SUPREME COURT OF QUEENSLAND

CITATION:	*Wang v Commissioner of Police* [2014] QCA 26
PARTIES:	**WANG, Yi** (applicant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	CA No 275 of 2013 CA No 276 of 2013 DC No 1373 of 2013 DC No 2562 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2014
JUDGES:	Margaret McMurdo P and Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In CA No 275 of 2013:** **1. Grant the application for leave to appeal but only against sentence on the offence committed on 29 March 2013.** **2. Allow the appeal against sentence.** **3. Set aside that part of the orders of 18 October 2013 that the applicant is fined $500 and pay $200 restitution for the offence committed on 29 March 2013.** **4. Instead, order that the applicant is fined $350.** **5. The orders of 18 October 2013 are otherwise confirmed.** **In CA No 276 of 2013:** **1. Grant the application for leave to appeal but only against sentence.** **2. Allow the appeal against sentence.** **3. Set aside that part of the orders of 18 October 2013 dismissing the appeal against sentence.**

4. **Instead, order that the appeal against sentence is allowed; the $500 fine imposed on 16 April 2013 in the Redcliffe Magistrates Court is set aside and a fine of $250 is substituted.**

5. **The orders made by the District Court and the Magistrates Court are otherwise confirmed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the applicant was convicted of causing unauthorised damage to property on 6 December 2012 – where the relationship between the applicant and complainant had been acrimonious for some time – where the complainant suffered damage from potting mix being thrown onto her balcony – where the complainant gave evidence that on at least 30 prior occasions potting mix had been thrown from the applicant's balcony up onto her balcony – where video footage was tendered that clearly depicted the applicant throwing potting mix onto the complainant's balcony – where the applicant gave evidence that he was innocent – where the magistrate found the applicant guilty and fined him $500 without recording a conviction – where the applicant appealed to the District Court – where the District Court judge dismissed the appeal against conviction and sentence – whether the applicant has demonstrated he has suffered a substantial injustice – whether the applicant has established any error on the part of the District Court judge warranting correction

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the applicant was convicted of two charges of causing unauthorised damage to property on 29 March and 16 April 2013 – where the complainant gave evidence that on 29 March 2013 she heard a loud bang and saw that potting mix had been splattered on her balcony – where the complainant gave evidence that on 16 April 2013 she saw a person with a raised arm throw potting mix which landed on her outdoor furniture, walls and windows – where video footage of each incident was tendered – where the applicant gave evidence that his actions were the consequence of provocation and were in self-defence – where the magistrate found the applicant guilty and fined him $1,000, recorded convictions and ordered he pay $400 in restitution – where the applicant appealed to the District Court – where the District Court judge dismissed the appeal against conviction but allowed the appeal against sentence – where the magistrate's sentence was set aside and instead the appellant was fined $500 in respect of each offence with a conviction recorded and ordered on each count to pay $200

compensation to the complainant – whether the applicant has demonstrated he has suffered a substantial injustice – whether the applicant has established any error on the part of the District Court judge warranting correction

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant was convicted of three offences of unauthorised damage to property under the *Regulatory Offences Act* – where the *Regulatory Offences Act* prescribes a fine of $500 – whether the *Penalties and Sentences Act* applies to regulatory offences – whether the amount prescribed under the *Regulatory Offences Act* is a maximum fine which can be mitigated or varied – where the applicant was fined $500 in respect of each offence – whether the maximum fine ought to have been imposed on the applicant in respect of each offence

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant was convicted of offences of unauthorised damage to property under the *Regulatory Offences Act* – where the applicant was ordered to pay $200 restitution to the complainant in respect of each offence – where the complainant's evidence did not establish that she spent $200 as a result of the applicant's offending on 29 March 2013 – whether the applicant should have been ordered to pay $200 restitution in respect of the offence of 29 March 2013

Acts Interpretation Act 1954 (Qld), s 41
Criminal Code 1899 (Qld), s 3, s 36
Penalties and Sentences Act 1992 (Qld), s 4, s 47, s 91
Regulatory Offences Act 1985 (Qld), s 7

COUNSEL: The applicant appeared on his own behalf
J Wooldridge for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The filed application in CA No 275 of 2013 refers to an appeal concerning "wilfully *[sic]* damage to property 05 July 13". The filed application in CA No 276 of 2013 refers to an appeal concerning "wilfully *[sic]* damage to property 16 April 13". The applicant has been self-represented at all stages of these proceedings and English is not his first language. His filed outlines of argument concern three offences allegedly committed on 6 December 2012, 29 March 2013 and 16 April 2013. All three alleged offences were dealt with in the Redcliffe Magistrates Court, the first on 16 April 2013 and the second and third on 5 July 2013. Counsel for the respondent has rightly apprehended that the application filed in CA No 276 of 2013 is intended to relate to the offence allegedly committed

on 6 December 2012 and that the application filed in CA No 275 of 2013 is intended to relate to offences allegedly committed on 29 March and 16 April 2013. At the hearing, with the consent of the parties, this Court determined it would treat CA No 275 of 2013 as relating to the offences allegedly committed on 29 March 2013 and 16 April 2013, and CA No 276 of 2013 as relating to the offence allegedly committed on 6 December 2012.

Background

[2] The applicant was convicted after a trial in the Redcliffe Magistrates Court on 16 April 2013 of unauthorised damage to property on 6 December 2012 under s 7 *Regulatory Offences Act* 1985 (Qld). He was fined $500, the maximum penalty available, and a conviction was not recorded. He was also ordered to pay $200 restitution. He appealed from those orders to the District Court under s 222 *Justices Act* 1886 (Qld). On 18 October 2013, his appeal was dismissed: *Wang v Commissioner of Police*.[1] He has applied for leave to appeal from that order under s 118(3) *District Court of Queensland Act* 1967 (Qld) (CA 276 of 2013).

[3] On 5 July 2013 after a trial in the Redcliffe Magistrates Court, he was found guilty of two counts of unauthorised damage to property under s 7 *Regulatory Offences Act*, the first on 29 March 2013 and the second on 16 April 2013. The magistrate fined him $1,000, recorded convictions and ordered he pay $400 restitution. He also appealed from those orders under s 222 *Justices Act* to the District Court. His appeal against the convictions was dismissed but his appeal against sentence was allowed. The magistrate's sentence was set aside and instead the appellant was fined $500 in respect of each offence with a conviction recorded and ordered on each count to pay $200 compensation to the complainant: see *Wang v Commissioner of Police*.[2] He has applied for leave to appeal under s 118(3) *District Court of Queensland Act* against those orders (CA No 275 of 2013).

[4] In both these applications for leave, the applicant has already had the benefit of a trial followed by an appeal. It follows that this Court will grant leave only where a further appeal is necessary to correct a substantial injustice and there is at least a reasonable argument that an error has been made which requires correction.

[5] Each charge concerned the same complainant. The applicant lived on the ground floor of an apartment complex. His balcony was directly below the complainant's balcony. Unfortunately, their relationship had been acrimonious for some time prior to the alleged offences, each believing the other had persistently behaved in an unneighbourly and unreasonable fashion.

CA No 276 of 2013

[6] The first count, as amended at the hearing before Magistrate Chilcott in the Redcliffe Magistrates Court, was that on 6 December 2012 the applicant wilfully damaged property, namely, verandah tiles and exterior walls belonging to the complainant and without her consent, express or implied, caused loss of $200.

[7] She gave evidence that on at least 30 prior occasions potting mix had been thrown from the applicant's balcony up onto her balcony and into her living room. She spoke to the building manager; sought advice through the body corporate; and

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1 [2013] QDC 245.
2 [2013] QDC 247.

unsuccessfully attempted to obtain a peace and good behaviour order. She installed a video camera to record any future incidents. At 3.30 am on 6 December she was awoken by a loud bang outside the bedroom window, looked out and saw a large amount of potting mix. At about 6.00 am she saw the applicant on his balcony and her partner turned on the camera. Another handful of potting mix was thrown up. She and her partner went onto their balcony. More potting mix came up and went through the open balcony door and onto her carpet. The soil was wet, sticky, difficult to clean up and it ate into the paintwork. She had had the balcony professionally cleaned but permanent stains remained. She was able to vacuum up the potting mix without permanent damage to the carpet. An invoice for $200 for the cleaning of the balcony on 13 December 2012 was tendered. She downloaded the video footage, a CD of which was tendered and played in court.[3] I have watched the footage and it clearly depicts the applicant throwing potting mix onto the complainant's balcony.

[8] In cross-examination, she agreed there had been earlier difficulties with calcification and water from her balcony dripping onto the applicant's balcony. As this was a body corporate issue and not her fault or responsibility, she tried to resolve it through the body corporate, which installed a pipe. The applicant referred to video footage of his balcony taken in December 2011, about a year before the alleged offence. The magistrate allowed him to play it, expressing doubt about its relevance. The complainant agreed that her previous efforts to obtain a peace and good behaviour order in the Strathpine Magistrates Court were unsuccessful. She denied that on 6 December 2012 her partner was intrusively video-recording the applicant. Their video camera was set up permanently in the window of their lounge room. She denied that she and her partner had made blood curdling noises throughout the night of 5 December and the early morning of 6 December. She did not know why the applicant had thrown the potting mix; there was no reason for him to do so.

[9] Police officer Michael Franks also gave evidence. He attended the complainant's premises on 6 December 2012 following a complaint. He saw wet stains and dark material on the carpet just inside the door to the balcony and wet dirt splattered against the back wall of the balcony, on the roof tiles, on the floor and on the balcony furniture. He saw a camera mounted inside the complainant's unit looking down onto the applicant's balcony area below. The complainant showed him a video. He knocked on the applicant's door, introduced himself and the applicant allowed him to enter. Police officer Franks told him there had been a wilful damage complaint. The applicant said that brown water from the complainant's balcony poured onto his plants. He asked the applicant if he wished to be interviewed, but the applicant declined.

[10] In cross-examination, the applicant suggested that it was not police officer Franks, but another police officer who attended his premises. Police officer Franks denied this. He agreed that the applicant tried to show him something from a magistrates court and asked why he did not charge the complainant. The applicant suggested that he had no reason to refuse to partake in a police interview. Police officer Franks said that he had recorded his conversation with the applicant on his mobile phone and at the request of the applicant this was played in court. The police officer agreed the recording showed there were matters he discussed with the complainant about which he did not give evidence. This was because they were not relevant to

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[3] Ex 2.

this charge. The police officer agreed that there was nothing in the recording to the effect of "Do you wish to be interviewed in relation to this complaint?" and the applicant responding "No, I don't." He also agreed that on a number of occasions the applicant attempted to give an explanation as to why he behaved as he did and asserted that he was the victim, not the complainant.

[11] After the close of the prosecution case, the applicant gave evidence. He spoke of the ill-feeling between him and the complainant and her partner. The applicant believed they were jealous of his success as a new migrant. Police officer Franks' evidence was fabricated. The applicant did not refuse to take part in a police interview. The magistrate in Strathpine did not believe the complainant's story. The applicant was innocent. This charge had turned his life upside down. It was racially motivated. He tendered a video of damage to his premises caused by filthy water from the complainant's balcony on 20 December 2011. In cross-examination, the prosecutor suggested that the complainant's video showed him throwing the soil onto her balcony; that this was not the first time he had done so; and that it would not be the last. The applicant responded, "I have no comment." He did not call other evidence.

[12] The magistrate found that the complainant was a plausible witness and, where there was conflict, preferred her evidence to that of the applicant. The complainant's evidence and her video footage established that the applicant damaged her property without her consent. She paid $200 in an attempt to repair the damage. The prosecution case was overwhelming. The applicant's evidence did nothing to weaken it. The defence of provocation did not apply. He found the applicant guilty. The prosecutor sought $200 restitution and noted that "the prescribed penalty is a fine of [$]500." The magistrate referred to the applicant's absence of prior offences, declined to record a conviction, imposed a $500 fine and ordered that he pay $200 restitution.

[13] In his appeal against conviction and sentence to the District Court, the applicant raised essentially the matters he raised before the magistrate.[4] The District Court judge noted that the applicant did not challenge the complainant's evidence that he caused the damage. The tendered invoice was for $200. In dismissing the appeal against conviction and sentence, her Honour added:

> "The statutory penalty for an offence pursuant to s 7 of the *Regulatory Offences Act* is a fine of $500 that was the penalty imposed by the Magistrate. The order for restitution is the amount it cost to remedy the damage caused by the [applicant] and therefore the orders imposed are not manifestly excessive."[5]

CA No 275 of 2013

[14] The applicant pleaded not guilty in the Redcliffe Magistrates Court before Magistrate Shearer to two charges against s 7 *Regulatory Offences Act* of wilful damage to the complainant's tiled flooring, rendered walls and balcony furniture causing loss of $200 on 29 March and 16 April 2013.

[15] The complainant gave evidence that at about 7.45 am on 29 March 2013 she heard a loud bang. She saw that potting mix had been splattered on her balcony. It hit the window and fell over her outdoor furniture and on the floor. She reported the

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4 *Wang v Commissioner of Police* [2013] QDC 245, [3].

5 Above, [19].

matter to police. She checked the footage on her video camera which she gave to police.

[16] On 16 April 2013 she was coming to court in respect of the incident with which CA No 276 of 2013 is concerned. She saw the applicant on his balcony and turned on the video camera. A person with a raised arm threw potting mix which landed on her outdoor furniture, walls and windows. She again telephoned police and gave them the video which was tendered. It depicted dirt being thrown up from the applicant's ground floor unit onto the complainant's balcony. The applicant lived alone. The soil had permanently stained the paintwork on the balcony walls and roof and an outdoor couch. Photographs were tendered depicting dirt on the balcony and couch and showing damage caused by potting mix on her couch, tiles and floor on 16 April 2013. She had the balcony pressure-cleaned. A receipt dated 23 April 2013 was tendered for cleaning the balcony. In cross-examination, the applicant attempted to ask the complainant about a hearing before a magistrate at Strathpine. Magistrate Shearer explained this was irrelevant to the charges, as was what happened between the complainant and the applicant in December 2011.

[17] Police officer Franks gave evidence that on 16 April 2013 he obtained from the complainant the video footage played to the court. He later spoke to the applicant and arrested him for the two offences. The applicant said, "You are a racist. You are a liar." As he had spoken to the applicant on prior occasions, he did not think an interview would be useful and did not offer him an interview. The applicant cross-examined police officer Franks about a "schedule for restitution and compensation" which the police officer had prepared and, it seems, was part of the prosecution material provided to the applicant. The schedule claimed $200 in respect of each alleged offence and $2,449.90 which was the cost to the complainant of purchasing a laptop computer, video camera and night time/motion activated video camera. The last line of the schedule stated "total value of property stolen $2,849.90". Police officer Marks explained that the reference to stolen property was a typing error and apologised to the court for it.

[18] The applicant gave evidence. He argued that his actions were the consequence of provocation and were in self-defence. He again sought to give evidence of incidents which occurred in December 2011 and of blood curdling noises from the complainant's apartment in July 2012. He tendered photographs depicting the state of his balcony in December 2011. In cross-examination, the prosecutor referred the applicant to the video footage depicting the potting mix being thrown from his balcony and suggested that, on each occasion, he had thrown the potting mix. The applicant responded, "I didn't see. I didn't see it was me. What I saw my – my rights as a Australian citizen is being greatly violated." He agreed that the video footage depicted his balcony. He was again asked whether it depicted him on the balcony. He stated, "I only saw my privacy was violated." The applicant did not call further evidence.

[19] The prosecutor submitted that the complainant had given evidence that she had spent around $200 on both 29 March and 16 April 2013 to fix the damage which the evidence established was done by the applicant. (In fact, she gave clear evidence of spending $200 to clean the balcony on only one occasion.) The magistrate, the prosecutor submitted, would find all the elements of both offences established. The applicant stated that he should be acquitted as the police officer had produced forged documents concerning stolen goods and committed perjury; the trial was in the "category of racial persecution".

[20] The magistrate referred to the complainant's evidence, the video footage of the two incidents and the photographs of the potting mix on the complainant's balcony. Although the video footage did not depict the applicant's face, the magistrate was satisfied beyond reasonable doubt that the applicant threw the potting mix from his balcony onto the complainant's balcony and that it caused damage. The applicant's allegations of racism did him no credit. He gave and produced no evidence to undermine the prosecution evidence. The magistrate was satisfied of his guilt beyond reasonable doubt on each charge. The magistrate stated: "In relation to both charges you're convicted and fined the sum of $1000. Convictions are recorded. I order that you pay the sum of $400 in restitution."

[21] In his appeal to the District Court, the applicant essentially canvassed similar issues to those raised in the Magistrates Court.[6] The District Court judge dealt with and dismissed each of those grounds.

[22] As to the sentences imposed, her Honour was concerned that the magistrate's single order for both offences (a $1,000 fine and $400 restitution) was inconsistent with the *Regulatory Offences Act* and with the *Penalties and Sentences Act* 1992 (Qld). The judge noted: "Pursuant to s 7 of the *Regulatory Offences Act* 1985 the statutory penalty is a fine of $500." For that reason, she allowed the appeal and imposed the sentence on each offence which the magistrate intended to impose: a $500 fine and $200 restitution. Her Honour considered that the recording of convictions was justified as the offence of 16 April 2013 was committed on the morning of the trial of the offence committed on 6 December 2012, and at the time of both offences he was subject to a notice to appear in respect of the 6 December 2012 offence.

The applicant's contentions

[23] In his notices of application for leave and the attachments to them, the applicant states that this Court should grant leave as "the District Court judge upheld a verdict which should not have been made in the first place. The penalty is too harsh." His "overwhelming and mind-blowing evidence was ignored/overlooked". The judge did not explain why the applicant's evidence was irrelevant. It did not matter that his video evidence of December 2011 predated the alleged offence. If his neighbour had slapped his face, he was entitled to slap back. The neighbour provoked the dispute and he defended himself. He was not guilty. There was insufficient evidence of any damage. He queried how a concrete wall could be damaged by potting mix and submitted that, if it could, his balcony was damaged by the complainant and her partner.

[24] In his written outline of argument and in his oral submissions, he further contended that the complainant "set him up" to commit the offences by provocative, unneighbourly behaviour. There was forgery and perjury by the complainant: the complainant's partner turned on the video camera to film the applicant only after he saw the applicant, not before. The police officer who charged him fabricated his story. If the audio recording of their conversation had been played, it would have recorded the police officer agreeing with the applicant that the police officer had fabricated his story. The applicant submitted that these are civil and body corporate matters and should not have been in the criminal courts. He was framed by the police because there was no evidence of any damage to his neighbour's property. He emphasised that he made efforts to improve the unfriendly situation with the

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6 *Wang v Commissioner of Police* [2013] QDC 247, [3].

complainant and her partner. He made complaints to the building manager and body corporate in order to avoid taking the law into his own hands. He could not understand why his evidence was not accepted by the magistrate and the judge. The complainant's provocative conduct justified his reaction. The police had double standards. The tendered receipts did not prove the property was damaged or that he caused the damage. His photos and video recordings showed mud coming from the complainant's balcony onto his balcony but the police did not care and the magistrates would not receive this evidence. The police and the complainant were obviously telling lies. The police prosecutor and the police officer who gave evidence were employed by the same people and this was "self-serving". In the circumstances, the sentence was too harsh. He was a victim of racial bullying, thuggery and police corruption. He was innocent. If he was not acquitted he would return to China and tell everyone about Australia's unfair justice system.

The *Regulatory Offences Act*

[25] During the hearing, the bench raised with counsel for the respondent the scope and effect of the *Regulatory Offences Act* and whether the penalty for offences against it could be mitigated. The Court gave the parties leave to make further written submissions on these matters. Those filed by counsel for the respondent were very helpful.

[26] When the *Regulatory Offences Act* was enacted in 1985, the *Criminal Code* 1899 (Qld) was also amended to provide for this new category of offences. The *Criminal Code* s 3 relevantly provides:

> "**Division of offences**
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> 3 (1) Offences are of 2 kinds, namely, criminal offences and regulatory offences.
>
> …
>
> (4) A person guilty of a regulatory offence or a simple offence may be summarily convicted by a Magistrates Court.
>
> … ."

[27] The *Criminal Code* Ch 5 relates to criminal responsibility (s 22 to s 36). Section 36 *Criminal Code* provides that with the exceptions of s 22(3),[7] s 29[8] and s 31,[9] Ch 5 does not apply to regulatory offences.

[28] The *Regulatory Offences Act* is of short compass, containing only nine sections. It provides for three categories of regulatory offences: unauthorised dealing with shop goods;[10] leaving a hotel etc without payment;[11] and, relevantly here, unauthorised damage to property.[12] The *Regulatory Offences Act* s 7 states:

> "**Unauthorised damage to property**
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> 7. Any person who wilfully destroys or damages the property of another and without the consent, express or implied, of

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7 "A person is not criminally responsible for an act or omission done or made in contravention of a statutory instrument if, at the time of doing or making it, the statutory instrument was not known to the person and had not been published or otherwise reasonably made available or known to the public or those persons likely to be affected by it."

8 Immature age resulting in absence of criminal responsibility.

9 Justification and excuse – compulsion.

10 *Regulatory Offences Act*, s 5.

11 Above, s 6.

12 Above, s 7.

> the person in lawful possession thereof and thereby causes loss of $250 or less is guilty of a regulatory offence and, subject to section 9,[13] is liable to a fine of $500."

[29] The then Minister for Justice and Attorney-General noted in the Second Reading Speech for the Regulatory Offences Bill that its objects were:

> "To provide … a further division of offences that will deal with prevalent minor illegal acts which occur in the community.
>
> …
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> … a regulatory offence will … not … be regarded as a criminal offence.
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> …
>
> These offences are prevalent throughout Queensland and are such that they should attract some sanction in view of the vast sums of money which are lost cumulatively to the business community and others. …
>
> From the commencement of the Bill, a conviction for any of the offences in the Bill should carry no more criminal stigma than a speeding offence does now. However there is no intention of allowing the offences to be dealt with by on-the-spot fines. An accused person will appear before a Magistrates Court for determination of the matter.
>
> I draw the comparison for the benefit of those who would argue against the decision to remove the right to trial by jury and ask those people whether they believe that a person charged with a speeding offence should have the right of trial by jury.
>
> This Bill is very much a reflection of our society's values and continual regulation of everyday conduct. The fact remains that serious criminal conduct remains within the Criminal Code, where it is dealt with on indictment by a judge and jury.
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> …
>
> The punishment that may be imposed is limited to a fine only. Of course, if the fine is not paid, the usual default provisions of the Justices Act will apply.
>
> …
>
> The third regulatory offence provided for in the Bill deals with the wilful destruction of property of another up to a value of $250. The fine that may be imposed under this clause is $500, plus investigation charges that may be imposed by the court.
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> …
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> A wilful damage charge on indictment may attract a maximum sentence of imprisonment with hard labour for three years or a fine of $2,000. This charge dealt with summarily may attract a sentence of imprisonment with hard labour for two years, or a fine equal to the amount of the injury and $1,000 in addition. Under the Regulatory Offences Bill a conviction for this offence may have a fine of $500 imposed, plus the discretionary fine component.

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[13] This section provides that a person convicted of a regulatory offence may also be ordered to pay by way of fine an amount not exceeding the costs of bringing the charge, including the costs of all reasonable investigations, the costs of court and the cost of compensating any person injured by the offence. The court may also make an order for payment of that part of the fine representing compensation.

> …
> The intention of the Bill is to decriminalise these regulatory offences and, with this in mind, a further classification of offence – a regulatory offence – has been added to section 3 of the Criminal Code. This is brought about by declaring the existing offences to be criminal offences.
> …
> Although minor offences are deserving of some penalty, that penalty should be of a lesser amount than that for criminal offences. A first offender should not be made to bear the effect of that minor offence for the rest of his life.
> The Bill represents a step forward in legislative reform of our criminal justice system by the decriminalisation of a range of minor offences which have been choking our court system and become a drain on the financial resources of the State. … ."[14]

[30] Consistently with the Minister's statements quoted above, the effect of s 3 *Criminal Code* is that a conviction of a regulatory offence is not a conviction for a criminal offence. This may provide some comfort to the applicant.

[31] The Minister's statements perhaps suggest a legislative intention that regulatory offences be punishable only by a fine. If so, that intention was not incorporated subsequently into the *Penalties and Sentences Act* 1992 (Qld). The purposes of the *Penalties and Sentences Act* include to collect into a single Act the general powers of courts to sentences offenders.[15] The term "offender" is defined as a person who is convicted of an offence, whether or not a conviction is recorded.[16] The term "offence" is not defined in the *Penalties and Sentences Act* but the definition of "offence" in s 3 *Criminal Code*[17] makes clear that it includes regulatory offences. Whilst the *Penalties and Sentences Act* states in terms that it does not apply to children,[18] it contains nothing to exclude its application to regulatory offences. On the contrary, s 91 *Penalties and Sentences Act* specifically states that if a court convicts an offender of a regulatory offence, whether or not it records a conviction, it may place the offender on probation. A similar provision is made in respect of community service orders[19] and combined probation and community service orders.[20] It follows that the *Penalties and Sentences Act* applies to regulatory offences, save that no penalty greater than the prescribed fine can be imposed.

[32] Nothing in the terms of s 7 *Regulatory Offences Act* nor in the Minister's statements suggests that the fine for a regulatory offence is anything other than a maximum fine which can be mitigated or varied.[21] Section 47 *Penalties and Sentences Act* and s 41 *Acts Interpretation Act* 1954 (Qld) put that proposition beyond doubt. A sentencing court may impose a lesser fine than the fine stated as the penalty for a regulatory offence or another sanction provided by the *Penalties and Sentences Act*, as long as it is no greater than the fine stated as the penalty for the regulatory offences.

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14 Hansard, Regulatory Offences Bill, 26 March 1985, 4467-4471.
15 *Penalties and Sentences Act*, s 3(a).
16 Above, s 4.
17 Relevantly set out at [26] of these reasons.
18 Above, s 6.
19 Above, s 101.
20 Above, s 109.
21 Compare s 305(1) *Criminal Code* which provides that "the crime of murder is liable to imprisonment for life, which can not be mitigated or varied under this Code or any other law".

Conclusion

[33] Essentially, the applicant in both applications seeks to re-argue points raised at his trial and again in his appeal before the District Court which were rightly rejected for the reasons given by the magistrates and the judge. The evidence on each count was overwhelming that the applicant threw potting mix onto the complainant's premises. The complainant gave evidence that on each occasion the potting mix thrown by the applicant had sullied paintwork on the walls and the roof of her balcony and on one occasion the outdoor furniture. She produced the receipt for the $200 she paid to have the balcony floors, walls and ceiling cleaned in respect of both the 6 December 2012 offence and the 16 April 2013 offence. Despite the cleaning, some permanent marks remained. The applicant gave no contradicting evidence. His evidence as to alleged past bad behaviour by the complainant and her partner did not provide any defence or excuse. The offences were breaches of s 7 *Regulatory Offences Act*. Although not criminal offences, these were not civil matters. They were lawfully prosecuted in the Magistrates Court. His complaints against the police officer are not made out. In any case, the police evidence was not critical to the proof of any charge. The many assertions that his human rights were breached and that he was a victim of racial prejudice are deeply offensive and are not made out.

[34] As to the proposed appeals against conviction for the three offences against s 7 *Regulatory Offences Act*, the applicant has not demonstrated that he has suffered a substantial injustice and nor has he established any error on the part of the District Court judge warranting correction.

CA No 276 of 2013

[35] During argument at the appeal hearing, however, some issues emerged concerning the orders made as to sentence on two counts. First, the applicant was sentenced to a $500 fine for each offence, the maximum fine available. In respect of the first offence committed on 6 December 2012 (CA No 276 of 2013), it was not appropriate to impose the maximum penalty. The applicant had no history of offending and was apparently an otherwise law-abiding citizen. It is true that he showed neither remorse nor insight and nor did he cooperate with the administration of justice, but the maximum penalty must be intended for the most serious examples of regulatory offences. The District Court judge erred in not identifying that the maximum fine for a first offence of this kind was manifestly excessive. The applicant has, therefore, demonstrated an error on the part of the District Court judge warranting correction.

[36] In respect of CA No 276 of 2013 I would grant the application for leave to appeal only in respect of sentence. I would allow the appeal and set aside that part of the order of the District Court judge of 18 October 2013 dismissing the appeal against sentence. Instead, I would allow the appeal against sentence, set aside the $500 fine imposed on 16 April 2013 in the Redcliffe Magistrates Court and instead substitute a fine of $250. The restitution order was entirely appropriate so I would otherwise confirm the orders imposed by the District Court and the Magistrates Court.

CA No 275 of 2013

[37] There are also difficulties with the sentence imposed for the offence committed on 29 March 2013 with which CA No 275 of 2013 is concerned. The applicant was then subject to a notice to appear on the offence of 6 December 2012. Although he had not been found guilty of any offence, this was an aggravating feature. Clearly,

it was a more serious example of a regulatory offence than the one he committed on 6 December 2012. Although it was still not in the worst category of regulatory offences, a heavier penalty was certainly warranted and it was open to record a conviction. The imposition of the maximum penalty, however, was manifestly excessive. A fine of $350 rather than the $500 maximum should have been imposed. There is an additional problem. He was ordered to pay $200 restitution in respect of this offence. The complainant's evidence[22] did not establish that she spent $200 as a result of the applicant's offending on 29 March 2013. The only tendered receipt for $200 at this trial was dated 23 April 2013 and therefore referred to the third offence committed on 16 April 2013. The order for restitution was wrongly made and the maximum penalty of $500 should not have been imposed for this offence. The judge erred in not identifying these errors on the part of the magistrate.

[38] As to the sentence imposed in respect of the offence committed on 16 April 2013, the position is different. The complainant's evidence and the tendered receipt established that she spent $200 in an attempt to remedy the damage caused by the applicant's offending on 16 April 2013. As both the magistrate and the District Court judge were acutely aware, this was a most serious regulatory offence because the applicant committed it after committing two similar offences (although at the time of his offending on 16 April 2013, he had not been convicted of them). It was an especially aggravating feature that when he committed this offence he was not only subject to notices to appear but was due to attend court for similar conduct that very day. He showed contempt for the administration of justice. It was, therefore, an example of the worst category of regulatory offence. The maximum penalty was warranted, as was the recording of a conviction. There was no error in the imposition of the sentence.

[39] In respect of CA No 275 of 2013, the applicant has demonstrated an error amounting to a substantial injustice warranting correction, but only in respect of the appeal against sentence on the offence committed on 29 March 2013. I would grant the application for leave to appeal, but only as to sentence, and allow the appeal against sentence to the limited extent of setting aside the District Court judge's order resentencing the applicant for the offence committed on 29 March 2013 and substituting a sentence of $350. I would also set aside the order that the applicant pay to the Registrar of the Magistrates Court at Redcliffe the sum of $200 in respect of the offence of 29 March 2013. I would otherwise confirm the orders imposed by the District Court.

ORDERS:

CA No 275 of 2013

1. Grant the application for leave to appeal but only against sentence on the offence committed on 29 March 2013.

2. Allow the appeal against sentence.

3. Set aside that part of the orders of 18 October 2013 that the applicant is fined $500 and pay $200 restitution for the offence committed on 29 March 2013.

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22 Summarised at [15] of these reasons.

4. Instead, order that the applicant is fined $350.

5. The orders of 18 October 2013 are otherwise confirmed.

CA No 276 of 2013

1. Grant the application for leave to appeal but only against sentence.

2. Allow the appeal against sentence.

3. Set aside that part of the orders of 18 October 2013 dismissing the appeal against sentence.

4. Instead, order that the appeal against sentence is allowed; the $500 fine imposed on 16 April 2013 in the Redcliffe Magistrates Court is set aside and a fine of $250 is substituted.

5. The orders made by the District Court and the Magistrates Court are otherwise confirmed.

[40] **FRASER JA:** I agree with the reasons for judgment of McMurdo P and the orders proposed by her Honour.

[41] **GOTTERSON JA:** I agree with the orders proposed by McMurdo P and with the reasons given by her Honour.