DISTRICT COURT OF QUEENSLAND

CITATION:	*BRD v Commissioner of Police* [2023] QDC 254
PARTIES:	**BRD** (Appellant) **v** **COMMISSIONER OF POLICE** (Respondent)
FILE NO/S:	327/22
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Mount Isa Magistrates Court
DELIVERED ON:	29 September 2023 (ex tempore)
DELIVERED AT:	Southport
HEARING DATE:	29 September 2023
JUDGE:	Farr SC DCJ
ORDER:	**1. Appeal allowed.** **2. Sentences imposed in Magistrates Court in Mount Isa on 15 November 2022 are set aside.** **3. The appellant is resentenced to 18 months probation in respect of each charge. That period of probation to commence from today's hearing date. The appellant must comply with the requirements set out in s. 93(1) of the Penalties and Sentences Act 1992.** **4. No convictions recorded.** **5. Order that the respondent pay the appellant's costs of appeal fixed in the amount of $1,700.**
CATCHWORDS:	CRIMINAL LAW – APPEAL – Justices Act 1886 – section 222 – appeal against sentence – where the appellant pleaded guilty to one count of breaching a bail condition and one count of contravention of a domestic violence order – whether the sentence imposed was manifestly excessive – where the appellant had no prior convictions - where the Magistrate failed to declare three days of pre-sentence custody which the appellant had served – whether appropriate regard was given to the mitigating circumstances – whether

	the sentence was within an appropriate range.
LEGISLATION:	*Justices Act 1886* (Qld)
	Penalties and Sentences Act 1992 (Qld)
COUNSEL:	J Merchant for the appellant
	B Wease for the respondent
SOLICITORS:	Mulherin Law for the appellant
	Commissioner of Police for the respondent

Introduction & background

[1] This is an appeal pursuant to section 222 of the *Justices Act 1886* (Qld). The appellant was sentenced in the Mount Isa Magistrates Court on the 15th of November 2022 to one count of breaching a bail condition and one count of contravention of a domestic violence order. In respect of each of those charges, he was sentenced to three months' imprisonment which was wholly suspended with an operational period of nine months.

[2] The ground of appeal is that the sentence was excessive.

Was sentence excessive

[3] There are a number of particulars that have been relied upon by the appellant in support of that ground of appeal. Perhaps, the most compelling of those is the fact that the learned sentencing Magistrate failed to declare three days of pre-sentence custody which the appellant had served; that was through no fault of the Magistrate. It must be said, as I understand it, he was not provided with that information during the sentence hearing. The other compelling ground is that the Magistrate discounted the availability of community service as a potential outcome by virtue of the fact that the appellant lived in Woolooma in New South Wales, and therefore, could not serve or perform community service… which was an incorrect statement of the law. The submission was also made to the Magistrate that a fine was inappropriate without any comparable decisions being placed before the Court. I tend to think that that was an incorrect submission as well given that at the relevant time, the appellant had no prior convictions.

[4] The offending conduct relates to the appellant travelling to Mount Isa and attending at an address. The facts are a little obscure, it must be said. There is no evidence

before the Court that he attended on the aggrieved, but he did speak to a witness for the purposes of suggesting that he wished to apologise for the trouble that he had caused. It was a breach of his bail to go to Mount Isa, because there was a specific condition that he not do so, and it was a breach of the domestic violence order if he attended within a certain distance of the aggrieved, and I understand that it is accepted on the evidence that he did do that.

[5] The Magistrate also took the view that there was some issue of threatening conduct involved in this. I understand the Magistrate's position, but he, perhaps, placed it too highly and did not offer the appellant the opportunity to contest what the Magistrate indicated he was going to conclude. His conclusion, that the appellants attendance at Mount Isa at that address was threatening in and of itself, at least to the extent of indicating "I know where you are and I can - I am prepared to travel there" is, perhaps, placing things a little too highly; but it is also to be said it was not benign conduct on the part of the appellant and it was in direct contravention of various conditions.

[6] The appellant, as I say, had no prior convictions, but he has incurred subsequent convictions, although for offences that occurred prior in time. They are of some relevance in that on the 5th of April this year, he was sentenced in the Southport Magistrates Court on two counts of contravention of a domestic violence order and one count of using a carriage service to menace, harass, or cause offence, and one count of use a carriage service to make a threat to cause serious harm. For those offences, he was placed on probation for a total of 18 months. Those offences occurred in July, August of 2022. The offences the subject of this appeal occurred on the 12th of November 2022. It has been submitted the totality issues do come into play in those circumstances for the purposes of determining this appeal and I agree with that submission.

[7] I am satisfied that the sentence which was imposed in the Mount Isa Magistrates Court was excessive in the circumstances. The Magistrate was really given precious little assistance by the Prosecutor. I note that the appellant's legal representative was a duty lawyer and one understands the difficulties that duty lawyers face in obtaining full and proper instructions in very short periods of time, but it does appear that the Magistrate discounted various options that may have been open to the Court leading him to an outcome of a period of imprisonment as being the only

viable option and that was an error on his part. It has resulted in a sentence which is excessive in the circumstances. The mere fact that the three-day declaration of pre-sentence custody was not made also results in the sentence that was imposed being excessive in the circumstances and that immediately enlivens the discretion of this Court to resentence the appellant.

[8] I have been told that the appellants response to probation since April of this year has been positive and that his rehabilitation is progressing in an acceptable way. The submission has been made on behalf of the respondent that this Court might take the view that had all of these matters been dealt with at the one time, a period of probation of two years' imprisonment may have been the outcome. Counsel for the appellant has indicated that the probation period in all likelihood would not have changed. I do not agree with the appellant's counsel in that regard. It seems to me that there would have been an additional period of probation in the circumstances had all these matters been dealt with together, and it does seem to me that the outcome would have in all likelihood have been a period of probation of two years.

Orders

1. The appeal is allowed.

2. The sentences imposed in the Magistrates Court at Mount Isa on the 15th of November 2022 are set aside.
3. The appellant is resentenced to 18 months probation in respect of each charge. That period of probation to commence from today's hearing date. The appellant must comply with the requirements set out in section 93(1) of the *Penalties and Sentences Act 1992* (Qld).
4. No convictions recorded.

5. Order that the respondent pay the appellant's costs of appeal fixed in the amount of $1,700.