

DISTRICT COURT OF QUEENSLAND

CITATION: *Aramoana v The Commissioner of Queensland Police Service*
[2021] QDC 19

PARTIES: **DARYL GRANT ARAMOANA**
(Appellant)
v
THE COMMISSIONER OF QUEENSLAND POLICE SERVICE
(Respondent)

FILE NO/S: 2429 of 20

DIVISION: Appellate

PROCEEDING: Appeal pursuant to section 222 *Justices Act 1866*

ORIGINATING COURT: Magistrates Court of Queensland

DELIVERED ON: 12 February 2021, ex tempore

DELIVERED AT: Brisbane

HEARING DATE: 4, 12 February 2021

JUDGE: Loury QC DCJ

ORDER:

1. Leave to amend the Notice of Appeal is granted.
2. Leave to adduce new evidence is granted.
3. The appeal is allowed.
4. Set aside the sentences imposed in the Magistrates Court.
5. Resentence the appellant as follows:
 - (a) For each of two counts of enter premises and stealing the appellant is sentenced to six months imprisonment suspended immediately for an operational period of 12 months.
 - (b) For each of two counts of entering premises with intent to commit an indictable offence the appellant is sentenced to six months imprisonment suspended immediately for an operational period of 12 months.
 - (c) For each of two counts of stealing from a locked receptacle the appellant is sentenced to six months imprisonment suspended immediately for an operational period of 12 months.
 - (d) For unlawfully using a motor vehicle the appellant is sentenced to 12 months probation.
 - (e) For possessing of a dangerous drug the appellant is sentenced to 12 months probation.
 - (f) For possession of a restricted drug the appellant is

- convicted and not further punished.
- (g) For failing to take reasonable care and precaution in respect of a needle the appellant is convicted and not further punished.
- (h) Sentences of imprisonment are to be served concurrently.

LEGISLATION: *Crimes Act 1914* s 20
Criminal Code Act 1899 ss 398, 408A, 421
Drugs Misuse Act 1986 ss 9, 10
Health (Drugs and Poisons) Regulation 1996 s 204
Justices Act 1886 ss 222
Magistrates Courts Act 1921 ss 14, 14A

House v The King (1936) 55 CLR 499
McDonald v Queensland Police Service [2018] 2 Qd R 612
Robinson Helicopter Co Inc v McDermott [2016] HCA 22;
(2016) 90 ALJR 679

COUNSEL: J Feely for the appellant
K McFarlane for the respondent

SOLICITORS: KLM Solicitors for the appellant
Office of the Director of Public Prosecutions for the respondent

- [2] The appellant pleaded guilty to 10 offences in the Magistrates Court at Wynnum on 21 August 2020. They were: two counts of enter premises and stealing; two counts of entering premises with intent to commit an indictable offence; one count of unlawfully using a motor vehicle; two counts of stealing from a locked receptacle; one count of possessing a dangerous drug; one count of possession of a restricted drug and one count of failing to take reasonable care and precaution in respect of a needle. He was sentenced that same day to a “global sentence” of two months imprisonment following which he was to be released on probation for a period of 18 months subject to conditions that he firstly, submit to such medical, psychiatric or psychological assessment and treatment as directed by the probation officer and secondly, that he submit to urinalysis testing and participate in therapeutic intervention to address illicit drug use as required by the probation officer.
- [3] In relation to the two offences of stealing from a locked receptacle the learned Magistrate was led into error, by the prosecutor informing him that those offences were laid under the Commonwealth Criminal Code. Accordingly he was sentenced to a recognisance pursuant to s 20 (1)(a) of the *Crimes Act 1914* in the sum of \$2000 to be of good behaviour for a period of 18 months.

The appeal

- [4] The appellant appeals pursuant to s 222 of the *Justices Act 1886*. Such an appeal is by way of rehearing on the evidence below, that is, a review of the record of proceedings below rather than a fresh hearing, together with any new evidence that I

allow to be admitted. I am required to conduct a real review of the evidence and the learned Magistrate's decision and make my own determination giving due deference and placing a good deal of weight on the Magistrate's view.¹ In order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error.²

- [5] As the appellant's appeal is against his sentence, that involves the exercise of a discretion. Accordingly the principles referred to in *House v The King*³ are apposite. If it appears that some error has been made in the exercise of the Magistrate's discretion because he has allowed irrelevant matters to affect him, mistaken the facts or failed to take into account some material consideration, then his decision should be reviewed and it is open for me to exercise the discretion afresh.
- [6] Leave to amend the notice of appeal was not opposed by the respondent. The grounds of appeal are as follows:
- (1) The sentence imposed by the learned sentencing Magistrate was manifestly excessive in all the circumstances.
 - (2) The learned Magistrate erred in imposing a s 20(1)(a) *Crimes Act 1914* (Cth) recognizance.
 - (3) The learned Magistrate erred in imposing a prison probation order in respect of the offence of s 204 *Health (Drugs and Poisons) Regulation 1996* (Qld).
 - (4) The learned Magistrate, in the premises of grounds 2 and 3 of the Outline of Submission on Behalf of the Appellant, failed to afford the appellant procedural fairness.
 - (5) The learned Magistrate did not have regard to the principle that a sentence of imprisonment was one of last resort.
 - (6) The learned Magistrate erred in imposing a short period of actual custody.
 - (7) The learned Magistrate erred in considering the factual circumstances of the impact upon the victim.

Error

- [7] It is conceded by the respondent that error does arise.
- [8] Affidavit material filed by the appellant⁴ establishes that the prosecutor quite properly contacted the appellant's legal representatives and the court in the afternoon, after the sentence had been pronounced, advising that the two charges of stealing from a locked receptacle were not Commonwealth offences as he had submitted but were rather State offences. The appellant's representative emailed the court indicating that he was seeking to re-open the sentence. A Court Services Officer replied that the matter had been "rectified immediately" by the learned

¹ *Robinson Helicopter Co Inc v McDermott* [2016] HCA 22; (2016) 90 ALJR 679, 686 at [43].

² *McDonald v Queensland Police Service* [2018] 2 Qd R 612.

³ (1936) 55 CLR 499.

⁴ No objection was taken by the respondent to the adducing of new evidence

Magistrate and that the sentence was not affected. It is unknown what that means. There is certainly no transcription of any orders having been made in open court altering the sentence imposed. The verdict and judgement record issued therefore does not accord with the pronouncement of the learned Magistrate in open court. It records that a prison probation order was imposed as referred to above for each of the charges except for unlawful possession of a restricted drug. The verdict and judgement record records that the appellant was convicted and not further punished for that offence. The sentence pronounced in open court for the offence of unlawful possession of a restricted drug is inconsistent with the verdict and judgement record.

- [9] The Magistrates Court is a court of record.⁵ The business of the Magistrates Court is to be conducted in open court unless the public interest or the interests of justice warrant an order that limits the extent to which the business of the court is open to the public.⁶ No order was made that any part of the proceedings were to be conducted other than in open court. There was nothing in the public interest or the interests of justice that warranted the business of the court being conducted other than in open court. The sentences to be imposed on the two offences of stealing from a locked receptacle had to be imposed in open court. The sentence imposed in open court was a sentence not open pursuant to the *Penalties and Sentences Act 1992*.
- [10] Further, section 10 of the *Penalties and Sentences Act 1992* requires that if a court imposes a term of imprisonment it must state in open court its reasons for the sentence. There was no power for the learned Magistrate to administratively impose a sentence of imprisonment on the appellant for the two offences of stealing from a locked receptacle, if that is what he was purporting to do.
- [11] Further error is conceded because procedural fairness was not extended to the appellant as he was not given the opportunity to be heard on a re-opening of the sentence imposed.
- [12] A further error is conceded by the respondent in that a prison probation order (as pronounced in open court) could not be imposed for the offence of possessing a restricted drug as the maximum penalty does not carry imprisonment. Whilst this is not the sentence that the verdict and judgement record reflects it is the sentence pronounced by the learned Magistrate in open court. There is no material before me to suggest any reason why the verdict and judgement record records the sentence as convicted and not further punished.
- [13] The appellant relies on a number of other grounds which are unnecessary to consider given that error has been demonstrated.
- [14] The appellant was released on bail pending his appeal after serving 19 days of his sentence. In those circumstances it is appropriate to exercise the sentencing discretion afresh.

The circumstances of the offending

⁵ *Magistrates Courts Act 1921* (Qld) s 14.

⁶ *Magistrates Courts Act 1921* s 14A(2).

- [15] The complainant operated a business in an industrial estate in Hemmant. The estate is surrounded by a metal fence and secured by gates at its entrance. The complainant's truck was parked in the estate. On 24 April 2020 the appellant entered the premises by cutting the wire fence to gain entry. He removed a rubber seal and glass panel to a sliding glass door to enter the business premises in which he stole the keys to the truck as well as a quantity of tools and some food. The appellant also broke into two secured shipping containers and stole a quantity of tools which he placed into the truck which he drove from the premises.
- [16] Between 27 and 28 of April (three or four days later) the appellant returned to the same industrial estate. He broke into the same two shipping containers by cutting the two new locks and removed the remaining tools. He also operated a forklift in order to steal a large metal woodcarving table. In total approximately \$10 000 worth of tools were stolen from the premises and shipping containers.
- [17] On 29 April 2020 the appellant was located by police inside the truck in Morningside. Some of the tools and the woodcarving table were located in the truck. The appellant was interviewed by police. He provided a false account as to how he came into possession of the truck however admitted breaking into the shipping containers and stealing the tools. Further investigations revealed that he had exchanged some of the tools for drugs. He was found in possession of approximately one gram of substance containing methylamphetamine.
- [18] Whilst on bail for that offending the appellant was found on 4 May 2020 in possession of an uncapped needle and syringe and a single tablet of Seroquel, which he was not prescribed.

The appellant's antecedents

- [19] The appellant is 46 years of age. He was 45 at the time of the offending. His criminal history commences in 2003 when he was 29 years of age with minor convictions for possessing drugs and utensils. He committed three further offences of possessing drug utensils, breaching a domestic violence order and contravening a police requirement in the period up until 2008. He did not offend again until 2018 when he was convicted of possessing drug utensils, possessing drugs, and unauthorised dealing with shop goods. On each occasion he was fined with no conviction being recorded.
- [20] On 30 January 2019 the appellant was sentenced to three months imprisonment suspended for 12 months for contravening a domestic violence order. On 30 October 2019 he was convicted of possessing tainted property and fined. The operational period of the suspended sentence was extended by seven days.
- [21] The learned Magistrate was told that the appellant's father passed away in early 2018 at a time when his marriage had broken down. It was in that turbulent period of his life that the appellant's use of drugs increased and that his life spiralled out of control. He had been struggling with homelessness at the time of his offending.
- [22] The appellant worked as a farm hand over 15 years before sustaining a back injury in 2012 which made securing work difficult.
- [23] The appellant is a citizen of New Zealand. Without work he had no income which added to the state of desperation he was experiencing at the time of the offending.

Three references were tendered. None of the referees refer to having any knowledge of the charges. Despite the learned Magistrate raising that issue with the appellant and his legal representatives at the hearing no attempt has been made to adduce any further evidence from any of the referees. Accordingly it is difficult to place any weight upon the contents of those references.

Re-sentencing

- [24] The appellant spent 19 days in custody before being released on bail. He has now obtained stable accommodation and accessed Centrelink benefits. The appellant is remorseful for his offending and entered pleas of guilty at a very early stage.
- [25] The offending is serious. The maximum penalties are: 14 years imprisonment for the offence of enter premises and commit an indictable offence;⁷ 10 years imprisonment for the offence of enter premises with intent to commit an indictable offence;⁸ 7 years imprisonment for the offence of unlawful use of motor vehicle;⁹ 10 years imprisonment for the offence of stealing from a locked receptacle;¹⁰ 15 years imprisonment for the offence of possessing dangerous drugs;¹¹ 2 years imprisonment for fail to take reasonable care and precautions in respect of syringe or needle;¹² and 60 penalty units for the offence of unlawful possession of restricted drugs.¹³
- [26] General and personal deterrence bear on the appropriate sentence to be imposed as does community denunciation. The appellant's offending in April 2020 was very serious. It involved the theft of a very large quantity of valuable property. The offending was persistent and targeted given the appellant's return to the premises for the purpose of stealing more property only a few days later. There was some sophistication to the offending given the use of a forklift to steal the woodcarving table. The theft of truck keys and a truck is also serious. The appellant offended in order to feed his drug addiction.
- [27] Bearing in mind that imprisonment is a sentence of last resort, I consider that the appropriate sentence is one of imprisonment. The appellant is not a youthful first offender to whom leniency would or should be extended.
- [28] Both the appellant and the respondent seek leave to adduce new evidence, neither of which is opposed. The respondent's material demonstrates that the appellant attended upon the Probation and Parole Office following his release on bail and was inducted into the probation order on 17 September 2020. It appears that the Probation and Parole Office did not appreciate that the probation order was the subject of an appeal. For the past five months the appellant has largely reported as directed and desisted from further offending. He is waitlisted for a substance abuse counselling program and a domestic violence perpetrator program.
- [29] The appellant has now been on bail since September 2020. He has been subject to a curfew between 10 pm and 6 am and has been required to report to police once per

⁷ *Criminal Code Act 1899* (Qld) s 421(2).

⁸ *Criminal Code Act 1899* (Qld) s 421(1).

⁹ *Criminal Code Act 1899* (Qld) s 408A(1)(a).

¹⁰ *Criminal Code Act 1899* (Qld) s 398.4(f).

¹¹ *Drugs Misuse Act 1986* (Qld) s 9(1)(d).

¹² *Drugs Misuse Act 1986* (Qld) s 10(4).

¹³ *Health (Drugs and Poisons) Regulation 1996* (Qld) s 204.

week. The length of time he has been on bail and the conditions imposed are not particularly onerous however I take it into account in determining the appropriate sentence.

- [30] The affidavit sworn by the appellant sets out his work history and his family circumstances. He affirms that he has cut ties with his former associates and that he predominantly socialises with family members and a single friend. He has three children who all live in Australia and he remains in contact with each of them.
- [31] Important to the exercise of my discretion is imposing a sentence that will assist the defendant to rehabilitate. A supervisory order is one which in my view would provide assistance to the appellant, however I do not consider that a probation order as submitted reflects the very serious nature of the appellant's offending. In order to assist the appellant to rehabilitate, I do not consider that it is in the community's interest to return the appellant to custody.
- [32] If sentencing the appellant at first instance I would have been inclined to impose a sentence of imprisonment in the order of 12 months with an order that he be released immediately upon parole. I must now take into account that he has served almost three weeks in custody and has complied with the probation order for a period of five months. I am minded to impose a head sentence of six months imprisonment, wholly suspended, for an operational period of 12 months on some offences and a 12 month probation order on other offences. Given that the head sentence that I have imposed is greater than that imposed in the Magistrates Court I gave the appellant the opportunity to abandon his appeal. The appellant has instructed that he wishes the appeal to proceed.
- [33] My orders are as follows:
1. Leave to amend the Notice of Appeal is granted.
 2. Leave to adduce new evidence is granted.
 3. The appeal is allowed.
 4. Set aside the sentences imposed in the Magistrates Court.
 5. Resentence the appellant as follows:
 - (a) For each of two counts of enter premises and stealing the appellant is sentenced to six months imprisonment suspended immediately for an operational period of 12 months.
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 - (d) For unlawfully using a motor vehicle the appellant is sentenced to 12 months probation.
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