

DISTRICT COURT OF QUEENSLAND

CITATION: *R v Nauer* [2020] QDC 119

PARTIES: **R**
(Prosecution)
v
Daniel Danees Nauer
(Defendant)

FILE NO/S: 700/19 (Beenleigh District Court)

DIVISION: Criminal

DELIVERED ON: 18 June 2020

DELIVERED AT: Brisbane

HEARING DATE: 29 May 2020 at Beenleigh District Court.

JUDGE: Byrne QC DCJ

ORDER: **1. The mandatory minimum penalty prescribed in section 50B(1)(e) is not applicable to this prosecution.**

CATCHWORDS: CRIMINAL LAW – MANDATORY MINIMUM PENALTY – where the defendant was charged with unlawfully supplying a category H weapon – whether the mandatory sentencing provision in s 50(1)(e) applies to the conduct of the defendant.

Acts Interpretation Act 1954, s 41
Criminal Code 1899, ss 564, 572
Evidence Act 1977, s 132C
Penalties and Sentences Act 1992
Weapons Act 1990, ss 50B, 65, schedule 2

Broederlow v Commissioner of Police [2019] QDC 228
R v DS [2019] QSC 288
R v WAY; ex parte Attorney-General (Qld) [2013] QCA 398
Rule v Commissioner of Police [2016] QDC 64
The Queen v de Simoni (1981) 147 CLR 383

COUNSEL: Mr S. Muir for the Prosecution
Mr P. Wilson for the Defendant

SOLICITORS: Office of Director of Public Prosecutions for the Prosecution
Affleck Lawton for the Defendant

Background

- (1) The Defendant has pleaded guilty to an offence in the following terms:

“That on a date unknown between the first day of November 2018 and the thirty-first day of December 2018 at Park Ridge in the State of Queensland, DANIEL DANEES NAUER unlawfully supplied a category H weapon to another person.”

- (2) The margin of the single count indictment contains:

“Section 50B(1)(c)(i)(e) Weapons Act 1990”.

- (3) A preliminary issue arose in the course of sentencing submissions concerned with whether a particular mandatory sentencing provision applied to the conduct of the defendant, and hence what sentencing options were available on sentence.

Legislative Provisions

- (4) Section 50B of the *Weapons Act 1990* (WA) relevantly provides:

“50B Unlawful supply of weapons

- (1) A person must not unlawfully supply a weapon to another person.

Maximum penalty—

- (a) if the person unlawfully supplies 5 or more weapons at least 1 of which is a category D, E, H or R weapon—13 years imprisonment; or
- (b) if paragraph (a) does not apply and the person unlawfully supplies 5 or more weapons—500 penalty units or 10 years imprisonment; or
- (c) if paragraphs (a) and (b) do not apply—
 - (i) for a category D, H or R weapon—500 penalty units or 10 years imprisonment; or
 - (ii) for a category C or E weapon—300 penalty units or 7 years imprisonment; or
 - (iii) for a category A, B, or M weapon—200 penalty units or 4 years imprisonment.

Minimum penalty—

- (d) ... or
- (e) for an offence, committed by an adult, to which paragraph (c)(i) applies, if the weapon is a short firearm and the person does not have a reasonable excuse for unlawfully supplying the weapon—2 ½ years imprisonment served wholly in a corrective services facility.

- (1A) For the purpose of subsection (1), penalty, paragraph (d) or (e), but without limiting those provisions, it is a reasonable excuse to unlawfully supply the weapon if—
- (a) a licence was in force within the 12 months immediately before the day the person committed the offence but is no longer in force at the time of the offence; and
 - (b) the person would have been authorised under this Act to supply the weapon at the time of the offence if the licence was still in force at that time; and
 - (c) it was not a reason for the licence being no longer in force that the licence had been surrendered, suspended or revoked under this Act.
- (2) A person does not contravene subsection (1) if the person to whom the weapon is supplied—
- (a) is authorised under a licence to possess weapons of the same category as the weapon supplied; or
 - (b) is authorised to possess the weapon under section 52, 53, 54(2), 55, 55A, 70 or 116.

Note—

If subsection (1) does not apply because subsection (2)(a) applies, the person disposing of the weapon may contravene section 36 (Sale or disposal of weapons).

- (3) ...
- (4) ...

- (5) The term “short firearm” is used in section 50B(1)(e) of the WA. That term is defined at Schedule 2 of the WA in the following terms:

“*short firearm* means—

- (a) a category H weapon that is a firearm; or
- (b) a category C, D or R weapon that is a firearm under 75cm in length.”

- (6) Section 41 of the *Acts Interpretation Act 1954* provides:

“41 Penalty at end of provision

In an Act, a penalty specified at the end of—

- (a) a section (whether or not the section is divided into subsections); or
- (b) a subsection (but not at the end of a section); or
- (c) a section or subsection and expressed in such a way as to indicate that it applies only to part of the section or subsection;

indicates that an offence mentioned in the section, subsection or part is punishable on conviction (whether or not a conviction is recorded) or, if no offence is mentioned, a contravention of the section, subsection or part constitutes an offence against the provision that is punishable on conviction (whether or not a conviction is recorded)—

- (d) if a minimum as well as a maximum penalty is specified—by a penalty not less than the minimum and not more than the maximum; or
- (e) in any other case—by a penalty not more than the specified penalty.

(7) Section 564 of the *Criminal Code* (the Code) relevantly provides:

“564 Form of indictment

- (1) An indictment is to be intituled with the name of the court in which it is presented, and must, subject to the provisions hereinafter contained, set forth the offence with which the accused person is charged in such a manner, and with such particulars as to the alleged time and place of committing the offence, and as to the person (if any) alleged to be aggrieved, and as to the property (if any) in question, as may be necessary to inform the accused person of the nature of the charge.
- (2) If any circumstance of aggravation is intended to be relied upon, it must be charged in the indictment.
- (2A) ...
- (3) It is sufficient to describe an offence in the words of this Code or of the statute defining it.
- (3A) ...
- (4) ...
- (5) ...”

(8) The term “circumstance of aggravation” is exhaustively defined in the Code as: “*circumstance of aggravation* means any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance.”

The Contentions

- (9) The defendant’s contentions are essentially:
- a. Section 50B(1)(e) of the WA provides for a circumstance of aggravation.
 - b. Although the provision was referred to by its number in the margin of the indictment, the defendant was arraigned according to the words of the charge which did not contain any averment of the circumstance of aggravation.
 - c. Accordingly he had not pleaded guilty, and has not been found guilty, of committing the aggravated form of the offence.
 - d. Therefore, the defendant has been convicted only of the offence in section 50B(1)(c) of the WA and faces a maximum penalty of 10 years imprisonment, with no mandatory minimum sentence.
- (10) The prosecution accept the correctness of the defendant’s submissions, and have not applied to amend the indictment.

Factual Background

(11) Although more detail is required for the purpose of determining an appropriate sentence, it is sufficient for the purposes of this ruling to observe that the defendant

accepted the accuracy of an agreed Statement of Facts tendered by the prosecution. In that statement the defendant is said to have provided a handgun to another for the purpose of it being on-sold. The handgun is correctly said to be a category H weapon.

- (12) There is no mention of the defendant ever having held any form of licence under the WA, and it would have been surprising if he had held one given his criminal history that has been placed before me.

Consideration

- (13) The defendant's submission that the penalty provision at section 50B(1)(e) of the WA does not apply to the defendant must be accepted.
- (14) Not every legislative provision that exposes a defendant to an increased penalty creates a "circumstance of aggravation"—see *R v WAY; ex parte Attorney-General (Qld)*.¹ However it seems to me that a legislative provision will more readily be taken to be a circumstance of aggravation where there is some factual allegation which much be established before it applies. This approach is consistent with the approach of the Court of Appeal in *WAY*² as well as the High Court in *The Queen v de Simoni*,³ as well as the statutory definition of the term.
- (15) By its terms, section 50B(1)(e) required proof of two matters before the provision could apply, namely that that the weapon was a short forearm and that the defendant did not have a "reasonable excuse for unlawfully supplying the weapon".
- (16) There is some divergence in the authorities as to the practical effect of section 50B(1)(e) of the WA – compare *R v DS*⁴ and *Broederlow v Commissioner of Police*.⁵ I prefer the reasoning and outcome in *DS* and accordingly if the two matters in section 50B(1)(e) are established to the standard required by section 132C of the *Evidence Act 1977*, subject to the pleading issue raised by section 564 of the Code, the defendant is liable to serve a minimum of 2 ½ years actual incarceration. If they were not established, he faces a maximum of 10 years imprisonment, and other sentencing options available under the Penalties and Sentences Act 1992 are enlivened also.
- (17) I have not been provided with any authority concerning the need to expressly charge what is asserted to be a circumstance of aggravation where a mandatory minimum penalty is provided for, apart from one other single judge decision of this Court, and putting to one side philosophical discussions about whether one form of sentencing disposition is a "greater punishment" than another form, the mere fact that the defendant must serve actual imprisonment if both matters in section 50B(1)(e) are established, and will not necessarily be so required if they are not established, in my view means that the provision provides a liability to "greater punishment". And so I accept that section 50B(1)(e) of the WA constitutes a circumstance of aggravation for

¹ [2013] QCA 398, [45]-[48] per McMurdo P, with whom Muir and Gotterson JJA agreed.

² *ibid*.

³ (1981) 147 CLR 383 per Gibbs C at 392 with whom Murphy and Wilson JJ agreed and per Brennan J at 405. Although Brennan J dissented, his Honour's observations are consistent with the majority approach on this point.

⁴ [2019] QSC 288.

⁵ [2019] QDC 228.

the offence defined, in this case, in section 50B(1)(c). I am comforted by the fact that my conclusion is consistent with the ruling by Long SC DCJ in *Rule v Commissioner of Police*.⁶

- (18) The fact that section 50B(1)(e) of the WA was marked in the margin to the indictment strongly suggests to me that the defendant and his legal representatives were on notice that the prosecution's (then) attitude was that the minimum mandatory sentence applied. The defendant was not arraigned before me, and I have not been supplied with a transcript of the procedure, but defence Counsel's oral submission to me unequivocally implied that the defendant was not informed at the time of arraignment of the notation in the margin. I accept that did not occur in light of that implied submission and the fact that such a form of arraignment would be unusual in this State. I therefore accept that the defendant pleaded guilty to a charge that was in the form reproduced in paragraph 1 of this ruling. That plea set the parameters of what was established against the defendant. As Brennan J said in *de Simoni*:⁷

“If the accused person by his plea admits what is alleged against him, the extent of his liability is established according to the tenor of his plea.”

- (19) That however is not a complete answer to the issue. The defendant did plead guilty to unlawfully supplying a category H weapon. By definition, and as a matter of law, all Category H weapons are “short firearms”. Thus, he pleaded guilty to supplying a “short firearm”. In my view, the first of the two matters in section 50B(1)(e) of the WA was established by the plea of guilty.
- (20) In my view, the second matter has not been established. The concept of “reasonable excuse” is often used in the WA, but is not defined. It therefore falls to be determined on a case by case basis as to whether any excuse is objectively reasonable in the circumstances. However, it must be something different to “unlawfulness” for the purposes of section 50B of the WA; this is borne out by the very wording of the provision itself which separates the concepts by speaking of having a reasonable excuse for the unlawful supply of the weapon. Section 50B(1A) of the WA offers a specific example of what might be considered to be a reasonable excuse for the purposes of that offence⁸ but it is a non-exhaustive definition of the term for the purposes of that offence provision.⁹
- (21) The Statement of Facts makes no mention of the defendant recently, or ever, having had a relevant licence. If the concept of reasonable excuse were limited to that specific provision, it might need to be considered whether there was any reasonable possibility that it could be raised in this prosecution and hence whether the plea of guilty acknowledged that it could not reasonably be raised, but the exculpatory concept is a wide ranging one and the point is that the defendant was not charged with not having any reasonable excuse to unlawfully supply the weapon. Put another way,

⁶ [2016] QDC 64.

⁷ *supra* at 406.

⁸ It is also reproduced in the analogous offence of trafficking in weapons at section 65 of the WA.

⁹ “For the purpose of subsection (1), penalty, paragraph (d) or (e), but without limiting those provisions, it is a reasonable excuse to unlawfully supply the weapon if ...”

he was not confronted with the allegation there was no reasonable excuse and, to adapt the words of Brennan J reproduced above, his plea of guilty and hence the extent of his liability did not establish the absence of a “reasonable excuse” for the unlawful supply of the weapon.

- (22) Given that the margin contains a notation referring to section 50B(1)(e) of the WA, it appears that the omission of the circumstance of aggravation in the body of the indictment was an oversight in this particular instance. Although section 572 of the Code provides a broad power to amend the indictment, even after verdict, the prosecution has not applied to amend the present indictment notwithstanding there being, in my view, an arguable case to amend. This matter must therefore be considered on the basis of the charge as it stands, and nothing in this ruling should be taken as an imprimatur to charge in a manner that avoids the application of the mandatory minimum penalty.

Conclusion

- (23) For the preceding reasons I accept that the circumstance of aggravation in section 50B(1)(e) of the WA was not expressly charged in the indictment, and the defendant’s plea of guilty did not in these particular circumstances implicitly acknowledge those matters. Accordingly the circumstance of aggravation cannot be relied upon,¹⁰ and the maximum penalty that the defendant faces is 500 penalty units or 10 years imprisonment.¹¹

¹⁰ Section 564(2) of the Code.

¹¹ Section 50B(1)(c) of the WA and section 41 of the *Acts Interpretation Act 1954*.