DISTRICT COURT OF QUEENSLAND

CITATION:	*Anderson v CDPP* [2020] QDC 7
PARTIES:	**MAREE FAY ANDERSON** (appellant) **v** **COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (respondent)
FILE NO/S:	BD 4459/2019
DIVISION:	Criminal
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court at Maroochydore
DELIVERED ON:	3 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	31 January 2020
JUDGE:	Sheridan DCJ
ORDER:	**1. The appeal is allowed.** **2. The sentence imposed in the Maroochydore Magistrates Court on 22 November 2019 is set aside and in lieu thereof the following sentences are imposed.** **3. The appellant is imprisoned for a period of 12 months.** **4. Convictions are recorded.** **5. The sentence is to commence on 22 November 2019.** **6. I declare that the appellant has served 72 days pre-sentence custody. I state that the dates are between 22 November 2019 and 2 February 2020.** **7. In respect of counts 1 to 3, pursuant to s 20(1)(b) of the *Crimes Act* 1914 (Cth), by order I direct the appellant be released after serving 72 days upon giving recognisance in the sum of $1000 conditioned that she be of good behaviour for a period of 3 years.** **8. The reparation order is confirmed.** **9. No order as to costs.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR

INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant fraudulently claimed social security payments amounting to $31,410.99 – where appellant pleaded guilty to three counts of obtaining financial advantage from the Commonwealth to which she was not entitled – where appellant was sentenced to 12 months' imprisonment with a recognisance release order after three months to be of good behaviour for three years – where Magistrate imposed one penalty for three separate charges – where respondent admitted error in exercise of sentencing discretion – where evidence omitted to be placed before Magistrate – whether Magistrate erred in failing to impose penalty on each count – whether leave should be given to receive fresh evidence – whether given admission of error appellate court should move to exercise sentencing discretion afresh – whether sentence imposed manifestly excessive

Crimes Act 1914 (Cth), s 4K, s 16A, s 20(1)(b)
Criminal Code 1995 (Cth), s 135.2(1)
Justices Act 1986 (Qld), s 222(2)(c), s 223(1), s 223(2)

Gallagher v The Queen (1986) 160 CLR 392, cited
Kendall v R (2014) 252 CLR 60, considered
Pavlovic v The Commissioner of Police [2006] QCA 134, cited
R v Newton [2010] QCA 101, considered
R v Pham [2015] 256 CLR 550, cited
Rhodes v Commonwealth Director of Public Prosecutions [2017] QDC 165, considered
Richardson v Queensland Police Service [2019] QDC 257, considered
Teelow v The Commissioner of Police [2009] 2 Qd R 489, cited

COUNSEL: A J Beard for the appellant
N M Hogan for the respondent

SOLICITORS: Legal Aid Queensland
Director of Public Prosecutions (Cth)

[1] This application came before the court on Friday, 31 January 2020 as an application for appeal bail.

[2] The applicant had been sentenced on 22 November 2019 in the Maroochydore Magistrates Court to 12 months' imprisonment with a recognisance release order after three months to be of good behaviour for a period of three years. The appellant has therefore already served two months ten days in custody and has 20 days of her custodial term remaining.

[3] A Notice of Appeal was filed on 10 December 2019 with an application for appeal bail filed on 29 January 2019. There seem to be some delay in the appellant's application for legal aid being determined.

[4] By the written submissions filed by Legal Aid on behalf of the appellant on the application for appeal bail it was submitted that, in the alternative to the grant of bail, the court could make orders allowing the appeal and make orders which would see the release of the appellant immediately.

[5] The respondent, in its written submissions filed on the morning of the bail application hearing, conceded that appeal bail should be granted.

[6] Given the undesirability of the appellant being released on bail, with a potential of being subsequently returned to custody, the respondent was asked why the court should not move to determine the appeal. The respondent submitted that they were not in a position to proceed with the appeal. The matter was stood down until 3:00 pm, with a strong indication being given that, by that time, the respondent should make every effort to be in a position to proceed with the appeal.

[7] At the resumed hearing at 3.00 pm, Friday 31 January 2020, the court proceeded to hear the appeal, with written submissions being provided by the respondent and with the application for bail pending appeal not pressed.

[8] The hearing was adjourned at 5.03 pm, Friday 31 January with a decision to be given Monday, 3 February in view of the urgency of the matter.

[9] The appellant appeals against the sentence imposed in the Magistrates Court at Maroochydore on 22 November 2019 as being excessive. The Notice of Appeal raised two matters in support of its contention that the sentence was manifestly excessive; namely failure to impose a separate order of imprisonment on each charge and a failure by the learned Magistrate to consider a psychologist's report dated 17 October 2019.

[10] The appeal is pursuant to s 222 of the *Justices Act* 1986 (Qld) (**Justices Act**). Section 222(2)(c) provides that where a defendant pleads guilty then the person may only appeal on the sole ground that the fine, penalty or forfeiture or punishment is excessive or inadequate. Section 223(1) provides that the appeal is to be heard by way of a rehearing on the evidence given in the proceedings before the Justices.

[11] In *Teelow v The Commissioner of Police* [2009] 2 Qd R 489, Muir JA said that it is a normal attribute of an appeal by way of rehearing that the powers of the Appellate Court are exercisable only when the appellant can demonstrate that the order is the result of some legal, factual or discretionary error.

[12] In terms of the first ground of appeal, namely the failure to impose a separate order of imprisonment on each charge, on the basis of the submissions made by the respondent, relying on s 4K of the *Crimes Act* 1914 (Cth) (**Crimes Act**), the first ground of appeal was only "faintly pressed" and appropriately so.

[13] The appellant had pleaded guilty to three counts of obtaining a financial advantage from the Commonwealth to which she was not entitled knowing or believing she was not eligible to receive that financial advantage contrary to s 135.2(1) of the

Criminal Code 1995 (Cth). An order for repatriation of the amount overpaid in the sum of $31,410.99 was made.

[14] In imposing sentence for the three separate charges, the learned Magistrate imposed one penalty, making no reference to the separate charges. However, in proceeding to impose the sentence, the learned Magistrate expressly stated that he was going to treat the three separate charges as one offence, noting that the period of offending covered a period of four and a half years, with the actual period of offending being about four years and two months.

[15] The appellant relied on the case of *Rhodes v Commonwealth Director of Public Prosecutions* [2017] QDC 165 (**Rhodes**). That case was clearly distinguishable. In *Rhodes*, the learned Magistrate had indicated an intention to impose a penalty in respect of each charge but then did not do so. Here, the learned Magistrate had clearly stated his intention to treat the offending as one offence.

[16] In such circumstances, the approach taken by the learned Magistrate was clearly permitted by s 4K of the *Crimes Act*. Ground 1 of the appeal must fail.

[17] In terms of Ground 2, namely a failure by the learned Magistrate to consider a psychologist's report dated 17 October 2019 (**Report**), in its written submissions the appellant had asserted that the Report was on the court file, but in its oral submissions conceded the Report was never on the file and never put before the learned Magistrate. This ground therefore must fail.

[18] However, it was submitted that this Court should now receive the Report as fresh evidence under s 223(2) of the *Justices Act*, presumably on the basis that it is relevant to the fact that the appeal was on the basis that the sentence was manifestly excessive.

[19] Under s 223(2), the court may give leave to receive fresh evidence, if the court is satisfied there are "special grounds" for the giving of leave. In *Pavlovic v The Commissioner of Police* [2006] QCA 134, the Court of Appeal referred to three main considerations for the grant of such leave which were stated by Gibbs CJ in *Gallagher v The Queen* (1986) 160 CLR 392 at 395. Whilst that case did not involve considerations under s 223 of the *Justices Act*, it was said by the Court of Appeal that it nonetheless provided a useful guide for the purposes of identifying the kind of "special grounds" which might be said to justify the grant of leave under s 223(2).

[20] The three main considerations identified by Gibbs CJ were whether the evidence relied on could, with reasonable diligence, have been produced at trial, whether the evidence is apparently creditable (or at least capable of belief) and finally, if believed, whether the evidence might reasonably have led the tribunal of fact to return a different verdict.

[21] Gibbs CJ also commented that the first consideration was not a universal and inflexible requirement and said that "the strength of the fresh evidence may, in some cases, be such as to justify interference with the verdict, even though that evidence might have been discovered before the trial."

[22] Here, the Report appears to have been inadvertently not admitted into evidence before the learned Magistrate. The learned Magistrate was only provided and only

received into evidence the subsequent report of the psychologist dated 20 November 2019, which had been written by way of an update to the more fulsome Report.

[23] The Report referred to multiple traumas that occurred throughout the appellant's life, which included a family disruption at the age of 10, when her parents separated, a strained relationship with her father, and a history of childhood sexual abuse. The report also refers to the appellant having a history as an adult of abusive intimate relationships.

[24] The Report says that the appellant's daughter's father was emotionally and physically abusive and that they separated when the child was two years old. The appellant took out a domestic violence order and was granted full custody.

[25] The Report says that the appellant described entering another relationship four years ago which lasted three to four months. In the course of that relationship, the appellant was manipulated to leave her job on the Sunshine Coast and move to Gladstone where she became socially isolated. The Report refers to her partner having become controlling and physically abusive with the abuse escalating one night to a point where the appellant's life was threatened and she fled the next morning with her daughter.

[26] The Report refers to the appellant being financially stressed and having to start again multiple times over the years to escape domestic violence. The Report was consistent with submissions made on behalf of the appellant and consistent with the letter to the court from the appellant and the letter from the appellant's mother.

[27] In his sentencing remarks, the learned Magistrate does not make any reference to any of these facts or events. In order to determine whether the Report would have led the tribunal to a different conclusion, it is necessary to examine the facts further.

[28] The amount of $31,410.99 was overpaid to the appellant over a period of 100 fortnights, a period as noted by the learned Magistrate of some four years and two months. During this period, it was accepted the appellant made 31 false and nil declarations and 76 under declarations. During the period of the offending, the appellant's gross income was $131,857.82, of which the appellant had declared $43,297.

[29] The offending was detected, as is often the case, via a data match. The appellant was contacted by the Department of Human Services first on 13 May 2015, at which time, the appellant confirmed that she was aware of her reporting obligations.

[30] It is an aggravating feature that after the initial detection and contact, as noted by the learned Magistrate, the appellant continued to underreport her income. The appellant was again contacted by the Department on 18 October 2017, where a further overpayment was raised with her. Nevertheless, the appellant continued to receive overpayments for a further three months. The appellant participated in an interview with the Department and whilst her participation did not contain any formal admissions, it was accepted that it is to be treated as having demonstrated an attempt to assist the Department's investigation.

[31] The appellant is now a 35 year old single parent with a 14 year old daughter. The appellant was working part-time as an assistant in nursing and had completed two years of a paramedical degree through the Sunshine Coast University. Whilst it was

submitted that the inevitable conviction was going to mean that she was unable to practise as a paramedic, that submission was not accepted by the learned Magistrate.

[32] By the date of hearing, the appellant was making a repayment towards the debt, though it would seem the monies at present was going towards prior debts. In oral submissions, the prosecutor submitted that she was making attempts at repayment. There seemed conflicting sumbmissions as to whether that amount was $40 per week or $20 per week. The learned Magistrate's sentencing remarks refer to the lengthy time it will take for the repayment to be made.

[33] As noted by the learned Magistrate, the monies were not being used to furnish an extravagant lifestyle, but for every day expenses in circumstances where the appellant felt she was struggling financially to provide for herself and her daughter.

[34] Submissions were made detailing the appellant's childhood abuse and the subsequent domestic violent relationships, the need to escape those relationships and the financial consequences of doing so. Reference was also made to the counselling being received by the appellant. In support of the submissions, there was the letters from the appellant and the appellant's mother, but nothing was put in writing from an independent source.

[35] The learned Magistrate did not refer to any of those matters in his sentencing remarks. If the learned Magistrate had before him a written report confirming the facts as stated in the submissions, the nature of the counselling being provided and the reason for it, there would have been a reasonable likelihood that greater weight would have attached to those circumstances and the effect of them given deeper consideration and comment, and a lower sentence imposed.

[36] In the circumstances, I consider that the Report might reasonably have led the Tribunal to return a different sentence. On that basis, I propose to grant leave to receive the Report.

[37] In the course of the hearing, the respondent properly drew to the attention of the court that the submissions that had been made by the prosecutor before the learned Magistrate, to the effect that a term of imprisonment was the only appropriate penalty, led the learned Magistrate to fall into error in the approach to the exercise of the sentencing discretion. The error in approach was said to be that a term of imprisonment with a period of actual custody was effectively the starting point and the only appropriate sentence in matters involving social security fraud unless the defendant could demonstrate some extenuating or exceptional circumstances.

[38] The respondent submitted that approach was not consistent with the sentencing principles that apply when sentencing federal offenders as those principles require the court to treat comparable decisions merely as "yardsticks" only and require each case to turn on its own facts; referring to the decision in *R v Pham* [2015] 256 CLR 550, [29].

[39] The respondent nevertheless submitted that even though the learned Magistrate had fallen into error, this court could not interfere with the sentence unless satisfied that the sentence imposed was "not correct or manifestly excessive". In making that submission, counsel for the respondent relied upon a statement by Smith DCJA in *Rhodes,* where his Honour said:

> Having determined there were errors in the sentencing process here, I now turn to the appropriate penalty to be imposed in this case because, indeed, if I form the view that the penalty imposed by the Magistrate was correct, there would be no need for interference.

[40] In my view, the statement by his Honour does not support the submission made by Ms Hogan. In that case, his Honour held there was errors in the sentencing process and he was therefore called upon to exercise the sentencing discretion afresh. In exercising the sentencing discretion afresh, it was commented that the court need not impose a different penalty if it ultimately concluded that the penalty imposed was correct. If the court reached that conclusion, the result would be that the sentence would be no different. It seems to me that this was all that was being stated by His Honour.

[41] If there is an error, as conceded and as is apparent in this case, the appeal should be allowed and the sentencing discretion exercised afresh. In doing so, I must have regard to the provisions of s 16A of the *Crimes Act*.

[42] I was referred to a number of sentences imposed or reconsidered on appeal throughout Australia, including four which were referred to in submissions before the learned Magistrate, namely *Arkrie v DPP (Cth)* [2012] WASC 200; *Panella v Wanganeen* [2018] SASC 100; *Esplin v Raffan* [2008] WASC 42 and *Feenstra v Pomare* [2017] WASC 344. The Commonwealth conceded that the four decisions which had been referred to the learned Magistrate were not sufficient to demonstrate discernible sentencing patterns, though before this Court the respondent did not provide any additional authority.

[43] Mr Beard for the appellant referred to the decision of the Queensland Court of Appeal in *R v Newton* [2010] QCA 101 and the previously referred to decision of Smith DCJA in *Rhodes*. I have considered those decisions. Helpfully both those decisions refer to and carefully analyse a number of earlier decisions of the Queensland Court of Appeal.

[44] In the time available and in the circumstances, it is unnecessary to set out here the facts and conclusions of each of those authorities. As is recognised in those authorities, each case depends on its own facts.

[45] In this case, the charges were serious, as was the period over which the offending took place and the amount of money involved was not insignificant. The appellant has a prior criminal history which, whilst relevant, is dated.

[46] On the other hand, it is not suggested that the monies were used to support a lavish lifestyle. Indeed, the total amount of the appellant's earnings was low being in the region of, according to the learned magistrate, $650 per week. Although it took time for the sentence to occur, it would seem that this was a consequence of the appellant being advised by a duty lawyer not to immediately plead guilty until she had obtained Legal Aid and the time then taken to obtain Legal Aid. In my view, unlike the learned Magistrate, I would treat the plea as more than a timely plea and the appellant should be given the benefit of that. Not only through her plea, but by the statements in her letter to the Magistrates Court, it is clear that the appellant is remorseful.

[47] Further, it is clear that the appellant has been the victim of abusive relationships and that some of the offending took place in the context of her escaping a violent abusive relationship and needing to start over. It is also apparent, that the appellant is now receiving counselling for the various traumas that she has suffered in her life.

[48] Having considered all matters, it is appropriate to impose a sentence of 12 months' imprisonment but it would be appropriate to make orders which would see the appellant released today. Given the provisions of s 4K of the *Crimes Act*, as the learned Magistrate did, I consider that it is appropriate to treat the offending as the one offence and to impose one penalty in respect of the three offences.

[49] My orders are therefore as follows:

1. The appeal is allowed.

2. The sentence imposed in the Maroochydore Magistrates Court on 22 November 2019 is set aside and in lieu thereof the following sentences are imposed.

3. The appellant is imprisoned for a period of 12 months.

4. Convictions are recorded.

5. The sentence is to commence on 22 November 2019.

6. I declare that the appellant has served 72 days pre-sentence custody. I state that the dates are between 22 November 2019 and 2 February 2020.

7. In respect of counts 1 to 3, pursuant to s 20(1)(b) of the *Crimes Act* 1914 (Cth), by order I direct the appellant be released after serving 72 days upon giving recognisance in the sum of $1000 conditioned that she be of good behaviour for a period of 3 years.

8. The reparation order is confirmed.

9. No order as to costs.

Postscript

[50] When this Court re-convened for the purpose of giving its reserved decision, counsel for the respondent sought leave to refer this Court to two further cases which considered the approach to be taken by the court where specific error was found in the exercise of the sentencing discretion.

[51] One of the cases was a decision of this court in *Richardson v Queensland Police Service* [2019] QDC 257 at [23] –[24], in which reference was made to a decision of the High Court in *Kendall v R* (2014) 252 CLR 60 at [35], where the High Court held:

> In the case of specific error, the appellate court's power to intervene is enlivened and it becomes its duty to re-sentence, unless in the separate and independent exercise of its discretion it concludes that no different sentence should be passed. By contrast, absent specific error, the appellate court may only intervene if it

> concludes that the sentence falls outside the permissible range of sentences for the offender and the offence.

[52] The view already expressed in paragraph [40] of these reasons, dealing with the statements made by Smith DCJA in *Rhodes*, is consistent with that statement. The additional authorities accordingly do not cause me to change my view of the law.