DISTRICT COURT OF QUEENSLAND

CITATION:	*Calvet v The Commissioner of Police* [2020] QDC 161
PARTIES:	**THEO PIERRE CALVET** (Appellant) **v** **THE COMMISSIONER OF POLICE** (Respondent)
FILE NO:	2120/19
DIVISION:	Criminal
PROCEEDING:	Appeal
ORIGINATING COURT:	Brisbane
DELIVERED ON:	14 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	26 June 2020
JUDGE:	Williamson QC DCJ
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW APPEAL – APPEAL AGAINST SENTENCE – where appeal under s 222(2)(c) of the *Justices Act 1886* – where applicant convicted of one offence of contravening order about information necessary to access information stored electronically – whether sentence imposed excessive.
COUNSEL:	Mr Rosser for the Appellant Mr Poplawski for the Respondent
SOLICITORS:	Donnelly Law Group for the Appellant Office of the Director of Public Prosecutions for the Respondent

[1] On 3 June 2019, the Appellant pleaded guilty and was sentenced in the Maroochydore Magistrates Court for one offence of contravening an order about information necessary to access information stored electronically ("***the s 205A offence***"). The Appellant was convicted and sentenced to six months imprisonment. The sentence was wholly suspended with an operational period of 18 months. This is an appeal against sentence under s 222(2)(c) of the *Justices Act 1886*. The sole issue to be determined is whether the sentence is excessive.

[2] By way of background, on 29 May 2019, Police executed a search warrant in relation to the Appellant. In executing the warrant, Police located and seized a large amount of cannabis, other dangerous drugs and related utensils. The Appellant's mobile phone was also seized. Given the quantity of cannabis and other utensils seized, Police formed the view that the Appellant's mobile phone may contain evidence of the commission of further drug offences. Police directed the Appellant to unlock the mobile phone, which was secured by a PIN. The Appellant refused to comply with the direction.

[3] The Appellant was transported to the Noosa Heads Police Watch-House, where he was again directed by Police to provide information to unlock his mobile phone. He refused. The Appellant was then charged with nine offences under the *Drugs Misuse Act 1986*, and released on a bail undertaking.

[4] On 31 May 2019, Police applied for, and obtained, an order from the Magistrates Court in Noosa to access information stored on the Appellant's mobile phone.

[5] On 2 June 2019, the Appellant voluntarily attended the Noosa Police Station. The requirements of the order obtained on 31 May 2019 were explained to him. The Appellant stated that he understood the requirements of the order, and the consequences of non-compliance with it. Police then gave the Appellant a direction to provide the information required by the order. He refused to comply, referring to legal advice he said he had received. The Appellant was, as a consequence of his refusal to comply with the order, arrested and charged.

[6] The Appellant appeared before the Magistrates Court at Maroochydore on 3 June 2019 to '*show cause*' in relation to his bail undertaking. Bail was opposed. Part way through the show cause hearing, the Appellant entered a plea of guilty in relation to the s 205A offence. Submissions, as a consequence, turned to the matter of sentence.

[7] The transcript of the hearing on 3 June 2019 reveals that the facts set out in paragraphs [2] to [5] were put before the sentencing Magistrate. There was no contest about those facts. The transcript also reveals that the Police Prosecutor made a number of submissions to assist the court in the exercise of the sentencing discretion. The Prosecutor submitted:

(a) the Appellant's '*history*' revealed '*nothing of a like nature*';

(b) the Appellant was a '*young person*' who did attend the Police Station voluntarily;

(c) the Appellant's failure to comply with the warrant requiring the provision of the necessary information was aggravated by reason that he had been given two opportunities to provide information to Police before the order;

(d) sentences for '*these types of matters*' need to reflect personal and general deterrence; and

(e) the decision in *Ross v Commissioner of Police* [2019] QCA 96 (***Ross***) '*reaffirmed that terms of imprisonment are appropriate in the circumstances*'.

[8] With respect to *Ross*, he was a 34 year old man who pleaded guilty to five offences. He had a minor, but irrelevant, criminal history. One of the charges to which he pleaded guilty was a s 205A offence.

[9] In response to a warrant, Ross provided passwords to Police in respect of two seized computers, but failed to provide passwords for six mobile phones. On behalf of Ross, it was submitted that the level of offending was minor. It was also submitted that the following matters in mitigation were relevant to the exercise of the discretion, namely: (1) his early plea of guilty; (2) his standing in the community as a respected businessman; (3) the level of remorse demonstrated for the offending; and (4) the extra-curial punishment suffered by Ross and his family through media attention. A Magistrate sentenced Ross to 12 months imprisonment, wholly suspended.

[10] The sentence imposed at first instance in *Ross* was unsuccessfully appealed to this Court, and the Court of Appeal. At paragraph [64] of the Court of Appeal's reasons for judgment, Wilson J (with whom Gotterson and McMurdo JJA agreed) said:

> "*In this case, the sentence of 12 months imprisonment imposed on the applicant adequately reflected the serious offence, which potentially concealed serious crimes and which was constituted by the contravention of a court order. The sentence acts as a sufficiently deterrent sentence against the applicant and others who may be tempted to contravene a court order to protect themselves. The immediate suspension of the imprisonment reflects the plea of guilty and other mitigating features. In all of the circumstances, the sentence was not manifestly excessive.*"

[11] Underlying paragraph [64] are two important considerations identified by Wilson J at paragraphs [43] and [58]. Her Honour said:

> "*[43] The gravamen of a section 205A Criminal code offence lies in the fact that it stymies an investigation and potentially conceals more serious offending, and has the potential to deflect a police investigation into potentially very serious offences.*"

And

> "*[58] The defiance of a court order is an act that strikes at the foundation to the criminal justice system and there is a need for general deterrence and denunciation when sentencing section 205A Criminal code offences.*"

[12] Against this background, the ultimate submission made by the Police Prosecutor as to penalty was as follows:

> "*…Your Honour, it is acknowledged the he did attend voluntarily and, again, it's in his favour – also in his favour, I guess, he's a young person.*
>
> *Notwithstanding same, your Honour, in accordance with that Court of Appeal case of Ross, the prosecution submit that the only appropriate sentence is one of imprisonment, and in line with that …particular case,…it would be difficult for the prosecution to argue anything other than it being wholly suspended.*"

[13] The Appellant was represented by Mr Rosser of counsel. Transcript of his oral submissions reveal it was immediately conceded that a fully suspended sentence was '*not out of range'*. Mr Rosser, however, invited the court to adopt a different course. He submitted the appropriate sentence was one involving a community service order, or probation. A number of matters were advanced in support of this submission, namely:

(a) s 9(2)(a) of the *Penalties and Sentences Act 1992* applied, which provides that a term of imprisonment was a sentence of last resort;

(b) the Appellant was only 19 years of age at the time of the offence;

(c) the Appellant was in full employment, and has the prospect of an apprenticeship, which may be thwarted by a term of imprisonment;

(d) the Appellant had '*almost no history*' and was a valued member of the community;

(e) the Appellant is remorseful – said to be horrified by what he had done; and

(f) the Appellant was a low level risk of re-offending.

[14] The sentencing remarks were delivered immediately upon the completion of oral submissions. The remarks are brief. They reveal the learned Magistrate took into account the Appellant's age. He described the Appellant as a '*very youthful*' offender. The learned Magistrate also took into account that a sentence of imprisonment should be imposed as a last resort. As against these mitigating features, the learned Magistrate took into account that the offending was aggravated by reason that the Appellant had an opportunity '*to do the right thing*'. That is to say, the Appellant was offered two opportunities to provide the necessary information to Police before the order of 31 May 2019 was obtained. He did not take up those opportunities that were fairly afforded to him.

[15] The sentencing remarks also reveal that the Court of Appeal's decision in *Ross* informed the exercise of the sentencing discretion. In this regard, the learned Magistrate said:

> "*...I have looked at that decision of Rice* (sic)*... Clearly the Court recognised that there are other orders that were possible, but, clearly notwithstanding the principle that imprisonment was a matter of last resort, that in these cases, deterrence looms large, larger than the need for rehabilitation. So I am going to imprison him for six months. It will be wholly suspended for 18 months. And the intent is to have this hanging over his head whilst other matters are being finalised...*"

[16] I understand the reference above to '*other matters*' is a reference to the charges against the Appellant under the *Drugs Misuse Act 1986*. At the time of the sentence, the Appellant had not been convicted of those charges, either by his own plea, or after a contested hearing. He was on bail for those offences at the time the order of 31 May 2019 was contravened.

[17] It is submitted on behalf of the Appellant that the sentence imposed on 3 June 2019 is excessive because the Magistrate did not give appropriate consideration to the Appellant's antecedents and mitigating factors.

[18] Did the Magistrate give appropriate consideration to the Appellant's antecedents and mitigating factors?

[19] The sentencing remarks demonstrate that the learned Magistrate took into account a number of mitigating features relevant to the Appellant, namely: (1) his age; (2) that he was a very youthful offender; (3) his plea of guilty; and (4) that a term of imprisonment was a sentence of last resort. These matters were not the only mitigating features relevant to the Appellant.

[20] The sentencing remarks do not suggest the learned Magistrate took into account a number of other matters in mitigation that were raised, but not the subject of challenge. In particular, the sentencing remarks do not disclose what weight, if any, was given to the Appellant's lack of criminal history at the time of the offence, his remorse and that he was a low risk of re-offending. That these matters were not expressly referred to in the sentencing remarks suggests the learned Magistrate erred.

[21] Further, the sentencing remarks do not suggest the learned Magistrate took into account the correct position with respect to the Appellant's employment prospects. Those prospects were relevant to the issue of rehabilitation, which looms large in the exercise of the sentencing discretion involving a youthful offender. The remarks disclose that the learned Magistrate regarded the Appellant's '*future*' as '*speculative*'. In this regard the sentencing remarks state:

> "*...So whilst I understand that when I imprison him that he is very youthful and he has got his whole future in front of him, that is rather speculative at the moment, given that he has been offered some sort of work, apprenticeship type work, and that when I look at what is required of me under the relevant provision of the Penalties and Sentences Act, I have to do more than engage in speculation...*"

[22] It was submitted by Mr Rosser that the Appellant, at the time of sentence, was fully employed in the family business. Mr Rosser also informed the court that the Appellant had been offered an apprenticeship as a mechanic. Neither matter was challenged by the Prosecution. To dismiss the combination of these matters as being '*speculative*' was, in my view, wrong. That the Appellant was gainfully employed, and was looking towards further employment, was material to the issue of rehabilitation, which is materially relevant to a youthful offender. This matter was not, in my view, properly considered in the exercise of the sentencing discretion. This again suggests the learned Magistrate erred.

[23] Whilst errors in the exercise of the sentencing discretion have been identified, it does not follow the sentence imposed is excessive and, as a consequence, ought be interfered with by this court. It is necessary to consider whether the errors led to the imposition of an excessive sentence.

[24] Here, I am satisfied that, even allowing for the most favourable view of the Appellant's antecedents and mitigating features, the sentence imposed was towards the upper limits of the discretion, but not excessive. This is so given three factors.

[25] First, *Ross* supports the proposition that a sentence involving a term of imprisonment for a s 205A offence was open to the learned Magistrate. That a term of imprisonment was open was also conceded by Mr Rosser at first instance.

[26] Second, the term of imprisonment imposed on the Appellant by the learned Magistrate was moderated in a significant way to reflect points of difference between the Appellant's circumstances and that of *Ross*. In particular, the sentence imposed reflects that Ross is an objectively more serious case than the Appellant's. Ross was an older offender with a minor criminal history. The Appellant, unlike Ross, could expect more leniency given he was a youthful offender with no criminal history and enjoyed good prospects of rehabilitation[1]. The sentence imposed also reflects that the nature of the offending in *Ross* was more serious given the number of phones involved. Ross did not provide access information for 6 phones. It should also be noted that the Appellant's circumstances involved an aggravating feature. He contravened the order of 31 May 2019 while subject to a bail undertaking.

[27] Third, the plea of guilty, and all of the mitigating features to which I have referred, have been reflected in a sentence which is wholly suspended. The suspension of the sentence can be said to fairly balance the serious nature of the offence as against the Appellant's circumstances. More particularly, in wholly suspending the sentence, the learned Magistrate did not interfere with the Appellant's rehabilitation. The sentencing remarks reveal the length of the operational period, coupled with the suspended term of imprisonment, were directed at providing the Appellant with an opportunity to address any issues he may have with drugs. This was in circumstances where the contravention of s 205A of the *Criminal Code* arose in relation to offences alleged under the *Drugs Misuse Act 1986*.

[28] At first instance, and on appeal, it was submitted on behalf of the Appellant that a sentence involving a community based order balances the serious nature of the offence (and any aggravating features) with the mitigating features present in the Appellant's case, including his youth. Such a sentence was also said to be consistent with the principle stated in s 9(2)(a)(i) of the *Penalties and Sentences Act 1992*. Those submissions can be accepted as correct, but it does not follow that the decision to not impose such a sentence is excessive.

[29] In my view, the sentence imposed was appropriate. It reflects the serious nature of the offence committed by the Appellant and the consequences of it, which are identified by Wilson J in *Ross* at paragraphs [43] and [58]. Furthermore, the sentence makes it clear that a salutary deterrent penalty will be imposed for contraventions of s 205A of the *Criminal Code*. Such a sentence is called for to ensure that orders of the kind to which the offence relates do not become a '*toothless paper tiger'*[2].

[30] As against these matters, the sentence imposed, in my view, fairly balances the Appellant's circumstances, in particular his youth, lack of relevant criminal history and rehabilitation prospects. These circumstances were reflected in the term of imprisonment imposed. They were also fairly reflected in the fact the term of imprisonment was wholly suspended.

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1 *R v Mules* [2007] QCA 47, [21] per McMurdo P, with whom Keane JA and Mullins J agreed.

2 *cf R v Abell* [2007] QCA 448, [33]

[31] In the result, the appeal is dismissed.