

# DISTRICT COURT OF QUEENSLAND

CITATION: *Luu v The Commissioner of Police* [2020] QDC 202

PARTIES: **JIMMY YUONG VINH LUU**  
(appellant)  
v  
**THE COMMISSIONER OF POLICE**  
(respondent)

FILE NO/S: 3418/18

DIVISION: Criminal

PROCEEDING: Appeal

ORIGINATING COURT: Magistrates Court at Richlands

DELIVERED ON: 26 August 2020

DELIVERED AT: District Court, Brisbane

HEARING DATE: 20 August 2020

JUDGE: Farr SC, DCJ

ORDER: **1. The appeal is allowed.**  
**2. The sentence of three months' imprisonment suspended immediately for two years is set aside.**  
**3. The appellant is fined \$1,500.00 to be paid within 3 months in default 14 days' imprisonment.**  
**4. A conviction is recorded.**  
**5. The disqualification period of six months remains as per the Magistrate's order.**

CATCHWORDS: CRIMINAL LAW – APPEAL – APPEAL AGAINST SEVERITY OF SENTENCE – *Justices Act 1886* (Qld) s 222 – where the appellant pleaded guilty on 28 August 2018 in the Richlands Magistrates Court to driving without a licence whilst disqualified – where an error in the exercise of the learned Magistrate's sentencing discretion needs to be demonstrated – whether the learned Magistrate erred in refusing to grant an adjournment when in all the circumstances it was correct to do so – whether the sentence was manifestly excessive.

*Justices Act 1886* (Qld) s 222.

*House v The King* (1936) 55 CLR 499.

*Johnstone v Jessen* [2016] QDC 144.

COUNSEL: S Di Carlo for the appellant  
K M McFarlane for the respondent

SOLICITORS: Grasso Searles Romano Lawyers for the appellant  
Office of the Director of Public Prosecutions for the  
respondent

## Introduction

- [1] The appellant pleaded guilty in the Richlands Magistrates Court on 28 August 2018 to the following charge:
- That on the 21<sup>st</sup> day of March 2018 he drove a motor vehicle on a road namely Macquarie Road, Berrinba, not being at that time the holder of a driver licence authorising him to drive that vehicle on that road and at the time he drove that vehicle on that road, he was disqualified from holding or obtaining a driver licence because of the allocation of demerit points.
- [2] He was sentenced to three months' imprisonment wholly suspended for an operational period of two years and was disqualified from holding or obtaining a driver licence for a period of six months.
- [3] He has appealed against the severity of the sentence pursuant to s 222 *Justices Act 1886* (Qld).

### Standard to be met on appeal

- [4] An appeal pursuant to s 222 of the *Justices Act 1886* (the *Act*) requires this Court to conduct a review of the sentencing hearing and ultimately correct any error of the sentencing Magistrate. This is determined on the basis of that review and this Court's own conclusions.<sup>1</sup> Necessarily, consideration must be had to the issues raised by the grounds of appeal and, as the appeal is in respect of an exercise of discretion, an error in the exercise of the sentencing discretion as identified in *House v The King*<sup>2</sup> needs to be demonstrated.<sup>3</sup>
- [5] This Court may confirm, set aside or vary an appealed order, or make any other order considered just.<sup>4</sup>

### Grounds of appeal

- [6] The grounds of appeal are:

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<sup>1</sup> Section 223 *Justices Act 1899* and see: *Fox v Percy* (2003) 214 CLR 118 at [25]; *Teelow v Commissioner of Police* [2009] QCA 84 at [2]-[4]; *Tierney v Commissioner of Police* [2011] QCA 327 at [26]; *Commissioner of Police v Al Shakaji* [2013] QCA 319; *White v Commissioner of Police* [2014] QCA 121 and *Forrest v Commissioner of Police* [2017] QCA 132.

<sup>2</sup> (1936) 55 CLR 499 at [505].

<sup>3</sup> *Teelow v Commissioner of Police* [2009] QCA 84 at [20]; *Forrest v Commissioner of Police* [2017] QCA 132; *McDonald v Queensland Police Service* [2017] QCA 255.

<sup>4</sup> Section 225 *Justices Act 1886*.

1. The learned Magistrate erred in refusing to grant an adjournment when in all the circumstances it was correct to do so.
2. The sentence was manifestly excessive.

### **Circumstances of offence**

[7] The facts placed before the learned Magistrate were as follows:

*“... it was Wednesday, the 21<sup>st</sup> March 2018, about ten past four in the afternoon, police observed the defendant driving a black Audi Coupe. The vehicle was stopped for a random licence check. The defendant was the only occupant. He produced his driver’s licence. Police confirmed his identity from that licence. The defendant told police that his licence was suspended and that it had been suspended about two months prior for a period of six months, which – and that is a demerit point suspension that was imposed as of the 9<sup>th</sup> February 2018, and it was opposed – sorry, imposed as a result of a failed appeal to the Beenleigh Magistrates Court for a... special hardship licence.*

*He said he was driving that day to visit a friend and to have some food with them. There was takeaway containers in the backseats to support that being his reason for driving.”*

### **Submissions**

#### ***Ground 1***

- [8] The matter was listed for a summary trial on 28 August 2018. Neither the appellant’s counsel nor solicitor attended the hearing. The police prosecutor advised the learned Magistrate that he had received communication from the appellant’s counsel advising that the intention was for the matter to proceed as a sentence but that the appellant’s counsel had court elsewhere and asked that the matter be adjourned so that counsel could appear at a later date.<sup>5</sup>
- [9] The appellant has submitted that the learned Magistrate erred in refusing the application for an adjournment of sentence and that such an error can enliven the discretion of this court to intervene.
- [10] The respondent has submitted that the decision of the learned Magistrate to proceed to sentence was not a decision made in the exercise of the sentencing discretion, but was an interlocutory order. Additionally, s 222(2)(c) of the *Act* relevantly states

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<sup>5</sup> Transcript of proceedings, p 2, ll 12-16.

that if a defendant pleads guilty, a person may only appeal under this section on the sole ground that a punishment was excessive or inadequate. The respondent submits therefore that this ground of appeal has no legislative foundation.

[11] I agree with that submission.

[12] However, the respondent quite properly has conceded that if the learned Magistrate's decision not to adjourn the sentence to allow the appellant to have legal representation resulted in the learned Magistrate either failing to take into account a relevant consideration or placing undue weight on any circumstance or matter, than that error would fall within the ambit of the second ground of appeal.

[13] I also agree with that submission.

[14] The appellant has submitted that the sentence imposed was excessive for a combination of reasons. In relation to the first of those reasons, the appellant's counsel has handed to this Court today an affidavit<sup>6</sup> by himself detailing the matters he anticipates he would have placed before the court if he had appeared at the sentence below. He submits that such matters were mitigatory and would have resulted in a lesser penalty.

[15] The second reason is that the penalty imposed is excessive when compared to the matter of *Johnstone v Jessen* [2016] QDC 144.

[16] The respondent submits that the penalty was not excessive and that the submissions that the appellant's counsel anticipates he would have made would not have resulted in a different penalty.

### **Determination**

[17] I will deal with the second of those matters first.

[18] In the appellant's favour is the fact that he pleaded guilty to the charge, notwithstanding that it was a late plea of guilty,<sup>7</sup> that he was in employment and that

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<sup>6</sup> In fact he handed up two affidavits from himself. The other purportedly explained the reason for his non-attendance at the Richlands Magistrates Court on the day in question. The appellant's counsel has undertaken to the Court to file the originals of these affidavits by close of business 21 August 2020.

<sup>7</sup> The matter had been set down for trial that day.

he was apprehended due to a random licence check as opposed to having been stopped by police because of poor driving.

- [19] The principal aggravating feature to the offence was the appellant's traffic record which ran to four pages and included three previous convictions for unlicensed driving, the most recent of which occurred on 8 February 2016. He was fined on each of those occasions. Additionally, the subject offence occurred when the appellant was disqualified from driving due to the accumulation of demerit points.
- [20] In *Johnstone v Jessen*, the defendant was initially sentenced to five months' imprisonment wholly suspended for a charge of unlicensed driving with a circumstance of aggravation that he was a repeat unlicensed offender. He too was intercepted by police for a random licence check which revealed he had not held a driver licence for over 16 years. His traffic history was described as shocking and included a number of convictions for unlicensed driving and disqualified driving although the most recent of those had occurred some four years prior to the driving in question. On appeal, the sentence was reduced to a fine of \$300.00 with a disqualification period of one month. This was a remarkably lenient penalty.
- [21] In the present matter, the appellant's most recent prior conviction for unlicensed driving was within two years of committing the offence the subject of this appeal. Additionally, he was disqualified from driving due to the accumulation of demerit points. These are aggravating features and place the appellant in a less favourable position than the defendant in *Johnstone v Jessen*.
- [22] Nevertheless, the difference between the sentences is significant and disproportionate and leads me to conclude that the sentence of a wholly suspended term of three months' imprisonment is excessive. I note that the learned Magistrate was not assisted by being provided with any comparable decisions in the first instance. Nor have I been provided with any comparable decisions other than *Johnstone v Jessen*.
- [23] Given this conclusion, I do not need to consider the potential impact on the Magistrate's decision of the submissions that the appellant's counsel would have made if he had attended at the Court as per his responsibilities.

[24] Nevertheless, the respondent has not objected to the receipt of the affidavit detailing those potential submissions and it is appropriate that I take them into account when determining sentence. However, without detailing the individual submissions, I am of the view that they do not further mitigate the offending conduct. No emergent reason has been identified to mitigate the appellant's decision to drive and the submissions contained in paragraph 3(a); (b); (g) and (h) were already known to the learned Magistrate. Furthermore, the circumstances of the appellant's prior convictions for unlicensed driving are of little relevance to this matter.

[25] I note that the maximum penalty for this offence is 40 penalty units or 12 months' imprisonment.

[26] Contrary to the appellant's initial submission that the order disqualifying him from holding or obtaining a driver licence for six months was excessive, s 79(3)(b) of the *Act* states that such a disqualification period for this charge is mandatory.

[27] I note also, that for the three prior convictions of unlicensed driving the appellant was fined amounts of \$500.00, \$350.00 and \$650.00 respectively. Clearly these fines have had no deterrent effect. Taking all matters into account, in my view the appropriate sentence for this matter is a hefty fine and I am of the view that an amount of \$1,500.00 is appropriate in all the circumstances.

[28] **Order**

1. The appeal is allowed.
2. The sentence of three months' imprisonment suspended immediately for two years is set aside.
3. The appellant is fined \$1,500.00 to be paid within 3 months in default 14 days' imprisonment.
4. A conviction is recorded.
5. The disqualification period of six months remains as per the Magistrate's order.