DISTRICT COURT OF QUEENSLAND

CITATION:	*CHN v Queensland Police Service* [2023] QDC 158
PARTIES:	**CHN** (Appellant) **v** **QUEENSLAND POLICE SERVICE** (Respondent)
FILE NO/S:	[Redacted]
DIVISION:	Appellate
PROCEEDING:	Appeal pursuant to s 222 of the *Justices Act 1886* (Qld)
ORIGINATING COURT:	Richlands Magistrates Court
DELIVERED ON:	28 February 2023
DELIVERED AT:	Brisbane
HEARING DATE:	28 February 2023
JUDGES:	Dearden DCJ

ORDER:

1. **Appeal granted.**
2. **Set aside the sentence of a fine of $1,800 with convictions recorded in respect of possession of a dangerous drug and two charges of possession of utensils imposed at the Richlands Magistrates Court on 22 July 2022.**
3. **Substitute a global fine of $500 in respect of all three charges with no convictions recorded.**
4. **Order the respondent pay the appellant's costs of this appeal fixed at $1,800.**

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE – appellant sentenced on drug offences - where the appellant was fined $1,800 with convictions recorded – where the charges were subject of a ss 651 & 652 Criminal Code committal application to join the appellants matters in the District Court – where the learned magistrate concluded that the charges were unrelated and sentenced the appellant *ex parte* - whether the sentence was manifestly excessive

COUNSEL:	A Edwards for the appellant L Maleckas for the respondent
SOLICITORS:	Hannay Lawyers for the appellant Office of the Director of Public Prosecutions for the respondent

Introduction

[1] This is an appeal by the appellant CHN in respect of the sentence imposed at the Richlands Magistrates Court on 22 July 2022, in respect of the following matters:

(1) possessing dangerous drugs;

(2) possess utensils or pipes, etc, that had been used; and

(3) possess utensils or pipes, etc, for use.

[2] The matter was dealt with ex parte. The defendant was fined $1,800 with convictions recorded and all property related to the offences being forfeited to the Crown.

Grounds of Appeal.

[3] The ground of appeal in the notice of appeal filed 2 August 2022 was as follows:

In the circumstances, the sentence imposed was manifestly excessive.

[4] In the appellant's outline of appeal, the appellant identifies two further grounds of appeal which are:

(a) the magistrate erred in proceeding to sentence the appellant ex parte when the relevant paperwork for the matter to be transferred to the District Court had been filed two days earlier; and

(b) the magistrate erred in declining to reopen or rehear the proceedings (exhibit 1, [1]).

[5] It is common ground between the appellant and the respondent Commissioner of Police, that the appeal should be granted, the sentences imposed by the learned magistrates at Richlands Magistrates Court on 22 July 2022 be set aside and that in lieu, the appellant be sentenced to a global sentence of a fine of $500 with no conviction recorded.

[6] The respondent does not oppose an order for costs fixed in respect of costs that are permitted pursuant to the Justices Act.

Background.

[7] The background to this matter is that on 9 September 2022, the appellant's residence was searched, and police located two used bongs, 4.2 grams of cannabis with bag included, scales, cannabis clippings and an incense burner with 0.2 grams of partly burned cannabis inside.[1]

[8] On 20 July 2022, the appellant's legal representatives sent signed documents pursuant to Criminal Code ss 651 & 652 to transfer the three drug offences the subject of the appeal to the Brisbane District Court, to be dealt with at a sentence on 1 August 2022 for other matters.

[9] On 22 July 2022, the learned magistrate at Richlands sentenced the appellant. Transcript p.2 indicates that the learned magistrate's sentencing remarks were brief and as follows:

> *There is no remorse to take into account, so there was no discount in penalty. The defendant is convicted and fined $1800, two months to pay, convictions are recorded. The property is forfeited to the Crown.*

[10] The submissions before the learned magistrate (who proceeded to deal with the matter ex parte) indicate that apart from the summary (presumably of the QP9) in respect of the facts, no other material was placed before the magistrate and the magistrate's reasons have been read into the text of this appellate decision.

[11] What then flowed was that on 26 July 2022, the Richlands Magistrates Court emailed the appellant's legal representatives, advising "We didn't received this application in time" (sic) and advising further that the appellant had been sentenced ex parte on 22 July 2022. [2] On 26 July 2022, the appellant's legal representatives wrote to the Richlands Magistrates Court and requested that the sentence be reopened to allow the transfer of the charges to be dealt with in the Brisbane District Court (a re-hearing is permitted pursuant to Justices Act s.142A(12) & (12A) for such reason as the court "thinks proper"), but the court responded the same day,

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1 Exhibit 1, [5].
2 Exhibit 1, [8].

indicating that the learned magistrate at Richlands had refused the application "on the papers", commenting (wrongly, it is submitted by the appellant's legal representatives) that "these charges are unrelated to his child sex charges". [3]

[12] The appellant was sentenced in the District Court for non-drug offences on 1 August 2022 and sentenced to three years' probation, a substantial financial compensation order, and no conviction was recorded.

The law – appeals.

[13] I refer to and adopt a useful summary of the relevant legal principles in matters such as this in *Wilson v the Commissioner of Police* [2022] QDC 15, [6] - [8] (per Morzone QC DCJ).

[14] The appellant submits that given the filing of the documents required to transfer the charges pursuant to Criminal Code ss.651 & 652, the charges should have been "uplifted" to the District Court, but then when the learned magistrate concluded that those charges were unrelated (a conclusion that it is submitted is wrong at law), the sentence identified was imposed and then subsequently, the application for reopening was refused.

[15] The appellant submits that the errors identified in the process include that the learned magistrate did not take into account that the charges were in fact related to the matters dealt with in the District Court; that there had been what was effectively an administrative error in the Richlands Magistrates Court dealing with the charges ex parte on an application to transfer had already been filed; and that by recording a conviction, when there were mitigating circumstances which were not able to be placed before the learned magistrate, and given the appellant's age, the learned magistrate fell into error.[4]

[16] The respondent, frankly and entirely appropriately, concedes that the recording of convictions together with the quantum of the fine ($1800) in the context of this sentence, made the sentence "manifestly excessive".[5]

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3 Exhibit 1, [9] – [10].
4 Exhibit 1, [21].
5 Exhibit 3, [3] & [25].

[17] The respondent identifies the failure to provide any reasons as to why convictions were to be recorded, which it is acknowledged indicates a failure to comply with and to consider the provisions of Penalties and Sentences Act (Qld) 1992 s.12 and the decisions of *Russell v Commissioner of Police* [2016] QDC 106, *Campbell v Queensland Police Service* [2008] QDC 233, *Hurley v Elliott* [2006] QCA 165 and *R v Meid* [2006] QCA 124 which all indicate clearly that the global fine of $1800 was, in context, manifestly excessive.

Discussion.

[18] I have no difficulty in concluding that the learned magistrate fell into error in the recording of a conviction and imposing the fine at $1800 in the context of the minor nature of the drug offences (possessing a dangerous drug and two offences of possessing utensils or pipes) in this matter.

[19] Whether or not the dealing of the matter ex parte and the refusal to reopen pursuant to Justices Act s.142A (12 & 12A) were errors by the learned magistrate, it is clear that the charges were only before the learned magistrate as a result of administrative oversight on the part of the Richlands Magistrates Court registry and it is bewildering to seek to understand why the very straightforward and cost effective process available to the learned magistrate pursuant to Justices Act s.142A(12) & (12A) was not utilised. However, the matter has come before this court by way of a Justices Act s.222 appeal; the respondent Commissioner of Police frankly and appropriately concedes the appeal, and it is clear that what is effectively the joint submission of both the appellant and the respondent should be followed by this court to ensure that a penalty which is not manifestly excessive, and which fits the particular circumstances of the appellant, is imposed in this case.

Orders

[20] I make the following orders

(1) Appeal granted;

(2) Set aside the sentence of a fine of $1,800 with convictions recorded in respect of possession of a dangerous drug and two charges of possession of utensils imposed at the Richlands Magistrates Court on 22 July 2022;

(3) Substitute a global fine of $500 in respect of all three charges with no convictions recorded;

(4) Order the respondent pay the appellant's costs of this appeal fixed at $1,800.