

DISTRICT COURT OF QUEENSLAND

CITATION: *Monsell v Commissioner of Police* [2020] QDC 250

PARTIES: **HENRY ROBERT MONSELL**
(appellant)

v

COMMISSIONER OF POLICE
(respondent)

FILE NO/S: 1456 of 2020

DIVISION: Appellate

PROCEEDING: Appeal

ORIGINATING COURT: Magistrates Court

DELIVERED ON: 1 October 2020

DELIVERED AT: Brisbane

HEARING DATE: 24 September 2020

JUDGE: Lorry QC DCJ

ORDER: **1. Extend time within which to file the Notice of Appeal until 21 May 2020.**

2. Allow the appeal.

3. Set aside the sentence imposed on the offence of unlawful use of a motor vehicle committed on 26 March 2017 and in lieu convict and not further punish the appellant for that offence.

4. Set aside the order requiring the appellant to pay restitution in the amount of \$12,000.

COUNSEL: DM Hans, solicitor, for the appellant
MJ Whelan, solicitor, for the respondent

SOLICITORS: Hans Legal for the appellant
Officer of the Director of Public Prosecutions (Qld) for the respondent

[1] On 11 April 2019 the appellant was sentenced in relation to fifteen offences. The effective head sentence imposed was one of three years imprisonment. On each of fourteen charges the appellant was given a parole release date fixed at 6 September 2019. In relation to one offence of unlawful use of a motor vehicle he was given a parole eligibility date for the same day. He was also ordered to pay \$12,000 in restitution in relation to one of the offences.

- [2] The sentence was re-opened on 15 April 2019 because it was understood that there could not be a parole release date and a parole eligibility date imposed at the same time.¹ The learned Magistrate sentenced the appellant for the one offence of unlawful use of a motor vehicle to three years imprisonment suspended after the appellant had served 369 days for an operational period of five years.
- [3] The appellant applies for an extension of time within which to appeal his sentences. His notice of appeal was filed approximately 12 months out of time on 21 May 2020. The explanation for the delay lies in the appellant not understanding that he had a right to appeal. He was not told that he could appeal. The appellant's file held by the Aboriginal and Torres Strait Islander Legal Service cannot be located. The appellant is also said to have a very limited education and limited literacy skills. It was not until he received legal advice upon being charged with further offences in March 2020 that the appellant became aware of his right to appeal. I consider that the explanation is a reasonable one given the appellant's limited education and literacy skills.
- [4] The real question for determination is whether there is any merit in the appellant's appeal.² I am of the view that there is merit in the appeal. The appellant appeals against the suspended sentence imposed for the offence of unlawful use of a motor vehicle and the restitution order. The sentence imposed by the learned Magistrate has resulted in an unintended consequence. Accordingly I extend time for filing of the notice of appeal to 21 May 2020.
- [5] For the purposes of this appeal the facts can be briefly stated. The appellant's offending consists predominantly of unsophisticated attempts at breaking and entering into dwellings and/or motor vehicles for the purposes of stealing the vehicle or the contents found therein.
- [6] The offending contained in charges 1 to 3 and 5 to 15 spans roughly five months, between 20 May 2018 and 13 October 2018. Most significantly, during this period the appellant broke into three motor vehicles and two dwellings on separate occasions, often stealing the vehicle itself and/or personal items and cash belonging to the owners of the dwellings or vehicles. Notably, on one occasion the appellant stole property valued at \$12,000 from one of the dwellings, for which he was ordered to pay restitution. The appellant also breached his bail and contravened a domestic and family violence protection order.
- [7] The appellant was often spotted during the commission of these offences and would attempt to evade police by fleeing the dwelling or vehicle on foot. On some occasions, he was in company with another person.
- [8] On 26 March 2017, some 14 months prior to the commencement of the appellant's 2018 offending, the appellant stole a vehicle from a dwelling in Lutwyche. He was not identified as the offender until 20 October 2018. This is the offence of unlawful use of a motor vehicle, for which the appellant received the suspended sentence.
- [9] The appellant appeals pursuant to section 222 of the *Justices Act 1986*. Such an appeal is by way of rehearing on the evidence before the Magistrate together with

¹ *Penalties and Sentences Act 1992* s 160F.

² *Beil v Mansell (No 1)* [2006] Qd R 199.

any new evidence adduced by leave.³ The court's appellate powers are only exercisable where the appellant can demonstrate that having regard to all the evidence now before the Court, that the order, the subject of the appeal, is the result of some legal, factual or discretionary error.⁴ As this is an appeal against the exercise of a sentencing discretion, in order to succeed, the appellant must satisfy this Court that the learned Magistrate acted upon a wrong principle, allowed an extraneous or irrelevant matter to affect him, operated under a mistake of fact or did not take into account a material consideration.⁵ It is not enough that I might have imposed a different sentence. It must appear that there has been some error into the exercise of the discretion. Such an error will be evident where the sentence is plainly unreasonable or unjust.

- [10] The offence which gave rise to the suspended sentence was committed on 26 March 2017. The appellant had been sentenced to an effective sentence of 13 months imprisonment on 27 February 2017. He was ordered to be released on parole on the date of sentence after having spent 160 days in pre-sentence custody. He was therefore on parole when he committed the offence of unlawful use of a motor vehicle. He came before the court again on 17 August 2017 for two offences of receiving tainted property and trespass and was sentenced to three months imprisonment with a parole eligibility date of the date of sentence.
- [11] Whilst there was a submission made at the hearing that the appellant could have been dealt with in relation to the offence of unlawful use of a motor vehicle at an earlier time, no reference was made to the necessity for the Magistrate to take account of totality considerations. Had the appellant been dealt with on 17 August 2017 in the Magistrates Court for the offence of unlawful use of a motor vehicle committed on 26 March 2017, it is not likely that he would have received a sentence in the order of three years imprisonment for that offence together with the offences of receiving tainted property and trespass.
- [12] No issue is now taken with the overall head sentence of three years imprisonment with a parole release or eligibility date after the appellant has served 12 months in prison. In light of the prolific nature of the appellant's offending in 2018, that was an appropriate sentence. Whilst it seems the intention of the learned Magistrate was to give the appellant certainty of release from prison, the unintended consequence of the imposition of the suspended sentence is that the appellant is now in breach of that suspended sentence and liable to serve a further almost two years of imprisonment.
- [13] The appellant was also ordered to pay \$12,000 in restitution. The prosecutor led the learned Magistrate into error by submitting the existence of the State Penalties Enforcement Registry meant that anyone can pay restitution, given enough time. The learned Magistrate was not informed as to the hierarchy of enforcement options under the *State Penalties Enforcement Act 1999*. That hierarchy is as follows:
1. suspension of the person's driver licence;
 2. conducting property searches for prospective seizure and sale;
 3. seizing or immobilising vehicles; and
 4. as a last resort, enforcement by imprisonment.⁶

³ *Justices Act 1886* s 223.

⁴ *Allesch v Maunz* (2000) 203 CLR 172 [22] – [23].

⁵ *House v The King* (1936) 55 CLR 499.

⁶ See *R v Matauaina* [2011] QCA 344.

- [14] Importantly, a debtor can be imprisoned if the registrar (a public servant) is satisfied, after attempting to enforce an enforcement or immobilisation warrant, that the unpaid amount cannot be satisfied in any other way or if the registrar issues an instalment payment or fine collection notice or makes a fine option order after attempting to enforce an enforcement or immobilisation warrant and the debtor fails to comply. That decision is non-reviewable. The Act does not give the sentencing court or any other court the power to review the merits of any executive decision including any decision to arrest or imprison a debtor.⁷
- [15] Although not a form of punishment, the potential consequences of a restitution order are relevant to a consideration of the appropriate overall sentence.⁸ The imposition of the restitution order by the learned Magistrate subjects the appellant to the possibility of being imprisoned for a further 109 days as a consequence of non-payment.
- [16] The appellant has no capacity to pay a fine. He has an extensive criminal history and has been sentenced to many terms of imprisonment. His criminal history is inconsistent with him having regular employment. There were no submissions made by the appellant's representative as to his capacity to pay any restitution and no instructions were taken in that regard.
- [17] Accordingly, I consider that two errors arose in the exercise of the learned Magistrate's decision. I should exercise the discretion afresh.
- [18] The head sentence imposed of three years imprisonment for all of the appellant's offending was appropriate as was the parole release date imposed requiring the appellant to serve a period of 12 months before being released on parole.
- [19] Given that a parole release date was imposed by the learned Magistrate which was intended to afford the appellant definite release on that date it is appropriate to now convict and not further punish the appellant for the offence of unlawful use of a motor vehicle. Such a sentence means that the sentence that the learned Magistrate intended to impose remains so.
- [20] I will also remove the order requiring the appellant to pay \$12,000 in restitution as he has no capacity to pay such a sum.
- [21] My orders are:
1. Extend time within which to file the Notice of Appeal until 21 May 2020.
 2. Allow the appeal.
 3. Set aside the sentence imposed on the offence of unlawful use of a motor vehicle committed on 26 March 2017 and in lieu convict and not further punish the appellant for that offence.
 4. Set aside the order requiring the appellant to pay restitution in the amount of \$12,000.

⁷ Ibid at [33].

⁸ Ibid at [35].