SUPREME COURT OF QUEENSLAND

CITATION:	*R v Solway* [2003] QCA 35
PARTIES:	**R** **v** **SOLWAY, Paul Campbell** (applicant)
FILE NO/S:	CA No 297 of 2002 DC No 2039 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	14 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2003
JUDGES:	McPherson and Jerrard JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW - JUDGMENT & PUNISHMENT - SENTENCE RECOGNISANCES, PROBATION & OTHER NON-CUSTODIAL ORDERS - PROBATION ORDERS – DISCRETION OF COURT - whether trial judge erred in considering himself bound to resentence after a breach of community based order *Penalties and Sentences Act* 1992 (Qld) s 12(6), s 123(1), s 126
COUNSEL:	A J Moynihan for the applicant R G Martin for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA.** The applicant was convicted on pleas of guilty before the District Court on 25 August 2000 of a count of stealing a privately owned letter box and another of wilfully destroying a picnic table in a public park to which he set

fire. He was admitted to probation for three years; he was also ordered to perform 80 hours of community service and to pay compensation of $450 within 12 months. The conviction was not recorded.

[2] The applicant failed to pay the compensation within the 12 month period. On 3 October 2001 he failed to appear to show cause and a bench warrant issued for his arrest. He then paid the compensation and the warrant was set aside on 7 November 2001. The probation order remained in force but he failed to comply with it. On no fewer than six separate occasions he failed to report and he failed to give notice that he had changed his address. For those breaches of conditions, he was summoned to appear in court on 3 June 2002, but did not respond. On 30 August 2002 he came before the same District Court judge who had originally sentenced him on 25 August 2000. On that date, his Honour set aside the original order made on 25 August 2000 and sentenced him to a further 80 hours community service. On this occasion the conviction was recorded.

[3] Making that order was on the face of it within the exercise of a proper sentencing discretion. Under s 123(1) of the *Penalties and Sentences Act* an offender who contravenes a requirement of a community based order commits an offence carrying a maximum of 10 penalty units. In other words, he may be fined for such a contravention. However, s 126(2) provides that, if the conditions in s 126(1) are satisfied (which they were here), the court may "in addition to or instead of dealing with" the offender under s 123(1), admonish and discharge the offender or make an order for repayment of an amount not paid, or for enforcement of its payment. Section 126(4) proceeds:

> "(4) The Court may also deal with the offender for the offence for which the community based order was made in any way in which it could deal with the offender if the offender had just been convicted before it of the offence".

[4] The application for leave to appeal against sentence is directed to the fact that on 30 August 2002 a conviction was recorded. That was a consequence that followed from s 12(6) of the Act. Section 12(6) provides:

> "If -
> (a) a Court
> (i) convicts an offender of an offence; and
> (ii) does not record a conviction; and
> (iii) makes a probation order or a community service order for the offender; and
> (b) the offender is subsequently dealt with by a court for the same offence in any way in which it could deal with the offender if the offender had just been convicted by or before it of the offence, the conviction for the offence must be recorded by the second court."

[5] On 30 August 2002 it would have been open to the sentencing judge under s 123(1) to impose a fine for the applicant's contravention of the community based order. That was the course contended for by counsel at the contravention hearing on that date. It was also what the Community Correctional Office had at first recommended be done. However, in view of the history of the applicant's non-compliance with the orders made in August 2000, the Office or the Officer concerned became less tolerant of the applicant or his attitude, and that

recommendation was withdrawn. Not only had the applicant failed on numerous occasions to report as required, but he had attempted to justify his failure to appear on 3 June 2002 by offering an explanation which, on closer investigation, turned out to be false. Instead, in her report dated 17 June 2002, the Community Correctional Officer recommended that the applicant be dealt with for the contravention offence under s 123(1) by being re-sentenced for the original offences pursuant to s 126(4). In making the order on 30 August 2002 that the applicant perform 80 hours of community service, his Honour was evidently acting on that recommendation.

[6] The result was that, by force of s 12(6)(b), of the Act, the recording of the conviction or convictions became mandatory. It was submitted that, from some interlocutory remarks made by his Honour in the course of the hearing, it was possible to infer that the learned judge was mistaken about the scope of function he was performing on 30 August 2002. He was not bound to re-sentence for the original offences but had a number of options open to him including the imposition of a fine under s 123(1); allowing the probation to continue; or admonishing and discharging the offender under s 126(2)(a) of the Act. Having, so it was submitted, thus misapprehended the nature of his function, his Honour had failed to consider this range of options and consequently fettered his discretion by assuming that the applicant must be sentenced for the original offence. The result was that a conviction had to be recorded under s 12(6)(b)

[7] After scrutinising the appeal record as a whole as well as the sequence of events and reports leading up to the hearing on 30 August 2002, I am not persuaded that his Honour made the error which the applicant attributes to him. It is unlikely he would have done so. He did not unthinkingly adopt the course he chose but did so because he was dissatisfied with the attitude of the applicant as evinced in his failure to perform the conditions of his probation and his lack of co-operation with the Correctional Service. It is unfortunate that the applicant, who is now 20 years old, should bear a record of a conviction for two relatively minor offences committed when he was only 17; but it was not only his conduct then that brought about this result. It was also the need to impress upon him in a compelling way that he must perform the community service order imposed on him on 30 August 2002 in accordance with its terms.

[8] I would dismiss the application for leave to appeal against sentence.

[9] **JERRARD JA:** I have read and respectfully agree with the reasons for judgment of McPherson JA and the order proposed.

[10] **MULLINS J:** I agree with the reasons for judgment of McPherson JA and the order proposed.