SUPREME COURT OF QUEENSLAND

CITATION:	*Lasker v Holeszko* [2019] QCA 163
PARTIES:	**LASKER, Benjamin Jon** (applicant) **v** **CHRISTOPHER JOHN HOLESZKO** (respondent)
FILE NO/S:	CA No 332 of 2018 DC No 3347 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane – Unreported, 7 November 2018 (Richards DCJ)
DELIVERED ON:	23 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2019
JUDGES:	Gotterson and Philippides JJA and Bradley J
ORDERS:	**1. The application for leave to appeal is refused.** **2. The applicant is to pay the respondent's costs of the application, to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM MAGISTRATES COURT – BY LEAVE OF COURT – FROM DISTRICT COURT – BY LEAVE OF COURT – where the applicant was charged with four offences against the *Sustainable Planning Act* 2009 (Qld), with the matter proceeding to a hearing before the magistrates court – where the magistrate, after delivering reasons, including findings that the applicant should be found guilty in respect of each of the four charges, and making orders to that effect by consent, adjourned the matter to a later date for the determination of penalty and costs – where the applicant lodged a notice of appeal in the District Court under s 222 of the *Justices Act* 1886 (Qld), prior to the penalty and costs hearing, seeking that the "convictions" imposed by the magistrate be quashed – where the respondent successfully applied to have the s 222 notice of appeal struck out, on the basis that a right of appeal did not exist until after penalty and costs had been decided and the complaint was "disposed of with final orders" – whether the orders made by the magistrate gave rise to a right of appeal under s 222 – whether the learned District Court judge erred in striking out the s 222 notice of appeal – whether leave ought to be granted

to the applicant to appeal against the decision of the learned District Court judge

District Court of Queensland Act 1967 (Qld), s 118
Justices Act 1886 (Qld), s 146, s 222, s 225
Penalties and Sentences Act 1992 (Qld), s 3

Mathews v Commissioner of Police [2015] QCA 284, applied
Maxwell v The Queen (1996) 184 CLR 501; [1996] HCA 46, cited
Paulger v Hall [2003] 2 Qd R 294; [2002] QCA 353, applied
R v Harris (1797) 7 TR 238, considered
R v Norfolk Justices; Ex parte Director of Public Prosecutions [1950] 2 KB 558, cited
Schneider v Curtis [1967] Qd R 300, applied
Walsh v Giumelli [1975] WAR 114, cited

COUNSEL: S W Trewavas for the applicant
B J Power for the respondent

SOLICITORS: Marland Law for the applicant
Legal Unit, Department of Natural Resources, Mines and Energy for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Bradley J and with the reasons given by his Honour.

[2] **PHILIPPIDES JA:** For the reasons given by Bradley J, I agree that the application should be dismissed with costs.

[3] **BRADLEY J:** The applicant seeks leave to appeal from a decision of a learned judge of the District Court. He makes his application under s 118 of the *District Court of Queensland Act* 1967.

Background

[4] The background to the application may be briefly summarised.

[5] On 5 April 2016, the respondent swore a complaint before a justice of the peace. In it, he alleged four charges against the applicant, each a contravention of the *Sustainable Planning Act* 2009. The complaint was attached to a summons and filed in the Magistrates Court at Roma. The court issued the summons and, together with the complaint, it was served on the applicant by registered post.

[6] Over six days between 29 June 2017 and 20 October 2017, in the Magistrates Court at Caboolture, Magistrate Hasted heard the evidence and received submissions of the parties in respect of the four charges.

[7] On 16 August 2018, the complaint was listed again. At the commencement of the hearing, Magistrate Hasted confirmed with counsel that the legal representatives of the parties had received "a draft copy of the court's written reasons and decision". His Honour then said, "I formally publish the decision of the court", advising that it was "in accordance with the draft copies received by the parties."

[8] The published written reasons ran to 46 pages. In them, his Honour set out the evidence adduced and the submissions made over the six hearing days. The written reasons concluded:

> "Upon a consideration of all of the evidence adduced in this proceeding and the submissions of the parties, the court is satisfied of the following matters of fact beyond reasonable doubt in respect of the defendant Benjamin Jon Lasker:"

[9] There followed numbered findings with respect to each of the four charges.

[10] The reasons then continued:

> "Having regard to the findings of fact made, the court is therefore satisfied that the prosecution has proven all of the essential elements of each of the four offences of carrying out assessable development without an effective development permit contrary to section 578(1) of the *Sustainable Planning Act 2009 (Qld)*, charged against Mr. Benjamin Jon Lasker. The court is also satisfied that the prosecution has negatived beyond reasonable doubt any applicable exculpatory provision to any of the four offences charged beyond a reasonable doubt."

[11] Immediately following these passages in the reasons, his Honour set out three numbered paragraphs under a heading "Court Orders". The first of these ordered an amendment of certain particulars of each charge. The second and third were in these terms:

> "2. The defendant Benjamin Jon Lasker be found "GUILTY" of each of the four offences of carrying out assessable development without an effective development permit contrary to section 578(1) of the *Sustainable Planning Act 2009 (Qld)*.
>
> 3. The court will hear further from the prosecution and the defence in relation to the question of penalty and costs to be imposed on the defendant for the offences for which he has been found "GUILTY"."

[12] Immediately after publication of the written reasons, counsel for the respondent, Mr Elmore, asked his Honour to look to consider "sentence and costs on a separate date". Once the availability of counsel was ascertained, his Honour said:

> "Then by consent the matter of the … complaints … is adjourned to the 16th of October 2018 for the – consider the issues of costs and also penalty and any other matters that the parties raise."

[13] There followed oral submissions to the court about directions for the adjourned hearing. Mr Elmore proposed an exchange of material on 1 October 2018. The applicant's counsel, Mr Trewavas responded:

> "May it please the court, if the prosecution can file by the 1st and then allow the defendant some time if there is anything to be put in evidence in reply – I simply don't know what the prosecution are proposing to put in evidence at this stage, but I'd like to preserve my position to introduce evidence in rebuttal if it is necessary."

[14] Both counsel adopted his Honour's suggestion of sequential dates for filing and serving any written material a party intended to rely on at the hearing on 16 October 2018. There followed this exchange:

> "BENCH: Then I'll formalise directions. Prosecution must file and serve any material – written material it intends to rely upon before the 24th of the 9th 2018 with the defence to file and serve any material upon which they rely – they will rely upon at the hearing on the 16th of October by on or before the 8th of the 10th 2018. Mr Elmore, any other matters from the prosecution point of view?
>
> MR ELMORE: No, thank you, your Honour.
>
> BENCH: Mr Trewavas, from the defence point of view, sir?
>
> MR TREWAVAS: No, thank you, your Honour."

[15] A document dated 16 August 2018, signed by the magistrate, was sealed by the court. I will return to this document.

[16] On 14 September 2018, the applicant filed a notice of appeal pursuant to s 222 of the *Justices Act* 1886. It was an appeal "against the orders made by Magistrate Hasted at Caboolture on 16 August 2018." The notice stated that on 16 August 2018 the applicant had been convicted on the four charges in the complaint. It raised seven grounds of appeal, alleging the magistrate "erred in law and/or fact" in various respects.

[17] It is common ground that the further hearing before the magistrate on costs and penalty scheduled for 16 October 2018 was vacated, until the outcome of the applicant's appeal was known.

[18] On 25 October 2018, an application to strike out the applicant's s 222 appeal was filed.[1] It contended the appeal was invalid because the complaint "has not been disposed of with final orders."

[19] On 7 November 2018, the strike out application was heard by her Honour Judge Richards. After considering the written submissions filed by each of the parties and oral submissions of counsel, her Honour ordered that the appeal be struck out pursuant to s 225(1) of the *Justices Act* and that the applicant pay the respondent's costs fixed at $300.00.

[20] On 5 December 2018, the applicant commenced this proceeding. It is made pursuant to s 118 of the *District Court Act* 1967. The applicant contends that the learned primary judge's decision to strike out the appeal was affected by an error of law.

The applicant's challenge

[21] In this court, the applicant's challenge to the learned primary judge's decision was put on this basis: on 16 August 2018 he was convicted on each of the four counts; and he had a right to appeal to the District Court from that "order".

[22] As the applicant's counsel submitted, the meaning of the word "conviction" varies from context to context. It can encompass merely a finding of guilt but can extend to include a court's final adjudication by sentence or other order, depending upon the statutory provision being considered.[2]

[23] In *Maxwell v The Queen*,[3] the High Court observed:

---

1 It was signed by Karen Delores Mant, apparently on behalf of the respondent.

2 *Cobiac v Liddy* (1969) 119 CLR 257 at 267 (McTiernan J).

3 *Maxwell v The Queen* (1996) 184 CLR 501 at 507 (Dawson and McHugh JJ); at 519 Toohey J adopted the same extract from *Burgess v Boetefeur*.

> "The question of what amounts to a conviction admits of no single, comprehensive answer. Indeed, the answer to the question rather depends upon the context in which it is asked. On the one hand, a verdict of guilty by a jury or a plea of guilty upon arraignment has been said to amount to a conviction. On the other hand, it has been said that there can be no conviction until there is a judgment of the court, ordinarily in the form of a sentence, following upon the verdict or plea. Thus Tindal CJ said in *Burgess v Boetefeur*:[4]
>
> > 'The word 'conviction' is undoubtedly verbum aequivocum. It is sometimes used as meaning the *verdict* of a jury, and at other times, in its more strictly legal sense, for the *sentence* of the court.'"

[24] The definition in the *Justices Act* confines the expressions "summary conviction" and "conviction" to "a conviction by a Magistrates Court for a simple offence."[5] This neither advances nor impedes the applicant's contention.

The right to appeal under s 222

[25] In any case, the right of appeal in s 222 is not based upon a "conviction", but on a person feeling aggrieved by "an order made by justices or a justice in a summary way on a complaint". The meaning of this expression was considered by the Full Court in *Schneider v Curtis*.[6] There, Gibbs J analysed s 222 in this way:

> "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.
>
> There was a sound reason for the legislature to allow a right of appeal under s 222 only from orders disposing of the complaint itself. On the hearing of an order to review the court has a discretion to refuse relief… However there is no similar discretion to refuse to allow an appeal under s 222 if it is established that the order appealed from was erroneous. Serious inconvenience could result if litigants could appeal from any decision on any interlocutory application made during the course of a case, including an application for a ruling on an incidental question that arose during the trial, and the court had no discretion to refuse to entertain such appeals."[7]

Returning to the point, his Honour continued:

> "Such an appeal in my opinion only lies from an order which disposes of a complaint, for example by dismissing it, or by entering a conviction and imposing a penalty."[8]

[26] In *Schneider*, the Full Court was considering an appeal from a magistrate's ruling that there was a case for the defendant to answer. Applying this analysis, Gibbs J found there was no right to appeal under s 222 in respect of the decision on a "no case" submission. Wanstall and Douglas JJ agreed.

---

4 (1844) 7 Man & G 481 at 504; 135 ER 193 at 202.
5 s 4.
6 [1967] Qd R 300.
7 at 304-305.
8 at 306.

[27] Absent a statutory power to do so, a magistrate who convicts without imposing a sentence "has not finally determined the complaint and would be subject to *mandamus* to compel him to do so."[9] The same understanding of the summary process has been expressed in this way:

> "a court of summary jurisdiction does not complete the hearing of an information merely by convicting, because that leaves in the air, without any judgment upon the matter one way or the other, the most important part of a hearing, namely, the sentence of the court".[10]

[28] This is not a recent view. More than two hundred years ago, the need for certainty and precision led to the identification of a "conviction" being "in the nature of a verdict and judgment", so that the absence of an adjudication of the penalty was a sound basis for quashing a conviction.[11]

[29] The decision in *Schneider* was considered by this court in *Paulger v Hall*.[12] There, it was accepted as authority for the proposition that the right of appeal is given only from an order "disposing of the complaint itself."[13] This court concluded that a party was entitled to bring an appeal under s 222 from the dismissal of his complaints.[14] The same analysis was accepted in *Mathews v Commissioner of Police*, where the right of appeal was found to be limited to "orders that finally dispose of a complaint."[15]

The decision of the magistrate on 16 August 2018

[30] The subject of the applicant's s 222 appeal is the sealed document dated 16 August 2018 noted at [15] above. It has a number of aspects.

[31] It begins as a record of the hearing at 2.00 pm that day, listing the persons who appeared for each of the parties, their respective instructors, and that the defendant did not appear in person, being "Excused". It then records that "Decision and reasons for decision are published in relation to the substantive four charges before the court."

[32] Next, under the words, "IT IS THE ORDERS OF THE COURT THAT", the three "Court Orders" found in the magistrate's published reasons are set out: see paragraph [11] above.

[33] These are followed by a final section introduced by the words "Pursuant to section 83A(5) of the *Justices Act 1886* (Qld) I make the following directions". Here four directions are found. Directions (i) and (ii) provide for the parties to file and serve "all written material" a party "intends to rely upon at the sentencing hearing" and (iii) provides that "The sentencing hearing of the defendant be otherwise adjourned" to the date agreed by the parties. Direction (iv) requires the registrar of the Caboolture Magistrates Court to "send a copy of these directions to the legal representatives of both parties."

[34] The document is signed by the magistrate and sealed by the court.

[35] It was common ground at the hearing in this court that no s 222 appeal could be brought from an interlocutory order. The first of the provisions under the "Order" heading is plainly

---

9 *Walsh v Guimelli* [1975] WAR 114 at 117.
10 *R v Norfolk Justices; Ex parte Director of Public Prosecutions* [1950] 2 KB 558 at 571.
11 *R v Harris* (1797) 7 TR 238. This was so even though the penalty for the particular conduct was fixed by the statute.
12 [2003] 2 Qd R 294.
13 at 300 [26].
14 at 301 [28].
15 [2015] QCA 284 at [17].

interlocutory, amending the particulars of each charge. So is the third, providing for the court to "hear further … in relation to the question of penalty and costs to be imposed on the defendant". The four directions included in the order are also plainly interlocutory in nature.

[36] The applicant's case here turns on the effect of the second paragraph of the "Orders". At the hearing of the appeal, it was contended that by this "Order" the magistrate determined "the matter" of the complaint in accordance with s 146(1)(a) of the *Justices Act*.

[37] Where both parties appear before the court on a complaint and summons alleging a simple offence, the magistrate may hear and determine the complaint.[16] The defendant must be asked how he or she pleads.[17]

[38] Where, as here, the defendant pleads not guilty, s 146(1)(a) authorises the court to:

> "proceed to hear the complainant and the complainant's witnesses, and the defendant and the defendant's witnesses, and the complainant and such witnesses as the complainant may examine in reply if the defendant has given evidence other than as to the defendant's general character and, upon consideration of all the evidence adduced, determine the matter and shall convict the defendant or make an order against the defendant or dismiss the complaint as justice may require".

[39] According to the applicant, from the moment of a conviction, in the language of s 146(1)(a), the court has determined the matter. He says the relevant operation of the *Justices Act* then ceases, and any further step must be taken under the *Penalties and Sentences Act* 1992.[18]

[40] This argument must be rejected. The applicant's contentions are contrary to the analysis applied in *Schneider*, *Paulger* and *Mathews*. The right of appeal arises from s 222 of the *Justices Act,* not from s 146(1)(a). The existence of that right is not determined by whether a defendant has been convicted. It depends on whether the order the subject of the appeal is one that "disposes of the complaint". The collection of sentencing powers and principles into the *Penalties and Sentences Act* did not alter the operation of s 222 of the *Justices Act* so as to give a party a right to appeal that did not previously exist.

[41] It is clear from the "Orders" and directions recorded on 16 August 2018 that the magistrates court was to "hear further" from the parties before exercising the discretion as to costs of the proceeding and before imposing a sentence on the applicant in respect of the four offences. Both those matters arise on the complaint. The magistrates court will not have disposed of the complaint until it has dealt with them.

[42] It follows that the learned primary judge did not err in striking out the applicant's s 222 appeal.

[43] If the application to appeal is dismissed, the summary processes on the complaint can be completed, including any conviction in accordance with s 151 of the *Justices Act*, any costs order in accordance with ss 157, 158B and 159 of that Act and any penalty in accordance with the *Sustainable Planning Act* and the *Penalties and Sentences Act*. Any appeal may then lie under s 222 of the *Justices Act* from the final disposition of the complaint by the magistrates court.

---

16 *Justices Act*, s 144.

17 s 145(1). If the defendant pleads guilty, the court convicts the defendant or makes an order against the defendant or deals with the defendant in a manner authorised by law: s 145(4).

18 This was said to follow from the first of the ten express purposes in s 3(a) of the *Penalties and Sentences Act*, namely "collecting into a single Act general powers of courts to sentence offenders".

The "Order" that the applicant "be found guilty"

[44] At the hearing of the application, particular attention was directed to the second "Order", that the applicant "be found "GUILTY" of each of the four offences". It is unusual in its expression. It does not conform to the requirements of s 151(3) of the *Justices Act* or rule 62 of the *Criminal Practice Rules* 1999. The departure from the statutory norm appears to have generated confusion as to whether the applicant had been convicted of the four offences charged in the complaint. The language in the third "Order" added to this confusion.

[45] It is unfortunate that the parties, who were on notice by the draft of the magistrate's reasons, did not seek to clarify this at the hearing on 16 August 2018.

[46] The published reasons expressly record each of his Honour's findings of fact. Those findings were, in his Honour's opinion, sufficient to lead to the conclusion that the applicant should be found guilty of the offences alleged in the complaint. The second "Order" was plainly a means of recording the magistrate's satisfaction that guilt has been proven and that, subject to considering submissions and evidence, his Honour would be prepared to convict the applicant and sentence him accordingly. The process was described in *Paley on Summary Convictions*:

> "Before a conviction can properly be pronounced, further considerations, however, arise dependent upon the age of the accused, his character, antecedents, health or mental condition, his means so far as known to the court in cases where a fine is proposed, the extenuating circumstances attendant upon the commission of the offence, or its trivial nature … In certain cases, courts of summary jurisdiction may be justified in considering the consequential effects of a conviction in deciding upon the form of punishment to be imposed … It may therefore become necessary, instead of giving an immediate and final judgment, to indicate that the case against the defendant is found proved, but that it will be adjourned to enable the justices to consider how and to what extent the court is able to exercise such discretion as the law allows."[19]

[47] This is distinct from the more usual process where: "After a decision to convict has been arrived at, evidence may be received of the result of enquiries as to the character and antecedents of the defendant."[20]

[48] With respect, it was unnecessary to record the findings in an "Order". Doing so had no effect on the rights of the parties beyond the findings in the published reasons. Any formal record of conviction and sentence is yet to be made. For the purposes of this application, the second "Order" might be regarded as a nullity.

[49] If by the second "Order" the applicant had been convicted of the offences, then the other directions recorded in the same document may not have been able to operate in the way, on their face, they were intended. This is because ss 157 and 159 of the *Justices Act* have been understood to require the magistrates court to order the payment by a defendant of any sum for costs "by the conviction or order" and not by any later order.[21] In the context of the surrounding "Orders" and directions recorded for 16 August 2018, plainly that was not to be the effect of the second "Order".

---

19 9th ed, 1926, pp 387-388.

20 ibid, p 389.

21 *Bell v Carter; Ex parte Bell* [1992] QCA 245 at 4-5.

[50] This consideration further supports the conclusion that the second "Order" is to be understood as no more than a record, in a different form, of the findings set out in his Honour's published reasons. Notwithstanding the infelicitous wording of the second and third "Orders", the applicant is yet to be formally convicted of the four offences.

Disposition of the application

[51] I would refuse the application for leave to appeal and order that the applicant pay the respondent's costs of the application, to be assessed on the standard basis.