

DISTRICT COURT OF QUEENSLAND

CITATION: *Opitz v Commissioner of Police* [2015] QDC 293

PARTIES: **ADAM LEIGH OPITZ**
(Appellant)
v
COMMISSIONER OF POLICE
(Respondent)

FILE NO/S: 12 of 2015

DIVISION: Criminal

PROCEEDING: s222 Appeal

ORIGINATING COURT: District Court, Maryborough

DELIVERED ON: 19 and 26 November 2015

DELIVERED AT: Brisbane

HEARING DATE: 28 October 2015

JUDGE: Reid DCJ

ORDER: **1. Appeal is allowed to the extent that it is ordered that the order of the Magistrate of 7 March 2015 be varied so that no conviction is recorded of either offence.**
2. The respondent pay the appellant's costs of and incidental to the appeal fixed in the sum \$1,800.00 together with the sum of \$454.60 for outlays.

CATCHWORDS: APPEAL – sentence – possession of weapons and explosives – whether or not to record conviction – whether Magistrate erred in recording conviction – where Magistrate indicated recording conviction without hearing submissions

COUNSEL: S. Cupina for the respondent

SOLICITORS: T. George (solicitor) of Suthers Lawyers for the appellant
Office of the Director of Public Prosecutions for the respondent

- [1] On 17 March 2015, the appellant was convicted on his own plea of guilty for the offence of unlawfully possessing three category A weapons and explosives on 19 February 2015. He was fined a total of \$1,500.00 and convictions were recorded in respect of both offences. His appeal relates only to the recording of the convictions.

The Magistrates Court Hearing

- [2] The appellant was on the day of the sentence represented by his current solicitor who happened to be the Duty Solicitor on that day. The charges involved the appellant's possession of:
- (1) a category A Boito break-action shotgun;
 - (2) a category A air rifle;
 - (3) a category A Sterling 20 rimfire rifle;
 - (4) a 12 gauge shotgun shell; and
 - (5) 15 x .22 rifle rounds.
- [3] In his submissions to the court the Police Prosecutor said that police in Tiaro "were called to a domestic violence incident. They attended and spoke with the aggrieved and were advised that he (appellant) had some unregistered firearms in their shed at their home address." When police were at that home address the appellant drove his motor vehicle past the residence. Police subsequently spoke to him. He denied having any unregistered firearms but nevertheless accompanied the police to the shed on his property. Police noticed the air rifle in the open near the rear of the shed. He said it belonged to his grandfather and said that he had no other firearms. Police took possession of the firearm and took the appellant to the watch house. When going there, they received further information that two firearms had been located in his car.
- [4] When police spoke to him about that, he said he had put them there "for his own protection" and told police they were loaded. Police attended the address, confirmed the weapons were located in the car and unloaded both. They of course were the break-action shotgun and the Sterling 20 rimfire rifle. The shotgun had one shell inside and the rimfire rifle had 15 x .22 rounds in a magazine. The defendant admitted he did not have a weapons licence and that he knew the firearms should have been registered.
- [5] It is to be noted that:
- (1) There was no evidence as to the nature of the domestic violence incident, nor the role the appellant played in that incident;
 - (2) No suggestion was made to the court that the appellant in any way threatened anyone with any of the weapons.
- [6] It should be also noted that his solicitor in making submissions on his behalf said nothing in the Magistrates Court not before me to explain his assertion to police that he had the weapons "for his own protection".
- [7] His solicitor who was then, as I said, the duty lawyer, submitted to the Magistrates Court:
- (1) That the appellant was a 37 year old man with no criminal history;

- (2) That he had a “continuous and outstanding work history” as a fitter, having worked locally for “many, many years” and was also a local farmer;
- (3) That on the day of the incident he learned of the sudden breakdown of his marriage “in one of the worst ways possible” but did not give any further explanation what this meant;
- (4) He had taken appropriate steps to finalise the breakdown of his marriage; had began Family Court proceedings on legal advice with respect to his children; was arranging to consent to orders for the making of a domestic violence family protection order and in my view, most importantly, had been referred by his general practitioner for counselling. That counselling had begun. It must be recalled this hearing was only one month and two days after the subject defending.

[8] His solicitor submitted to the Magistrate a fine was the appropriate penalty. He did not make and was not invited by the Magistrate to make, any submissions about the recording of a conviction.

The Sentence

- [9] The learned Magistrate in imposing the sentence he did, referred to:
- (1) the plea of guilty “at the first opportunity”;
 - (2) the explanation for his behaviour;
 - (3) the fact that “weapons are involved and domestic violence situations where things can get out of hand”; and
 - (4) the fact that the appellant had a couple of loaded weapons in his car.
- [10] He then imposed fines totalling \$1,500.00 and ordered that convictions be recorded for each offence, without hearing any submissions on that issue.
- [11] The applicant’s solicitor then intervened, asking to be heard on the issue of recording convictions.
- [12] The learned Magistrate immediately indicated “nothing was put before the court in relation to affecting his employment in any way as a fitter” and that he was “encouraged” to make the orders he did because of the “nature and the seriousness of the offences”.
- [13] The solicitor apologised for not making earlier submissions with respect to the recording of a conviction. He submitted that the fact that he had no prior criminal history, and the nature and circumstances of the offence together with the requirements of the *Penalties and Sentence Act 1992* (Qld), meant no conviction should be recorded. He submitted it was unnecessary to have direct evidence that the recording of a conviction might adversely affect employment and that, if the appellant were to lose his current long term employment, the recording of a conviction could adversely affect his prospects of regaining work. Finally he submitted that the recording of a conviction could unduly influence a Family Court Judge cast with determining the issues between the applicant and his wife.
- [14] The Magistrate indicated he “proposed” to retain the recorded conviction. He referred to his view that having possession of two loaded weapons in his motor vehicle “in a domestic violence situation” was “really serious” and that because the

defendant was well established in employment, with a good work history, recording a conviction was not likely to affect his employment.

- [15] Curiously he then indicated “I hold a different view to many in relation to recorded and not recorded conviction”. He went on to say that in his view “what is considered by the employers now is whether or not you’ve been charged with an offence, whether you’ve pleaded guilty to it or were found guilty after a hearing. The recording of a conviction, in effect, it’s provided by statute that it be recorded of the court of record. So, in effect, it’s one that remains on the record. If you were to come before the court on another offence in the future, it will show but it will just show that it’s a conviction that wasn’t recorded. In effect, overall, it becomes a bit of a nonsense. But in this case each conviction will be recorded.”

The Appeal

- [16] The appeal is, as I have said, confined to the question whether convictions ought have been recorded.
- [17] The appellant’s solicitor submitted that to impose a conviction made the sentence manifestly excessive and that the learned Magistrate failed to properly consider the provisions under s12 of the *Penalties and Sentences Act* when doing so.
- [18] It was accepted by the parties before me that on an appeal such as this, consistent with observations of the High Court in *House v The King* (1936) 55 CLR 499, that it is not a sufficient basis for this court to intervene, that this court might have struck a different balance between the competing considerations which had to be weighed in the exercise of the discretion. Starke J at 503 said:

...the sentence imposed upon an accused person for an offence is a matter peculiarly within the province of the judge who hears the charge: he has a discretion to exercise which is very wide, but it must be exercised judicially, according to rules of reason and justice, and not arbitrarily or capriciously or according to private opinion

- [19] The balance of the court, in a majority judgment, continued at 504-505:

It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.

- [20] It was also accepted that where a sentence is shown to be excessively severe, an inference may be drawn by the appellate court that the sentence is manifestly wrong without identifying any particular error by the sentencing court (see *R v Wolff* (1914) 10 Cr App R 107 and *Dinsdale v The Queen* (2000) 202 CLR 321 at 341).

- [21] The solicitor for the appellant submitted that the learned Magistrate failed to give adequate consideration to the appellant's mitigating circumstance, to his plea and to the proper application of the provisions of the *Penalties and Sentences Act*, in particular, sections 9, 11, 12 and 13 thereof. He submitted in particular that the provisions of s 13 require a court to give significant weight to an early plea of guilty. He relied on the High Court decision in *Cameron v R* [2002] HCA 6 that, with respect to a plea, "the issue is to what extent the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice. And a significant consideration on that issue is whether the plea was entered at the first reasonable opportunity."
- [22] In this case, the plea was entered on the first return date of the charge when he was assisted only by the duty lawyer. It ought, the appellant's solicitor submitted, had therefore been a strong mitigating factor resulting in "the maximum reduction of his sentence".
- [23] Section 12 of the *Penalties and Sentencing Act* 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.
- [24] In considering the "nature of the offence" referred to in sub-section (2)(a) thereof, the appellant's solicitor submitted that, consistent with *R v Briese & Attorney-General of Queensland* [1997] QCA 10, the more serious the offence the greater the legitimate public interest in knowing that a person has been convicted of it. He submitted that these offences were both summary offences, not capable of being taken on in indictment. He also submitted that the case involved no use of actual violence, no breach of trust, and no economic or other loss to any victim. He submitted the facts disclosed no propensity to offend and no risk of reoffending.
- [25] While he conceded that as duty lawyer he had made minimal submissions about the possible impact on the applicant if convictions were recorded, he said this was a consequence both of the system of duty lawyering and also of the Magistrate's failure "to give proper notice ... of his intention to record a conviction".
- [26] In relation to the first of these issues he pointed to the Magistrate's saying that recording a conviction "may well affect, in part, social or economic wellbeing but this is a type of offence that the court maintains should not be purportedly kept lessened by the not recording of a conviction". It was then that the Magistrate stated the comment I earlier set out concerning his holding "a different view to many" in relation to recording a conviction because of his view that employers take into account whether a person is charged and pleads guilty to any offence or is found guilty of an offence rather than whether a conviction is recorded.

[27] The appellant's solicitor submitted that approach is contrary to the objects of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ("the Act") and amounted to error by the learned Magistrate. Section 5(2) of that Act provides:

(2) A person shall not be required or asked to disclose and, if so required or asked, shall not be obliged to disclose for any purpose a conviction that is not part of the person's criminal history or of the criminal history of another person or a charge made against the person or another person.

[28] A "charge" is defined in s 3(1) of that Act to mean an allegation formally made in court that a person has committed an offence where a conviction is not recorded.

Consideration

[29] Accordingly he submitted, correctly in my view, that the Magistrate's remarks that I have set out are incorrect. The appellant, if asked about prior convictions, would not, in accordance with s 5(2) of the Act, be required to disclose this matter if no conviction were recorded. He could, in circumstances where he has no prior criminal history, properly answer that he has no prior convictions. In my view that protection is not merely "a bit of nonsense" as the Magistrate stated. It is an important aspect of the sentencing process and should probably have been considered in that light by the Magistrate.

[30] In my view the appellant has shown that the Magistrate was thus in error. Consequently, consistent with *House v King* (supra), I must consider the question whether a conviction ought have been recorded afresh.

[31] Before doing so there is one further issue I wish to discuss. As I earlier indicated the Magistrate initially fined the appellant and indicated that a conviction was recorded before the duty lawyer made any submission about whether or not he should do so. The duty lawyer then indicated he wished to be heard on that issue. He was given the opportunity to do so but the Magistrate's view did not change. The question whether to record a conviction is an important aspect of the sentencing process and is habitually, in my experience, discussed at the end of the sentencing process. It is an integral part of the overall process nevertheless. In my view, in circumstances such as this, where the imposition of a conviction was not mandated as, for example, where a period of imprisonment is imposed, it is highly desirable that a judicial officer invite a party to make submissions on the issue of whether or not a conviction should be recorded before making any determination to do so.

[32] Determining to do so before hearing submissions on the topic might, in some circumstances be seen as unfairly fettering the discretion whether or not to record a conviction even if, as here, a party then asks to be heard on that topic. Because of what I think is error that I have identified in relation to the Magistrate's view as how an employer might consider the recording of an conviction, and in what circumstances an employer could become aware of that fact if no conviction is recorded, it is unnecessary to finally determine the matter of whether the Magistrate's decision was in fact unfairly fettered. I do however indicate that I think there is something to be said for the view that to have proceeded as the Magistrate did, unfairly fettered the discretion he then purported to exercise.

[33] Ultimately it is my view that the Magistrate did in this case err in recording convictions. In coming to this conclusion it is important to recognise that neither I,

nor the court at first instance, knew anything about the 'domestic violence incident'. Absolutely nothing was revealed of it. No suggestion was made that the appellant did or intended to threaten the complainant with respect to that domestic violent matter with his firearms. Indeed there is nothing to indicate that she was aware of his having the firearms in the car with him. It seems she was well aware of the fact that he had a gun or guns kept in a shed at the property and these seemed to have been kept there long term. He said he had them in his car "for his own protection" but that statement was not explored by police when they spoke to him about the offending. No explanation about it was given to the court.

- [34] There is no doubt that to be in possession of a loaded shotgun and a loaded 15 round .22 rifle is a serious example of possession of firearms. However in my view the particular circumstances of the offending whereby he had just found out about the breakup of his marriage, where he had no prior convictions whatsoever, was 37 years of age and had, in the period of less than 5 weeks since the offending consulted his general practitioner and commenced engaging in counselling, means there is every reason to think that the appellant in this case will not again reoffend.
- [35] In my view in those circumstances it was appropriate that no convictions be recorded. In the circumstances the appeal is allowed.
- [36] I will order also that the respondent pay the appellant's costs of and incidental to the appeal fixed in the sum \$1,800.00 together with the sum of \$454.60 on account of outlays associated with the obtaining of the transcripts of the Magistrates Court proceedings. The Crown does not oppose these orders.