SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cay, Gersch and Schell; ex parte A-G (Qld)* [2005] QCA 467
PARTIES:	**R** **v** **CAY, Daniel Stephen** (respondent) **GERSCH, Llewellyn Charles** (respondent) **SCHELL, Aaron Daniel** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 241 of 2005 CA No 242 of 2005 CA No 243 of 2005 DC No 149 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	14 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2005
JUDGES:	de Jersey CJ, Keane JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**In each matter, the appeal against sentence by the Attorney-General is dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER - APPLICATIONS TO INCREASE SENTENCE - OTHER OFFENCES - where each respondent pleaded guilty to one count of armed robbery and was sentenced to two years probation - where the learned sentencing judge ordered that no convictions should be recorded - where the offence involved the robbery of a service station at night - where the respondents were each aged between 17 and 18 years of age

at the time of the offence - where the offence was carried out in an incompetent and amateurish fashion - where the respondents were apprehended soon after the robbery took place - where each of the respondents had spent time in custody prior to sentence - where extensive submissions were made on behalf of each respondent before the learned sentencing judge as to why convictions should not be recorded to which the Crown made no response - where, on appeal, the Attorney-General did not seek to challenge the imposition of a non-custodial sentence but submitted that the seriousness of the offence meant that convictions ought to have been recorded - whether the learned sentencing judge had erred in deciding to exercise his discretion to order that no convictions be recorded

Penalties and Sentences Act 1992 (Qld), s 12

DPP v Candaza & Ors [2003] VSCA 91; No 2, 3, 4 and 5 of 2003, 25 June 2003, applied
Jennings v Carrigan [1994] QCA 371; CA No 266 of 1994, 21 September 1994, cited
R v Bain [1997] QCA 035; CA No 452 of 1996, 14 March 1997, cited
R v Bainbridge, Cullen & Ludwicki [1993] QCA 428; (1993) 74 A Crim R 265, distinguished
R v Briese; ex parte Attorney-General [1998] 1 Qd R 487, distinguished
R v Brown; ex parte Attorney-General [1994] 2 Qd R 182, applied
R v Condoleon (1993) 69 A Crim R 573, cited
R v Dullroy & Yates; ex parte A-G (Qld) [2005] QCA 219; CA No 111 and CA No 112 of 2005, 24 June 2005, cited
R v Fullalove (1993) 68 A Crim R 486, cited
R v Gallagher; ex parte Attorney-General [1997] QCA 467; [1999] 1 Qd R 200, cited
R v Horne [2005] QCA 218; CA No 104 of 2005, 22 June 2005, cited
R v Ingram [1996] QCA 013; CA No 376 of 1995, 13 February 1996, cited
R v Jackson; ex parte Attorney-General [1995] QCA 001; CA No 276 of 1994, 2 February 1995, distinguished
R v Qualischefski [1994] QCA 289; CA No 139 of 1994, 12 August 1994, cited
R v S; ex parte Attorney-General [1997] QCA 288; CA No 262 of 1997, 5 August 1997, cited
R v Seiler [2003] QCA 217; CA No 3 of 2003, 26 May 2003, considered
R v Taylor and Napatali; ex parte A-G (Qld) [1999] QCA 323; (1999) 106 A Crim R 578, cited
R v Watters [1994] QCA 026; CA No 475 of 1993, 3 February 1994, distinguished

Wilmot v Saleri [1997] QCA 125; CA No 26 of 1997, 18 April 1997, distinguished

COUNSEL: R G Martin SC for the appellant in CA No 241 of 2005, CA No 242 of 2005 and CA No 243 of 2005
A W Moynihan for the respondent in CA No 241 of 2005
A J Kimmins for the respondent in CA No 242 of 2005
A J Rafter SC for the respondent in CA No 243 of 2005

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant in CA No 241 of 2005, CA No 242 of 2005 and CA No 243 of 2005
Legal Aid Queensland for the respondent in CA No 241 of 2005
Ryan & Bosscher for the respondent in CA No 242 of 2005
Clewett Corser & Drummond for the respondent in CA No 243 of 2005

[1] **de JERSEY CJ:** I am indebted to Keane JA for his recitation of the relevant circumstances. I agree with His Honour that the appeal should be dismissed.

[2] This is a case where one cannot confidently conclude the learned primary Judge erred in not recording convictions, although there was in my view an ample basis for recording convictions. Even though the armed robbery was incompetently carried out, there were serious aspects to it, quite apart from the inherent gravity of any armed robbery: for example, it was planned rather than spontaneous, and Cay used a knife, a disguise and rubber gloves.

[3] The primary Judge was presented with comprehensive submissions by Defence Counsel urging that convictions not be recorded. The Crown Prosecutor made no submission in response on that question, which was unfortunate then, and is significant now where the only ground of the Attorney's appeal concerns that question.

[4] It is right to say that the primary Judge, in his sentencing remarks, addressed, in sufficient detail and accurately, issues arising under the relevant statutory provision, s 12 of the *Penalties and Sentences Act* 1992 (Qld). The question for this court now is very limited: was the Judge obliged, because of the seriousness of the offence, to record convictions, notwithstanding the aggregation of circumstances favouring not doing so – especially, its arguably having been an aberrant offence out of character, committed by youthful offenders. I have reached the view he was not obliged to do so.

[5] I mention at this stage one particular aspect of the Judge's remarks. He said: "the recording of *may* adversely impact upon your prospects of obtaining employment in the future or obtaining different employment". That will invariably be the case, and one would not think that alone would necessarily carry much weight in the discretionary exercise under s 12. That aside, s 12(2) refers to "the impact that recording a conviction *will* have on the offender's – (i) economic or social wellbeing; or (ii) chances of finding employment" (emphasis added). The legislation thereby invites attention to what would, or would be likely to ensue in the case at hand, were a conviction recorded, and not to mere possibilities: would the fact of the conviction have an impact, or noticeable effect, on his chances of

gaining employment? If "yes", then that may weigh against recording a conviction. But I cannot see how it could suffice, to activate s 12(2)(c)(ii), to answer: "it could". His Honour's reference to the possible effect on employment was arguably not irrelevant, as one of the "circumstances of the case" to be considered under s 12(2) (albeit it would not usually carry much weight). But it should not be seen as addressing the consideration arising under s 12(2)(c).

[6] Mr Moynihan, for the respondent Cay, fastened on the word "chance" in s 12(2)(c)(ii). The provision speaks of "chance" because it contemplates possible future employment not yet secured. But it is upon that prospect that a conviction *would* impact, for the consideration to weigh against conviction. The legislature may have had in mind cases where an offender's education, training, background or interests pointed to future employment in a particular area, or exposure to a particular range of employments, on which a recorded conviction would impact; as well as the case where conviction of the particular offence would impact on his chance of finding any employment.

[7] I respectfully record my concern at the manner of reference to the consideration under s 12(2)(c)(ii) as it arose in *R v Condoleon* (1993) 69 A Crim R 573, 576, in that the impact is raised there in terms of possibility not probability.

[8] Prudence dictates that where this issue is to arise, Counsel should properly inform the court of the offender's interests in relation to employment, and his relevant educational qualifications and past work experience, etc, so that a conclusion may be drawn as to the fields of endeavour realistically open to him; and provide a proper foundation for any contention a conviction would foreclose or jeopardize a particular avenue of employment. Compare *R v Fullalove* (1993) 68 A Crim R 486, 492.

[9] I agree with the view expressed in the Victorian Court of Appeal in *DPP v Candaza & Ors* [2003] VSCA 91, [17], that "in all but the most exceptional case, persons who plead guilty to armed robbery should expect to have convictions recorded against them". The discretion whether or not to record a conviction is expressed, in s 8 of the Victorian *Sentencing Act* 1991, in terms almost identical to those of s 12(2) of the *Penalties and Sentences Act*. Other categories of case may warrant the same approach, for example, cases of substantial dishonesty, but it is not on this occasion necessary to deal with the question more comprehensively.

[10] While, as I have said, there was here an ample base for recording convictions, it nevertheless cannot in the end be said that His Honour was not entitled to exercise his discretion the other way.

[11] The breadth of the discretion arising under s 12 of the Act has been mentioned in a number of cases. See, for example, *R v Brown*; *ex parte Attorney-General* [1994] 2 Qd R 182, 193. A Judge exercising the discretion not to record a conviction must however appreciate that in consequence, other people dealing with the offender in the future will not be informed that the offence has been committed, which is itself a potentially serious matter. The question should be confronted: is there sufficient reason to contemplate subsequently denying persons, with an otherwise legitimate interest in knowing the truth, knowledge of the offender's true circumstances?

[12] Especially where the offence is by nature serious, the question whether or not to record a conviction should be addressed with considerable care, not only by the

defence, but also by the Crown Prosecutor. It was unsatisfactory that in this case, no attitude was expressed by the Prosecutor. A substantial argument could have been mounted in support of the recording of convictions, respecting the community's fundamental interest in knowing the truth about an offender's background.

[13] **KEANE JA:** On 2 September 2005, each of the respondents was convicted on his plea of guilty of one count of armed robbery. Each was sentenced to two years probation. The learned sentencing judge ordered that no convictions should be recorded.

[14] The Attorney-General has appealed against these sentences on the ground that they are manifestly inadequate because, it was submitted, they failed to reflect the gravity of the offence, failed to give sufficient weight to the need for a deterrent sentence, gave too much weight to factors going to mitigation and convictions should have been recorded.

Circumstances of the offence

[15] The complainant was the console operator of a service station on High Street, Toowoomba. The respondents were residing together with two other young men at a house in Horton Street, Toowoomba.

[16] At 8.35 pm on Sunday 26 June 2005, the complainant was sweeping the floor of the shop when he noticed a man standing in the back corner of the store. The man was wearing what appeared to be a surgical glove on his hand. When the man turned, the complainant saw that he was also wearing a green bandana which covered his face. The man approached the counter, purchased a packet of lollies and then left the shop. The complainant immediately contacted his manager who told him to call the police, which he did.

[17] About 10 minutes later, the same man entered the shop again, approached the counter and asked for a packet of cigarettes. He then said: "Actually, I'll take all the money in the till as well." He then produced a knife from his jumper pocket with his right hand.

[18] The complainant pressed the wrong button on the cash register that caused it to close out of the computer program which was running. As a result, the complainant had to lean down to re-activate the program. As he did so, the offender climbed on his stomach onto the counter to watch the complainant's movements. As he did this, he held out the knife in front of him.

[19] The cash register opened and the offender said: "Just all the notes will do and I don't need a bag." The complainant removed $600 in notes and gave them to the offender who left the shop, pushing past other customers as he did so.

[20] The complainant observed the offender run down High Street and saw a white sedan motor vehicle following the offender. The complainant again called the police.

[21] Patrolling police officers received information of the robbery and went to the intersection of High Street and Alderley Street where they forced a white sedan motor vehicle to stop. The driver of the sedan was the respondent Schell. The passenger was the respondent Cay who was wearing a green scout scarf tucked under the hood of his jacket.

[22] A search of the motor vehicle revealed two wooden handled knives, both with 30 cm blades, and two surgical style rubber gloves. Police searched Cay and located $600 in notes in one of his pockets.

[23] Cay and Schell admitted that they had committed the robbery. They said they had checked the scene before Cay actually committed the robbery with Schell collecting Cay at a pre-determined location in a nearby alleyway. They had agreed that if Cay had been caught he would take the blame for the offence.

[24] In an interview with police two days later, which was arranged at their own request, Cay and Schell informed on the respondent Gersch, asserting that he was the mastermind. They said that an argument over money for food had broken out in the house where the respondents lived. Only Gersch was working. Cay was receiving government benefits. The other three young men had no income at all. The argument included a claim that Cay owed Gersch $60. In the course of this argument, they began to joke about robbing a convenience store. Cay and Gersch began to take the idea more seriously. Gersch proceeded to identify the service station which was robbed as a possible target and noted the roads around it, including possible escape routes. Gersch and Schell then drove to the service station to check out the area around it and Gersch identified the best rendezvous spots before they returned home to collect Cay.

[25] Schell told police that he agreed to act as the getaway driver after being coaxed by Gersch and being told by him that if Cay got caught he wouldn't mention anyone else's name. Schell also told police that after Cay had first gone into the service station shop, Cay had told him that he didn’t want to go through with the robbery. Cay and Schell told Gersch that they didn’t want to go through with it. Gersch told Cay that he might as well "do it" as Cay had already been in the store and that it would work if there was no-one in there. Cay then agreed to go ahead with the plan to rob the store. It may be noted here that there were other persons in the store when Cay actually carried out the robbery.

[26] Cay's version of events to the police was similar to that given by Schell.

[27] Gersch was apprehended by police. He declined to be interviewed by police regarding his part in the offence.

The respondents' circumstances

[28] Cay was born on 11 April 1987. He was 18 years of age at the time of the offence. He has a minor criminal history because of one previous offence, involving the possession of dangerous drugs and associated utensils, for which he was fined with no conviction being recorded. He has suffered from depression since he was 10 or 11 years old. Since he was 13 years old he has been on medication or receiving counselling for this condition. He was remanded in custody for 69 days before he was sentenced. His mother and father are supportive of him. The offence occurred shortly after he had left home to try to stand "on his own two feet".

[29] Schell was born on 18 January 1987. He was 18 years of age at the time of the offence. He too has a minor criminal history of the same nature as Cay. He spent 17 days on remand in custody in relation to the offence of present concern. References put before the court below asserted that he was of good character and an industrious employee, working between 47 to 50 hours per week. He has voluntarily undertaken counselling since his release from custody.

[30] Gersch was born on 9 December 1987. He was 17 years of age at the time of the offence. Gersch has no criminal history. He was remanded in custody for 67 days before he was sentenced. He was assaulted while in custody on several occasions. Many personal references were tendered as to his previous good character and his good work history.

The sentence

[31] Before the learned sentencing judge, Gersch's counsel denied that he had masterminded the offence as Cay and Schell had asserted in their interview with the police. The learned sentencing judge did not resolve the dispute as to the extent of Gersch's involvement. The prosecution submitted, and his Honour accepted, that the respondents should be regarded as equally culpable, even though each contributed in different ways to the commission of the offence. The result is that it is not open to this Court now to act upon a view of the facts which would involve treating Gersch as more culpable than Cay or Schell.[1]

[32] The learned sentencing judge referred to the victim impact statement from the complainant. This statement suggests that the complainant, although understandably afraid at the time of the offence and unsettled for some time thereafter, has not been permanently affected by the robbery. The complainant still works at the service station, though he finds working at night an unpleasant experience and tries to avoid night shifts when given the choice.

[33] His Honour emphasised that it was "very fortunate that it appears that the complainant has not suffered any significant emotional or psychiatric or psychological disturbance as a result of the commission of this offence". This factor was expressly referred to by the learned sentencing judge as a reason for the lenient approach taken by him to the sentencing of the respondents.

[34] His Honour also referred to the periods of pre-sentence custody served by the respondents. His Honour observed that the length of time spent in pre-sentence custody by Cay and Gersch was "quite significant".

[35] The learned sentencing judge acknowledged the prevalence of this type of offence, and the importance of general deterrence as a consideration in forming an appropriate sentence. On the other hand, his Honour noted that the respondents were all youthful with no significant criminal histories. They had all pleaded guilty to an ex officio indictment. His Honour also referred to the co-operation by Cay and Schell with the authorities as being of a very high order.

[36] The learned sentencing judge concluded that:

> "If it were not for the fact that each of you had served a significant period in presentence custody, then it seems to me that something other than probation might be required, whether that be an intensive correction order or a further community based order whereby you would be required to perform community service".

The appeal

[37] The appellant did not argue that a non-custodial sentence was not open to the learned sentencing judge in circumstances such as the present. That a non-custodial

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[1] See *R v Wheeler & Sorrensen* [2002] QCA 223; CA No 56 and CA No 57 of 2002, 25 June 2002 at [12] - [18].

sentence was open in the circumstances of the present case is supported by decisions of this Court such as *R v Taylor and Napatali; ex parte A-G (Qld)*,[2] *R v Dullroy and Yates*; *ex parte A-G (Qld)*[3] and *R v Horne*.[4]

[38] The focus of the submissions made on the appeal was, therefore, not upon whether a custodial sentence, or some other sentence involving a more intensive correctional regime than probation, should have been imposed on the respondents. Rather, the principal focus of the appellant's argument on appeal was upon the issue of whether the learned sentencing judge erred in the exercise of the discretion, conferred by s 12(1) of the *Penalties and Sentences Act* 1992 (Qld) ("the Act"), to order that no conviction be recorded against each of the respondents.[5]

[39] Section 12(2) of the Act sets out the matters that must be taken into account by a sentencing judge when determining whether or not to record a conviction. It provides that:

> "(2) In considering whether or not to record a conviction, a court must have regard to all circumstances of the case, including -
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> (a) the nature of the offence; and
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> (b) the offender's character and age; and
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> (c) the impact that recording a conviction will have on the offender's -
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> (i) economic or social wellbeing; or
>
> (ii) chances of finding employment."

[40] It is well established that the correct approach to be taken to the exercise of the discretion pursuant to s 12 is that expressed by Macrossan CJ in *R v Brown; ex parte Attorney-General*,[6] where his Honour said:

> "Where the recording of a conviction is not compelled by the sentencing legislation, all relevant circumstances must be taken into account by the sentencing court. The opening words of s 12(2) of the Act say so and then there follow certain specified matters which are not exhaustive of all relevant circumstances. In my opinion nothing justifies granting a general predominance to one of those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than another, may have claim to greater weight."

[41] The learned sentencing judge, in deciding to exercise his discretion to order that no conviction be recorded, had regard to the circumstances of the offence, the youth of the respondents and to "the fact that the recording of a conviction may adversely impact upon your prospects of obtaining employment in the future or obtaining different employment". His Honour also took account of the absence of any significant impact on the complainant and the circumstance that the offence did not involve actual violence or the use of a firearm.

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2 [1999] QCA 323 at [15]; (1999) 106 A Crim R 578 at 583.

3 [2005] QCA 219; CA No 111 and CA No 112 of 2005, 24 June 2005 at [55], [65].

4 [2005] QCA 218; CA No 104 of 2005, 22 June 2005.

5 It may be noted that the Act authorises the making of a probation order whether or not a conviction is recorded: *Penalties and Sentences Act* 1992 (Qld), s 90.

6 [1994] 2 Qd R 182 at 185. See *R v Briese; ex parte Attorney-General* [1998] 1 Qd R 487 at 493.

[42] Given the content of s 12(2) of the Act, the considerations to which his Honour referred were clearly relevant to the exercise of his discretion. The appellant advanced no argument to the contrary.

[43] One complaint that is advanced by the appellant is that there was no specific identification of any employment option open to any of the respondents which might be hampered by the recording of a conviction. But the existence of a criminal record is, as a general rule, likely to impair a person's employment prospects, and the sound exercise of the discretion conferred by s 12 of the Act has never been said to require the identification of specific employment opportunities which will be lost to an offender if a conviction is recorded. While a specific employment opportunity or opportunities should usually be identified if the discretion is to be exercised in favour of an offender, it is not an essential requirement.[7] Such a strict requirement would not, in my respectful opinion, sit well with the discretionary nature of the decision to be made under s 12, nor with the express reference in s 12(2)(c) to "the impact that recording a conviction will have on the offender's **chances of finding employment**" (emphasis added). In this latter regard, s 12(2)(c) does not refer to the offender's prospects of obtaining employment with a particular employer or even in a particular field of endeavour.

[44] In *R v Seiler*,[8] the applicant had pleaded guilty to six counts of burglary and stealing as well as six counts of fraud. He was sentenced to perform community service, placed on probation and convictions were recorded. The applicant sought leave to appeal against the recording of the convictions. White J, with whom McPherson JA and Wilson J agreed, concluded that the order to record the convictions should be set aside. In the course of considering the matters contained in s 12(2) of the Act her Honour observed that:

> "No evidence was offered to the sentencing court about the impact that recording a conviction would have on the applicant's … chance of finding employment but it might be presumed with some confidence that the revelation could only have a negative impact on his employability."

[45] The point to be made here is that the very nature of some offences means that the recording of a conviction will inevitably damage an offender's future employment prospects and, therefore, his or her prospects of rehabilitation. It is for this reason that, for example, a court might be quicker to record a conviction for offences that might only be relevant to certain employers, such as dangerous driving, than for offences that would concern all potential employers, such as fraud or stealing as a servant.[9] Armed robbery, with its connotations of personal violence, falls squarely into the latter category. Of course, it may be accepted that simply to point to a possible detrimental impact on future employment prospects will usually be insufficient, of itself, to warrant the positive exercise of the discretion to order that a

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7 See *R v Condoleon* (1993) 69 A Crim R 573 at 576; *R v Fullalove* (1993) 68 A Crim R 486 at 492 - 493.

8 [2003] QCA 217; CA No 3 of 2003, 26 May 2003.

9 See, eg, *R v Pahoff* [2002] QCA 525; CA No 286 of 2002, 2 December 2002 where this Court recognised this consideration when refusing leave to an offender to appeal against the decision of the sentencing judge to order that no conviction be recorded for offences of breaking, entering and stealing and obstructing a police officer, but that a conviction be recorded for the offence of dangerous driving.

conviction should not be recorded.[10] It does not follow that the learned sentencing judge erred by taking into account "the fact that the recording of a conviction may adversely impact upon [the respondent's] prospects of obtaining employment in the future or obtaining different employment".

[46] Another submission advanced by the appellant is that the offence "was planned, as opposed to being a spontaneous folly", and that this is a consideration going to the seriousness of the offence. But it is clear from his Honour's reasons that the learned sentencing judge was fully aware of the circumstances of the offence. And in any event, it is clear that the decision to embark on this foolish venture was really a spur of the moment decision which was the product of muddle-headed thinking by a group of young men in straitened circumstances.

[47] The third point which the appellant makes is that the making of the order is apt to mislead members of the public who have dealings with the respondents as to their character.[11] In this regard, it was said by the majority of the members of this Court in *R v Briese; ex parte Attorney-General*:[12]

> "For present purposes it is enough to note that the making of an order under s 12 has considerable ramifications of a public nature, and courts need to be aware of this potential effect. In essence a provision of this kind gives an offender a right to conceal the truth, and it might be said, to lie about what has happened in a criminal court.
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> On the other hand the beneficial nature of such an order to the offender needs to be kept in view. It is reasonable to think that this power has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation, and it may be thought to be a reasonable tool that has been given to the courts to avoid undue oppression."

[48] It is important to note that, before the learned sentencing judge, no submissions were advanced by the prosecution in reply to the arguments put on behalf of the respondents that no conviction be recorded. It was not suggested by the prosecution to his Honour that, for example, the respondents or any one of them might seek to make use of the order to conceal their offence from "bodies or authorities whose duty it is to determine whether or not an applicant is a fit and proper person to be licensed under a particular statute".[13] The absence of submissions on this point by the prosecution means that the learned primary judge's reasons did not deal explicitly with the issue of whether the character of each respondent was such as to

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10 So much has previously been held by this Court in cases such as *R v Bain* [1997] QCA 035; CA No 452 of 1996, 14 March 1997 and *R v Van Le* [2003] QCA 256; CA No 144 of 2003, 18 June 2003.

11 A person may not be asked or obliged to disclose any conviction that is not part of that person's "criminal history": *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld), s 5(2). A "criminal history" consists only of recorded convictions: *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld), s 3. Unrecorded convictions need only be disclosed in very specific circumstances, such as for the purposes of an inquiry authorised by another Act: *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld), s 5(3).

12 [1998] 1 Qd R 487 at 491 (hereafter referred to as "*Briese*").

13 Cf the observations of McPherson JA in *R v Beissel* [1996] QCA 488; CA No 425 of 1996, 12 November 1996 quoted in *Briese* [1998] 1 Qd R 487 at 492.

enable him safely to conclude that the offence was so far out of character that there was no real likelihood that members of the public having dealings with any of the respondents would be misled as to their true character. His Honour's reasons, and his findings in favour of the respondents, are, however, sufficiently comprehensive, in my view, to enable one to infer that his Honour had formed the view that this escapade was truly out of character for each of these young men, and that no mischief to the public would be caused by reason of the making of an order enabling them to conceal the truth about this offence. In my view, this Court should not now act upon a different view, especially when no submissions to the effect of that now under consideration were put to the learned sentencing judge.

[49] In *DPP v Candaza & Ors*,[14] the Victorian Court of Appeal refused to set aside the decision of the learned primary judge not to record a conviction in a case of armed robbery by a group of youthful offenders. It was emphasised by Winneke ACJ that "in all but the most exceptional case, persons who plead guilty to armed robbery should expect to have convictions recorded against them".[15] In that case, however, the Victorian Court of Appeal held that it had not been demonstrated that the learned primary judge's discretion had miscarried having regard to the circumstances of the case which showed that each of the offenders had expressed deep remorse for his offending conduct, was from a hardworking family which supported him, the offending was out of character and the prospects of rehabilitation were strong.

[50] While it will only be "the most exceptional case of armed robbery" that no conviction would be recorded, the facts of this case were certainly exceptional. The offenders are very young and essentially of previous good character. They were trying to "make a go" of living away from home in straitened circumstances. They were hesitant and amateurish in their commission of the offence. Their victim did not suffer any serious harm. As I have noted, the complainant's victim impact statement makes it clear that, while he is understandably wary of the reoccurrence of a similar episode, there have been no other long term consequences. It must also be taken into account that the offenders have endured the "sharp slap" of a substantial pre-sentence period in custody. Given the evidence placed before the learned sentencing judge regarding the prospects of future education and employment for each of the three offenders, there were good reasons to make an order which encouraged their rehabilitation. In this regard, there can be no doubt that the encouragement of rehabilitation is one of the principal reasons for the existence of s 12 of the Act. The view that an order that the conviction not be recorded would be apt to encourage the rehabilitation of the respondents, and that the claims of rehabilitation were stronger than the need for denunciation or deterrence in this case was a view which was reasonably open to the learned sentencing judge.

[51] The circumstances in *Briese*,[16] where an Attorney's appeal against an order by the sentencing judge that a conviction be not recorded was successful, may be distinguished from those of the present case. In *Briese*, the offender was 19 years old. He had committed three offences, including two armed robberies, over a period of 15 days making it difficult to characterise his offending as a mistake or an

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14 [2003] VSCA 91; No 2, 3, 4 and 5 of 2003, 25 June 2003.

15 [2003] VSCA 91; No 2, 3, 4 and 5 of 2003, 25 June 2003 at [17].

16 [1998] 1 Qd R 487.

aberration. That offender had been an inmate at a centre for treatment necessitated by abuse of illicit drugs, and he told police that he was stealing to purchase heroin to which he had been addicted since he was 17. It does not appear from the judgments in that case that the offender had anyone to vouch for his good character. There was no reason for optimism as to his prospects of rehabilitation.

[52] Of the other decisions cited by the Attorney-General as throwing light upon the resolution of the issues which arise in the present case, *R v Bainbridge, Cullen & Ludwicki*[17] may immediately be placed to one side on account of the much more serious nature of the offending involved in that case and the sentences which were imposed, which meant no separate consideration was given to the question of whether or not convictions should be recorded. Similarly, *R v Watters*[18] was another case involving more serious offending where no real argument was advanced as to why a conviction should not be recorded. *R v Jackson; ex parte Attorney-General*,[19] is also readily distinguishable due to the use in that case of actual violence to steal from a taxi driver, and the reliance by the sentencing judge on the irrelevant consideration of the offender's sporting prowess as a ground for not imposing a conviction. No such error on the part of the learned sentencing judge in this case has been made out. The other case on which the appellant relied, *Wilmot v Saleri*,[20] was a case where this Court declined to upset a Magistrate's decision to impose a conviction while recognising that "had the Magistrate chosen not to impose a conviction, that decision would equally not be appealable".

[53] In my opinion, it was open to the learned sentencing judge in the present case to conclude that the offence was so out of character for these young men that, on balance, the interests of the community were best served by an order which is apt to facilitate the rehabilitation of each of these young men in circumstances where there is no immediately apparent risk that the public is likely to be seriously misled about the content of their character.

Conclusion and orders

[54] In summary, the decision by the learned sentencing judge to order that a conviction not be recorded involved the exercise of a judicial discretion. In exercising his discretion in favour of the respondents, his Honour acted upon relevant considerations. It has not been demonstrated by the appellant that the exercise of his Honour's discretion was affected by an error of legal principle or mistake of fact. I am not persuaded that the decision of the learned sentencing judge was other than a sound exercise of the discretion conferred by s 12 of the Act.

[55] The appeal should be dismissed.

[56] **MACKENZIE J:** The reasons for judgment of Keane JA set out the essential facts in detail. For the purposes of my reasons, those which require emphasis are that the respondents Cay and Schell were apprehended shortly after the robbery and made statements to the police. Two days later, they gave further statements to the police implicating Gersch, who was then apprehended and declined to give a record of interview to the police. The only issue argued was whether the learned sentencing

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17 [1993] QCA 428; (1993) 74 A Crim R 265.
18 [1994] QCA 026; CA No 475 of 1993, 3 February 1994.
19 [1995] QCA 001; CA No 276 of 1994, 2 February 1995.
20 [1997] QCA 125, CA No 26 of 1997, 18 April 1997.

judge's failure to record a conviction against each of the respondents rendered the sentence manifestly inadequate.

[57] The sentencing proceeded on an ex-officio indictment. In 2000, a Practice Direction was issued (Practice Direction 2 of 2000) in respect of ex-officio indictments. The Practice Direction refers to the inherent risks in proceeding by that process where there is no agreed set of facts. Whatever its intended scope of operation, the principles stated in it should be adopted as a matter of prudence to avoid the kind of difficulties that make this case an unsuitable vehicle to overturn an exercise of discretion by a sentencing judge not to record a conviction.

[58] In the present case, a written document was tendered, but it was no more than a summary of admissions made by Cay and Schell. It merely stated that Gersch had been apprehended and had declined to give a record of interview to the police. The statement of facts is not signed by any of the legal representatives of the respondents.

[59] Cay and Schell had attributed a role to Gersch in their second records of interview that arguably made his part in the robbery more serious than theirs. Those records of interview, particularly Schell's, included Gersch's role in events leading up to the formation of the plan to rob the service station which included Gersch nominating the location, Gersch discussing and pointing out routes and possible rendezvous points around the service station and persuasion of Cay and Schell to go through with their assigned roles in the robbery when they expressed reluctance to do so. There is at least some evidence consistent with that reluctance, in that Cay had gone to the service station twice but not robbed it on the first occasion, even though he had his face covered with a bandana and appeared to have a surgical glove on his hand. Later he came back and stole money from the console operator at knife point.

[60] The statement of facts before the learned sentencing judge therefore did not have anything in it that indicated that Gersch had accepted what the others had said about his role. With regard to Gersch's position, his counsel said the following during his submissions:

> "So far as the facts are concerned, my client takes some issue with the fact of the description of him as being a mastermind. He also takes some issue in relation to a number of the matters which were raised by the other two persons in their interviews with the police. I've discussed this with my learned friend, the Crown Prosecutor, and I've indicated to her, he does not quibble with the fact that he was involved in what led up to the commission of the offence.
>
> He does not quibble with the fact that he was to be the driver of a second car, but apart from that, there are issues in relation to what he is supposed to have done in preparation et cetera. I don't believe that there's really any necessity to go through the facts and work out who said what at what particular stage. He admits the basis of the Crown case, but does not agree with a lot of the detail".

[61] If, as seemed to be suggested to us, no agreed statement of facts was drafted in respect of Gersch because of his disagreement with some aspects of what the others said about his role, it disregards the intent of the Practice Direction that there should be agreement between the Crown and defence as to the basis of a plea before an ex officio indictment is presented. What the Crown Prosecutor told the learned

sentencing judge, that while each of the respondents played a different role, they may be seen as equal parties to the offence, is a retreat from the version given by Gersch's co-offenders. It is unfortunate that no attempt was made to state on the record, or clarify during submissions, precisely what those roles were, or what facts Gersch was admitting to as the basis upon which he should be sentenced. Failure to do so had two consequences.

[62] One is that no consideration was able to be given to whether the Crown might wish to challenge Gersch's version if it minimised his role. Once Gersch contested the extent of his role, it would have been necessary to call evidence of any conflicting versions of events to do so. While in many cases it might be fanciful to think that a co-accused might provide such evidence, the fact that both Cay's and Schell's counsel relied in mitigation on cooperation of a kind which might have fallen under s 13A of the *Penalties and Sentences Act* 1992 (Qld) had Gersch not pleaded guilty, made it less so in this case.

[63] Another was that the submission that no convictions should be recorded proceeded without any precise definition of Gersch's role and on the basis of the Crown Prosecutor's concession that each accused should be considered equal parties.

[64] When the additional circumstance that no submission was made by or sought from the Crown in response to the defence submissions that a conviction should not be recorded is added, it can be seen that the sentencing proceeded on a less than ideal basis. The Crown had submitted that imprisonment, suspended or by means of an intensive correction order, should be imposed. It was, of course, implicit in that submission, had it succeeded, that a conviction would be recorded. However that flowed from the fact that a conviction had to be imposed if imprisonment was ordered. It said nothing about what might be appropriate if imprisonment was not ordered.

[65] It is established by *R v Bainbridge Cullen & Ludwicki* (1993) 74 A Crim R 265, *R v Taylor & Napatali; ex parte A-G (Qld)* [1999] QCA 323, and *R v Dullroy & Yates; ex parte A-G (Qld)* [2005] QCA 219 that it is not necessarily beyond a proper exercise of sentencing discretion to impose a non-custodial sentence for an offence of armed robbery in company in the case of youthful offenders. It is also not beyond the limits of the proper exercise of sentencing discretion to order that a conviction not be recorded in an appropriate case. The basic principle in s 12(2) of the *Penalties and Sentences Act* is that in considering whether or not to record a conviction the court must have regard to all the circumstances of the case. Then, non-exclusive examples of things to which regard must be had are set out. They are the following

> "(a) the nature of the offence; and
> (b) the offender's character and age; and
> (c) the impact that recording a conviction will have on the offender's –
> (i) economic or social wellbeing; or
> (ii) chances of finding employment."

[66] Each of those factors should be taken into account. In some cases the nature of the offence, as committed, will be such that the competing claims under paras (b) and (c) may not be enough to tilt the balance in favour of not recording a conviction. In the end it involves an exercise of judgment on the part of the sentencing Judge,

after weighing the relative importance of all relevant circumstances, as to whether a conviction should or should not be recorded.

[67] In the course of submissions on sentence, each of the counsel for the respondents who, with the exception of Mr Kimmins, were not counsel below, addressed the question of impact of a conviction on the economic or social wellbeing or chances of finding employment on the part of their clients. In the case of Cay it was said that despite not achieving an OP score, he was quite articulate and intelligent. He intended to undertake studies to gain an OP and then ultimately go to university. It was said he was particularly keen on studying science and had a real interest in computers.

[68] In the case of Schell, he was in employment as a labourer when sentenced. A generalised submission was made that a conviction would have long-term ramifications, including consequences with respect to employment. In the case of Gersch, he had been an apprentice butcher but had lost that job when he went into custody. He had, by the time of sentence, expressions of interest in employing him as a builder's labourer, removalist and in a firm that repairs sewing machines. It was said that he had aspirations of completing a trade. It was also said that he had "some aspirations of possibly travelling overseas at some stage once he had completed the relevant qualifications". Counsel then made a compendious submission, including reference to the respondent's desire to work, and concluding "that he is a worker and willing to undertake work, that to record a conviction against him, having regard to his age and circumstances would be unnecessary and would, in fact be burdensome, having regard to all the overall features".

[69] As previously noted, the Crown made no submission specifically directed towards the recording of a conviction. However it is fair to say that information by counsel given to the learned sentencing Judge concerning any clearly identifiable impact on their respective clients was scant.

[70] The learned sentencing Judge referred to *R v Briese; Ex parte Attorney-General* [1998] 1 Qd R 487 and *R v Condoleon* (1993) 69 A Crim R 573. He then, in effect, referred to the criteria in s 12(2) in a general way, with resonances with *Condoleon* in relation to impact on employment, and said that he would not record a conviction.

[71] It is difficult, given that fairly unspecific statement of reasons, to assess the weight the learned sentencing Judge gave to the various components of s 12(2) for the purpose of coming to a conclusion that the exercise of his discretion miscarried. There is authority supporting the possibility of non-recording of a conviction for offences of this kind (*Dullroy & Yates*), although the intrinsic seriousness of the offence will weigh heavily against that conclusion except in cases where there are particular features justifying not recording a conviction. In this case Cay and Schell had, prior to the offence, only one previous court appearance, on the same day, for minor drug offences and Gersch had no previous convictions. That kind of background, along with the amateurish nature of the offence, the surprising lack of serious effects on the victim and their youth were all relevant factors in considering how to exercise the discretion.

[72] The authorities as to the approach that should be taken to s 12(2)(c) are not always easy to reconcile. Cases such as *Condoleon, R v Qualischefski* [1994] QCA 289, *Jennings v Carrigan* [1994] QCA 371, *R v Gallagher; ex parte Attorney-General*

[1999] 1 Qd R 200, *R v Ingram* [1996] QCA 013, *R v Bain* [1997] QCA 035 and *R v S* [1997] QCA 288 illustrate the benefit of establishing a sufficient factual basis to justify a finding that recording of a conviction will have a discernible impact on economic or social wellbeing or chances of finding employment.

[73] On the other hand, there are other instances of which *R v Fullalove* (1993) 68 A Crim R 486, (Lee J at 493) and *Seiler* [2003] QCA 217 are examples, of a less demanding approach. *Condoleon* was concerned with a person who was concentrating on a sporting career at the time of the offence. She had a work history before the offence and had applied for work since the offence. If there was no more to the facts than that, the observation of Macrossan CJ and Pincus JA at 576 falls into the same category. They said "on the facts placed before the court below, such a conviction – indeed any conviction – could affect her prospects of again obtaining employment".

[74] Section 12(2)(c) speaks of the impact a conviction "will" have on the offender's economic or social wellbeing or chances of finding employment. This involves an element of predicting the future. Ordinarily, the word "will" in that context would imply that at least it must be able to be demonstrated with a reasonable degree of confidence that those elements of an offender's life would be impacted on by the recording of a conviction. The notion of impact on the offender's "chances of finding employment" is another way of describing the impact of a conviction on the opportunity to find employment in the future or the potentiality of finding employment in the future.

[75] In cases involving young offenders, there is often uncertainty about their future direction in life. Perhaps, because of this, the concept may, in practice, often be less rigidly applied than in the case of a person whose lifestyle and probable employment opportunities are more predictable.

[76] Other authorities such as *Briese, Gallagher* and *Hagen* [1996] QCA 447 raise the important issue of the tension between the interests of the offender and the right of people who may have future contact or dealings with the offender to know his or her background. *Gallagher* also raises the question whether, in a case where there is concern that a conviction may inhibit international travel, the provisions of a Queensland law governing non-disclosure of previous offences is likely to ameliorate the disclosure requirements for entry into the receiving country.

[77] As previously mentioned, the present case, because of the way in which it developed is not a suitable vehicle to attempt any detailed analysis of how s 12(2) should be applied in cases of this kind. Because of this, the issues alluded to above concerning the operation of s 12(2)(c) do not arise squarely for decision in this application.

[78] On the case as it was before him, the learned sentencing judge's decision not to record a conviction against all the respondents was within the range of options open to him. No error in principle can be identified in his exercising his discretion in that way on the facts before him. I agree that the Attorney General's appeal against sentence must be dismissed.