DISTRICT COURT OF QUEENSLAND

CITATION:	*Dever v The Commissioner of Police* [2017] QDC 65
PARTIES:	**PAUL LINDSAY DEVER** (appellant) **v** **THE COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	D127/16 and D128/16
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Caloundra Magistrates Court
DELIVERED ON:	17 February 2017 (reasons published 22 March 2017)
DELIVERED AT:	Maroochydore District Court
HEARING DATE:	17 February 2017
JUDGE:	Robertson, DCJ
ORDER:	**Both appeals are dismissed. There is no order as to costs.**
CATCHWORDS:	APPEAL: where appellant pleaded guilty to two offences while legally represented; when appellant now contends that her Honour should not have accepted his pleas because of his mental impairment, where her Honour was aware of the appellant's mental state; where no reports were placed before her to indicate his mental impairment either at the time of commission of the offences or at sentence. SENTENCE: where terms of imprisonment imposed with immediate release on parole (State offence) and recognizance (Federal offence); where appellant was a mature man with a lengthy history including like offences, whether sentences imposed was manifestly excessive. **Legislation** *Criminal Code* (Qld) 1899 s 27, 227B(1), 222 *Criminal Code Act* (Cth) *1995* s 7.31, 474, 474.15, 474.17(1), **Cases** *Bull v The Queen* (1974) 131 CLR 203 at 257 *White v Commissioner of Police* [2014] QCA 121 *House v The King* (1936) 55 CLR 499

R v Flew [2008] QCA 290
Channon v The Queen (1978) 33 FLR 433

COUNSEL: G. Cummings for the respondent

SOLICITORS: No appearance [Self-represented] for the appellant
Commissioner of Police for the respondent

[1] On 17 August 2016, at a time when he was legally represented, the appellant pleaded guilty in the Caloundra Magistrates Court to two charges namely:

> "1. on 23 July 2016 at Currimundi he used a telephone service in a menacing, harassing or offensive way contrary to s 474.17(1) of the *Criminal Code Act* 1995 of the Commonwealth; and
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> 2. on 13 June 2016 at Moffat Beach he distributed prohibited visual recordings contrary to s 227B(1) of the *Queensland Criminal Code*."

[2] He was sentenced in relation to the Federal offence to imprisonment of 12 months, and was released forthwith upon giving security by way of recognisance in the sum of $3,500 conditioned that he be of good behaviour for three years. Her Honour somewhat reluctantly imposed a further condition (at the request of the appellant's solicitor) that he consult with his psychiatrist upon release from custody. She was not assisted by either the defence or prosecution as to her power to make such an order. It is of no moment now, as she reopened the proceedings a few days later and removed this condition.

[3] In relation to the State charge he was sentenced to six months imprisonment with a parole release date set on 17 August 2016. In relation

to both orders her Honour made a pre-sentence custody declaration of 15 days.

[4] On 16 September 2017 the appellant lodged separate notices of appeal pleading that both orders were manifestly excessive.

[5] The notices of appeal and the outlines have been prepared by the appellant in person. The respondent's outline in both matters was filed on 2 December 2016 and both parties were notified on 15 December 2016 by the Deputy Registrar that the appeals would be heard at 10.30 am on 17 February 2017.

[6] On that day the appellant did not appear. By then I had read the transcripts of the proceedings before her Honour Magistrate Tonkin on 17 August 2016 and her decision of that day and I also had read the transcript of the whole proceedings as involving the appellant before her Honour on 10 August 2016 when he was also represented; and I had read the outlines of both parties.

[7] On 17 February 2017, I dismissed both appeals and made no order as to costs and indicated that I would publish brief reasons. These are my reasons.

The appellant's contention

[8] As I have noted, the appellant has prepared and filed his notices of appeal and outlines himself. He lodged separate appeals in relation to each offence but the outlines are the same in each.

Ground 1

[9] His first ground appears to be an attempt to challenge the conviction on the basis that he was of unsound mind at the time of the commission of the offences and had a defence under s 27 of the *Queensland Criminal Code* and or s 7.31 (of the *Commonwealth Criminal Code*).

[10] It is clear that her Honour was aware that the appellant suffered from some sort of psychiatric condition. Her Honour referred to her own dealings in the past with the appellant as a Magistrate including the proceedings on 10 August 2016, and the appellant's solicitor referred to his client seeing a psychiatrist[1] and a psychologist and being on medication. The solicitor did not have any reports and was clearly acting on direct instructions. Her Honour referred to him being "under psychiatric care in the past". In his Notice of Appeal filed 16 September 2016 he refers to suffering from a "Major Mental Psychotic Illness – such as Schizo effective" [sic], and to two other psychiatrists (not the one referred to by the solicitor on 17 August 16), but does not provide any reports which would be relevant to assessing his state of mind as at the date of commission of the offences.

[11] On 15 December 2016 he "filed" a report dated 7 September 2016 from yet another psychiatrist, Dr Fionnuala Dunn which appears to be a letter to a GP in Buderim.[2] She refers to seeing the appellant on 2 September 2016 at his request. She describes his "presenting problem" in these terms:

> "Paul is self-litigating and arranged the appointment with me in order to get a report stating he had a mental health defence for the crimes committed this year as he is attempting to get the conviction overturned. Paul had actually pleaded guilty to both charges, one of uploading a video recording and the second of using a carriage service to offend/harass. Paul states that he was psychotic at the time and therefore did not

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1 Transcript 1-24, 25

2 This letter is on file D, 128/16 but does not have a file number.

> understand what he was doing. Apparently he sent a recording he made of his female flatmate to their landlord. He also got in contact with several females, one of whom he sent photo [sic] of his penis and she sent it to the police. ….
> Paul has a history of psychosis and he describes male and female voices interacting with him and that sometimes they build him up and "sometimes break my mind". He stated that sometimes he is aware of his delusions but at other times he is not. He was taking Quetiapine 400 mg and Solian between 200-400 mg for several years. He told me he has been Dexamphetamine for 20 years, averaging 10 tablets a day. I note he was seeing Dr Illesinghe privately from 2013-15 and continued on 8 tablets of Dexamphetamine a day."

[12] In the "summary" sections she says it is "my impression" that he has a Chronic Schizoaffective Disorder that causes him to be quite disorganised. She states:

> "I advised Paul that I could not retrospectively say that he was psychotic at the time and even if I did, that this would not necessarily [sic] he was deprived of the necessary capacity to have a mental health defence. He appeared to be accepting of this."

[13] It is clear from the record itself, and from this document, that the appellant's psychiatric disorder was in existence long before he committed the offences to which he pleaded guilty on 17 August 2016, and that he had professional contact with a number of psychiatrists. Any evidence about his mental state in June/July 2016 would not be "fresh" in the sense in which the authorities characterise such evidence, and indeed, the report of 7 September 2016 suggests very low prospects of any mental health defence being maintained.

[14] It is clear from the record of proceedings[3] that the defendant was (at times) emotional, but there is no suggestion of any severe psychosis at those times such as would alert a very experienced Magistrate and solicitor to the need for his mental impairment at the time he committed the offences to be

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3 Both on 10 August 2016, CD 4 and 17 August 2016, CD 6.

explored further. There is no valid reason why her Honour would not accept the pleas entered, when he was legally represented, and there is no basis on which the plea can be revisited and the appeals against conviction are dismissed.

The sentence appeals

[15] An accurate summary of the chronology leading up to the commission of the offences and the offences themselves is set out at paragraphs 5-10 of the respondent's outline filed 2 December 2016:

> "5. Between 30 May and 6 June 2016 Mr Dever stayed at a house owned by Mr EF at Moffat Beach. Mr EF, Mr Dever and Ms BD each had their own bedroom at that house.
> 6. Ms BD recorded nude images of herself and sexual activities by her; these were private and kept on a hard drive in her bedroom; Mr Dever had no permission to access, copy or publish any of this data. Ms BD had no dealings with Mr Dever whatsoever.
> 7. On 6 June 2016 Mr Dever was evicted by Mr EF.
> 8. On 9 June 2016 Mr Dever uploaded nude images and at least one video of Ms BD masturbating to YouTube. He also commenced sending messages to Mr EF informing him he had images and videos of Ms BD.
> 9. On 13 June 2016 Mr Dever sent a further message to Mr EF, including a link to YouTube. When Mr EF followed the link it took him to a video of Ms BD masturbating. The video could only be viewed by persons to whom Mr Dever had provided the link; it had been viewed by five persons.
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> (i) Ms BD became aware of the video having been uploaded and being able to be viewed; she was highly distressed and provided a victim impact statement demonstrating a significant impact. She was quite traumatised.
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> (ii) When formally interviewed the defendant stated:
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> a. He had found a USB with a date on the floor in the lounge-room of the house.
> b. He had uploaded the video and supplied the link to Mr EF because Mr EF had a thing for Ms BD.
> c. He had no obvious reason for distributing this video.
> d. He had retained a copy of the data on a USB (which was recovered from his car).

(iii) Mr Dever was charged with one offence of distribution of prohibited visual recordings contrary to s 227B of the *Queensland Criminal Code* and released on bail.

10. On 23 July 2016, whilst on this bail, Mr Dever sent a number of unsolicited text messages with sexual overtones to Ms XY. He also sent her a picture of his erect penis. Ms XY was extremely concerned and provided a victim impact statement demonstrating a significant impact.
    (i) Ms XY and Mr Dever were unknown to each other.
    (ii) Mr Dever was charged with an offence using a carriage service to menace, harass or offend contrary to s 474.17 of the Commonwealth Criminal Code 1995."

[16] He was remanded in custody on 4 August 2016. On 10 August 2016 he appeared in the Maroochydore Magistrates Court before her Honour by video-link and confirmed that he wished to plead guilty to both charges. Although initially legally represented by a solicitor Mr Tobin, when Mr Tobin sought an adjournment for a week to prepare for the sentence Mr Dever elected to represent himself and opposed the adjournment. He wanted the matter to proceed to sentence that day. The matter proceeding to sentence was opposed by the prosecution because it did not have materials, however the Magistrate was concerned that the matter not be adjourned for a lengthy period so the police could obtain their materials while Mr Dever was remanded in custody. The prosecution later pressed for a three week adjournment. The Magistrate eventually adjourned the sentence hearing of the matter until 17 August then upon learning that the matter could not proceed that day Mr Dever indicted that he would make no application for bail.

[17] At the time of sentence the appellant was 44 years of age. He had a lengthy criminal history going back to 1999. He had many convictions for breaching domestic violence protection orders. On 21 September 2011 he

was admitted to probation and community service orders for a number of offences of dishonesty but also for a serious assault of a person over 60 years. On 11 December 2013 he was convicted of a number of a dishonesty offences but also an offence under s 474.15 of the *Commonwealth Criminal Code*. On that occasion he used a telephone service to threaten to kill a police officer. On 30 February 2015 he was convicted in the Caloundra Magistrates Court of a number of offences including another breach of s 474.17 of the *Commonwealth Criminal Code*. That offence involved menacing a 43 year old female who he had met to discuss a business matter. When she did not like the website he had designed for her, he sent in excess of 50 messages to her which were menacing, threatening and offensive. On 9 February 2016 he appeared again in the Caloundra Magistrates Court for a number of DVO breaches for which he was sentenced to two years' probation.

[18] He was subject to this order at the time he committed both offences the subject of the appeal. When he committed the Commonwealth offence he was already on bail for the State offence. Her Honour had before her an adverse report from probation and parole services indicating that he was not complying with conditions of probation.

[19] The prosecutor submitted (reasonably) that the appellant had not taken advantage of many opportunities given to him in the past by courts to rehabilitate. He emphasised the serious nature of the offending, the significant effect on the victims, and the appellant's criminal history particularly the previous breaches of s 474, and that the offences had been committed whilst he was subject to probation.

[20] The appellant's solicitor did not have any reports to tender to her Honour which is regrettable, but had, in advance, referred her to a number of authorities relevant to the potential mitigating effect of his client's mental illness. He accepted that a term of imprisonment was called for but argued that it should be moderated to take into account his mental health issues and he argued for a suspension which her Honour (reasonably) indicated she did not favour.

Her Honour's sentencing remarks

[21] Her Honour indicated that she was aware of the appellant's mental health issues from her past dealings with him but in the absence of evidence it was difficult to treat the issue as a factor which reduced moral culpability. She took into account the effect on the victims and the appellant's lack of insight into the effect of his actions on the victim. From the probation and parole report (which was not challenged) she referred to his failure to take prescribed medication despite being aware of his medical condition and the advice of doctors. She then imposed the sentences under challenge and declared 15 days pre-sentence custody.

Disposition

[22] The only actionable ground under s 222 is that the sentences were excessive. Section 222 also governs appeals against sentence for federal offences: *Bull v The Queen* (1974) 131 CLR 203 at 257. The appeal is by way of a technical rehearing on the evidence before her Honour: *White v Commissioner of Police* [2014] QCA 121, and is subject to the principles in *House v The King* (1936) 55 CLR 499 at 505-5.

[23] It is difficult to discern what legal, factual or discretionary error is pleaded in the appellant's notices of appeal and outline. He makes a number of complaints about police and his (Legal Aid solicitor), and refers mainly to positive steps he has taken since the orders to address the causes of his offending behaviour. The argument seems to be that he should not have been imprisoned because of his mental illness. Apart from the difficulty of proof because of the absence of any evidence before his Honour, the appellant's solicitor submitted that a term of imprisonment was warranted and in this regard see *R v Flew* [2008] QCA 290, para 29 per Keane JA (as his Honour then was). Her Honour was not assisted at all by either party as to appropriate comparable sentences. At one point, she remarked that she felt like her court was treated like some sort of legal advice service. It can be accepted that resources are stretched very thin before what is by far the busiest criminal court in Queensland, but it is regrettable that the only authority handed up to her Honour as a comparable was in fact a decision in a civil case involving damages.

[24] Because of his two prior convictions for the Federal offence, her Honour imposed the more significant penalty for that offence. The maximum penalty for the Federal offence was three years and for the State offence it was two years. Her Honour made no error in her approach to the issue of the appellant's mental health. In effect, she took it into account but treated it as neutral. Given his criminal history; there will come a point – if he does not take medication and medical advice – that if he reoffends he faces the prospect of his mental illness falling into that other category which "may mark him as a more intractable subject for reform than one who was

no so affected": *Channon v The Queen* (1978) 33 FLR 433 per Brennan J (as the Chief Justice then was) at 436-437.

[25] There is no error demonstrated in her Honour's approach to this issue, nor are the sentences imposed manifestly excessive.

[26] Both appeals are dismissed. There is no order as to costs.