UCPR may be used in aid of the Court's criminal jurisdiction.
(g) The registrar should not have removed the individuals from the proceedings.

Respondent's submissions

[13] On the other hand the respondent submits that the appeal is incompetent.[13] It is submitted that only an interlocutory order was made by the magistrate and by reason of longstanding case authority the appeal is not competent and should be dismissed.

[14] The respondent in further written submissions[14] submits:

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7 Exhibit 1.
8 Exhibit 6
9 [2007] 2 Qd R 302; [2006] QCA 567.
10 Exhibit 8.
11 Exhibit 5.
12 [2017] QCA 280 at [12].
13 Exhibit 4.
14 Exhibit 7.

(a) That the UCPR are irrelevant bearing in mind McGill SC DCJ on 1 May 2019 dismissed an application for the individuals to be joined as parties to the appeal.
(b) Any subpoenas are criminal in nature and are not under, nor should be under, the UCPR.
(c) The case of *R v Gibb*[15] relied on by the appellant is not relevant.
(d) The respondent concedes that an interlocutory ruling may be considered on an appeal against conviction.

Discussion

[15] Section 222(1) of the *Justices Act 1886* (Qld) provides:

> "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.
> Notes—
> 1 Under the *Criminal Code, section 669A(6)*, an appeal against a decision by a person under this section to a District Court judge is removed directly to the Court of Appeal if the Attorney-General also appeals against the decision under section 669A.
> 2 This division applies in relation to an order made by justices dealing summarily with a child charged with an offence, but appeals must be made to a Childrens Court judge—see the *Youth Justice Act 1992, section 117*."

[16] In *Schneider v Curtis*,[16] Gibbs J said that the phrase (which then contained "upon" a complaint) is to be understood as follows:

> "The section does not give a right of appeal from any order made in proceedings commenced by a complaint but only from 'an order made upon a complaint.' These words…in my opinion refer to an order disposing of the complaint itself and do not include an order upon an application made during the course of the proceedings instituted by the complaint."

[17] Despite the substitution of the word "on" for "upon", the Court of Appeal has continued to regard *Schneider v Curtis* as authority for the proposition that s 222 of the *Justices Act 1886 (Qld)* only allows right of appeal to the District Court upon orders finally disposing of a complaint.

[18] In *Owen v Cannavan & Anor*,[17] the Court of Appeal following *Schneider v Curtis* dismissed an application for leave to appeal concerning an order made by a magistrate refusing to remit summary proceedings from the Magistrates Court at Brisbane to the Magistrates Court at Gympie.

[19] In *Coulter v Ryan*,[18] the majority of the Court of Appeal accepted that *Schneider v Curtis* was good law and held that an appeal against a costs order was incompetent.

[20] I am bound of course to follow the decision of the majority.

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15 [2017] QCA 280.
16 [1967] Qd R 300 at pp 304-305.
17 [1995] QCA 324.
18 [2007] 2 Qd R 302; [2006] QCA 567 at [4]-[5].

[21] In *Kosteska v Phillips*,[19] the Court of Appeal noted that an appeal to the District Court for a magistrate's decision setting down a matter for trial was incompetent because of the principles contained in *Coulter v Ryan*.

[22] Finally, in *Mathews v Commissioner of Police*,[20] O'Brien DCJA (as His Honour then was) dismissed an appeal by the appellant against a referral by the magistrate pursuant to s 20B(1) of the *Crimes Act 1914* (Cth) to refer the question of the appellant's fitness for trial to the District Court. His Honour applied *Schneider v Curtis* noting it had been upheld in a number of decisions and formed the view that the order made by the magistrate was not an appealable order.

[23] His Honour's decision was upheld by the Court of Appeal in *Mathews v Commissioner of Police*[21] and special leave to the High Court was refused in *Mathews v Commissioner of Police*.[22]

[24] Bearing in mind the abundant authority referred to above, I accept the respondent's submissions.

[25] I also add as well that it is undesirable there be a fragmentation of the criminal trial process.[23] Any issues raised concerning the subpoenas can be raised at the hearing of an appeal against conviction.[24]

[26] Insofar as *R v Gibb*[25] is concerned, that case considered a different issue. That case was concerned with documents to be obtained potentially to establish appeal grounds against a conviction. I am considering the validity of an appeal under s 222 of the *Justices Act* concerning an interlocutory order.

[27] I also add that it seems to me that the issuing of summonses in Magistrates court criminal proceedings is governed by sections 78 and 83 of the *Justices Act.* Rule 33 of the *Criminal Practice Rules 1999 (Q)* also applies by virtue of section 5 of the *Criminal Practice Rules.*

[28] I do not consider any arguments by the appellant as to the correct parties to the appeal answer the direct point in issue here which is: is the appeal competent.

Conclusion

[29] In conclusion the respondent's submissions as to the competency of the appeal are correct here.

[30] In all of the circumstances I find the appeal is incompetent as it is not an appeal against a final order.

[31] My orders therefore are:
1. The appeal is dismissed.

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19 [2011] QCA 266 at [4]-[6].
20 [2011] QDC 246 at [9]-[12].
21 [2011] QCA 368 at [11].
22 [2012] HCASL 64.
23 *Sankey v Whitlam* (1978) 142 CLR 1; [1978] HCA 43 at p 26; *Paulger v Hall* [2003] 2 Qd R 294; [2002] QCA 353 at [27].
24 *Commissioner of Police v Spencer* [2014] 2 Qd R 23 at [92].
25 [2017] QCA 280.

2. I make no order as to costs.[26]

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[26] Section 127 of the *Drugs Misuse Act 1986* (Qld).