

SUPREME COURT OF QUEENSLAND

CITATION: *R v Dodd* [2010] QCA 31

PARTIES: **R**
v
DODD, Mathew Lee
(applicant/appellant)

FILE NO/S: CA No 261 of 2009
DC No 325 of 2009

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Ipswich

DELIVERED ON: 26 February 2010

DELIVERED AT: Brisbane

HEARING DATE: 5 February 2010

JUDGES: McMurdo P, Muir JA and Douglas J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The application for leave to appeal against sentence is granted.**
2. The appeal is allowed, only to the extent of setting aside the order that a conviction is recorded on each count, instead ordering that no conviction is recorded on each count.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – the applicant pleaded guilty to one count of entering premises with intent to commit an indictable offence and one count of serious assault – the applicant was mistakenly sentenced in the Magistrates Court to two years probation with no convictions recorded – sentence vacated and committed to District Court – sentenced to two years probation and convictions recorded on each count – the District Court judge did not consider whether or not to record convictions – the applicant was 22 years old at the time of offence, made an early guilty plea, had no criminal history, had good work history, made efforts at rehabilitation and expressed remorse – references tendered suggested offending was out of character – the recording of a conviction would detrimentally impact the applicant's economic and social well-being – whether recording convictions was manifestly excessive

Criminal Code 1899 (Qld), s 340(g), s 421(1)
Penalties and Sentences Act 1992 (Qld), s 12(1), s 12(2)(a)-
 (c)

R v Seiler [\[2003\] QCA 217](#), considered

COUNSEL: C Cuthbert for the applicant
 M B Lehane for the respondent

SOLICITORS: O' Sullivans Law Firm for the applicant
 Director of Public Prosecutions (Queensland) for the
 respondent

- [1] **McMURDO P:** The applicant, Mathew Lee Dodd, pleaded guilty on 18 September 2009 in the Ipswich District Court to one count of entering premises with intent to commit an indictable offence and one count of serious assault. He was sentenced to two years probation with convictions recorded. He applies for leave to appeal against sentence contending that the trial judge's sentencing discretion miscarried only insofar as convictions were recorded.
- [2] Dodd was jointly charged with Jake Anthony Brock and Brendan Craig Thoms. They both also pleaded guilty that day. They were each sentenced to 18 months imprisonment on both counts. The judge fixed an immediate parole release date for Thoms and fixed Brock's parole release date at 18 November 2009. Thoms was 20 years old and had some criminal history for minor offences of violence and for breach of probation. Brock was 25 years old with a more extensive criminal history including offences of violence and was in custody when sentenced for the present offences. By contrast, Dodd was 22 at the time of his offending, 23 at sentence and had no criminal history.
- [3] Dodd was originally sentenced for the present offences in the Ipswich Magistrates Court on 2 July 2009 to two years probation with no convictions recorded and an order that he pay the complainant compensation of \$300. Dodd paid that compensation on 2 July 2009. The magistrate subsequently re-opened the sentencing proceedings and determined that she did not have jurisdiction. Dodd and his co-offenders then came to the Ipswich District Court for sentence on an *ex officio* indictment.
- [4] The prosecutor in the District Court made the following submissions. Dodd indicated an early plea of guilty. The penalty imposed by the magistrate was appropriate, although the judge was not bound by that sentence.
- [5] He tendered a schedule of facts which was to the following effect. On 4 February 2009, the three offenders and another male associate, Carfanton, were drinking at Thoms' house. They discussed an incident involving the cousin of Dodd's girlfriend and the nephew of the complainant. The nephew allegedly distributed inappropriate photographs of the cousin on the internet. The nephew lived with his 62 year old uncle, the complainant. The group decided they would visit the nephew and speak to him about the incident. They arrived at the complainant's home where a woman told them that the nephew was not there. It seems they left without incident. Carfanton and Brock continued drinking at Thoms' house. Dodd received a phone call from an unidentified woman about the nephew. She said that she and others had guns and were going to shoot Dodd and his associates. Dodd thought that the nephew was at the complainant's home. He asked his co-offenders to go there with

him. Dodd, Brock, Thoms and Carfanton drove to the complainant's home between 9.15 and 9.25 pm looking for the nephew. Dodd told another male associate, Baradel, to get out of the car as "he was a nice guy and it did not concern him"; Dodd was concerned for Baradel's safety if guns were used. Dodd, Brock and Thoms got out of the car and went into the complainant's property (count 1). Brock and Thoms covered their faces with bandanas. Carfanton and Baradel remained outside the property. Brock and Thoms walked up the driveway and saw the complainant sitting at a table (apparently outside the house) drinking. Thoms carried a metal pole. Brock yelled aggressively at the complainant. The complainant told them his nephew was not home and stood up. Brock kicked the complainant to the chest causing him to fall to the ground. Dodd was standing near Brock at this time (count 2). The complainant's age made the offence a serious assault: see s 340(g) *Criminal Code* 1899 (Qld). Thoms was further back up the driveway and the pole he was carrying was not used in any way in the assault. Brock and Dodd ran back up the driveway and left.

- [6] Dodd's counsel at sentence submitted that Dodd's involvement in this offence was out of character. She tendered a large number of character references to the following effect. Dodd's present employer considered him to be honest, reliable and talented mechanically. Other references from previous employers referred to his honesty and reliability. Personal references listed his many positive qualities and noted that these offences were out of character. He was a talented BMX bike rider.
- [7] Defence counsel also tendered a letter of apology from Dodd to the complainant in which Dodd expressed his remorse. He explained that he had consumed alcohol and was not thinking properly when he offended. He expressed his guilt and revulsion at his actions and asked forgiveness from the complainant.
- [8] Dodd's barrister then submitted as follows. At the time Dodd committed these offences, he was recovering from a knee injury which prevented him from participating in his sport of bike riding. As a result, he became depressed and began to drink to excess. In that context, he misguidedly took up the cause of his girlfriend's cousin. He was deeply ashamed of his involvement in these offences. After he committed them, he voluntarily attended a psychologist, Mr Michael Johnstone, and undertook treatment to develop effective strategies to deal with his problems. A tendered report from Mr Johnstone confirmed that these sessions had made Dodd calmer, more able to control his feelings and to put his life events in better perspective; he was truly remorseful and had made substantial progress at rehabilitation.
- [9] Dodd's counsel emphasised that he had a good work history and that he had been employed by the same firm since he was 17 years old. His employer was keen for him to undertake, at the employer's expense, TAFE training to further his skills. Dodd had contributed to the community through the sport of BMX and, more recently, motocross racing. He had assisted the Ipswich City Council in planning bike tracks for young people and in cleaning up waterways. He had been accepted into induction training with the State Emergency Services. He had the benefit of a supportive upbringing and his father was in court at sentence. Dodd made admissions to police and cooperated with the administration of justice. He had paid the \$300 compensation ordered by the Magistrates Court. Defence counsel urged the judge to impose a period of between 12 and 18 months probation but made no submissions as to whether or not convictions should be recorded. The judge

questioned why a lesser sentence than that imposed by the magistrate (two years probation) should now be imposed.

- [10] In sentencing, the judge noted that Dodd, unlike Thoms and Brock, had no previous convictions. After reciting the facts and Dodd's antecedents, her Honour noted that the offences were clearly out of character and committed at a time when he was going through a bad period personally. He had sent a letter of apology, was remorseful, had paid compensation, entered an early guilty plea, had a good work history and had done community work. He was, however, the link between his co-offenders and the complainant. Although terms of imprisonment were appropriate for Thoms and Brock, the sentence imposed by the magistrate of two years probation was appropriate because of the many mitigating factors. Her Honour then stated: "All right. Well, in your case a conviction is recorded."
- [11] The transcript of the sentencing proceeding suggests that the judge did not give patent consideration to whether or not convictions should be recorded. Neither counsel made submissions on the issue, probably because they both assumed that, as convictions were not recorded when the sentence was originally imposed in the Magistrates Court, convictions would not be imposed in the District Court. With hindsight, that was a brave assumption. But defence counsel was entitled to consider that the judge would not record convictions against her client in circumstances where the magistrate had not done so, without giving counsel an opportunity to make submissions on the issue.
- [12] The court in sentencing an offender is required to consider whether or not to record a conviction: see *Penalties and Sentences Act 1992* (Qld) which relevantly provides:

"12 Court to consider whether or not to record conviction

- (1) A court may exercise a discretion to record or not record a conviction as provided by this Act.
- (2) In considering whether or not to record a conviction, a court must have regard to all circumstances of the case, including—
 - (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.

... ."

- [13] In the present case, the judge did not invite submissions as to whether convictions should be recorded despite no convictions being recorded when the original sentence was first imposed in the Magistrates Court. The judge did not articulate any reasons for recording convictions. It seems likely in these circumstances that the judge did not turn her mind to the exercise of discretion in any informed way. This Court should now re-exercise the discretion given by s 12, having regard to all the circumstances of the case, including those set out in s 12(2)(a)-(c).
- [14] The offence had extremely serious aspects to it. Dodd encouraged Thoms, Brock and others to go with him to the complainant's home to pursue a grievance with the complainant's nephew. He and his co-offenders were affected by alcohol. They anticipated that there may be violence at the property. Thoms was armed with a metal bar. Brock assaulted the completely innocent 62 year old complainant inside

his own property and kicked him, knocking him to the ground, while Dodd stood nearby.

- [15] On the other hand, Dodd, at 22 years old when he offended and 23 at sentence, was a relatively young man. He had a supportive upbringing and continued to have family support at sentence. He had no prior criminal history. He had an excellent work history and promising prospects of furthering his education. He was well regarded in the community and was involved in BMX and motocross racing. He had made promising efforts at rehabilitation and sought professional assistance to ensure he did not re-offend. He made admissions to police and pleaded guilty at an early time. He expressed remorse for his actions. He wrote a letter of apology to the complainant and had paid the \$300 compensation to the complainant originally ordered by the magistrate.
- [16] There was no direct evidence before the sentencing court as to the impact that the recording of a conviction would have on his economic or social well-being or his chances of finding employment. In this Court, his counsel stated, without evidence, that he hoped to travel overseas in pursuit of his sport of BMX and motocross racing and that a conviction would be detrimental in this respect. She also submitted that a conviction would have a general detrimental effect on his economic and social well-being and his chances of finding employment.
- [17] In *R v Seiler*,¹ this Court noted that where there was no evidence about the impact that the recording of a conviction would have on an offender's economic or social well-being or chances of finding employment, it could be presumed with some confidence that a conviction could only have a negative impact on these matters. That common sense observation is apposite in this case.
- [18] The question of whether or not to record convictions in this case is finely balanced because of the serious nature of Dodd's offending on the one hand, and the many factors in Dodd's favour on the other. The discretion could quite properly be exercised either in recording or not recording convictions. I am finally persuaded that Dodd should be given the benefit of not having convictions recorded against him, despite the seriousness of the offences. His commission of these offences seems completely out of character and at a time when his life was at a low ebb. To his credit, he has since turned his life around and made impressive efforts at rehabilitation. Convictions are likely to detrimentally impact upon his economic and social well-being. Should he lose his present employment, convictions would detrimentally affect his chances of finding employment in the future. If the decision to not record convictions turns out to be misplaced and Dodd re-offends in any significant way during the two year probation period he is presently undertaking, he will be dealt with by the courts with the likely consequence of then having convictions recorded for these offences.
- [19] I would grant the application for leave to appeal and allow the appeal, but only to the extent of setting aside the order that a conviction is recorded on each count. Instead, I would order that on each count no conviction is recorded. I would otherwise confirm the sentence imposed at first instance.
- [20] **MUIR JA:** I agree with the reasons of the President and with her proposed orders.
- [21] **DOUGLAS J:** I agree with the reasons of the President and the orders proposed by her.

¹ [2003] QCA 217.