

DISTRICT COURT OF QUEENSLAND

CITATION: *R v Poynter* [2016] QDC 82

PARTIES: **THE QUEEN**
v
STEPHEN RAYMOND POYNTER
(defendant)

FILE NO/S: Indictment 496/2015

DIVISION:

PROCEEDING: Application

ORIGINATING COURT: District Court at Townsville

DELIVERED ON: 13 April 2016

DELIVERED AT: Brisbane

HEARING DATE: 4 April 2016

JUDGE: McGill SC, DCJ

ORDER: **Application dismissed**

CATCHWORDS: CRIMINAL LAW – Sentence – recording conviction as a conviction for a domestic violence offence – so recording conviction for previous offence – to what offences this provision applies.
Criminal Code s 1 (“domestic violence offence”)
Penalties and Sentences Act 1991 s 12A(3)-(6).
Nicholas v R (1998) 193 CLR 173 – cited.
Polyukhovich v The Commonwealth (1991) 172 CLR 501 – cited.
R v Koster [2012] QCA 302, 226 A Crim R 247 – cited.
R v MD [2016] QDC 61 – cited.

COUNSEL: D Orr for the Crown
E G Bassett for the defendant

SOLICITORS: Director of Public Prosecutions for the Crown
ATSILS for the defendant

[1] On 5 February 2016 the defendant pleaded guilty to one count of unlawfully doing grievous bodily harm. The sentence was adjourned, and came on before me on 4 April 2016 when the defendant also pleaded guilty to one summary offence, contravention of a protection order under the *Domestic and Family Violence Protection Act* 2012 (“the Act”). The complainant in both matters was at the time

of the offending in a long term de-facto relationship with the defendant, and a protection order had been made in her favour in February 2015. I sentenced him to a term of imprisonment for the indictable offence, in respect of which a conviction was recorded and, pursuant to s 12A(2) of the *Penalties and Sentences Act 1991* (“PSA”), ordered that the conviction also be recorded as a conviction for a domestic violence offence. For the summary offence the defendant was convicted and a conviction was recorded¹ but he was not further punished.

- [2] On that day the prosecutor filed by leave an application pursuant to s 12(3) of the PSA seeking an order that four earlier offences of which the defendant had been convicted be recorded as convictions for a domestic violence offence. After hearing submissions from the prosecutor, I reserved my decision. I was at the time concerned about whether this had the effect of attributing additional significance to a conviction which had previously been dealt with by a court, and whether if so that might infringe against the principle of non-retrospectivity of criminal laws.² In the event however it seems to me that, for a different reason, that issue does not arise in this matter.
- [3] The application was made in respect of four offences, two of which were committed on 11 March 1997, offences of assault occasioning bodily harm and wilful destruction of property. The defendant was convicted of both in the Magistrates Court at Palm Island on 19 March 1997. On each count he was sentenced to six months imprisonment suspended for two years, so presumably convictions were recorded. In each of those counts it appears from the court brief prepared by the Queensland Police Service, a copy of which was put before me, that the complainant was then in a de-facto relationship with the defendant; the property offence related to the destruction of her television set with a hammer.
- [4] The defendant was before the District Court in Townsville on 21 October 1999, when he was dealt with for one count of assault occasioning bodily harm, the complainant being his sister, as appears from the sentencing remarks of the sentencing judge, the present Chief Judge, a copy of which was put before me on the hearing of the application. He was then sentenced to a term of imprisonment. On 31 January 2006 the defendant was before the Palm Island Magistrates Court and was convicted of one count of assault occasioning bodily harm, which had been committed on 1 January 2006 against his sister, as appears from the court brief a copy of which was put before me. He was ordered to pay compensation and perform community service. The defendant did not dispute before me either the fact or these detail of any of these convictions.

Legislation

- [5] The relevant parts of s 12A of the PSA provide as follows:
- “(3) If a court makes an order under subsection (2) or convicts an offender of an offence against the *Domestic and Family Violence Protection Act 2012*, part 7, the prosecution may apply to the court

¹ After considering s 12A of the PSA further, I ought to have recorded that conviction as a conviction for a domestic violence offence also.

² *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 609 – 626 per Deane J. This however was a dissenting judgment: *Nicholas v R* (1998) 193 CLR 173 at [149] per Gummow J. As to the presumption of non-retrospectivity, see *R v Koster* [2012] QCA 302, 226 A Crim R 247.

for an order that an offence, stated in the application, of which the offender has previously been convicted (a *previous offence*)—

- (a) for a previous offence for which a conviction was recorded—also be recorded as a conviction for a domestic violence offence; or
 - (b) otherwise—be entered in the offender’s criminal history as a domestic violence offence.
- (4) The application—
- (a) may be made in writing or orally; and
 - (b) must include enough information to allow the court to make a decision about whether it is appropriate to make the order.
- (5) The court may ask the prosecutor for further information for it to decide whether to make an order under subsection (6).
- (6) If, after considering the application, the court is satisfied a previous offence is a domestic violence offence, the court must order that the offence—
- (a) for a previous offence for which a conviction was recorded—also be recorded as a conviction for a domestic violence offence; or
 - (b) otherwise—be entered in the offender’s criminal history as a domestic violence offence.
- (7) ...
- (8) If a court is satisfied an error has been made in recording or entering an offence as a domestic violence offence, the court may, on an application or its own initiative, correct the error.”

- [6] This was a case where I made an order under subsection (2) and the prosecution did apply as contemplated in subsections (3) and (4). It follows that under subsection (6) I must make an order that the offence also be recorded as a conviction for a domestic violence offence if I am satisfied that the previous offence “is a domestic violence offence”. The term “domestic violence offence” is, by s 4 of the PSA, given the meaning given by the *Criminal Code* s 1, which defines that expression as follows:

“*domestic violence offence* means an offence against an Act, other than the *Domestic and Family Violence Protection Act 2012*, committed by a person where the act done, or omission made, which constitutes the offence is also—

- (a) domestic violence or associated domestic violence, under the *Domestic and Family Violence Protection Act 2012*, committed by the person; or
- (b) a contravention of the *Domestic and Family Violence Protection Act 2012*, section 177(2).”

- [7] The offences concerned were offences against an Act other than the Act, so the question is whether the act or omission which constitutes the offence is also “domestic violence or associated domestic violence under” the Act committed by the person, or an offence of breaching a protection order. At the time of the commission of the acts which constituted each of the offences the subject of the application, the defendant was in a relationship with the complainant which would satisfy the definition of an intimate personal relationship in the Act, in the case of

the complainant for the first two offences,³ and would satisfy the definition of a family relationship in the case of the complainant for the second two offences,⁴ so that in each case there was a relationship with the complainant which would satisfy the definition of “relevant relationship” in s 13 of the Act. By s 8(2)(a) of the Act, domestic violence includes causing personal injury to a person, and by s 8(2)(c) domestic violence also includes damaging a person’s property. So the acts done by the defendant which constituted each of those four offences would now amount to domestic violence under the Act.⁵

Analysis

- [8] The question which arises however is as to the construction of the definition of “domestic violence offence” in the *Criminal Code* s 1, in circumstances where at the time the four offences in question were committed, the Act did not exist. The Act commenced on 17 September 2012: s 2. Part 10 of the Act makes it clear that the Act replaced the *Domestic and Family Violence Protection Act* 1989. From the commencement applications for a protection order under the 1989 Act were to be treated as applications made under the Act (s 197) and the court could make an order under the Act in relation to domestic violence committed before the commencement of the provision: s 198. By s 196 an order made under the 1989 Act was taken to have been made under the Act, and s 177, which makes contravention of a domestic violence order an offence, applied in relation to an order made under the 1989 Act. As I read s 196 however s 177 only applied to a contravention which occurred on or after the commencement of the Act, and not to a contravention which had previously occurred, which was presumably to be dealt with under the 1989 Act. The position therefore was that the Act was retrospective in the sense that an order could be made under the Act on the basis of conduct which had occurred prior to the commencement of the Act, but was not retrospective in that conduct which constituted the offence of breach of a protection order under the previous Act committed prior to the commencement of the Act did not become an offence under the Act.
- [9] The real issue however is whether the definition applies on the basis that the relevant conduct constituted domestic violence⁶ under the Act at the time it occurred, or on the basis that it would constitute domestic violence under the Act if it occurred now. The definition was inserted in the *Criminal Code* by the *Criminal Law (Domestic Violence) Amendment Act* 2015 s 3, and that Act also amended ss 564 and 572. The former section was amended to insert subsection (3A), which permitted an indictment to allege that an offence, necessarily an offence charged, was a domestic violence offence, and the latter allowed a court to amend an indictment to include such an allegation.⁷ There is nothing in that context which provides any guidance as to the correct interpretation of the definition. The only amendments to the PSA were the insertion of the definition and s 12A, and a

³ See the Act s 14, 15(1).

⁴ See the Act s 19

⁵ In this case the position is clear enough. Because of the complexity of the definitions in Part 2 of the Act, whether the act or omission is also domestic violence within s 8(1) of the Act could well be a matter of considerable difficulty.

⁶ I do not need to consider whether the relevant acts amounted to “associated domestic violence” under the Act, because under the Act s 9 that is conduct within s 8(1), ie “domestic violence”, towards a person other than an aggrieved, which is meaningless in this context.

⁷ Considered in *R v MD* [2016] QDC 61 by Smith DCJA.

regulation power, which also do not provide any guidance to the correct interpretation. There was also no transitional provision in the 2015 Amendment Act.

- [10] I have looked at the Explanatory Note for the Bill that became the Amendment Act. It is clear from that note that some retrospective operation of the provision relating to the recording of prior convictions as convictions of domestic violence offences was intended, as necessarily follows from its terms, but the Note says nothing which throws any light on the question of whether the retrospectivity was intended to extend prior to the commencement of the Act, which is the issue here.
- [11] The crucial verb in the definition of domestic violence offence, “is”, is in the present tense, as is the expression “which constitutes the offence”, which applies to the relevant act or omission, constituting the offence against the other Act. That suggests that whether the act or omission is domestic violence is to be tested at the time when the act or omission constitutes the offence against the other Act. Hence the question is whether, at the time the act or omission constituting the offence occurred, it was also domestic violence under the Act. That was necessarily not the case prior to 17 September 2012, the day when the Act commenced. It is not enough that, after the Act commenced, the act or omission was domestic violence under the Act, or that it would now be domestic violence under the Act. If that is what the legislature intended, the definition of “domestic violence offence” inserted into s 1 would have been expressed differently.
- [12] It follows that none of the four offences the subject of this application meet the definition of “domestic violence offence” in s 1 of the Criminal Code, and so none was a domestic violence offence for the purposes of s 12A(6). Hence the application must be dismissed. That means that it is not necessarily for me to consider whether, if the subsection did purport to apply to these offences, it should be construed as not doing so in order to avoid some impermissible retrospectivity.