SUPREME COURT OF QUEENSLAND

CITATION:	*Kosteska v Phillips; Kosteska v Commissioner of Police* [2011] QCA 266
PARTIES:	**KOSTESKA, Lille** (applicant) **v** **PHILLIPS, Ian** (respondent) **KOSTESKA, Lille** (applicant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	CA No 63 of 2011 CA No 64 of 2011 CA No 96 of 2011 DC No 911 of 2011 DC No 1063 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Applications for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2011
JUDGES:	Margaret McMurdo P, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In each of CA No 63 of 2011, CA No 64 of 2011 and CA No 96 of 2011 the application for leave to appeal is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the applicant seeks leave to appeal from two interlocutory orders of the District Court and a further order dismissing an appeal from a finding in the Magistrates Court that the applicant was guilty of unlawful possession of cannabis – where applicant sought leave to appeal on a number of grounds including that the Court of Appeal was not a lawfully established court – where the applicant had not served notices to Attorneys-General under s 78B *Judiciary Act* 1903 (Cth) notifying them

that the matter involved issues arising under the Constitution – whether the Court can determine the applications where the applicant has not served s 78B notices – whether leave to appeal should be granted

District Court of Queensland Act 1967 (Qld), s 118(3)
Drugs Misuse Act 1986 (Qld), s 118
Judiciary Act 1903 (Cth), s 78B
Justices Act 1886 (Qld), s 222
Vexatious Litigants Act 1981 (Qld) (repealed)
Vexatious Proceedings Act 2005 (Qld), s 10, s 16

Cameron v Peter D Beattie (in his capacity as Premier) & Ors [2001] QCA 392, cited
Clampett v Kerslake (Electoral Commissioner of Queensland) [2009] QCA 104, cited
Coulter v Ryan [2007] 2 Qd R 302; [2006] QCA 567, cited
Glennan v Commissioner of Taxation (2003) 198 ALR 250; [2003] HCA 31, cited
R v Gorton [2001] QCA 43, cited
Re Cusack (1985) 60 ALJR 302, cited
Re Finlayson; Ex parte Finlayson (1997) 72 ALJR 73, considered
Re Skyring (1994) 68 ALJR 618, considered
Re Skyring [1999] QCA 460, cited
Re Skyring's Application (No 2) (1985) 59 ALJR 561, cited
Sharples v Arnison [2002] 2 Qd R 444; [2001] QCA 518, cited
Skyring v Australia & New Zealand Banking Group [1993] QCA 118, cited
Skyring v Australia & New Zealand Banking Group Ltd [1994] QCA 143, cited
Skyring v Australia & New Zealand Banking Group Ltd [1995] QCA 376, cited
Skyring v Commonwealth Commissioner of Taxation [1993] QCA 119, cited
Skyring v Lohe [2000] QCA 451, cited
Till v Johns [2004] QCA 451, cited

COUNSEL: The applicant appeared on her own behalf
M B Lehane for the respondents

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

[1] **MARGARET McMURDO P:** The applicant, Lille Kosteska, has filed three applications for leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld) from three separate orders of the District Court.

[2] The first, CA No 63 of 2011, is from an order of Judge Rafter SC on 31 March 2011 refusing the applicant's request to delist her appeal to the District Court from a magistrate's finding that she was guilty of unlawful possession of cannabis. The

appeal was listed in the District Court for hearing on 15 April 2011. On 31 March 2011, the applicant argued that the appeal should be delisted because she wished to make an application in respect of it to the High Court of Australia. Judge Rafter referred to correspondence on the file from the Deputy Registrar of the High Court to the appellant dated 26 November 2010. The Deputy Registrar had noted that the documents that she had attempted to lodge did not comply with the rules and would not be accepted. The correspondence from the High Court Deputy Registrar suggested that her efforts in that court were futile. As the applicant had filed the appeal in the District Court, it was in the interests of justice that the appeal proceed to hearing on 15 April. For those reasons, Judge Rafter refused her application to delist the appeal.

[3] The appeal was subsequently heard and refused by Judge Shanahan on 15 April and that order is the subject of CA No 96 of 2011. It would therefore be pointless to grant leave to hear an appeal from Judge Rafter's order refusing to delist a matter which has been heard since and is now itself the subject of another application for leave to appeal to this Court. It follows that the application for leave to appeal in CA No 63 of 2011 should be refused.

[4] CA No 64 of 2011 is from another order of Judge Rafter made on 31 March 2011. The applicant was charged with an offence of disqualified driving as a repeat unlicensed driver. On 23 March 2011 she appeared before Magistrate Callaghan in the Brisbane Magistrates Court. The applicant said she wanted the case heard that day. The magistrate explained that this was not possible as the prosecution was also entitled to procedural fairness and had only been informed that day that the applicant was pleading not guilty. The magistrate set the case down for hearing on 12 May 2011 to allow both sides to prepare their cases.

[5] The applicant appealed to the District Court from this unremarkable order listing the matter for trial. Judge Rafter noted the interlocutory nature of the order. This meant that the appeal to the District Court was premature; so much was clear from *Coulter v Ryan*.[1] For those reasons, his Honour dismissed the appeal.

[6] Judge Rafter was plainly right. The applicant had no right of appeal under s 222 *Justices Act* 1886 (Qld) from Magistrate Callaghan's interlocutory order: see *Coulter v Ryan*. The application for leave to appeal from Judge Rafter's order in CA No 64 of 2011 should be refused.

[7] CA No 96 of 2011 concerns the appeal to the District Court from Magistrate White's finding at the Beaudesert Magistrates Court on 31 May 2010 that the applicant was guilty of unlawful possession of cannabis. The sentence proceedings were adjourned and had not been dealt with at the time of this application. The appeal was heard on 15 April 2011 by Judge Shanahan who gave ex tempore reasons dismissing it. The applicant has applied for leave to appeal from that order. Her arguments before Judge Shanahan seem to have been the same arguments she has raised in this court.

[8] First, she challenged the jurisdiction of the District Court to hear her appeal. As she was the appellant, this challenge seems irrational. In any case, Judge Shanahan rightly noted that he had jurisdiction to hear the appeal under s 222 *Justices Act*.

[9] She next contended the matter should not have been dealt with summarily in the Magistrates Court. Judge Shanahan noted that the *Drugs Misuse Act* 1986 (Qld)

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1 [2007] 2 Qd R 302; [2006] QCA 567.

s 118 provided for the prosecution to elect to deal with a charge of this kind summarily; that was what occurred here. His Honour also noted the applicant's argument that the *Drugs Misuse Act* was unlawful, as were all statutes since the Imperial Statute of Westminster and the *Australia Act* 1986 (Cth) abolished the English Parliament's capacity to legislate for Australia. The applicant also raised a complaint that the only form of legal tender was gold or silver coin. These arguments, his Honour observed, had previously been dismissed by superior courts and were without merit.

[10] Judge Shanahan noted the applicant's claim that cannabis had beneficial effects and that the drug was not dangerous as she used it medicinally. His Honour observed that this was no basis for overturning a finding of guilt.

[11] Judge Shanahan reviewed the evidence before the magistrate. A valid search warrant was executed by police on the applicant's residence. Police found a small amount of green leafy material there. The material was later examined and a certificate was tendered stating that it was cannabis. Indeed, the applicant gave evidence that the cannabis was hers and that she used it for medicinal purposes. She also agreed she was the occupier of the premises. There was abundant evidence on which Magistrate White could properly convict the applicant of the charge.

[12] Although the applicant claimed that she was confused at times during the trial, his Honour observed that she made the points she wished to make orally; gave evidence; and made submissions about her legal arguments. He considered it unsurprising that she had difficulty articulating her legal arguments because they were without merit and tortuous. As the evidence against her was overwhelming and confirmed in her own evidence, and as there was no unfairness in the way the trial was conducted, his Honour ordered that the appeal should be dismissed.

[13] The applicant made oral submissions at the Court of Appeal hearing in a courteous manner. She read from a document which she later handed to the Court. She challenged the authority of this Court to hear her applications, claiming that it was not a lawfully established court and that, for constitutional reasons, her matters should be uplifted to the High Court of Australia. She stated that she had informed the Queensland Attorney-General of her arguments but that she had not informed other Attorneys-General of her application as required under s 78B *Judiciary Act* 1903 (Cth).

[14] Although ordinarily s 78B(1) prevents a Court proceeding to hear a matter involving the interpretation of a constitutional question, notices under s 78B are unnecessary where the contention raised is plainly unarguable. As Toohey J explained in *Re Finlayson: Ex parte Finlayson*:[2]

> "In terms of s 78B, a cause does not 'involve' a matter arising under the Constitution or involving its interpretation merely because someone asserts that it does. That is not to say that the strength or weakness of the proposition is critical. But it must be established that the challenge does involve a matter arising under the Constitution". (footnotes omitted)

More recently, Gummow, Hayne and Callinan JJ in *Glennan v Commissioner of Taxation*[3] cited Toohey J's observations with approval.[4]

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2 (1997) 72 ALJR 73, 74.

3 (2003) 198 ALR 250; [2003] HCA 31.

4 Above [14].

[15] As I shall shortly explain, the applicant's contentions as to her constitutional argument are so clearly misconceived that it cannot be said they involve a matter arising under the Constitution. This Court can determine her applications even though she has not served s 78B notices on the Attorneys-General.

[16] When I questioned the applicant about one of her submissions, she stated she was "just following directions given to me". She later said that "Alan" had helped her with her material. Mr Alan Skyring was in the back of the Court. She explained that she suffered from anxiety and was confused about dates and asked the Court to consult "Alan" if the Court wanted information which she could not supply. Mr Skyring at this point moved forward to address the Court but was quickly told that his assistance was unnecessary. He resumed his seat in the rear of the Court. It is clear from the transcript of these matters in the Magistrates and District Court and from the applicant's submissions in this Court that Mr Skyring has been present at some (if not all) of these hearings and has aided and encouraged the applicant in pursuing her appeals in which arguments were raised that he had previously raised unsuccessfully in this Court where Mr Skyring has been a frequent litigator: see for example *Skyring v Commonwealth Commissioner of Taxation*;[5] *Skyring v Australia & New Zealand Banking Group*;[6] *Re Skyring*;[7] and *Skyring v Lohe.*[8] Unfortunately it seems likely that his "assistance" to the applicant has added to her anxious and confused state and her financial difficulties about which she addressed this Court.

[17] Mr Skyring was declared a vexatious litigant under the *Vexatious Litigants Act* 1981 (Qld) (repealed) on 5 April 1995. Under s 16 *Vexatious Proceedings Act* 2005 (Qld), orders under the repealed Act are taken to be orders under the current Act. It is of concern to the administration of justice that a vexatious litigant like Mr Skyring may be encouraging vulnerable people like the applicant to undertake unwinnable litigation and to pursue appeals which impose unnecessary costs on the community. It amounts to an abuse of process. It may be appropriate in like instances in the future, for the Attorney-General to consider whether an application should be made to permanently stay proceedings if it is thought that Mr Skyring may be acting in concert with another person in the institution of proceedings in Queensland Courts: see s 10 V*exatious Proceedings Act* and *Cameron v Peter D Beattie (in his capacity as Premier) & Ors;*[9] but cf *Clampett v Kerslake (Electoral Commissioner of Queensland).*[10]

[18] As Judge Shanahan identified, the applicant's contentions have all been aired in this and other courts before and have rightly been dismissed: see for example *Sharples v Arnison;*[11] *Skyring v Australia & New Zealand Banking Group Ltd*;[12] *Re Skyring's Application (No 2)*;[13] and *Re Cusack.*[14] In *Re Skyring,*[15] Dawson J said: "It would, in my view, be an abuse of process to allow the applicant to relitigate a matter

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5 [1993] QCA 119.
6 [1993] QCA 118; [1994] QCA 143.
7 [1999] QCA 460.
8 [2000] QCA 451.
9 [2001] QCA 392.
10 [2009] QCA 104.
11 [2002] 2 Qd R 444; [2001] QCA 518.
12 [1995] QCA 376.
13 (1985) 59 ALJR 561.
14 (1985) 60 ALJR 302.
15 (1994) 68 ALJR 618.

which has already been decided adversely to him".[16] See also Professor Anne Twomey's discussion of these arguments in "The Australia Acts 1986 Australia's Statutes of Independence".[17] Constitutional arguments specifically challenging the constitutionality of the *Drugs Misuse Act* on other bases have also failed: see, for example, *R v Gorton*[18] and *Till v Johns.*[19]

[19] The applicant's arguments in this Court are as unmeritorious as those she mounted before Judge Shanahan. She has not demonstrated any error in Judge Shanahan's approach to her appeal. She should not be given leave to appeal from it. It follows that application CA No 96 of 2011 should also be refused.

ORDERS:

In each of CA No 63 of 2011, CA No 64 of 2011 and CA No 96 of 2011 the application for leave to appeal is refused.

[20] **FRASER JA:** I agree with the reasons for judgment of the President and the orders proposed by her Honour.

[21] **WHITE JA:** I have read the reasons for judgment of the President and agree with those reasons and the orders which she proposes.

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16 Above, 619.
17 2010, Federation Press, pp 367-368.
18 [2001] QCA 43.
19 [2004] QCA 451.