

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Pickering* [2016] QCA 231

PARTIES: **R**  
v  
**PICKERING, Jamieson Lawrence**  
(applicant)

FILE NO/S: CA No 116 of 2016  
SC No 1007 of 2015

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane – Date of Sentence: 5 April 2016

DELIVERED ON: 13 September 2016

DELIVERED AT: Brisbane

HEARING DATE: 29 August 2016

JUDGES: Gotterson and Philip McMurdo JJA and Daubney J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **The application is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to two counts of unlawfully supplying a dangerous drug – where the applicant was sentenced on each of the offences to three years’ probation and a conviction recorded on each – where the applicant was the proprietor of a nightclub – where the applicant supplied cocaine to two young women – where it is submitted that the sentencing judge sentenced on a basis which was unavailable on the evidence, namely that the Office of Liquor and Gaming Regulation would remain unaware of the offending – whether the sentencing judge erred by taking into account the possibility that not recording a conviction would conceal the offending from the Office of Liquor and Gaming Regulation – whether the recording of a conviction was manifestly excessive  
*Penalties and Sentences Act* 1992 (Qld), s 12  
*Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37, cited  
*R v Briese; ex parte Attorney-General* [1998] 1 Qd R 487; [\[1997\] QCA 10](#), considered  
*R v Pham* (2015) ALJR 13; [2015] HCA 39, cited

COUNSEL: P J Callaghan SC, with B P Dighton, for the applicant  
D Boyle for the respondent

SOLICITORS: Murphy's Lawyers for the applicant  
Director of Public Prosecutions (Queensland) for the  
respondent

- [1] **GOTTERSON JA:** I agree with the order proposed by Daubney J and with the reasons given by his Honour.
- [2] **PHILIP McMURDO JA:** I agree with Daubney J.
- [3] **DAUBNEY J:** On 5 April 2016, the applicant pleaded guilty to two counts of unlawfully supplying the dangerous drug cocaine. On each count he was sentenced to three years' probation, and convictions were recorded.
- [4] The applicant now seeks leave to appeal against sentence, with the proposed appeal limited to the recording of the convictions. The grounds of the proposed appeal are that:
- (a) the learned sentencing judge erred when, in exercising his discretion to record convictions on both counts, he took into account the possibility that not recording a conviction would conceal the offending from the Office of Liquor and Gaming Regulation, and
  - (b) the sentence was, in all the circumstances, manifestly excessive.

### **Background**

- [5] The offences occurred on 1 March 2015. At that time, the applicant was 49 years old, and was the proprietor of a Gold Coast nightclub.
- [6] On the evening in question, two young women went to a party at the applicant's apartment. When these women arrived at the apartment, the applicant and another man, Stevens, were in the kitchen with about six lines of cocaine lined up on the bench. The applicant and Stevens asked the young women if they wanted any, and the young women accepted the offer. The applicant asked, "You're all 18 hey?", to which the women responded in the affirmative. Both women were, in fact, younger than 18 but, as the prosecutor informed the learned sentencing judge, each was, in any event, carrying fake identification.
- [7] The applicant passed over a rolled up \$50 note and each of the young women ingested cocaine through that tube.
- [8] Subsequent police investigation of Stevens' mobile phone revealed a short video depicting part of the offending.
- [9] The applicant had a very dated criminal history consisting of only one minor and, for present purposes, irrelevant offence.

### ***Penalties and Sentences Act 1992***

- [10] As I have already noted, the only issue on the present application concerns the exercise of the discretion to record convictions. In that regard, s 12 of the *Penalties and Sentences Act 1992* ("PSA") relevantly provides:

- “(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.”

### **Submissions at sentence hearing**

- [11] Senior counsel who appeared for the applicant below focused his submissions, relevantly, on the possible impact that the recording of convictions would have on the applicant’s dealings with the liquor licensing authorities. So much is clear from the following passage of argument:<sup>1</sup>

“HIS HONOUR: Mr Boulten, if it assists you, I’m not troubled about the three year probation aspect. The matter which I am finding more difficult is why a conviction should not be recorded.

MR BOULTEN: It’s because of no one factor but a combination of all the relevant factors, and, in that sense, the seriousness of the offence is a very important one. Although we accept that general deterrence is a very important feature of sentencing people who supply dangerous drugs, in the circumstances of this case general deterrence needs to be tempered, to some degree, because there has already been, and will continue to be, other penalties extra curial. For instance, he is likely to have to deal with the Office of Liquor, Gaming and Racing, in some way, shape or form. It’s going to pop its head up.

HIS HONOUR: Well, one would expect so.

MR BOULTEN: Yes.

HIS HONOUR: The idea that someone would be the proprietor of a night club who gives cocaine to young women is not likely to command universal appeal.

MR BOULTEN: No. And he expects that there’ll be an inquiry, expects that he’ll need to address concerns. There’s no way of knowing for sure what’s that’s going to lead to.

HIS HONOUR: But that will happen whether a conviction’s recorded or not.

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HIS HONOUR: I understand that and I’m willing to accept that his efforts in relation to that organisation are commendable, but the

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<sup>1</sup> AR 31-32.

recording of a conviction's unlikely to have any impact upon the consideration to be given by the liquor licensing authority.

MR BOULTEN: I beg to, respectfully, differ just marginally because ---

HIS HONOUR: Why might it make a difference?

MR BOULTEN: Because it will be a signal from the court that this is an offence which, in all of the circumstances that you're aware of, was capable of being dealt with without a conviction and that will be something that the liquor authorities are entitled to take into account.

HIS HONOUR: The thing that concerns me about not recording the conviction is the potential to pull the wool over the eyes of people who need to know. He's a proprietor of a nightclub. Why would the court, in those circumstances make an order which may have an impact upon the capacity of relevant statutory authorities to discharge their function?

MR BOULTEN: I understand that that is a matter which your Honour does need to take into account, yet there are other factors also which your Honour needs to balance against that in determining this issue. It really is an aberration for him to be in a position like this. It's an extraordinary position for him to be in."

[12] There was then some further argument, which is not relevant for present purposes, on the potential consequences of the recording of convictions on the applicant's ability to travel to the United States.

[13] The prosecutor submitted that the offences were serious enough to warrant the recording of convictions, and then argued that the matter should not be left in a position where there is an ability to hide the fact of the conviction having been recorded.<sup>2</sup> To this, his Honour replied:<sup>3</sup>

"I'm not sure factually about that here. It looks as though the conviction will come to the attention of the liquor licensing authority whether it's recorded or not ..."

[14] In reply on this point, the applicant's counsel argued:<sup>4</sup>

"MR BOULTEN: Oh, it's of some particular interest to the Gold Coast newspapers and the Brisbane newspapers. I don't read them normally, myself, because I read other newspapers, but this has been a matter of high political – of high public interest and he's not going to escape the attention of the Office of Liquor and Gaming. There will be some inquiry. It's not like he's hiding any of this. There will be consequences in all probability. Just exactly what they are will, in part, depend on what your Honour orders.

It will not be a determination of what happens in the future, but your Honour can send appropriate signals, through your Honour's reasons and orders, about where this offence sits in the hierarchy of offending. My friend says this is serious. Yes. All offences like this are serious, but

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<sup>2</sup> AB 36, line 20.

<sup>3</sup> AB 36-39.

<sup>4</sup> AB 38.

with all due respect, this is not so serious an offence in the circumstances of this case that would not properly justify your Honour concluding that for exceptional reasons there is no need to record a conviction.”

### **Sentencing remarks**

[15] It is appropriate to set out the relevant part of his Honour’s sentencing remarks in full.<sup>5</sup>

“The question is what is a just sentence in accordance with the statutory requirements and sentencing principle.

In forming a view about this, it is necessary to consider whether an order ought to be made recording the conviction. The Court has a discretion in circumstances where probation is ordered, which is what I have in mind in your case, not to record a conviction.

The Act prescribes that, in considering whether or not to record a conviction, the Court must have regard to all circumstances of the case, and then goes on to identify three which must be included as factors to be weighed in the balance, namely, the nature of the offence, the offender’s character and age and the impact that recording a conviction will have on the offender’s economic or social wellbeing or chances of finding employment.

Turning for the moment just to the three specified matters that must be included when having regard to all circumstances of the case, these things may be said: the offence of supplying cocaine has its serious aspects. It is true that those to whom the cocaine was supplied were, as I have said, willing, if not anxious, to ingest the drug, and the experience would not have been novel for either of them. But the offence in its nature is serious, as the maximum penalty prescribed by the Parliament attests.

I accept, as was submitted on your behalf by Mr Boulten, that when all the circumstances of the offending are considered, this is very much at the lower scale of the seriousness of an offence of the supply of cocaine.

Your good character is attested to by a wide range of referees who have experience of you in your families, in business and socially. You are obviously highly regarded. And it must be a matter of considerable personal shame for you to find yourself in this situation, especially as your offending, or at least your arrest, attracted a deal of publicity, which has, in a sense, inflicted a measure of punishment already on you and members of your family that have come to know of your disgrace.

The recording of a conviction is likely to have some impact upon the assessment that authorities may make in connection with matters that bear upon your prospect of controlling a licensee of nightclub premises. And there is a chance – I put it no higher than that – that the recording of a conviction may make it somewhat more difficult for you to obtain a visa to travel to the United States, where you have business interests.

You are the director and majority shareholder of a company that holds the liquor licence for the nightclub to which I have referred and from

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<sup>5</sup> AB 41-42.

which you derive most of your income. The Liquor Act allows a person to obtain a liquor licence only if the commissioner is satisfied that that person is a fit and proper person. It is likely that the recording of the conviction will, as was submitted on your behalf, at the least amount to an adverse factor in any consideration by the Commissioner of your capacity to hold a liquor licence in respect of the nightclub or any similar interest, if you were to look to acquire such a venture in future.

That is a material consideration to be weighed in the balance.

**On the other hand, the Court must be alert to the possibility that not to record the conviction might have the consequence that information is concealed from authorities whose duty it is to determine whether or not you are a fit and proper person to be licensed under the Liquor Act or for some other similar purpose. I accept that that concern does not of itself mean that you might not be granted the benefit of the non-recording of a conviction, and apply, in this respect, the observations of Justices Thomas and White in *R v Briese; Ex parte Attorney-General* [1998], 1 Qd R 487, at page 492.**

On a consideration of all the circumstances which seem to me material, I have come to the conclusion that the appropriate course is to order that the convictions be recorded.” (emphasis added)

### Submissions

- [16] On the present application, counsel for the applicant focused on the observations which I have highlighted in the above extract, almost to the exclusion of what had otherwise been said by the learned sentencing judge. Indeed, it was conceded in the applicant’s written outline that what had been said by his Honour up to that particular point could be regarded as “unexceptionable”.<sup>6</sup>
- [17] The applicant contended, however, that the highlighted passage evinced an error of principle because his Honour sentenced on a basis which was unavailable on the evidence. The applicant pointed to evidence before the sentencing judge in the form of an opinion from a solicitor with extensive liquor licensing experience. That opinion relevantly stated:<sup>7</sup>

“Although I understand that the relevant offences did not take place on licensed premises, there would be little doubt, in my experience, that the Commissioner would be concerned with any prospective licensee supplying drugs. Although this provision does not necessarily regard an applicant for a liquor licence who has been convicted of an offence to have an unsuitable history or bad repute, a criminal conviction for the offence provides the Commissioner with indisputable evidence of a person’s character, reputation and behaviour. In my experience, there is little doubt that the Commissioner would have real concerns about approving a new liquor licence in such circumstances, and any application may well result in the application being refused.”

<sup>6</sup> Applicant’s submissions, para 11.

<sup>7</sup> AB 96.

- [18] The applicant submitted that there was no evidence to suggest that, by not recording a conviction, the licensing authority would be unaware of the offending and unable to act appropriately or accordingly. It was said that, by sentencing on the basis that it was possible that the authority would remain unaware of the offending, his Honour necessarily engaged in speculation in circumstances where this was not a case in which an omission to record a conviction would “pull the wool over the eyes” of the authority.
- [19] These points were emphasised in argument before this Court, with senior counsel for the applicant contending that the sentencing judge “expressly insisted that his discretion was being informed by the possibility of concealment”, that this was an error, and that there was no basis in the evidence for the judge even to contemplate the possibility that the offending conduct could be concealed from the licensing authority.
- [20] Counsel for the respondent highlighted the way in which the point had been argued before the learned sentencing judge, noting that it was clear that the judge was aware that the offending conduct would come to the attention of the licensing authority regardless of whether a conviction was recorded or not. It was submitted in that context that, in saying “information is concealed from the authorities”, his Honour was not suggesting that the offending conduct would not be brought to the attention of the authorities in any event.

## **Discussion**

### ***Error in exercise of discretion?***

- [21] Several points may be noted from the passages of argument below to which I have referred at [9] – [12]:
- (a) The sentencing judge was fully cognisant of the fact that the offending conduct would come to the attention of the liquor licensing authority regardless of whether a conviction was recorded or not;
  - (b) Counsel for the applicant urged the sentencing judge not to record a conviction as a means, in effect, of sending a message to the liquor licensing authority that this offending was of such a minor character as not to warrant the recording of a conviction;
  - (c) Counsel for the applicant conceded that it was appropriate for the judge to take into account the potential for the non-recording of a conviction to “pull the wool over the eyes of people who need to know” or for the Court to make an order “which may have an impact upon the capacity of relevant statutory authorities to discharge their function”.
- [22] In the course of the unchallenged part of his sentencing remarks, his Honour expressly adverted to the prospect of the recording of a conviction having an adverse impact on any assessment by the liquor licensing authority of the applicant’s capacity to hold a liquor licence. By these remarks, his Honour expressly addressed the submission which had been made to the effect that a conviction ought not be recorded so as to send a message to the licensing authority that the Court considered this to be a trivial level of offending.
- [23] It was in that context, and for the purpose of identifying the factors relevant to the exercise of the discretion, that his Honour made the observations which are now sought to be impugned. His Honour expressly invoked the observations of Thomas

and White JJ (as they each then were) in *R v Briese; ex parte Attorney-General*<sup>8</sup> in which their Honours said:<sup>9</sup>

“The existence of a conviction sometimes involves direct disadvantage under the law, as for example under the *Corporations Law*. A person who has been convicted on indictment of any offence, or of other prescribed offences is prohibited for five years from being a director of or taking part in the management of any corporation (*Corporations Law* s. 229). However ‘it is not the position that a conviction should never be recorded if it will have an adverse impact upon an applicant because of the consequences attached to a conviction by other legislation’. (*R. v. Hagan* (C.A. 442, 443/1996; Court of Appeal, 15 November 1996, unreported). The court in that case added:

‘That section exists to protect the public, and it is not appropriate that this Court should routinely fashion a special order with the object of defeating the operation of such a section.’

In *R. v. Beissel* (C.A. 424, 425/1996; Court of Appeal, 12 November 1996, unreported), McPherson J.A. observed:

‘In my opinion it really misapprehends the purpose and function of provisions like section 12 (of the *Penalties and Sentences Act*) to suppose that the provisions they confer are designed to enable the fact that criminal convictions have been sustained to be concealed 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.’

In that case White J. observed:

‘The applications against recording of a conviction also seem to me to give an unwarranted benefit to the applicants which will have the effect of seeking to hide from the liquor licensing authority and the Department of Consumer Affairs which administers the *Auctioneers and Agents Act* conduct which really ought to be taken into account by them when considering the issue of any such licences.’

Those observations should not be taken as laying down a rule that the court must not grant an offender the benefit of non-recording of a conviction whenever it is likely that the offender might come before such a board; it is a stricture to look at the matter carefully and to bear in mind the potential public harm that may result from the court’s authorising concealment of the truth.”

- [24] It is, to my mind, clear that the learned sentencing judge was not under any misapprehension that the non-recording of a conviction might lead to the fact of the offending being hidden from the liquor licensing authority. On the contrary, it is clear that the judge appreciated the fact that the offending conduct would likely be known by the licensing authority in any event. Rather, by the passage in question, his Honour was identifying a relevant factor in the exercise of the discretion, having regard to the

<sup>8</sup> [1998] 1 Qd R 487; [1997] QCA 10.

<sup>9</sup> [1998] 1 Qd R 487, 491-492.



argument which had been put that the Court could “send appropriate signals, through [the judge’s] reasons and orders, about where this offence sits in the hierarchy of offending”. It was not about whether the offending conduct would be concealed, but rather a consideration of whether a non-recording of a conviction would inappropriately conceal the Court’s opinion as to the serious nature of the offending.

- [25] I do not accept the basis on which the applicant’s contention is founded, and accordingly would not find that the sentencing judge’s exercise of discretion was infected by the error contended for by the applicant.

***Manifestly excessive?***

- [26] Nor do I consider that, in the circumstances of this case, the recording of convictions was manifestly excessive.

- [27] It is sufficient in that regard for me to repeat and respectfully adopt all of that part of the learned sentencing judge’s remarks which the applicant conceded was “unexceptionable”.

- [28] Despite the factors which stood in the applicant’s favour, including his good character, negative publicity and personal shame, and the prospects of the recording of convictions impacting on his livelihood as the proprietor of licensed premises and his capacity to travel overseas, this was a case of a mature man supplying a Schedule 1 drug to young women, albeit in small quantities. Even accepting that the offending in this case was at the very low end of the relevant spectrum, the offence of supplying a Schedule 1 drug is an inherently serious offence. In my view, it cannot be said that, in the circumstances of the case, the recording of convictions was not within the proper sentencing discretion. Having regard to all of the relevant sentencing factors, there is no reason to conclude that there was some misapplication of principle which led to the decision to record convictions.<sup>10</sup>

- [29] Finally, I should record that even if I had been persuaded on the applicant’s proposed first ground of appeal that there had been an error of principle in the exercise of the sentencing discretion, the practical outcome for the applicant would have been no different. If leave to appeal had been granted, I would nevertheless have been of the view that no different sentence should be passed. The unchallenged sentence of three years’ probation was appropriate and, for the reasons set out above, I would have been satisfied that convictions should be recorded. In those circumstances, I would have dismissed the appeal.<sup>11</sup>

**Conclusion**

- [30] For the reasons set out above, the applicant has not persuaded me that there is any proper basis for the grant of leave to appeal against sentence. The application should be refused.

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<sup>10</sup> *R v Pham* (2015) 90 ALJR 13, per French CJ, Keane and Nettle JJ at [28].

<sup>11</sup> *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37.