DISTRICT COURT OF QUEENSLAND

CITATION:	*McNeil v Queensland Police Service* [2023] QDC 160
PARTIES:	**MCNEIL, Matthew** (applicant) **v** **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	1795 of 2020
DIVISION:	Appellate
PROCEEDING:	Appeal pursuant to s 222 of the Justices Act 1886 (Qld)
ORIGINATING COURT:	Richlands Magistrates Court
DELIVERED ON:	3 March 2023
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2023
JUDGES:	Dearden DCJ
ORDER:	**(1) Appeal granted.** **(2) Set aside the sentence imposed at the Richlands Magistrates Court on 20 July 2022 for the "enter premises and commit indictable offence" charge, and the "public nuisance" charge.** **(3) Resentence the appellant in respect of the "enter premises and commit indictable offence" charge to 262 days imprisonment.** **(4) It is declared that 262 days spent in pre-sentence custody between 14 June 2022 and 2 March 2023 be deemed time already served under the sentence.** **(5) Resentence the defendant on the "public nuisance" charge to "convicted and not further punished".**
CATCHWORDS:	CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE – where the appellant pleaded guilty to offences of enter premises and commit indictable offence and commit public nuisance – sentenced to a term of imprisonment to be served cumulatively - whether the learned magistrate failed to have regard to the totality principle – whether the sentence was manifestly excessive

COUNSEL: M Coburn for the appellant
S Poplauski for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Office of the Director of Public Prosecutions for the respondent

Introduction

[1] The appellant, Matthew McNeil, appeared at the Richlands Magistrates Court on 20 July 2022 in respect of offences of enter premises and commit indictable offence (10 February 2022) and commit public nuisance (14 June 2022). Pleas of guilty were entered to both charges and the appellant was sentenced as follows:

> *Enter premises and commit indictable offence - 8 months' imprisonment, wholly suspended for an operational period of three years.*
>
> *Commit public nuisance - 2 months' imprisonment to be served cumulatively with a parole eligibility date of 20 July 2022 (36 days of pre-sentence custody declared).*

[2] The appellant filed a notice of appeal on 28 July 2022, and subsequently an amended notice of appeal on 8 November 2022.

Grounds of appeal.

[3] The appellant's amended grounds of appeal are as follows:

(1) The learned magistrate failed to have regard to the totality principle;

(2) The magistrate erred in not reducing, or not adequately reducing, the sentence to reflect the appellant's pleas of guilty;

(3) The magistrate placed undue weight on the appellant's criminal history which resulted in a sentence that was disproportionate to the gravity of the offence;

(4) The learned magistrate failed to have regard to the principle that imprisonment should be imposed only as a sentence of last resort; and

(5) The sentence imposed was manifestly excessive.

[4] There being no objection, the appellant is granted leave to proceed on the amended grounds of appeal.

The law - appeals

[5] I respectively adopt, with approval, the observations of Morzone KC DCJ in respect of Justices Act s 222 appeals in respect of sentences as set out in *Wilson v Commissioner of Police* [2022] QDC 15, [6] - [8].

Facts of offending

[6] The respondent has conveniently summarised the facts of the offences as follows:-[1]

5.2 Briefly, on 10 February 2022 at around 4.00 am the appellant entered the property of Sarah Downey and stole tobacco and two lighters ($50 in value) from a table on the rear patio. The complainant was inside at home and observed the appellant shining a torch through the windows of her house. The appellant was identified via a fingerprint and DNA sample taken from a cup he left at the scene. On 16 June 2022 whilst the appellant was in custody, he was formerly charged for this offence.

5.3 On 6 June 2022 the appellant was sentenced in the Richlands Magistrates Court to a bundle of offences which were committed during a similar offending period to the above charge. He was sentenced to nine months' imprisonment and received an immediate parole release date.

5.4 On 14 June 2022, whilst on the parole for the sentence imposed on 6 June 2022, the appellant committed public nuisance by approaching customers at a 7-Eleven fuel station. The appellant approached at least three vehicles and a number of customers, one of which was filling up her vehicle. The appellant approached her and said something that scared her and caused her to run into the store and requested someone call police. Police arrived and located the appellant nearby, who claimed he had only been trying to sell a bottle of alcohol to get money for food. He denied approaching the customers

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1 Exhibit 3 - outline of submissions on behalf of the respondent [5.2] - [5.4].

and refused to listen to police before being arrested and transported to the Richlands Watchhouse whereby he was denied bail.

[7] The appellant outlines the prior criminal history of Matthew McNeil as follows:[2]

7.1 At the time of sentence, the appellant had a 15-page criminal history commencing in 1999. This was tendered and marked as exhibit 2 in the sentence proceedings (affidavit of Bronwyn Mantle sworn 16 September 2022, exhibit BM - 5).

7.2 Of particular relevance is the entry from the Richlands Magistrates Court on 6 June 2022, where the appellant received a head sentence of 9 months' imprisonment with an immediate parole release.

7.3 The parole order is breached only by the public nuisance offence as the enter premises charge was committed prior to 6 June 2022.

[8] The appellant's outline summarises the sentence proceedings as follows: [3]

8.1 A schedule of facts was relied upon and marked exhibit 1 (affidavit of Bronwyn Mantle sworn 16 September 2022 exhibit BM - 4)

8.2 The prosecutor submitted that with respect to charge 1, the totality principle applies and that if the appellant was dealt with on the 6th of June 2022, he would not have received any greater penalty.

8.3 The legal representative for the appellant made detailed submissions with respect of penalty and the appellant's personal antecedence.

8.4 Of particular relevance the following submissions were made:

8.4.1 Charge 1 was the most serious charge before the court and should attract a sentence of 8 months' imprisonment with an immediate parole release date.

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2 Exhibit 1 - outline of submissions on behalf of the appellant [7.1] - [7.3].
3 Exhibit 1 - outline of submissions on behalf of the appellant [8.1] - [8.4]

8.4.2 Charge 2 was committed whilst subject to parole but was not the most serious example of a public nuisance offence as it involved the appellant trying to sell alcohol and should attract a fine.

8.4.3 It was submitted that the nature of the charge of charge 2 does not warrant a term of imprisonment and a parole eligibility date and if sentenced to an actual period of imprisonment, would cause the sentence to be excessive.

8.4.4 It was further submitted that if his Honour adopted the approach being put forward on the appellant's behalf, he would still need to apply to the parole board to have his order reinstated as it was suspended at the time.

[9] I should note the appellant's solicitor at sentence (who was not the legal representative who appeared on this appeal) displayed significant fortitude in dealing with a judicial officer who, in my view, behaved in an unnecessarily overbearing manner, apparently based on previous interactions with this particular appellant. Despite being cut off repeatedly by the learned magistrate and despite the learned magistrate expressing entrenched views in respect of the appellant as a result of those previous proceedings, the appellant's sentence solicitor proceeded with submissions that ensured that her ability to advocate fully on behalf of her client was not impeded, despite the responses from the bench.

[10] It is, in my view, incumbent on all judicial officers, even those in busy summary courts, to engage respectfully and courteously with the lawyers appearing for clients in those courts, to ensure that justice is dispensed fairly and appropriately. Critically, judicial officers should, where possible, avoid exchanges which appear to be predicated on a pre-judgement of relevant and contestable issues, as in this case.

Ground 1 - *The learned magistrate failed to have regard to the totality principle.*

[11] The appellant submits, and the respondent effectively accepts, that the learned magistrate was required to consider but failed to take account of the totality principle as set out in *Mill v The Queen* (1988) 83 ALR 1, 5 - 6. The submission that was made on behalf of the appellant's legal representative at sentence was that eight months imprisonment with immediate parole release date would appropriately

apply the totality principle given when the offence occurred in relation to the other sentences that the appellant was then serving. However, by imposing a sentence as submitted for (eight months), but then making it subject to a suspension operational period of three years, the learned magistrate quite clearly did not effectively incorporate the principle of totality into the overall sentence. This was further exacerbated, of course, by the sentence imposed in respect of the public nuisance charge.[4]

[12] The respondent, as indicated, accepts that the learned magistrate fell into error both with the imposition of the cumulative sentence for the public nuisance offence, as well as the structure of the sentence in respect of the enter premises charge.

[13] In the circumstances, it becomes unnecessary to consider the further grounds, although I have no hesitation in accepting that the learned magistrate fell into error and that the consequent sentence was manifestly excessive.

[14] The dilemma that this court then faces in dealing with the appellant's appeal, which was of course lodged shortly after the sentence on 20 July 2022, is that the appellant has since 14 June 2022 now completed 262 days of pre-sentence custody. It is common ground from both the appellant and the respondent's legal representatives in this court that that time period can be declared, and although the sentence contended for before the learned magistrate may well have been appropriate (a concurrent eight months' sentence with immediate parole, and a modest fine for the public nuisance offence), the further period of time that the appellant has spent in custody makes that an inappropriate sentence in the context of this appeal, and the timeframe since sentencing and the lodgement of the appeal.

[15] In all of the circumstances, it is clear that the appeal should be granted, and the appropriate penalty (which would not have been the penalty imposed at first instance in this form) is to sentence the appellant to time served, that is the 262 days in relation to the enter premises and commit indictable offence charge, and to convict and not further punish in respect of the public nuisance charge.

Orders

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4 Exhibit 1 - outline of submission on behalf of the appellant [10.1] - [10.8].

[16] The formal orders then will be as follows:

(1) Appeal granted.

(2) Set aside the sentence imposed at the Richlands Magistrates Court on 20 July 2022 for the "enter premises and commit indictable offence" charge, and the "public nuisance" charge.

(3) Resentence the appellant in respect of the "enter premises and commit indictable offence" charge to 262 days imprisonment.

(4) It is declared that 262 days spent in pre-sentence custody between 14 June 2022 and 2 March 2023 be deemed time already served under the sentence.

(5) Resentence the defendant on the "public nuisance" charge to "convicted and not further punished".