

DISTRICT COURT OF QUEENSLAND

CITATION: *Ferreira v Queensland Police Service* [2023] QDC 252

PARTIES: **FERREIRA, Carlos Adelino Henrique**
(appellant)

v

QUEENSLAND POLICE SERVICE
(respondent)

FILE NO/S: 970/2023

DIVISION: Appellate

PROCEEDING: Appeal

ORIGINATING COURT: Brisbane Magistrates Court

DELIVERED ON: 12 May 2023 (delivered *ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 12 May 2023

JUDGES: Dearden DCJ

ORDER:

(1) Appeal granted.

(2) Set aside the sentence imposed of three months with parole release date after one month at the Brisbane Magistrates Court on 12 April 2023 on one charge of breach of bail condition.

(3) Substitute a sentence of one month's imprisonment, wholly suspended, with an operational period of three months.

(4) Declare the period of 12-19 April 2023, a total of 7 days, as time served in respect of this sentence.

CATCHWORDS: CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE – where the appellant pleaded guilty to one charge of breach of bail condition – where the appellant tried to obtain a passport - where appellant was sentenced to 3 months imprisonment with parole release after serving one month – whether the sentence was manifestly excessive – whether the learned magistrate fell into error by relying on

COUNSEL: unsourced hearsay
 S Lynch for the appellant
 LM Devereaux 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 against sentence by the appellant Carlos Ferreira in respect of an offence of breach of bail condition, for which he was sentenced on 12 April 2023 at the Brisbane Magistrates Court, to three months' imprisonment with parole release after serving one month.

Grounds of appeal

- [2] A sole ground of appeal is as follows:

The [learned magistrate] erred in sentencing to manifest excess.

Bail

- [3] The appeal against sentence was filed on 13 April 2023, and on 19 April 2023, the appellant was granted bail pending appeal, having by then served seven days' imprisonment.¹

Background

- [4] The appellant has helpfully summarised the background as follows:²

3.1 On 23 January 2020, the appellant was granted bail on his own undertaking on fraud and money laundering charges conditioned that inter alia:

- (a) he surrender his passport,*
- (b) that he reside at the address stated, and*
- (c) that he report thrice weekly to police.*

¹ Exhibit 1 – Submissions on behalf of the appellant, [3.5]-[3.7].

² Exhibit 1 – Submissions on behalf of the appellant, [3.1]-[3.4].

3.2 On 4 June 2021, [he] breached the residential condition of that bail by not having the consent to reside other than at the agreed address. He was, however, continuing to report in accordance with his obligations. He pleaded guilty to that breach on 23 June 2021 in the Brisbane Magistrates Court and was placed on recognisance or six months to be of good behaviour.

3.3 On 11 April 2023, the appellant was arrested for a further breach of a bail condition. Namely, he had applied for a passport which had issued on 16 January 2023.

3.4 On 12 April 2023, he pleaded guilty to the breach in the Brisbane Magistrates Court before [the learned Acting Magistrate], who sentenced him to three months' imprisonment with parole after one month.

The Law - Appeals

[5] I refer to and adopt my exposition in respect of appeals pursuant to *Justice's Act 1886* (Qld) (JA) s 222, as set out in *APL v Queensland Police Service* [2022] QDC 214, [3] - [5].

[6] More specifically, in respect of an appeal against sentence, I also refer to and adopt my exposition of the law set out in *APL v Queensland Police Service* [2022] QDC 214, [6] - [10]. I also refer to and adopt the observations of Muir JA in *Teelow v Commissioner of Police* [2009] QCA 84, [4]:

It is a normal attribute of an appeal by way of rehearing that "the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error ... At least that is so unless, in the case of an appeal by way of rehearing, there is some statutory provision which indicates that the powers may be exercised whether or not there was error at first instance." On an appeal by way of rehearing, an appellate court can substitute its own decision based on the facts and the law as they stand at the date of the decision of the appeal. [citations omitted].

[7] As Judge Morzone QC DCJ aptly observed in *Wilson v The Commissioner of Police* [2022] QDC 15, at [8]:

The decisions of House v The King (1936) 55 CLR 499, 504 and 505 and Kentwell v R (2014) 252 CLR 60, [35] are distinguished cases of specific error and manifest excess. Once an appellate court identifies a specific error,

the sentence must be set aside, and the appellate court must exercise the sentencing discretion afresh, unless, in that separate and independent exercise, it concludes that no different sentence should be passed. By contrast, an error may not be discernible; but the sentence is manifestly excessive by being too heavy and lies outside the permissible range. Only then may the appellate court intervene and, in the exercise of its discretion, consider what sentence is to be imposed.

Facts

- [8] The appellant pleaded guilty before the learned magistrate at Brisbane Magistrates Court on 12 April 2023 to one charge of breach of bail.
- [9] The prosecution's submissions were brief and can be quoted in full as follows:³

So the bail was entered into on the 23rd of June 2020 and - and he remained - he remains on bail for the offences at the moment, your Honour, and of course there's several - well, there - there are several conditions on the bail; one of them not being - being that he not apply for a passport, having relinquished his current passport to the Brisbane Magistrates Court to achieve bail in 2020. So that was - the Brisbane Magistrates Court should have that tucked away somewhere.

So March 2023 police received information indicating that the defendant had travelled to Canberra to obtain a Portuguese passport and he was planning to leave the country. And police received further information that the defendant had made several comments relating to his current court matters. The defendant is alleged to have stated words to the effect of "I drove to Canberra to get my Portuguese passport. As you know, it is looking really bad for me, and I will not accept to go to jail. And also I went to do some tests and radiography hoping that I have something wrong in my brain to be able to avoid jail and go into a mental institution instead, but all my tests came back good."

So after receiving this information, police received or made inquiries with Interpol in Portugal, who confirmed that a Portuguese passport was issued to the defendant on the 16th of January 2023 in Canberra. On the 11th of April, police spoke with the defendant in Burpengary. He took part in an interview and - and stated that he had applied for a Portuguese pass - passport and wanted to dissolve his current marriage to his wife, he said. He - he denied ever receiving the passport and when directly asked, confirmed that he did not ever receive a passport from his application.

³ Exhibit 3 – Affidavit of Brianna Hayes, affirmed 2 May 2023, exhibit A(a), sentencing submissions transcript 1-4 16 – 1-5 125.

So he was arrested and transported to the city station during which he admitted that he was in possession of the passport which he then stated he believed was at his residence. And the passport is yet to be recovered by police; it remains outstanding. So those are the facts in relation to this.

It seems that - I am instructed that the DPP may apply for the revocation of his bail given the facts that are outlined from this breach. Your Honour, so I tender the history. He has got a previous breach but other - no other history and a copy of the undertaking for which he was subject to.

[10] The appellant's criminal history,⁴ indicates the appellant was previously dealt with for a breach of bail condition at the Brisbane Magistrates Court on 23 June 2021, and sentenced to a recognisance in the sum of \$500 to be of good behaviour for six months, with no conviction recorded.

[11] The appellant's legal representative then made submissions which follow, including an exchange with the learned magistrate towards the end of those submissions:⁵

Now, your Honour, my client is 59 years of age. He's an Australian citizen; he has been in Australia for 41 years. He has been married since 1988. He was first married in Australia on the 13th of February 1988. He was then married in Portugal on the 7th of August 1988. He and his wife separated 10 months ago and it has been an amicable separation. A lot of the related issues to the separation are his pending charges. He's on Alprazolam and he's seeing a psychiatrist once a week; that's Dr Ian Curtis. He has engaged a solicitor in Portugal for a divorce to be undertaken. That solicitor's name is George Fernandez and my client instructs there's a card of his in his wallet. Now, Mr Fernandez advised my client that he required identification which was from Portugal to assist in the separation and divorce of his wife. Not thinking about the fact that he has his bail conditions of not applying for a passport, he applied for a Portuguese passport which was issued.

My client instructs that he could not provide any other identification as such a working card from Portugal because he has not been there for such a significant period of time. He instructs that the passport's at his house. I'm not sure what searches were undertaken when they collected him apart from the fact that it's still there. So I do not know why police did not think to take him once he said, yes, I've got the passport, I'm not sure why they didn't take him to [the] house to go and collect that. But my client instructs that it's at his house, it's locked away in his room. There's nothing to suggest other than the comments that were made. My client said I haven't – he's unsure of

⁴ Exhibit 3 - Affidavit of Brianna Hayes, affirmed 2 May 2023, exhibit A(b).

⁵ Exhibit 3 - Affidavit of Brianna Hayes, affirmed 2 May 2023, exhibit A(a), sentencing submissions transcript 1-4 l6 - 1-5 l25.

the comments and where they've come from. But insofar as any searches, tickets, anything like that, he said nothing like that has occurred. The sole purpose of him applying for that passport was because of the fact that he was required to get a Portuguese identification to assist with this divorce.

He's been on bail nearly two and a half, three years. My office acts with respect to the fraud. There's still negotiations ongoing, submissions have been sent insofar as quantum [SRC]. He has instructed counsel, we have got a counsellor involved. There's never been anything other than instructions to contest quantum which we have been undertaking with the DPP. He's a massage therapist; it's his own business. He's had the business for about 10 months. He was previously employed, but as a result of his mental health deterioration, he's found it hard to continue with his previous works; it was as a sales representative for a medical company. He earns approximately \$1300 a week.

He has one previous entry; that was from 2001 [2021], where he received a fine. Taking into consideration the circumstances around this, my submission is that it could be adequately dealt with by way of a fine. With respect to the passport issue, I mean that's - - -

HIS HONOUR: It doesn't get much more serious than trying to obtain - or getting a passport when you've got a bail condition that says you can't.

LEGAL REPRESENTATIVE: Like I said, your Honour, it was an oversight by him with respect to the fact that it was a Portuguese passport as opposed to an Australian passport. It doesn't distinguish between the two on the bail condition which he has been on, like I said, for nearly three years now.

HIS HONOUR: It can't have been the only way to identify himself.

LEGAL REPRESENTATIVE: That was - but I mean, those were my instructions.

HIS HONOUR: That is what he tells you?

LEGAL REPRESENTATIVE: Yes, yes. I asked him about Australian identification, he said he wasn't able to use Australian identification. He has advised me that there is email correspondence on his computer with respect to his engagement of his solicitor overseas to assist with the divorce. And that was the catalyst for obtaining the passport. My client undertakes, of course, he will surrender the passport.

HIS HONOUR: Surely this is an offence that calls for a term of imprisonment?

LEGAL REPRESENTATIVE: Well, I - your Honour, I have made my submission in respect to a client.

HIS HONOUR: Do you have any comparative sentences?

LEGAL REPRESENTATIVE: No, no. I do not have any comparatives.

- [12] The learned magistrates sentencing remarks are also brief and can also be quoted in full, as follows:-⁶

I've taken into account your timely plea of guilty today to the one charge of breaching a bail condition, that you must not apply for a passport. You remained on bail since the 23rd of June 2020 but you did plan to leave the country and obtain a passport to help you do so, and you say to identify yourself to Portuguese authorities in respect of seeking a divorce.

You're 59 years of age. You are an Australian citizen. You've had gainful employment. I'm told you are seeing a psychiatrist. It's very difficult to follow your story about needing the passport for the innocent purpose that you've stated. There are many ways that people can identify themselves and I don't accept that this was the only way that you could be identified to Portuguese authorities, in the absence of reliable evidence, other than your say-so. Such as documentation from the Portuguese authorities requiring that form of proof.

This is an offence that really does strike at the heart of the bail system. You clearly intended to leave the country and evade your responsibility to face the charges which, according to your bail undertaking, are a false entry in a record and a fraud charge. You stated, in effect, to the police a fear of going to jail. Putting it bluntly, you intended to abscond.

In all of the circumstances, a term of imprisonment is called for, to send a clear message to you and to likeminded people that bail conditions must be complied with and they cannot be breached in such a serious manner as to obtain a passport when you're told not to. You are sentenced to a term of three months' imprisonment. Your parole release date will be the 12th of May.

Submissions

- [13] The appellant identifies a clear factual error by the learned magistrate, which undoubtedly affected the learned magistrate's assessment of the seriousness and significance of the bail breach.

⁶ Exhibit 3 - Affidavit of Brianna Hayes, affirmed 2 May 2023, exhibit A(b), sentence transcript 1-2 ll 1-25.

[14] The police prosecutor told the learned magistrate:⁷

So March 2023 police received information indicating that the defendant had travelled to Canberra to obtain a Portuguese passport and he was planning to leave the country.

[15] And:⁸

...[the appellant said] it's looking really bad for me and I won't accept to go to jail.

[16] The appellant's legal representative, as set out above, submitted relevantly:-⁹

My client said I haven't – he's unsure of the comments and where they've come from. But insofar as any searches, tickets, anything like that, he said nothing like that has occurred. The sole purpose of him applying for that passport was because of the fact that he was required to get a Portuguese identification to assist with this divorce.

[17] The learned magistrate, in his sentencing remarks, has either misheard or misunderstood the submissions made by the prosecutor. The police prosecutor did not submit that the appellant had stated to police a fear of going to jail and or that he planned to leave the country. Rather, that was part of the unsourced information provided to police by an unknown person, which prompted the investigation and led to police discovering that the appellant had, contrary to his bail condition, obtained a Portuguese passport.

[18] It should also be noted that the appellant, through his legal representative, effectively denied that unsourced information, as set out above.

[19] The appellant's counsel on this appeal, Mr Lynch, submits:¹⁰

5.5 Much turned on his Honour's misunderstanding of the facts as he readily concluded that he had admitted he did not want to go to jail and therefore reasoned he was absconding the jurisdiction. That was despite submissions that he was unsure where the comments had come from and there being a denial the words had been said.

⁷ Exhibit 3 - Affidavit of Brianna Hayes, affirmed 2 May 2023, exhibit A(a), sentencing submissions transcript, 1-3 ll25-27.

⁸ Exhibit 3 - Affidavit of Brianna Hayes, affirmed 2 May 2023, exhibit A(a), sentencing submissions transcript, 1-3 ll30-31.

⁹ Exhibit 3 - Affidavit of Brianna Hayes, affirmed 2 May 2023, exhibit A(a), sentencing submissions transcript, 1-4 ll26-30.

¹⁰ Exhibit 1 - Submissions on behalf of the appellant, [5.5]-[5.6].

5.6 His Honour therefore, failed to acknowledge that the appellant had the passport from 16 January 2023 and had not otherwise used it to abscond. Submissions were made that there was no “searches, tickets, or anything like that”. The appellant had the passport for a period of nearly three months before police intervened. Indeed, they had the information from “March” and only spoke with him on 11 April 2023. Whatever they assessed the risk as being, police did not endeavour to recover the passport at any time.

[20] The respondent’s counsel, Ms Devereaux, submits in response:¹¹

24. The use of the words “in effect” suggests that the Magistrate may not have thought this was a direct admission to police. It is submitted that the Magistrate understood the submissions of the parties, and it is not accepted that the Magistrate made an error. The Magistrate heard submissions from both parties about the alleged remarks. The police prosecutor submitted that the alleged remarks were part of the information supplied to police, and the applicant’s solicitor submitted that the applicant did not accept that the remarks were made.

25. However, if the Magistrate was under the misapprehension that this was an admission to police, it is submitted that it would not have impacted the Magistrate’s sentence. The information provided to the Magistrate about the applicant’s state of mind and conduct, namely obtaining the Portuguese passport, was the catalyst for the police investigation but was not the basis of the breach of bail.

26. It is noted that the information supplied to police, specifically that the applicant had travelled to Canberra and obtained a Portuguese passport, was correct. The Magistrate was at liberty not to accept the applicant’s explanation as to why he had obtained the passport and heard submissions on that point.

Discussion

[21] In my view, the learned magistrate has clearly fallen into error and misunderstood the prosecution’s submissions. Although the information the police received was correct in respect of the appellant obtaining a Portuguese passport, in Canberra, the balance of the information was unsourced hearsay, and denied by the appellant through his legal representative.

¹¹ Exhibit 2 - Outline of submissions on behalf of the respondent, [24]-[26].

- [22] Clearly, error having been identified, the sentence should be set aside, and sentencing discretion exercised afresh. The learned magistrate's error led to a misapprehension as to the seriousness of the appellant's offending, which I consider clearly leads to a conclusion that the sentence imposed, which required a substantial period of actual custody, was, in the circumstances, manifestly excessive.
- [23] As the respondent's counsel submits, however, the breach of bail condition by obtaining a passport was indeed a serious and deliberate act or conduct by a defendant who had previously been dealt with, leniently in my view, for a far less serious breach of the same bail undertaking (although a different condition).
- [24] Although I consider that the learned magistrate misconstrued the submissions before him as to the appellant's intention to abscond, there is no doubt that obtaining the passport provided the appellant with the means or opportunity to abscond (subject of course to obtaining the necessary tickets to leave Australia and making it through the necessary security checks on leaving).
- [25] Balanced against that, however, was the appellant's early plea of guilty, gainful employment, his voluntarily accessing psychiatric treatment and, critically, that there was no indicia that the appellant had done anything in the period of almost three months since obtaining the passport to facilitate leaving the jurisdiction, such as undertaking internet searches for travel arrangements, and/or purchasing air tickets or the like.
- [26] In those circumstances, the seriousness of the offence can be appropriately and proportionately dealt with by the imposition of a short prison sentence, which would also reflect that the appellant had served seven days of actual custody before his release on bail. That sentence should, however, be wholly suspended to ameliorate its effect, with a short operational period, to reflect the lack of other aggravating features in the appellant's circumstances.

Orders

- [27] Accordingly, I make the following orders:

(1) Appeal granted.

- (2) Set aside the sentence imposed of three months with parole release date after one month at the Brisbane Magistrates Court on 12 April 2023 on one charge of breach of bail condition.
- (3) Substitute a sentence of one month's imprisonment, wholly suspended, with an operational period of three months.
- (4) Declare the period of 12-19 April 2023, a total of 7 days, as time served in respect of this sentence.