SUPREME COURT OF QUEENSLAND

CITATION:	*Bode v Commissioner of Police* [2018] QCA 186
PARTIES:	**BODE, Gerald Lansborough** (applicant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	CA No 197 of 2017 DC No 17 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Townsville – Unreported, 3 August 2017 (Durward SC DCJ)
DELIVERED ON:	7 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2018
JUDGES:	Sofronoff P and Gotterson and McMurdo JJA
ORDER:	**Leave to appeal refused with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – where the applicant was convicted of assault occasioning bodily harm by a magistrate – where the applicant appealed his conviction to the District Court under s 222 *Justices Act* 1886 – where the learned District Court judge identified four errors of fact made by the learned magistrate – where the applicant's appeal to the District Court was nonetheless dismissed – where the applicant submits that the learned District Court judge failed to re-hear the case – where the learned District Court judge said that the identification of the factual errors on the part of the learned magistrate was important so that those same mistakes were not made on appeal – where the applicant submits that the learned District Court judge merely considered whether the learned magistrate ought to have reached the conclusion that he did – whether the applicant has demonstrated a failure on the part of the learned District Court judge to conduct a re-hearing such as to amount to a manifest error occasioning a substantial injustice *District Court of Queensland Act* 1967 (Qld), s 118 *Justices Act* 1886 (Qld), s 222, s 223

Forrest v Commissioner of Police [2017] QCA 132, cited
Robinson Helicopter Company Inc v McDermott (2016) 90 ALJR 679; [2016] HCA 22, cited
Rowe v Kemper [2009] 1 Qd R 247; [2008] QCA 175, cited

COUNSEL: J A Greggery QC for the applicant
C N Marco for the respondent

SOLICITORS: Purcell Taylor for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** This is an application for leave to appeal under s 118 of the *District Court of Queensland Act* 1967 arising out of an unfortunate fight between two elderly bookmakers at the Ingham Races on 29 August 2015. The complainant, Lloyd Frank Mitchell, and the applicant had been good friends. They and other friends of theirs had jointly owned a beach hut which they had decided to sell. There was an agreement that each of the partners except Mr Mitchell would receive $11,000 from the purchase price. Mr Mitchell would only receive $4,000 because, as was understood between them, he had not taken any part in the maintenance or payment of liabilities in respect of the property for the previous 10 years. On 29 August 2015 the applicant came to Mr Mitchell's bookmaker's stand at the Ingham races and gave him an envelope containing his share of the proceeds of sale. When he opened the envelope, instead of $4,000 he found only $3,400 in it. Mr Mitchell could not see the applicant anywhere but he saw the applicant's wife, Anne, nearby. He asked her why the cheque in the envelope was for the smaller sum. She replied words to the effect that they had had legal advice and that was all that Mr Mitchell would get. Mr Mitchell said he would get legal advice too.

[2] Sometime later the applicant came and spoke to Mr Mitchell. He said, "Keep Anne out of this. This is between you and me, arsehole."

[3] At the end of the race meeting, Mr Mitchell went to get his car. According to Mr Mitchell's evidence at the trial in the Magistrates Court, as he walked to the carpark to retrieve his car he saw the applicant coming in the opposite direction. As they were about to pass each other the applicant jolted Mr Mitchell's right shoulder with his own right shoulder. This threw Mr Mitchell off balance. As he turned to confront the applicant, the applicant punched him in the middle of the forehead. Mr Mitchell fell to the ground. The applicant then held him with one hand and his other arm raised as though to strike him. The applicant said, "Now you're going to get yours, cunt."

[4] Mr Mitchell cannot actually remember hitting the ground and he cannot recall being hit again. Almost immediately a security guard, Thomas Holden, hurried over and separated the two men. Mr Mitchell was bleeding from his right ear. He had bruising and soreness to his knee and to his left shoulder.

[5] The existence of these injuries was corroborated by photographs that had been taken of them on that day. They showed injuries consistent with a fall and a red mark on his forehead.

[6] Mr Holden said that he saw two men wrestling each other on the ground. He saw the one who was on top, the applicant, hitting the one underneath with his closed

fist. He saw him hit the complainant twice in this way and was then able to grab the applicant's arm and separate the two men. According to Mr Holden both men were aggressive. He saw that the complainant was bleeding from the area of the ears.

[7] As I have said, the fight took place on 29 August 2015. On 3 September 2015, Mr Mitchell consulted his general practitioner, Dr Gavin Andrews. Mr Mitchell told Dr Andrews that he had been assaulted and had landed on his shoulder. Dr Andrews found swelling over the left collarbone consistent with such a fall. During a second consultation on 9 September 2015, Mr Mitchell told Dr Andrews that he had had a "bit of a knock on the head". Dr Andrews made no note about any complaint concerning a punch to the head or any injuries to the head or face consistent with being punched.

[8] The applicant's evidence was different. He recalled seeing Mr Mitchell walking in the direction of the carpark. He said that they bumped each other. He described it as a "little nudge". He said "he nudged me, I nudged him, both at the same time, sort of thing". He said that Mr Mitchell then "flew into a ballistic rage and started to punch me". To stop this assault, the applicant grabbed Mr Mitchell by the shirt and threw him to the ground. The applicant said that Mr Mitchell punched him five or six times. He denied that he hit or punched Mr Mitchell at all. He said that he himself suffered a "busted lip and I had a big bruise on this shoulder and I had few little other bruises".

[9] The learned magistrate preferred the evidence of Mr Mitchell. He said:

> "My impressions are – of Mr Mitchell as a witness, are that he gave a frank and direct account of what happened. He was responsive to questions to the best of his recollection. He was articulate and made appropriate concessions, in particular about his inability to remember certain things. He gave his evidence and responded to questions put to him in a considered, thoughtful, and what I would describe as a polite manner."

[10] The learned magistrate accepted that Mr Mitchell's memory of the assault might have been imperfect because of the shock of the experience itself. He found that Mr Mitchell was "both a truthful witness and that what evidence he gave was both plausible and credible".

[11] He found that Mr Mitchell's evidence of injury to his ear had been supported by Mr Holden's evidence and by the evidence of another witness who had seen him immediately after the incident. He found that Mr Mitchell's evidence about the injury to his forehead was supported by what could be seen on the photograph of Mr Mitchell's forehead taken on the day of the incident and which the learned magistrate himself examined. He concluded that when Mr Mitchell consulted Dr Andrews some days later it was likely that there was no injury on the forehead requiring treatment. This would explain his failure to report that aspect of his injuries to Dr Andrews.

[12] The learned magistrate also found Mr Holden's evidence to be reliable and he accepted almost all of it. There was a part of Mr Holden's evidence that the learned magistrate did not accept. Mr Holden had said that the warring couple had moved about 20 metres from the place where Mr Holden had first seen them to the place to where he later confronted them on the ground. This did not accord with the evidence of the complainant or the applicant and the learned magistrate did not

accept that part of Mr Holden's evidence. However, he concluded that the remainder of Mr Holden's evidence, about seeing the injuries inflicted on the complainant and the absence of any injuries on the applicant, as well as the evidence of the actual assault, was reliable and he accepted it accordingly.

[13] The learned magistrate did not accept the evidence of the applicant. Having regard to the respective sizes of the two men, he found it implausible that Mr Mitchell would have initiated an assault against the applicant. The learned magistrate described Mr Mitchell as "a 71 year man, tall and of slight build". There was evidence that Mr Mitchell had had heart surgery in 2004 and that he was taking blood-thinning medication. He had hearing aids in both ears and wore prescription sunglasses. The applicant was described as a man of "much heavier build than Mr Mitchell".

[14] The learned magistrate preferred the evidence of Mr Mitchell where it conflicted with the evidence of the applicant. He also preferred the evidence of Mr Holden where it conflicted with the evidence of the applicant. He found expressly that as Mr Mitchell and the applicant approached each other, the applicant hit Mr Mitchell with his right shoulder putting him off balance. He found that the applicant punched Mr Mitchell to the middle of his forehead with his right hand. He found that Mr Mitchell fell to the ground as a result of being punched and that, while Mr Mitchell was on the ground, the applicant struck him on the head twice with a closed fist.

[15] The assault that had been charged was:

> "That on the 29th day of August 2015 at Ingham in the State of Queensland one Gerald Landsborough Bode unlawfully assaulted one Lloyd Frank Mitchell and thereby did him bodily harm."[1]

[16] The particulars of the prosecution case had been the subject of brief submissions at the beginning of the trial. Those particulars, as the applicant's then counsel said she understood them, were:

> "A shoulder, a punch to the head and then multiple strikes whilst on the ground."

[17] The bodily harm comprised "a bruise or a reddened mark to the forehead, and also a bruise to his leg".[2]

[18] It follows that the prosecution had proved the case that it had set out to prove.

[19] The applicant appealed to the District Court pursuant to s 222 of the *Justices Act* 1886 (Qld). There were two grounds of appeal. The first was that the conviction was unreasonable and could not be supported having regard to the evidence. The second ground contained two separate parts. First, it was asserted that the learned magistrate ought to have directed himself in accordance with *Jones v Dunkel*,[3] in respect of the failure of the prosecution to call a treating doctor from the Townsville Hospital as a witness. Second, it was claimed that the learned magistrate erred in drawing an inference, favourable to the prosecution, that the complainant had

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1 AB 2.
2 AB 10.
3 (1959) 101 CLR 298.

probably reported his facial injuries to the treating doctor at Townsville Hospital when this was not in the evidence and, having drawn that inference, the learned magistrate then wrongly used it to justify the complainant's failure to report the same injuries to his face to Dr Andrews.

[20] At the hearing of the appeal before Judge Durward SC, the applicant's counsel explained that it was common ground that the applicant had thrown or pushed Mr Mitchell to the ground and that Mr Mitchell had thereby suffered injuries to the left side of his body from his shoulder to his hip.

[21] The submissions in support of the grounds of appeal were wider than the notice of appeal. First, it was submitted that "the element of causing bodily harm was not proved". This was an odd submission to make because, although it is true that the learned magistrate did not expressly find in terms that "bodily harm" had been proved, he made express findings that Mr Mitchell had suffered an injury to his ear, to his forehead and to other parts of his body as a result of the assault. The applicant's counsel at the commencement of the trial had stated that she understood expressly that "the complainant will complain of a bruise or reddened mark to his forehead and also a bruise to his leg".

[22] Second, the applicant's counsel submitted to Judge Durward SC that Mr Holden's evidence was "irreconcilable with the complainant's evidence".

[23] As I have said, the learned magistrate had referred to parts of Mr Holden's evidence that were inconsistent with the evidence otherwise given by the applicant and the complainant. He was free to accept part of the witness's evidence while rejecting other parts.

[24] Thirdly, the applicant submitted that the learned magistrate "focussed upon demeanour as the first basis upon which he assessed the complainant's evidence". It was submitted that the learned magistrate failed to conduct "a comparison of the complainant's evidence with all of the relevant known facts". That submission was unjustified. The learned magistrate made express reference to respects in which Mr Mitchell's evidence was supported by the evidence of Mr Holden and another witness as well as by the photographs and, to an extent, the evidence of Dr Andrews. He gave similar attention to the evidence of the applicant and the respects in which it was unsupported by other evidence.

[25] Further, the applicant submitted to the learned District Court judge that the learned magistrate wrongly inferred that the complainant had said particular things to the treating doctor at Townsville Hospital. In a passage quoted in the applicant's written submissions to the learned District Court judge, the learned magistrate had found that the complainant had given evidence that at the hospital "he told a doctor that he'd been assaulted and he wanted his injuries documented". That was indeed the evidence that the complainant gave before the learned magistrate. The learned magistrate used that evidence as a possible explanation why the complainant did not inform Dr Andrews, whom he saw some days after his hospital visit, about any injuries to his forehead. That was speculative but it led nowhere because the mark on the forehead could be seen in the photographs. Finally, the applicant submitted that the learned magistrate had reversed the onus of proof. He did this, it was said, because the learned magistrate rejected the applicant's explanation for his failure to report the incident to the police himself. The applicant's explanation had been that he did not believe that there was any "big deal". This rejection was part of the

learned magistrate's reasoning towards his rejection of the applicant's evidence as a whole.

[26] An appeal to the District Court under s 222 involves re-hearing. On this application the applicant submits that the learned District Court judge failed to re-hear the case. Of course, if the learned District Court judge failed to do so then that would be an error of law[4] that might justify leave to appeal.

[27] The learned District Court judge accepted the applicant's counsel's submission that the learned magistrate had made four errors of fact. The four errors were said to have been:

(a) the failure to prove bodily harm as a result of the assault;

(b) the use of the appellant's failure to report the matter to the police as relevant to an assessment of the applicant's credit;

(c) the use of the demeanour of the witnesses as an aid to an assessment of credit;

(d) the drawing of an inference about what might have been said at the hospital.

[28] For the reasons I have already given, I respectfully disagree that the learned magistrate had erred in these or in any other respects. However, the presence or absence of such errors is entirely immaterial for present purposes. This is because, as the learned judge appreciated and as he expressly said, the appeal before him was by way of re-hearing and it was necessary for him to "consider[ed] the evidence independently and to determine the appeal on that basis". His Honour said that his identification of these supposed errors was only important so that he himself did not make the same errors.

[29] His Honour then referred to the applicant's counsel's submission that, on the whole of the evidence, the prosecution had failed to prove beyond reasonable doubt that the appellant had been the aggressor. His Honour rejected that submission. In the passage of his Honour's reasons that deals with this ground, Durward DCJ said:

> "In my assessment: (1) it is open on the evidence to conclude that the complainant was assaulted by the defendant. It was the defendant that had been aggravated by the behaviour of the complainant in their earlier contact and by the complainant's questioning of the appellant's wife; (2) the evidence of Mr Holden was open to be accepted in respect of the assault. His earlier observations from a distance, that may have differed from other evidence, is not determinative of the acceptance of his evidence of what he saw and what he did when he was with the two men at close range; (3) what was said by the complainant about his injuries at the hospital is irrelevant to findings about the incident; (4) demeanour, per se, is a poor basis for assessing credibility, although it is a constituent part amongst other matters of such in assessment in many cases; (5) the non-reporting of the incident by the appellant is, in my view, a red herring and it is irrelevant; (6) the complainant referred to several injuries suffered. It is open to infer that the injuries, or any of them, even though not specifically particularised any injury to the shoulder

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4 *Rowe v Kemper* [2009] 1 Qd R 247 at [5].

> – would have interfered with his health and comfort. It is open to find that the complainant suffered bodily harm in the incident inferentially, to the shoulder, even in the absence of more specific particularisation.
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> Despite some reservations about the evidence in the context of credibility and the Magistrate's advantage in respect of that matter (having seen and heard the evidence) and ignoring evidence that is irrelevant to a determination of criminal responsibility (matters to which I have referred) I consider that there is evidence upon which the appellant may be properly convicted of a charge of assault occasioning bodily harm."

[30] The applicant has attacked this passage in the judge's reasons on the ground that it evidences a failure on his Honour's part to undertake a true re-hearing. It is submitted that the three occasions upon which his Honour used the expression "it is open" and his use of the expression "was open" showed that, rather than making his own assessment of the evidence with a view to reaching his own conclusion, his Honour merely considered whether the learned magistrate ought to have reached the conclusion that he did. That submission should be rejected. It ignores three things. First, shortly before the passage set out above, his Honour had said:

> "I have referred to the judgment *Forrest v The Commissioner of Police*.[5] It asserts the proper approach that on an appeal is by way of rehearing, in fact, it simply restates what has always been the law. I have considered the evidence independently and will determine the appeal on that basis."

[31] Second, his Honour began the quoted passage with the words "In my assessment". Finally, his Honour concluded by saying "I consider that there is evidence upon which the appellant may be properly convicted of a charge of assault occasioning bodily harm".

[32] Those three statements, and indeed the tenor of the whole judgment, show that his Honour understood the task before him and that he applied himself faithfully to that task. For that reason, I find no error in his Honour's approach.

[33] An appeal to the Court of Appeal pursuant to s 118 of the *District Court of Queensland Act* 1967 is an appeal *strictu sensu*. There is no right of appeal; leave must be sought and obtained.

[34] For the reasons I have given, the learned District Court judge did not make the mistake that the applicant submitted he did make. In any case, where there have been two concurrent findings of fact, it would require an applicant to show a manifest error and a substantial injustice before leave would be granted to permit a third agitation of the same issues.

[35] Not only have I not been able to find any error or injustice but, in the application for leave to appeal itself, the applicant has not identified any such injustice.

[36] For these reasons I would refuse leave to appeal with costs.

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5 [2017] QCA 132.

[37] **GOTTERSON JA:** I agree with the order proposed by Sofronoff P and with the reasons given by his Honour.

[38] **McMURDO JA:** I regret that I am unable to agree with the orders proposed by the President. The reason is that, in my view, the District Court judge did not conduct a rehearing, as was required by s 223 of the *Justices Act* 1886 (Qld). I would grant leave to appeal, allow the appeal and remit the case to the District Court for that rehearing to be conducted.

[39] The notice of appeal to the District Court stated, as the first ground of appeal, that: "The conviction is unreasonable and cannot be supported having regard to the evidence." That ground is likely to have misled the judge into thinking that the appeal was analogous to an appeal made to this Court, under s 668E of the *Criminal Code* (Qld), under which a verdict of a jury may be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. In such an appeal, the question for this Court is whether it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he or she was convicted.[6]

[40] This explains why the judge consistently expressed his findings in the terms of an appeal on that ground under s 668E, rather than in the terms of a judgment after a rehearing of the case. The judge repeatedly expressed his findings in terms of what was "open on the evidence", "open to be accepted", "open to infer" and "open to find". Those statements were made in the passage set out by the President at paragraph [29] of his judgment. As also appears from that passage, the judge expressed his ultimate conclusion as being that there was "evidence upon which the appellant may be properly convicted".

[41] The judge did refer to this Court's judgment in *Forrest v Commissioner of Police*,[7] remarking that the judgment "asserts the proper approach that on an appeal is by way of rehearing". But with respect, the judge appears to have misunderstood what a rehearing required, because, to my mind, it is clear that no rehearing was conducted by him.

[42] The task of a court conducting an appeal by way of rehearing is described by the High Court in *Robinson Helicopter Company Inc v McDermott* as follows:[8]

> "A court of appeal conducting an appeal by way of rehearing is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings." (Footnotes omitted.)

[43] As the President has discussed, the judge found that the magistrate erred in some respects. In this Court, the respondent does not argue to the contrary, that is to say that the judge was wrong to identify those errors. The judge was required to make his own findings of fact and to decide whether the case against the applicant was

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6 *R v Baden-Clay* (2016) 258 CLR 308, 330; [2016] HCA 35 at [66].
7 [2017] QCA 132.
8 (2016) 90 ALJR 679, 686-687; [2016] HCA 22 at [43].

proved beyond reasonable doubt. He failed to do so. The result is that the applicant has not had a rehearing of the case and he has been deprived of the appeal to which he was entitled.

[44] An appeal to this Court requires leave. In this exceptional case, where the applicant has not had a consideration by an appellate court of his case, it is in the interest of justice that leave be granted. I would remit the case to the District Court, that being the court with the responsibility to decide the appeal.