DISTRICT COURT OF QUEENSLAND

CITATION:	*Hargood v Commissioner of Police* [2022] QDC 13
PARTIES:	**TIGER HARGOOD** (Appellant) **v** **COMMISSIONER OF POLICE** (Respondent)
FILE NO/S:	37/21
DIVISION:	Criminal
PROCEEDING:	Appeal pursuant to s. 222 of the *Justices Act 1886* (Qld)
ORIGINATING COURT:	Magistrates Court at Ipswich
DELIVERED ON:	15 February 2022
DELIVERED AT:	Ipswich
HEARING DATE:	8 February 2022
JUDGE:	Rinaudo AM DCJ
ORDER:	**1. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE AND CONVICTION – where the appellant was sentenced in the Magistrates Court for various offences – where the ultimate sentence did not fall outside the appropriate sentencing range – whether the learned Magistrate erred by failing to apply section 9(2)(a) of the *Penalties and Sentences Act 1992* (Qld) that a sentence of imprisonment should only be imposed as a last resort
LEGISLATION:	*Justices Act 1886* (Qld), ss. 222, 223 *Penalties and Sentences Act 1992* (Qld), ss. 9, 125
CASES:	*Age v Queensland Police Service* [2020] QDC 169 *House v The King* (1936) 55 CLR 499 *Kentwell v The Queen* (2014) 252 CLR 60 *MIL v Commissioner of Police* [2021] QDC 330 *Norbis v Norbis* (1986) 161 CLR 513

Russell v Commissioner of Police [2018] QDC 183
R v Clemments [2010] QCA 38
R v KAV [2020] QCA 28
R v Lovi [2012] QCA 24
R v Tout [2012] QCA 296

APPEARANCES: D. Hans (Hans Legal) for the appellant
B. McMahon (Commissioner of Police) for the respondent

Introduction

[1] Tiger Hargood (the appellant) was convicted of various offences and sentenced on 18 May 2021 to a period of nine months' probation. He was further sentenced on 20 August 2021 in respect of 13 offences for which he received various sentences. Some of the offences for which the appellant was sentenced on 20 August 2021 were committed whilst he was subject to the probation order imposed on 18 May 2021.

[2] As a result, he fell to be re-sentenced for the breach of probation as well as being sentenced for the other offences. Terms of imprisonment and probation, as set out in the schedule below, were imposed and a parole release date was set on the date of sentence, and 46 days of pre-sentence custody was declared as time already served.

[3] The appellant was re-sentenced for the breach of the original probation order to a further 15 months' probation. Convictions were recorded.

[4] The appellant now appeals the sentence imposed on him on 20 August 2021 on the sole ground that the learned Magistrate erred in failing to apply s. 9(2)(a) of the *Penalties and Sentences Act 1992* (Qld) (the "**Act**").

History of offending

[5] The offences for which the appellant was re-sentenced on 20 August 2021 included two unlawful use of motor vehicle on 31 March 2021, one dangerous operation of a motor vehicle on 31 March 2021, attempt to enter premises and commit indictable offence on 29 March 2021, and receiving tainted property between 27 March 2021 and 1 April 2021. He was sentenced on 18 May 2021 to nine months' probation in respect of all charges. He was disqualified from driving for a period of six months,

and he was further sentenced to 50 hours of community service to be completed within one year.

[6] The learned Magistrate summarised the most serious of the offences, for the purposes of her consideration, as the unlawful use of motor vehicle and dangerous operation. Vehicles were stolen from houses which involved burglaries. Two motor vehicles were taken: a RAV4 and a Mazda3 hatchback. Her Honour said:[1]

> You were seen driving the stolen RAV4 at high speed on the Logan Motorway. You were then travelling at high speed on Brisbane Terrace at Redbank Plains. A tyre deflation device was deployed. The vehicle swerved onto the wrong side of the wrong [sic], narrowly avoiding other vehicles travelling in the opposite direction. You stopped. Four occupants got out of the vehicle. You were the driver. You were pursued on foot by police. You then got into the second stolen car and started the engine.

[7] She also noted that, prior to this incident, the RAV4 had been used at an attempted enter premises at the Oxenford Tavern. Three male persons failed to gain entry after attempting to enter by kicking and throwing a rock through a glass window. The learned Magistrate noted that other offences relating to the probation order included keys stolen in the burglaries and receiving stolen number plates which were attached to the stolen RAV4.

[8] Annexure A to the written submissions on behalf of the appellant sets out a summary of the offences for which the appellant was sentenced on 20 August 2021. The facts and outcomes are as follows:

Offence	**Date**	**Summary**	**Penalty imposed**
Stealing	30/03/2021	Stealing of $76.07 worth of fuel	15 months probation
Enter premises and CIO by break	28/05/2021-31/05/2021	Break in of business premises at night by smashing window; theft of items valued at $1,140	6 months imprisonment
Stealing	31/05/2021	Theft of personal belongings from shopping centre totalling $8,650 ($4,150 item recovered)	2 months imprisonment
Commit public nuisance	10/06/2021	Engaging in a fight in public	15 months probation
Unregulated high-risk activities	10/06/2021	Scaling of fence at casino	15 months probation

[1] Transcript of Decision, TS4.5 to 4.10.

Breach of bail condition	14/06/2021	Non-compliance with curfew condition	15 months probation
Breach of bail condition	19/06/2021	Non-compliance with sign-in condition	15 months probation
Contravention of police banning notice	20/06/2021	Breach of banning notice concerning Fortitude Valley	Convicted and not further punished
Stealing	24/06/2021	Theft of bicycle (value not specified)	2 months imprisonment
Stealing	24/06/2021	Theft of alcohol from liquor store with total value of $196	2 months imprisonment
Breach of bail condition	02/07/2021	Non-compliance with curfew condition	15 months probation
Breach of bail condition	03/07/2021	Non-compliance with curfew condition	15 months probation
Possess tainted property	04/07/2021	Possession of luxury carry bag	1 month imprisonment

[9] As can be seen, this offending occurred between 30 March 2021 and 4 July 2021. Except for the stealing charge of 30 March 2021, all other offences occurred subsequent to the appellant being sentenced to probation on 18 May 2021. Indeed, the enter premises and commit indictable offence charge occurred just 10 days after the previous sentence. The appellant spent 45 days in pre-sentence custody.

Submissions

[10] The appellant sought leave to replace the initial ground of appeal of manifestly excessive, with the specific allegation of Ground 1 set out in paragraph [4] above. There being no objection, I allowed the amendment.

[11] It was conceded that the sentence did not fall outside of the appropriate sentencing range. It was submitted that the issue now was the process of reasoning in reaching the ultimate outcome. It was submitted that:[2]

(a) with respect to the breach of probation, the appellant ought to be fined or admonished and discharged, allowing the original order to continue;

(b) for all other offences, a global probation order should be imposed.

[2] Written Submissions on Behalf of the Appellant at [5].

[12] The appellant appealed on the basis that there was no reference to the principle of imprisonment as a last resort by the learned Magistrate or any party. In this regard, s. 9(2)(a) of the Act provides:

> (2) In sentencing an offender, a court must have regard to—
>
> (a) principles that—
>
> (i) a sentence of imprisonment should only be imposed as a last resort; and
>
> (ii) a sentence that allows the offender to stay in the community is preferable
>
> …

[13] It was submitted that the offences were not so serious that a period of imprisonment was plainly called for. It was submitted that a global probation order was within contemplation and a sound exercise of discretion, especially where the Court had the option to take into account the appellant's 1.5 months on remand without declaration.[3]

[14] It was submitted that, "*taking into account the unique features of this matter and the exchange of submissions, it is submitted this is not a matter where consideration of the principle can be reasonably inferred"*.[4] An express acknowledgment was realistically called for. In its absence, it cannot be safely concluded that her Honour was satisfied there was no option other than a period of imprisonment.

[15] It was submitted that, having regard to the following factors, a global probation order was appropriate:[5]

(a) the inherent seriousness of the appellant's property offending in the enter premises and stealing offence from 31 May 2021;

(b) the appellant's persistence in committing property offences;

(c) the appellant's extreme youth;

(d) the principle that imprisonment should only be imposed as a last resort;

(e) the 45 days of pre-sentence custody spent solely on remand for the sentence matters.

[16] It was further submitted that it would be within a sound exercise of discretion to not record a conviction.

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[3] Ibid at [16].
[4] Ibid at [17].
[5] Ibid at [18].

[17] It was noted that the appellant was 18 years of age throughout the offending period. The following submission was made (footnotes omitted):[6]

> The history of the first probation order reveals that the rehabilitative components were yet to take effect. The 'court report' document indicates that the appellant was agreeable to engaging in counselling with Anglicare Youth but that the referral was not actioned prior to his incarceration. Ultimately, it was the applicant's own actions which caused him to be incarcerated, but the effect of rehabilitative interventions such as counselling remains untested.

[18] It was further submitted that the appellant is now 18 and has experienced his first time in custody as an adult. It was submitted that the prospects of rehabilitation should be treated with a level of genuine optimism, albeit guarded by his own non-compliance with the probation order.[7]

[19] The respondent submitted that the offending was serious, and that monetary loss totalled $10,062.07, of which $5,912.07 is unrecovered.

[20] It was submitted that in the case of *R v KAV* [2020] QCA 28 at [35], the Court of Appeal held that, *"there is no basis to conclude that the failure of the sentencing Judge to specifically refer to a sentence of imprisonment as a sentence of last resort constituted an error in the sentencing discretion".*

[21] At the sentence, the prosecution stated that *"*[u]*ltimately, the prosecution submits for a penalty that imprisonment is the only appropriate sentence outcome"*.[8] And further, *"If your Honour is against me that imprisonment is required today, it would be my submissions that a lengthier period of probation period in the realms of possibl*[y] *up to two years would be appropriate"*.[9]

[22] It was submitted that the learned Magistrate took into account the following:[10]

(a) the nature of the offending;

(b) the appellant was 18 years old at the time;

(c) the appellant's plea of guilty;

(d) the appellant's cooperation with police;

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[6] Ibid at [21].
[7] Ibid at [22].
[8] Transcript of Proceedings, Day 1, page 1-4 at lines 29-30.
[9] Transcript of Proceedings, Day 1, page 1-4 at lines 38-40.
[10] Outline of Submissions on Behalf of the Respondent at [12].

(e) the appellant's criminal history;

(f) the appellant's personal circumstances;

(g) the appellant's engagement with past court orders; and

(h) the consequences of a conviction being recorded.

[23] In *R v Clemments* [2010] QCA 38, the appellant's counsel submitted that error occurred by the sentencing Judge's failure to refer specifically to the principles in s. 9(2)(a) of the Act. The Court held that there was *"no basis for thinking that the sentencing judge overlooked that principle"*. Further, the Court states that:

> The sentencing judge was entitled to conclude in the facts of this case that whilst probation would be appropriate for a person who needed supervision to address the possibility of future offending, that was not a consideration here and that a term of imprisonment was the appropriate sentence, particularly having regard to the importance of deterrence.

[24] The respondent submitted that "*the learned Magistrate did not act upon an incorrect principle*". As such, there were no grounds upon which this Appellate Court should interfere with the learned Magistrate's exercise of her sentencing discretion.[11]

[25] The respondent submitted that the appellant does not contend that the sentence was manifestly excessive, and that a review of somewhat comparable decisions demonstrates that there is a wide sentencing discretion for offences of this kind.[12] It was further submitted that even if it could be argued that a more lenient approach was taken in other cases where the material facts were different, that would not establish that the sentence imposed in this case was outside the appropriate range.[13] In *R v Tout* [2012] QCA 296, Fraser JA (with whom Muir and Gotterson JA concurred) stated:

> … a contention that a sentence is manifestly excessive is not established merely if the sentence is markedly different from sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been misapplication of the principle, or that the sentence is "unreasonable or plainly unjust"*: Hili v The Queen* (2010) 242 CLR 520 [58], [59].

[11] Ibid at [16].
[12] Ibid at [17] and [23].
[13] Ibid at [24].

Applicable law

[26] Appeals under s. 222 of the *Justices Act 1886* (Qld) are by way of a rehearing on the evidence given in the proceeding before the Magistrate.[14] Where a defendant pleads guilty, an appeal can only be brought on the sole ground that the sentence was excessive or inadequate. In *House v The King* (1936) 55 CLR 499 at 504-505, it was noted that:

> It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the 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. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

[27] In *Kentwell v The Queen* (2014) 252 CLR 60, the High Court noted at [35]:

> 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.

[28] A mere difference in opinion about the way in which the discretion should be exercised is not a sufficient justification for review.[15]

Consideration and Decision

[29] The primary contention of the appellant, as I see it, is that the learned Magistrate should have structured a sentence which would have allowed for no conviction to be recorded. The appellant had spent 46 days in pre-sentence custody and the learned Magistrate did not impose any further actual imprisonment.

[30] This would mean, given the provisions of s. 125(2) of the Act, that to avoid the recording of a conviction in respect of the breach of probation, the learned Magistrate would have had to either admonish the appellant or fine the appellant for the breach. Otherwise, a conviction must be recorded. In my view, given the objective seriousness of that offending and the fact that the subsequent offending

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[14] *Justices Act 1886* (Qld) s. 223(1).
[15] Outline of Submissions on Behalf of the Respondent at [5], citing *Norbis v Norbis* (1986) 161 CLR 513, 517-519.

was similar in nature and committed soon after the probation order was imposed, it was not open to the learned Magistrate to deal with the breach of probation in that way.

[31] In sentencing the appellant, the Magistrate was required to balance considerations of youth and prospects of rehabilitation with deterrence, both general and specific deterrence and community protection.

[32] The offences for which the appellant was to be re-sentenced and sentenced were serious: in the case of the former, two unlawful use of motor vehicle, one dangerous driving, one attempting to enter premises and commit indictable offence and three receiving tainted property; in respect of the latter, serious offending as set out in the schedule above.

[33] It seems to me to be plain that the learned Magistrate, in imposing a term of imprisonment, considered that that was the appropriate sentence, and accordingly, it can be clearly inferred that she took the view that whilst a sentence of imprisonment should be a last resort, it was not appropriate to impose such a sentence on the appellant in this case.

[34] Both the prosecutor in the passage set out above, and the duty lawyer who appeared on behalf of the appellant at the sentence, stressed on the Magistrate that probation was an option, allowing for no conviction to be recorded. The duty lawyer submitted:[16]

> It's certainly serious offending, your Honour, and aggravated, as your Honour has said, by the fact that he has committed them so soon after his previous sentence. My main submission is that if your Honour imposes a period of imprisonment, a conviction has to be recorded which could have detrimental effects to him moving forward given his age.

[35] Her Honour also had the report from Probation and Parole, which was tendered. It noted:[17]

> Mr Hargood is within the infancy of his order with agency assessments conducted identifying that Mr Hargood has needs within the areas of employment, substance use and gambling. Conversations regarding engagement with intervention services occurred in relation to substance abuse and mental health. Mr Hargood initially presented with resistance to intervention however agreed to be referred to Anglicare Youth Counselling Services. Due to incarceration, the referral is yet to be actioned.

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[16] TS1-9.7 to 9.11.
[17] See affidavit of Tara Humphrey affirmed on 7 February 2022 at page 16.

[36] It was noted that, given the above and the further offending, Mr Hargood was deemed as not suitable for community-based supervision orders. In her sentencing remarks, her Honour noted, "*What is concerning is that having been granted that probation order on the 18th of May, you have almost immediately commenced reoffending by way of committing offences of dishonesty*".[18]

[37] Her Honour concluded:[19]

> And it is not just the going out and committing offences so soon after being placed on probation. It is also that even when you were on bail, you did not comply with bail. You had a curfew. You did not comply with it. You just are not following any of the rules anywhere basically is what I am suggesting to you. All right. Well, look, what I am going to do is this, Mr Hargood. I am going to make a combination of orders. There is going to be an imprisonment order, which gives you credit for the pre-sentence custody and gives you a period of time on parole. Then there is going to be a longer probation order. I think the nine months order that you had was not long enough. It needs to be longer. But, again, if you do not comply with it, it is not going to be – they are not going to show you any tolerance or patience, because you have already had one shot and this is your next shot, your last shot; you understand?

[38] Although no comparable authorities were provided to her Honour in respect of the sentence range, it has been accepted by the appellant that the sentence imposed was within range. The respondent agrees that it was.

[39] The appellant relies on the decision of *MIL v Commissioner of Police* [2021] QDC 330, in which Farr SC DCJ allowed the appeal re-sentencing the appellant in that case to probation, and no convictions were recorded. The appellant had pleaded guilty to two counts of unlawful use of a motor vehicle, one count of burglary and one count of possession of dangerous drug, and was sentenced by the learned Magistrate to six months' imprisonment for each of the two unlawful use of motor vehicle charges and nine months' imprisonment for the burglary charge. Convictions were recorded. In that case, his Honour determined that the penalty imposed was excessive. He then went onto consider the Magistrate's failure to refer to s. 9(2)(a) of the Act in the following way:

> [18] Given that the appellant was only 18 years of age at the time, with little criminal history, the absence of reference to that particular legislative provision unfortunately causes me to take the view that his Honour did not have regard to it and there can be no question that again, such a failure would constitute an error of law such that this court's discretion to overturn or set aside the sentence imposed and re-sentence afresh is enlivened.

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[18] Transcript of Decision, TS2.18 to 2.20.
[19] Ibid TS5.24 to 5.35.

> [19] In that regard, I note, relevantly, that the appellant, as I've already indicated, was only 18 years of age at the time that he committed these offences. But the most serious offence – that being burglary – occurred during daylight hours whilst no one was home. It would seem on the material before the court that his involvement in the unlawful use offences was as a passenger, not a driver. Those vehicles were recovered and returned to their owners without damage. I infer, given that the offenders for the burglary were caught very soon thereafter, that any property that was stolen was recovered. The defendant has no relevant criminal history. Importantly, he's not previously had the benefit of supervision in the community – at least adult supervision. Submissions were made that he had a prejudicial upbringing involving domestic violence and alcoholism. That is a relevant consideration on sentence. And prior to his incarceration, he had actively sought employment in labouring – labouring-type positions.

[40] Of course, in this case, the burglaries were at night, the appellant was driving the motor vehicle the subject of the dangerous operation charge, and a substantial amount of money was not recovered, over $5,000.00. There does appear to have been some prejudicial upbringing after his parents split up and a lengthy custody battle followed. His parents are both fully deaf. He did complete grade 12 and is described as quite well spoken. He already had the benefit of a probation order in respect of very serious charges and had that criminal history. There is some suggestion that he may have been undertaking a Certificate III course in community service and had been doing some volunteering.

[41] In addition, as I have already said, it seems to me that submissions were clearly made to her Honour that she should not impose a term of imprisonment, and therefore not record convictions, because of the detrimental effect that might have on the appellant moving forward, given his age.

[42] The respondent relied on the decision of *Russell v Commissioner of Police* [2018] QDC 183, again a decision of Farr SC DCJ, where terms of imprisonment were imposed, convictions were recorded, and His Honour dismissed the appeal. His Honour referred to *R v Lovi* [2012] QCA 24 in which Muir JA (with whom de Jersey CJ and Atkinson JA agreed) said:[20]

> Imprisonment for short periods of young offending, such as the applicant, who have not been previously imprisoned, is generally recognised as potentially harmful to their rehabilitation. Batt JA accurately remarked in *R v Mills* that rehabilitation benefits the community as well as the offender. As Aburbury CJ observed in *Lahey v Sanderson*:
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> > 'The Courts have recognised that imprisonment is likely to expose a youth to corrupting influences and to confirm him in criminal ways, that's defeating the very purpose of the punishment imposed. There has

[20] *Russell v Commissioner of Police* [2018] QDC 183 at [18].

> accordingly been a universal acceptance by the Courts in England, Australia and elsewhere of the view that in the case of a youthful offender his reformation is always an important consideration and, in the ordinary run of crime the dominant consideration in determining the appropriate punishment to be imposed. It has been said by Lord Goddard, the former Lord Chief Justice of England, that a judge or magistrate who sends a young man to prison for the first time takes upon himself a grave responsibility. With that I respectfully agree.'

[43] In that case, his Honour noted at [23]:

> The appellant's age is, of course, but one of the considerations relevant to the determination of an appropriate sentence. Also of relevance is the fact that the appellant committed the substantive offences whilst the subject of both a probation order and a community service order. It is also relevant that such orders related to offences of a similar nature to the substantive offences. Additionally, his response to those orders was abysmal. He failed to attend at the probation office on every occasion he was required to attend and did not perform any community service.

[44] Similar considerations apply in this case. Of course, in relation to the observations of Aburbury CJ, in this case, the appellant was not sentenced to any further term of actual imprisonment apart from the period of remand he had served. The parole release date was set at the date of sentence. The sole purpose in sentencing the appellant to a term of imprisonment was so that the appellant would have the benefit of parole which would have the effect of seeing him breached if he committed any further offences, rather than probation, which would require him to be returned to the Court for consideration of re-sentence.

[45] The respondent also relied on the decision of *Age v Queensland Police Service* [2020] QDC 169. In that case, Fantin DCJ considered an appeal on the ground of manifestly excessive. Her Honour found error on the part of the sentencing Magistrate because of a failure to properly apply principles of totality, given that the appellant's further offending had breached a parole period and the sentence was required to be imposed cumulatively. It was submitted that this was further authority that actual imprisonment was within range for young offenders committing property offences.

[46] I am satisfied that the learned Magistrate was aware of her obligations in respect of the proper sentencing principles and properly took into account submissions made by both the prosecutor and the defence. She was aware of the appellant's age. She was aware that the recording of a conviction *"could have detrimental effects to him moving forward given his age"*.

[47] Her Honour addressed the appellant directly saying, *"And there is really nothing left. When you commit these sorts of offences and if we cannot give you community-based orders, there is nothing left but imprisonment"*.[21]

[48] In the circumstances, I am satisfied that no error occurred, that her Honour gave proper consideration to the relevant principles as set out in s. 9(2) of the Act, and determined that, in this case, a sentence of imprisonment was appropriate and within range. Accordingly, the appeal is dismissed.

[21] Transcript of Decision, TS5.14 to 5.16.