SUPREME COURT OF QUEENSLAND

CITATION:	*Constable S J Miers v Blewett* [2013] QCA 23
PARTIES:	**MIERS, CONSTABLE S J** (applicant) **v** **BLEWETT**, **Christopher Lee** **aka BLEWITT, Christopher Lee** (respondent)
FILE NO/S:	CA No 82 of 2012 DC No 373 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	22 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2012
JUDGES:	Holmes and Fraser JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal granted.** **2. Appeal dismissed.** **3. The applicant shall pay the respondent's costs of and incidental to the appeal, including the application for leave to appeal, to be assessed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where respondent convicted in the Magistrates Court of two offences under s 80(1) of the *Domestic and Family Violence Protection Act* 1989 (Qld) – where respondent had previously been convicted of two offences against s 80(1) of the *Domestic and Family Violence Protection Act* 1989 (Qld) – where prosecution sought to tender the whole of the respondent's criminal history – where prosecution did not seek to rely on the criminal history to raise the maximum sentence, but to increase the penalty that could be imposed on the respondent – where no notice was served by the prosecution under s 47(5) of the *Justices Act* 1886 (Qld) in relation to the prosecution's reliance on the respondent's previous convictions – where Magistrate

rejected the tendering of the whole of the respondent's criminal history – where on appeal in the District Court the judge upheld the Magistrate's decision – where none of the respondent's criminal history was taken into account in determining the sentence – whether the lack of notice under s 47(5) of the *Justices Act* 1886 (Qld) had the effect of preventing the court from taking the two previous convictions against s 80(1) of the *Domestic and Family Violence Protection Act* 1989 (Qld) into account – whether evidence of the two previous convictions for offences against s 80(1) of the *Domestic and Family Violence Protection Act* should be admissible – whether other prior non-domestic violence offence convictions of the respondent should have been taken into account in determining the sentence – whether District Court Judge erred in affirming the Magistrate's ruling that the respondent's criminal history was inadmissible

Criminal Code 1899 (Qld), s 1, s 564(2)
Domestic and Family Violence Protection Act 1989 (Qld), s 80(1)
Justices Act 1886 (Qld), s 47(4), s 47(5)
Penalties and Sentences Act 1992 (Qld), s 9(2)(r), s 9(4)(g), s 11

Faulkner v Morris [2010] QDC 33, cited
Kingswell v The Queen (1985) 159 CLR 264; [1985] HCA 72, cited
Smith v Ash [2011] 2 Qd R 175; [2010] QCA 112, cited
The Queen v De Simoni (1981) 147 CLR 383; [1981] HCA 31, followed
The Queen v James [2012] QCA 256, cited
The Queen v Meaton (1986) 160 CLR 359; [1986] HCA 27, cited
Washband v Queensland Police Service [2009] QDC 243, overruled

COUNSEL: M R Byrne SC for the applicant
M A Green for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the applicant
McGinness & Associates for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.

[2] **FRASER JA:** Constable Miers has applied for leave to appeal against sentences imposed upon the respondent. On 22 June 2010, the respondent was convicted on his pleas of guilty in the Magistrates Court of two offences under s 80(1) of the *Domestic and Family Violence Protection Act* 1989. On 12 May 2010, the respondent had contravened a protection order made on 14 October 2008. A conviction was recorded and the respondent was fined $450, in default of payment to be imprisoned for four days. For a similar offence on 13 May 2010,

a conviction was recorded and the respondent was sentenced to 41 days imprisonment, with a declaration that 41 days of pre-sentence custody between 13 May 2010 and 22 June 2010 constituted imprisonment already served under the sentence. (For a third offence, breach of a condition of the bail upon which the respondent was released after the 12 May 2010 offence, a conviction was recorded and the respondent was not further punished. It is not necessary to refer again to this offence.)

[3] There were conditions of the protection order that the respondent be of good behaviour towards the aggrieved and must not commit domestic violence. A similar order had been made against the woman in favour of the respondent. The Magistrate was informed that they were in a relationship and both were alcoholics. In the first offence, on 12 May 2010, they argued about money, the argument escalated into screaming, pushing and shoving by both of them, and the respondent picked up a glass beer bottle and threw it at the woman's head. She blacked out for a short period of time and, upon waking, ran out of the house. The respondent locked himself in the house and continued to yell abuse. When police arrived the respondent was barricaded inside the house, in which there were broken beer bottles, and the woman was outside the house. There was a deep gash to the left-hand side of her head and she needed to be transported to the hospital for treatment. Defence counsel submitted that although she was taken to the hospital she left without seeing anyone.

[4] The respondent was released on bail on the following day, 13 May 2010. The aggrieved woman complained that on the same day the respondent hit her across the head with an open hand on three occasions, aggravating the laceration he had inflicted the night before. Police found smashed glass and the woman with blood coming from her head. Both the respondent and the woman told police that they were aggressive towards each other verbally and physically but only in self-defence. The respondent's version was that after he was released from the watch-house he acceded to the woman's request to go to a local hotel. After drinking there they returned to the house. She smashed numerous beer bottles inside the house and he left. (On the respondent's version he may have been guilty of breaching a non-contact condition of the protection order, although this is not clear.)

[5] Section 80(1) of the *Domestic and Family Violence Protection Act* 1989 specified the maximum penalty for those offences:

> "…(a) if—
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> (i) the respondent has previously been convicted on at least 2 different occasions of an offence against this subsection; and
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> (ii) at least 2 of those offences were committed not earlier than 3 years before the present offence was committed;
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> 2 years imprisonment; or
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> (b) otherwise—40 penalty units or 1 year's imprisonment."

[6] During the sentence hearing the prosecutor sought to tender the respondent's criminal history. The criminal history recorded that the respondent had been dealt with for various summary drug offences in 1984, 1998, and 2006. He had been convicted of wilful damage of police property and obstructing a police officer in 2006 and of a breach of bail condition in September 2009. On 22 September 2009,

the respondent was convicted of wilful damage of police property and of assaulting or obstructing a police officer. On the same occasion he was also convicted of an offence against s 80(1), committed on 21 August 2009. No conviction was recorded on those three offences and the respondent was fined $1,200. On 8 February 2010, the respondent was convicted of a second offence against s 80(1), committed on 27 December 2009. A conviction was recorded and, in addition to a fine of $500, the respondent was sentenced to six months imprisonment, which was suspended for an operational period of 18 months.

[7] The respondent's counsel objected to the tender on the ground that the respondent had not been served with a notice stating the previous convictions in accordance with s 47(5) of the *Justices Act* 1886. Section 47 of that Act provides:

> "(1) The description of any offence in the words of the Act, order, by-law, regulation, or other instrument creating the offence, or in similar words, shall be sufficient in law.
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> (2) Where a person is convicted of an offence by a Magistrates Court other than the Childrens Court and it is proved to the satisfaction of the court on oath or as prescribed by subsection (3) that there has been served upon the defendant with the summons or a reasonable time before the time appointed for the appearance of the defendant a notice specifying any alleged previous conviction of the defendant for an offence proposed to be brought to the notice of the court in the event of the defendant's conviction for the offence charged and the defendant is not present in person before the court, the court may take account of any such previous conviction so specified as if the defendant had appeared and admitted it.
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> (3) Any person who serves such a notice specifying any alleged previous conviction may serve such notice in the same manner as is provided for the service of a summons by this Act and may attend before any justice having jurisdiction in the State or part of the State or part of the Commonwealth in which such notice was served and depose, on oath and in writing endorsed on the notice, to the service thereof
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> (3A) Such deposition shall upon production to the court by whom the case is heard and determined be sufficient proof of the service of the notice on the defendant.
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> (4) Unless otherwise expressly provided, if, for the purpose of the assessment of penalty in respect of a simple offence, it is intended to rely upon a circumstance which renders the defendant liable, upon conviction, to a greater penalty that that to which the defendant would otherwise have been liable, that circumstance shall be expressly stated in the complaint made in respect of that offence.
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> (5) However, if the circumstance is that the defendant has been previously convicted of an offence, the alleged previous conviction must be stated in a notice served with the complaint.

> (6) Despite subsections (4) and (5), if the proceedings for the offence were started by a notice to appear, the alleged previous conviction must be stated in a notice served –
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> (a) with the notice to appear; or
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> (b) a reasonable time before the time appointed for the defendant's appearance."

[8] The prosecutor disclaimed reliance on the criminal history as a circumstance rendering the respondent liable for the maximum penalty of two years imprisonment under s 80(1)(a) of the *Domestic and Family Violence Protection Act* 1989. He submitted that the respondent's criminal history was material to the appropriate sentence under s 80(1)(b). It was submitted for the respondent that the effect of the decision in *Washband v Queensland Police Service*[1] was that, because no notice had been given under s 47(5), the prior convictions could not be relied upon by the prosecution or used by the Magistrate in determining penalty.

[9] The Magistrate noted that the prosecutor disclaimed reliance upon the two previous convictions of domestic violence offences as rendering the respondent liable to the higher maximum penalty under s 80(1)(a), but found that the only reason the criminal history was tendered was to increase the penalty to which the respondent was liable. The Magistrate considered that was particularly the case in relation to a previous conviction of a similar kind of offence. The Magistrate referred to *Washband* and to *Faulkner v Morris*,[2] held that a notice should have been served under s 47(5) putting the respondent on notice that the prosecution intended to rely upon the criminal history, and ruled that the criminal history was not admissible. Accordingly, in imposing the sentences the Magistrate did not take into account any of the convictions recorded in the criminal history.

[10] The applicant appealed to the District Court under s 222 of the *Justices Act* 1886 on the ground that the sentences imposed for the two offences against s 80(1) of the *Domestic and Family Violence Protection Act* 1989 were manifestly inadequate. The applicant's main contention was that the Magistrate erred in law in holding that the whole of the respondent's criminal history was inadmissible; at most, only the previous offences against s 80(1) should have been excluded. The District Court judge accepted a submission by the respondent's counsel that the Magistrate's ruling with respect to the criminal history in the form in which it was sought to be tendered was correct in law. The judge construed that ruling as precluding proof only of the two previous convictions under s 80(1) of the *Domestic and Family Violence Protection Act* 1989. Because the prosecutor did not seek to tender a criminal history which recorded only the respondent's other convictions, it could not be said that the Magistrate erred in rejecting the tender. The judge also recorded a concession by the applicant's counsel that the applicant no longer sought that the respondent be returned to prison in respect of a breach of a suspended sentence of imprisonment constituted by the offences under consideration. The judge considered that the long delay between the hearing in the Magistrates Court and the hearing of the appeal in the District Court was also a fact to be considered in deciding whether it would be appropriate to impose a penalty requiring the respondent to serve any further period in actual custody. The appeal was dismissed and a costs order was made in favour of the respondent.

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1 [2009] QDC 243.

2 [2010] QDC 33.

[11] The applicant now seeks leave to appeal from the decision in the District Court under s 118 of the *District Court of Queenslandt Act* 1967. The applicant contends that the District Court judge erred in affirming the Magistrate's ruling that the respondent's criminal history was inadmissible. The respondent contends that the Magistrate was correct in ruling that evidence of the previous convictions of offences against s 80(1) of the *Domestic and Family Violence Protection Act* 1989 was inadmissible, that the sentences were not manifestly inadequate, and that leave to appeal should not be granted to permit another challenge to those sentences.

[12] At the heart of the proposed appeal is a challenge to the construction of s 47(5) of the *Justices Act* 1886 in *Washband*. That challenge has merit and the issue is of general importance in the administration of justice in the Magistrates Court. This is, therefore, an appropriate case for the grant of leave to appeal.[3]

[13] Contrary to the District Court judge's analysis, I construe the Magistrate's ruling as a decision that, because of the absence of a notice under s 47(5), the prosecution could not prove any previous conviction, whether or not such proof would result in an increase in the statutory maximum penalty for the offence. In so ruling, the Magistrate applied Durward DCJ's decision in *Washband* at [43] that, if a prior conviction has not been the subject of a notice under s 47(5), it "…cannot be relied upon by the prosecution, and cannot be used by the Magistrate in determining the penalty or period of disqualification to be imposed". The respondent did not seek to support that decision. Rather, the respondent accepted that s 47(5) was directed only to previous convictions which had the effect of increasing the maximum penalty for an offence. To that extent there was common ground between the applicant and the respondent. I agree.

[14] In sentencing an offender, a prior conviction may amount to a "relevant circumstance" to which the sentencing court must have regard under the *Penalties and Sentences Act* 1992, s 9(2)(r). A prior conviction might also be taken into account in assessing the offender's character under s 11 of that Act and, under s 9(4)(g), in sentencing an offender for any offence involving the use or attempted use of violence against another person or an offence that resulted in physical harm to another person, the sentencing court must have regard to the past record of the offender and the number of previous offences of any type committed. In some cases, taking previous offences into account in obedience to those provisions will result in a more severe penalty than would otherwise be imposed, but a previous conviction which only has that potential effect is not caught by s 47(5) of the *Justices Act* 1886. It treats a previous conviction as an example of a circumstance which, in terms of s 47(4) "…renders the defendant liable…to a greater penalty than that to which the defendant would otherwise have been liable". That does not comprehend a circumstance which merely bears upon the exercise of the sentencing discretion in a way which might result in a more severe penalty than otherwise would be the case. If s 47(4) had that effect it would require every complaint of a simple offence to set out every circumstance which might influence the sentencing discretion in favour of a more severe penalty. The section does not have such a broad and impractical effect. Rather, s 47(4), and thus s 47(5), refer to a circumstance which increases what otherwise would be a defendant's potential liability for punishment for the offence. That will occur where the relevant circumstance results in a greater penalty or a greater maximum penalty. Relevantly

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[3] See *Smith v Ash* [2011] 2 Qd R 175 at [50].

to this matter, s 47(5) refers to a circumstance, two previous convictions for the same offence, which results in a greater maximum penalty.

[15] Accordingly, s 47(5) did not require notice to be given of any of the respondent's previous convictions for offences which were not offences against s 80(1) of the *Domestic and Family Violence Protection Act* 1989. Those previous convictions should have been taken into account by the Magistrate if and to the extent that they were material to the sentences to be imposed for the current offences. The decision to the contrary in *Washband* should be overruled.

[16] A more difficult question is whether the failure expressly to state the circumstance(s) in the complaint where s 47(4) is applicable, or in a notice served with the complaint where s 47(5) is applicable, merely has the effect that the greater maximum penalty is inapplicable or whether it also has the effect of precluding the sentencing court from taking the circumstance into account at all in determining the appropriate sentence. I have described the issue in those terms because the structure and language of ss 47(4) and 47(5) suggest that they must operate in the same way in this respect. In this case, the question is whether, as the respondent argued, the effect of s 47(5) is that the failure to state the two previous convictions for offences against s 80(1) in a notice served with the complaint merely had the effect that the greater maximum penalty under s 80(1)(a) was inapplicable, or whether it also had the effect of precluding the sentencing court from taking either of the two previous convictions into account at all in determining the appropriate sentence. The first, narrower view of the operation of s 47(5) was preferred by Henry J, with whose reasons the President and Holmes JA agreed, in *R v James*[4] but the point was not argued in that case. I am persuaded that authority upon the closely analogous provisions of the *Criminal Code* requires that the broader view be applied.

[17] Section 1 of the *Code* defines "circumstance of aggravation" as "any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance." Section 564(2) requires that any circumstance of aggravation intended to be relied upon "must be charged in the indictment." In *The Queen v De Simoni*,[5] a majority of the High Court held that the indistinguishable provisions in ss 1 and 582 of the *Criminal Code* (WA) precluded reliance upon an uncharged circumstance to increase the sentence. The text of s 47(4) of the *Justices Act* combines the definition of "circumstance of aggravation" in s 1 of the *Criminal Code* and the provision in s 564(2) of the *Code*, with textual alterations to cater for effects of differences between simple offences and indictable offences. The High Court's reasoning in the following passage is applicable in relation to the similar provisions in s 47 for simple offences:

> "The meaning of these words in s. 582 is not altogether clear. Read literally, the words of the section appear to cast a duty on the person presenting the indictment rather than to place a fetter on the power of the trial judge to consider all the relevant circumstances in imposing sentence. However, there must necessarily be implied a prohibition in the words of the section. Obviously the Crown Prosecutor is prohibited from relying upon any circumstance of aggravation not charged in the indictment. But the prohibition must necessarily

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4 [2012] QCA 256.

5 (1981) 147 CLR 383 at 388.

extend further: it must also be directed to the judge. It would be an absurd result if s. 582 required the judge to enforce the prohibition against the prosecutor, and prevent him from relying on a circumstance of aggravation that had not been charged in the indictment, but nevertheless permitted the judge himself to rely on such a circumstance. The crucial question then is whether a judge can be said to rely upon a circumstance of aggravation within the meaning of s. 582, when he takes that circumstance into consideration in imposing a sentence, and by reason of it inflicts a penalty more severe than he would otherwise have imposed. In the ordinary use of language, a judge who decides that by reason of the existence of a circumstance of aggravation he will impose on the offender a greater punishment than that which he would have imposed if the circumstance had not existed, can be said to rely upon that circumstance in reaching his decision. However, it is said that the significance of a circumstance of aggravation is that its existence renders the offender liable to a greater punishment than that to which he would be liable if the offence were committed without the existence of that circumstance - in other words, that it exposes the offender to liability to a greater maximum penalty. From this it follows, so it is argued, that s. 582 prevents a judge from imposing more than the maximum penalty provided for the offence as charged, but does not prevent him from taking the circumstance of aggravation into account as one of the circumstances of the offence which was committed, provided that he does not impose more than the maximum penalty provided for the offence if committed without the circumstance of aggravation. This argument, upon which the Crown relies, of course reads words into s. 582; it requires the section to be read as though it provided that the circumstance of aggravation may be relied upon for some purposes but not for others. As a matter of language, the definition of 'circumstance of aggravation' does not require s. 582 to be read down in this way. The definition shows what is a circumstance of aggravation; s. 582 declares the consequence when a circumstance of aggravation has not been charged in the indictment. For example, the fact that the offender was armed with a dangerous weapon is a circumstance of aggravation; s. 582 has the effect that the fact that the offender was so armed may not be relied upon unless it was charged in the indictment. Section 582 does not say that the fact that the offender was so armed may not be relied upon for the purpose of rendering the offender liable to a greater maximum penalty; its words are general and unrestricted.

At first sight it may seem unlikely that the framers of the Code intended that an offender should be sentenced on the fictitious basis that no circumstance of aggravation existed when it is found by the trial judge that such a circumstance did exist, particularly when such a finding is based upon an unchallenged statement of facts made by the prosecutor after the offender has pleaded guilty. However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be

> punished for an offence of which he has not been convicted. Section 582 reflects this principle. The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence."

[18] The applicant acknowledged that, subject to one point of distinction, *The Queen v De Simoni* might require the same interpretation of ss 47(4) and 47(5) of the *Justices Act*. The suggested point of distinction was that the phrase "unless otherwise expressly provided" in s 47(4) of the *Justices Act* allows for the application of those provisions of the *Penalties and Sentences Act* which require sentencing judges to take previous convictions into account. But the opening words provide an exception only where another provision expressly provides to the contrary of the requirement to state the circumstance of aggravation in the complaint. A similar exception implicitly applies for s 47(5) in relation to another provision which provides to the contrary of the requirement in s 47(5) to state the circumstance of aggravation in a notice served with the complaint. There is no provision to that effect in the *Penalties and Sentences Act*. *The Queen v De Simoni* cannot be distinguished upon the basis submitted by the applicant.

[19] The provisions of the *Code* considered in *De Simoni* did not include any provision in the form of s 47(5). The applicant submitted that the apparent purpose of s 47(5) is that, in a case of a not guilty plea, the finder of fact – the Magistrate – will not be informed of a previous conviction before being called upon to determine whether the prosecution has proved the offence beyond reasonable doubt. That mirrors the practice approved by the High Court where there is no similar express statutory provision applicable in relation to indictable offences for which the maximum penalty is increased by a circumstance of aggravation comprising a previous conviction. In *The Queen v Meaton*[6] the High Court held, by majority, that the practice set out in *Kingswell v The Queen*[7] should be followed:

> "In other words, the accused should, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence together with any circumstances of aggravation other than the alleged previous conviction. If he pleads not guilty or the court orders a plea of not guilty to be entered, the jury should be charged in the first instance to inquire only regarding those matters. If the accused is convicted the jury will, if the accused does not admit the previous conviction, be asked to find if he was previously convicted of the earlier offence alleged: but, in relation to Victoria, see *Crimes Act* 1958 (Vict.), as amended, s. 395. In the event of an accused pleading guilty to the offence as charged but then disputing an alleged previous conviction, since no jury will have been empanelled the judge will proceed to determine that issue. Furthermore, if an accused person pleads guilty only to the offence as defined by s. 233B, any matters of aggravation that may be in dispute will fall to be determined in accordance with the practice prevailing in the State concerned."

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6 (1986) 160 CLR 359.

7 (1985) 159 CLR 264 at 279-281.

[20] The expression of a similar practice in s 47(5) of the *Justices Act* was not submitted to be a ground upon which *The Queen v De Simoni* could be distinguished. I consider that the reasoning in that decision should be applied in the interpretation of s 47.

[21] The Magistrate was correct in refusing to take into account the two previous convictions which had the legal effect under s 80(1)(a) of the *Domestic and Family Violence Protection Act* 1989 of increasing the maximum penalty for the offences to which the respondent pleaded guilty. On the authority of *The Queen v De Simoni*, the inadmissibility of the two previous convictions could not be avoided merely by the prosecutor disclaiming reliance at the sentence hearing upon them as a circumstance rendering the respondent liable to the increased penalty of two years imprisonment.

[22] The applicant submitted that ss 47(4) and (5) precluded reliance only upon one of the two previous convictions of offences against s 80(1) of the *Domestic and Family Violence Protection Act* 1989 (Qld) because one previous conviction of that offence did not constitute a circumstance which increased the maximum penalty. That may be so, but the prosecutor asked the Magistrate to rely upon both convictions. That was not open to the Magistrate.

Disposition

[23] The Magistrate was correct in holding that the evidence of the two previous convictions for offences against s 80(1) of the *Domestic and Family Violence Protection Act* 1989 should not be received but was in error in not taking into account the respondent's other previous convictions. The omission to take them into account may have had an effect upon the sentence. However it is not appropriate to reconsider the sentence or to grant leave to appeal for that purpose. There was very substantial and unexplained delay in the prosecution of the appeal to the District Court. As a result, the respondent's sentence was completed years before the application for leave to appeal was heard in this Court. Accordingly, whilst leave to appeal should be granted, the appeal should be dismissed. I would emphasise that the dismissal of the appeal involves no comment upon the appropriateness of the sentence imposed upon the respondent.

[24] The respondent applied for costs of the proceedings in this Court. I would accede to that application. The appeal was in the nature of a test case and, as I would decide the appeal, the respondent is the successful party.

Orders

[25] I would grant leave to appeal and dismiss the appeal. The applicant should be ordered to pay the respondent's costs of and incidental to the appeal, including the application for leave to appeal, to be assessed.

[26] **ATKINSON J:** I agree with the reasons of Fraser JA and the orders he proposes.