DISTRICT COURT OF QUEENSLAND

CITATION:	*Ponturo v Commissioner of Police* [2019] QDC 174
PARTIES:	**MARC ANTHONY PONTURO** (appellant) v **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	3121/2018
DIVISION:	
PROCEEDING:	s 222 Appeal
ORIGINATING COURT:	Brisbane Magistrates Court
DELIVERED ON:	20 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2019
JUDGE:	Dearden DCJ
ORDER:	**1. Appeal granted.** **2. Confirm the sentence imposed by the learned sentencing magistrate at the Brisbane Magistrates Court on 29 August 2018 in respect of all charges, but vary the order as to the date in respect of the appellant's parole, fixing a parole release date at 20 September 2019.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted and sentenced to one month imprisonment for possession of a dangerous drug – where the appellant was convicted and sentenced to three months' imprisonment for supplying a dangerous drug – where the appellant suffered from drug dependency – where the appellant had undertaken steps towards rehabilitation – where the appellant had recently obtained full-time employment – whether the sentence was manifestly excessive
LEGISLATION:	*Justices Act* 1886 (Qld) s 222(1), s 223 *Penalties and Sentences Act* s 9
CASES:	*Chapman v Queensland Police Service* [2016] QDC 141

Forrest v Commissioner of Police [2017] QCA 132

McDonald v Holeszko [2018] QDC 204

McDonald v Queensland Police Service [2017] QCA 255

R v Crook [2012] QCA 305

R v Lovi [2012] QCA 24

COUNSEL: C Minnery for the appellant (pro bono)
E McGregor for the respondent

SOLICITORS: Jasper Fogerty Lawyers for the appellant (pro bono)
Office of the Director of Public Prosecutions for the respondent

[2] The appellant, Mark Anthony Ponturo, pleaded guilty to the following charges at the Brisbane Magistrates Court on 29 August 2018:

> "1 x possessing dangerous drugs (on 5 May 2018, cannabis);
> 1 x supplying dangerous drugs (on 5 May 2018, cannabis);
> 1 x possessing anything used in the commission of a crime (on 5 May 2018, a mobile phone);
> 1 x possessing dangerous drugs (on 5 May 2018, cannabis);
> 1 x possessing dangerous drugs (on 5 May 2018, lysergic acid);
> 1 x possessing anything used in connection with a crime (on 5 May 2018, digital scales and a grinder);
> 1 x possess utensils or pipes (on 5 May 2018, a home-made smoking utensil).[1]

[3] The appellant was sentenced to one month imprisonment on each of the two charges of possession of a dangerous drug (cannabis) charge, 3 months' imprisonment in respect of the supply dangerous drug (cannabis) charge, and on the balance of the charges, a single fine of $500. The parole release date was set at 27 September 2018 (one month after the imposition of the sentence).[2]

Grounds of Appeal

[4] The appellant appeals on the following grounds:

> "1. that the sentence of imprisonment, including the actual custodial component, was manifestly excessive in all of the circumstances;
> 2. that the learned sentencing magistrate erred by imposing a period of actual custody."[3]

The law – appeals

[5] I refer to and adopt my exposition of the relevant statutory provisions (*Justices Act* 1886 (Qld) s 222(1) and s 223) and statements of principle from *McDonald v Queensland Police Service* [2017] QCA 255 and *Forrest v Commissioner of Police*

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[1] Notice of Appeal to a District Court Judge, filed 29 August 2018, p. 1; Outline of Argument - Appellant, filed 7 March 2019, [2].
[2] Notice of Appeal to a District Court Judge, filed 29 August 2018, p. 1; Outline of Argument – Appellant, filed 7 March 2019, [2]-[3]; VJR of Mr Marc Anthony Ponturo, dated 29 August 2019.
[3] Notice of Appeal to a District Court Judge, filed 29 August 2018, p. 1.

[2017] QCA 132, as set out in my decision in *McDonald v Holeszko* [2018] QDC 204 at [6]-[9].

[6] In *Chapman v Queensland Police Service* [2016] QDC 141, Durward SC DCJ at [30]-[31] identified the relevant principles in an appeal against sentence in the following terms:-

> [30] The material principle to be applied in an appeal against sentence is that some error in the exercise of the sentencing discretion must be identified: in *House v The King* (1936) 55 CLR 499. Dixon, Evatt and McTiernan JJ, at 505 wrote:
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> > "*The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges comprising the appellate court consider that, if they had been in the position of the primary court they would have taken a different course. It must appear that some error has been made in exercising their 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*."
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> [31] The principles governing appeals against the exercise of discretion on sentencing are well established. In *Hughes v Hopwood* (1950) QWN 21 at 31, Macrossan CJ stated that an appeal court is not entitled to interfere unless it "… *can find that the sentence is manifestly excessive or that there are some circumstances which show that the magistrate acted under a misapprehension of fact or on some wrong principle in awarding a sentence".*

The circumstances of the offences

[7] The allegations were set out by the police prosecutor before the learned magistrate in the following terms:

> "… at about 4.30 in the afternoon, police from Brisbane [indistinct] Tactical Crime Squad were conducting patrols in an unmarked police vehicle in the vicinity of the Alderley Arms Hotel in relation to drug activity. Whilst in that location, they observed two males sitting in the gutter near the entrance to the hotel car park. Police parked about 20 metres away, where they've observed a black Mitsubishi Triton. Police parked 20 metres away from that, saw the two males. The Triton has entered and passed the police vehicle, turning on the service road. Police intercepted the vehicle. The driver was identified as Michael Damian Woodland. The front passenger was identified as the defendant in this matter, and rear passenger as a Henry Lawrence.
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> Checks were conducted on the occupants on the police database as a result. And the reason for them being them [sic] are the known drug activity. Also, the defendant in this – here, he was drowsy and red eyes. The occupants were detained for a search. Subsequent to that search, police located a clip seal bag containing 1.7 gram [sic] of

> green leaf material in the pants of the defendant. He was cautioned. He admitted ownership, stating that the cannabis was his. … That's in respect to charge 1 and with respect to charge 2 and 3, police located a clip seal bag containing 9.1 grams of green leaf material on Woodland's person. Police had then inspected the mobile phones of the defendant and Woodland, locating messages that indicated that the defendant had just supplied Woodland with the green leaf material. When questioned after cautioning, both males admitted that the defendant had supplied the clip seal bag to Woodland for $90 when the defendant got into the Triton.
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> With respect to charge 4 … police then conducted a search at 4/20 Lorne Street, Alderley, as a result of other information from that detention and then conducted an emergent search as a result of that search. Police located in the garage a clip-seal bag containing … 3.25 grams, 6.58 grams and two bowls containing remnants of green leaf material. Police also located a clip-seal bag containing cannabis seed. When located, the defendant stated, "The cannabis is the only thing I use to get me through my anxiety. You've just ruined a week's worth of medication for me." With respect to charge 6, police … also located in the garage with the other drugs was a clip-seal bag containing one tablet of LSD. With respect to charge 7, the police also located the set of digital scales and electric grinder containing the residue and smell of burnt cannabis – or smell of cannabis. And with respect to charge 8, police located in the garage … a bong constructed of a Gatorade bottle, pipe and cone piece, smelling of burnt cannabis. The defendant was issued with a notice to appear in relation to those matters. Post-search approval was granted."[4]

[8] The appellant's criminal history was tendered before the learned magistrate, and the prosecutor submitted:

> "Your Honour will note the criminal history of the defendant. The defendant appears before you at 22 years of age, has just shy of six years of criminal history. From 2012 and not one year is there not an offence of a drug related matter. Your Honour it's prosecution submission that the term of imprisonment is in range."[5]

[9] Subsequently the police prosecutor also submitted:

> "… [the appellant] is presenting as someone with a genuine desire to change, you know and I would urge your Honour to make orders that enable him to continue on that path."[6]

[10] The appellant's submissions and the further conduct of the sentence before the learned magistrate are helpfully summarised in the appellant's Outline of Argument as follows:

> "20. The court was told that the appellant has struggled with drug dependence and illegal drug use for a long time, essentially

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4 Sentence submissions transcript, 1-3, l 26 to 1-4, l 17.
5 Sentence submissions transcript, 1-4, ll 17-21.
6 Sentence submissions transcript, 1-12, ll 1-3.

since he suffered a broken vertebrae at about age sixteen or seventeen. He used cannabis for pain relief, as his father did, and progressed over years to addiction to benzodiazepines. That addiction got worse and worse, to the point that the appellant was using up to fifty milligrams a day. The appellant sought help from Dr Donohue, and with that assistance had managed to reduce his use to ten milligrams a day at the time of the sentence. In summary, he was well on the path to recovery, it is submitted, and the letter from Dr Donohue makes it clear that, at least in the doctor's opinion, the appellant is committed to change.

21. The appellant was, and is, committed to rehabilitation, and had a drug counselling appointment booked the following week (i.e. the week after sentence). Most importantly, he had just gained his first full-time job working as a painter, and that had been transformative.

22. The process of the sentence was essentially that the learned magistrate at first instance challenged the submission that the appellant had arranged drug counselling.[7] Her Honour took the view that in fact the appellant had received no drug counselling, throughout his six year addiction.[8]

23. Her Honour seemed to criticise the appellant for both not arranging drug counselling through the course of the proceedings (that is, in the time between the sentence on 29 August 2018 and the charges first being laid, as of 5 May 2018 i.e. a little less than four months), and for failing to take advantage of previous opportunities afforded in previous court orders.

24. Her Honour also appeared critical of the appellant's job opportunity, challenging the submission that he had employment, and then drawing on her previous experience to suggest that the opportunity as a painter might be unlicensed.

25. Her Honour was critical of the appellant for the lateness of his plea of guilty, and when informed that the appellant had only received legal representation shortly before the previous mention, and the need to arrange the discontinuance of a charge which was not proceeded with by the prosecution, rendering the plea of guilty timely, did not appear to expressly acknowledge the correctness of this submission.

26. The sentence was stood down for the court to receive information from the Probation and Parole service as to the appellant's performance on previous orders. That report was received … however, it is clear that the report talks about a superficial level of engagement with probation and parole,[9] and some cancelled appointments[10] and indicated an

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7 See Sentence submissions transcript, 1-5, l 18 to 1-6, l 27.

8 See Sentence submissions transcript, 1-5, ll 27-45, and particularly at l 45.

9 See Sentence submissions transcript, 1-11, l 12.

10 See Sentence submissions transcript, 1-11, l 4.

issue with further probation or supervisory orders on the basis of the risk of reoffending.[11]

27. It is apparent that Her Honour took the approach set out at [Sentence submissions Transcript] page 8, line 36, which is that she felt constrained in imposing any sentence other than actual imprisonment because of a lack of substance abuse counselling. With respect, this is an approach which is incorrect in law – there is no basis for taking this approach on a sentence, and it is submitted that it was wrong to do so. The appellant pointed out, and (importantly) the prosecution accepted the issues that had arisen with his work meaning he could not attend a substance abuse counselling appointment prior to the sentence, but instead had an appointment after the sentence, the following week …[12]

28. It is submitted [on behalf of the appellant] that the learned magistrate at first instance essentially started from a position that the fact that the appellant had not completed substance abuse counselling meant that actual imprisonment was the only appropriate sentence. Her Honour refused to accept an explanation (the appellant's work) for that not having occurred. Her Honour did not expressly accept that the plea of guilty was at least timely, if not early. Her Honour maintained a position inconsistent with accepting the appellant's employment was not only real, but key to his rehabilitation and future prospects of remaining drug and offence free."[13]

[11] The respondent, conversely, characterises the sentencing process as follows:-

"7. The remarks of the learned magistrate demonstrate a measured consideration of the appellant's circumstances and the submissions made on his behalf. In sentencing the appellant the magistrate made explicit reference to:

(a) the appellant's young age;[14]
(b) his plea of guilty and its timing;[15]
(c) his criminal history;[16]
(d) his recent employment;[17] and
(e) his past performance on probation and community service and the recommendation from probation and parole that he was unsuitable for further community based orders.[18]

8. While accepting that the offending was at a low level on the scale of seriousness, the magistrate properly regarded the appellant's act of selling cannabis as an escalation in his offending, which included 5 previous convictions for drug

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11 See Sentence submissions transcript, 1-11, l 5-6.
12 See Sentence submissions transcript, 1-11, l 23 (particularly l 41), to 1-12, l 3.
13 Outline of Argument - Appellant, filed 7 March 2019, [20]-[28].
14 See Sentence decision transcript, p. 2, l 13.
15 See Sentence decision transcript, p. 2, ll 2-4.
16 See Sentence decision transcript, p. 2, ll 12-22; ll 43-44.
17 See Sentence decision transcript, p. 2, ll 20-28.
18 See Sentence decision transcript, p. 2, ll 21-41.

possession.[19] The appellant had previously been subject to a 12 month probation order imposed in 2013, an 80 hour community service order imposed in 2015 (breached), and a one month term of imprisonment and a further 18 month probation order imposed in 2016.

9. The magistrate queried the vague submissions made on the appellant's behalf about his efforts to rehabilitate prior to sentence. The appellant's lawyer initially submitted that the appellant had 'taken steps' towards rehabilitation with a counsellor, but then conceded that no appointment had actually taken place.[20] The appellant's lawyer also submitted that the appellant was seeing his GP in effort to rehabilitate, but also conceded that the letter from Dr Donohue actually made no reference to illicit drugs.[21]

10. The appellant's recent employment was submitted to be the reason why he had not engaged with counselling prior to sentence. No explanation was offered for his failure to engage with counselling in the months prior.[22] While the magistrate did enquire as to the licensing requirements of the appellant's employment as a subcontractor, it should be noted that Her Honour explicitly stated that those enquiries were not relevant to her decision.[23]

11. The magistrate then stood the matter down in order to obtain a report from probation and parole as to the appellant's past performance on supervised orders. The report spoke of the appellant's mixed response to supervision and only a superficial engagement with the order imposed in 2016. It cited frequent failures by the appellant to attend appointments with counsellors as directed, failures to comply with monthly reporting on 11 separate occasions, and the appellant committing a further offence during the term of the order. Ultimately, the report opined that the appellant had gained little benefit from supervision, and recommended that he was not suitable for further community based orders." [24]

Discussion

[12] The respondent submits (correctly) that "there is a wide sentencing discretion available for cases involving the possession and/or supply of cannabis, even where commerciality is not alleged. Penalties can range from fines, community service orders, probation orders, suspended sentences and even sentences in which periods of actual custody are required to be served."[25]

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19 See Sentence submissions transcript, 1-9, l 6.
20 See Sentence submissions transcript, 1-6, ll 11-22.
21 See Sentence submissions transcript, 1-6, ll 3-12.
22 See Sentence submissions transcript, 1-10, ll 14-15.
23 See Sentence submissions transcript, 1-12, ll 14-18.
24 Outline of Submissions on behalf of the Respondent, filed 11 April 2019, [7]-[11].
25 Outline of Submissions on behalf of the Respondent, filed 11 April 2019, [12], citing *R v Crook* [2012] QCA 305, [17].

[13] The appellant, on the other hand, argues that:

(a) the appellant was still a young man (aged 22 at sentence);[26]

(b) the appellant was sentenced to his first sentence of actual imprisonment, which was not imposed as a last resort contrary to the *Penalties and Sentences Act* 1992 (Qld), s 9(2)(a);[27]

(c) the learned magistrate placed too much weight on the prior criminal history;[28]

(d) the learned magistrate failed to take account of the fact that the supply charge involved "an extremely small amount of a schedule 2 drug, for an extremely small amount of money, to an associate, on one occasion";[29]

(e) the offending was not committed in breach of any orders;[30]

(f) the sentence had the effect of ignoring or destroying work done by the appellant to rehabilitate himself (in particular returning to work);[31]

(g) that a short period of actual imprisonment imposed on a young offender with otherwise good prospects of rehabilitation was counterproductive;[32] and

as a consequence, the learned magistrate imposed a sentence which was manifestly excessive in all of the circumstances.

[14] In particular it is submitted by the appellant that the learned magistrate inappropriately constrained her approach to the sentence given that she perceived the appellant had not accessed drug counselling, and she failed to recognise the commitment to ending drug use and undertaking employment.[33]

[15] The appellant's criminal history was undoubtedly a concern for the learned magistrate, given that it reflected convictions for drug related offending between 5 November 2012 and the offences for which the appellant was sentenced on 29 August 2018. The criminal history contains (relevantly) four offences of possessing utensils or pipes between 5 November 2012 and 20 May 2015, and five offences of possessing dangerous drugs between 13 September 2013 and 11 September 2017, with outcomes ranging from a recognisance good behaviour order of four months with drug diversion and no conviction recorded, through to modest fines and community service (on which the appellant was resentenced on breach to short jail sentences of 14 days and one month concurrent, with immediate parole, and probation). A careful examination of that criminal history[34] indicates ongoing but low level involvement in (primarily) Schedule 2 drugs. The supply charge before the learned magistrate is the only drug offence on the appellant's criminal history which would not otherwise be considered minor.

[16] In the light of that analysis, and guided by the decisions of *R v Lovi* [2012] QCA 24, and *R v Crook* [2012] QCA 305, I consider that the learned magistrate has placed

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26 Outline of Argument - Appellant, filed 7 March 2019, [29].
27 Outline of Argument - Appellant, filed 7 March 2019, [30].
28 Outline of Argument - Appellant, filed 7 March 2019, [31].
29 Outline of Argument - Appellant, filed 7 March 2019, [32].
30 Outline of Argument - Appellant, filed 7 March 2019, [33].
31 Outline of Argument - Appellant, filed 7 March 2019, [37].
32 Outline of Argument - Appellant, filed 7 March 2019, [39] citing *R v Lovi* [2012] QCA 24, [38].
33 Outline of Argument - Appellant, filed 7 March 2019, [42]-[43].
34 Sentence Exhibit No. 1, tendered 29 August 2018.

too much weight on the appellant's criminal history and insufficient weight on the identifiable prospects of, and commitment to rehabilitation (for which the letter from Dr Donohue[35] was of some assistance, although not referring directly to the appellant's use of illegal drugs), the demonstrated positive step of obtaining full-time employment, and the appellant's age at the time of sentence (22 years). In my view, the learned magistrate fell into sentencing error in that balancing exercise.

[17] Mr Minnery, who appears on behalf of the appellant, submits that the term of imprisonment on the supply charge could have been shorter, but his primary submission is that the appropriate sentence should not have required a term of actual imprisonment.

[18] In my view, the quantum of the sentence imposed by the learned magistrate was not in error (it reflected, appropriately, the learned magistrate's recognition that the supply charge reflected a more serious offence committed by the appellant in the context of his previous drug offending), but for the reasons I have identified above, that sentence should have been ameliorated by having the appellant placed on immediate parole. Given that it is likely that the appellant will be randomly tested for drug use during that period of parole, it ensures both a significant and proportionate punishment for his offending, while at the same time providing the appellant's best opportunity to demonstrate the steps he has taken towards rehabilitation (including a commitment to drug counselling and fulltime employment), as well as an acknowledgment of the benefit of the appellant's timely plea of guilty.

Conclusion

[19] Accordingly, I make the following orders:

1. Appeal granted.
2. Confirm the sentence imposed by the learned sentencing magistrate at the Brisbane Magistrates Court on 29 August 2018 in respect of all charges, but vary the order as to the date in respect of the appellant's parole, fixing a parole release date at 20 September 2019.

Costs

[20] I will hear the parties on costs.

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35 Sentence Exhibit No. 2, tendered 29 August 2018.