SUPREME COURT OF QUEENSLAND

CITATION:	*Atkinson v Costanzo & Anor* [2002] QSC 001
PARTIES:	**ROBERT ATKINSON, Commissioner of the Police Service** (applicant) **v** **JOHN COSTANZO, Magistrate** (first respondent) **JANELLE MARJORIE LEAH WASS** (second respondent)
FILE NO/S:	S9427 of 2001
DIVISION:	Trial
DELIVERED ON:	10 January 2002
DELIVERED AT:	Brisbane
HEARING DATES:	20, 26 November 2001; 18, 20 December 2001
JUDGE:	Helman J.
CATCHWORDS:	JUDICIAL REVIEW – PREROGATIVE ORDERS - construction of s 8 of the *Drug Rehabilitation (Court Diversion) Act* 2000 *Criminal Code,* s 3(3), s 340, s. 340(b), s. 552A, s 552A(2), s 552B, s 552C, s 552D, s 552D(1), s 552D(2), s 552E, s 552F, s 552G, s 552H, s 552I, s 552J *Drug Rehabilitation (Court Diversion) Act* 2000, s 3, s 3(1)(d), s 3(2), s 6, s 7, s 7(1)(b), s 8, s 8(1), s 8(1)(b), s 8(1)(c), s 8(1)(d), s 17(2), s 19, s 19(a) *Drug Rehabilitation (Court Diversion) Regulation* 2000 *Drugs Misuse Act* 1986, s 13, s 45(2), s 45(4) *Judicial Review Act* 1991, s 44 *Police Service Administration Act* 1990, s 4.8(1) *Re Boe Criminal Justice Commission* (1993) 1 QAR 167 *John Burke Ltd v. The Insurance Commission* [1963] Qd R 587 *The Great Fingall Consolidated Ltd v. Sheehan* (1906) 3 CLR 176 *Webster v. McIntosh* (1980) 32 ALR 603

COUNSEL:	Mr A. Kimmins for the applicant Mr J. Kooreman for the first respondent. Mr J. M. McInnes for the second respondent.
SOLICITORS:	Mr C. J. Strofield, Queensland police service solicitor, for the applicant. Crown Solicitor for the first respondent. Legal Aid Queensland for the second respondent.

[1] **HELMAN J:** The applicant, the commissioner of the Queensland police service, seeks prerogative orders against the first respondent, a magistrate, by way of application for review under the *Judicial Review Act* 1991. On 21 June 2001, the second respondent applied to be dealt with under the *Drug Rehabilitation (Court Diversion) Act* 2000 on charges of serious assault under s. 340 of the Queensland *Criminal Code* and on other charges against her pending in the Magistrates Court. On 17 August 2001, the first respondent, sitting at Beenleigh as a pilot program magistrate as provided for in the *Drug Rehabilitation (Court Diversion) Act*, ruled that the charges of serious assault were charges of relevant offences as defined in s. 8 of the Act. The applicant challenges the first respondent's ruling in relation to one of the charges:

> That on the 19th day of October 1998 at Brisbane in the state of Queensland [the second respondent] assaulted Tony Boyd PATTEMORE a police office whilst Tony Boyd PATTEMORE was acting in the execution of his duty.

Although the transcript of the hearing of 17 August 2001 indicates that the first respondent's ruling concerned two charges of serious assault, on the last occasion when this matter was before me (20 December 2001, when certified true and correct copies of the Beenleigh Magistrates Court files were produced) Mr Strofield, who appeared for the applicant then, made it clear that the application was confined to the charge I have mentioned. That charge appears on a bench charge sheet upon which no court file number is endorsed, and which bears the date 21 June 2001.

[2] The applicant seeks an order 'preventing the First Respondent from dealing with the Second Respondent as an eligible person pursuant to the *Drug Rehabilitation (Court Diversion) Act* …' and an order 'declaring the determination made by the First Respondent in relation to the Second Respondent on 17 August 2001 to be void and of no effect'.

[3] Under s. 19 of the *Drug Rehabilitation (Court Diversion) Act*, a pilot program magistrate may make an intensive drug rehabilitation order against an offender if satisfied of certain things, including (a) that the offence is a relevant offence, and (b) that the offender is an eligible person. In s. 8 the term 'relevant offence' is defined:

> **What is a "relevant offence"**
>
> **8.(1)** Each of the following is a **"relevant offence"**—
>
> (a) a simple offence;

(b) an indictable offence that may be dealt with summarily;

(c) a prescribed drug offence;

(d) another offence prescribed under a regulation that is punishable by imprisonment for a term of not more than 7 years.

(2) A relevant offence does not include a disqualifying offence.

In s. 7 the term 'disqualifying offence' is defined. So far as it is relevant to this application it is as follows:

What is a "disqualifying offence"

7.(1) A **"disqualifying offence"** is

…

(b) an indictable offence involving violence against another person, other than an offence charged under any of the following provisions of the *Criminal Code*—

…

- section 340(b).

In s. 6 the term 'eligible person' is defined:

Who is an "eligible person"

6.(1) A person appearing before a pilot program court charged with an offence is an **"eligible person"** if—

(a) the person is not a person who must be dealt with as a child under the *Juvenile Justice Act* 1992; and

(b) the person is drug dependent and that dependency contributed to the person committing the offence; and

(c) it is likely the person would, if convicted of the offence, be sentenced to imprisonment; and

(d) the person satisfies any other criteria prescribed under a regulation.

(2) The person is not an eligible person if—

(a) the person is serving a term of imprisonment, other than under the *Penalties and Sentences Act* 1992, section 112; or

(b) a charge against the person for a disqualifying offence is pending in a court.

(3) Without limiting subsection (1)(d), the regulation may require that the person be someone who resides within a stated locality.

In s. 3 the objects of the Act and the means by which they are to be achieved are set out:

Objects of this Act

3.(1) The objects of this Act are to reduce—

(a) the level of drug dependency in the community; and

(b) the level of criminal activity associated with drug dependency; and

(c) health risks to the community associated with drug dependency; and

(d) pressure on resources in the court and prison systems.

(2) The objects are to be achieved by establishing a pilot court diversion program—

(a) to identify drug dependent persons who are suitable to receive intensive drug rehabilitation; and

(b) to improve their ability to function as law abiding citizens; and

(c) to improve their employability; and

(d) to improve their health.

When a pilot program magistrate is deciding whether to make an intensive drug rehabilitation order, it does not matter if the offence was committed before or after the commencement of the Act: s. 17(2).

[4] The charge against the second respondent, serious assault, was brought under s. 340(b) of the *Criminal Code*, which is as follows:

340 Serious assaults

Any person who—

…

(b) assaults, resists, or wilfully obstructs, a police officer while acting in the execution of the officer's duty, or any person acting in aid of a police office while so acting;

…

is guilty of a crime, and is liable to imprisonment for 7 years.

[5] The question argued before me was that of the construction which should be put upon the words 'an indictable offence that may be dealt with summarily' in s. 8(1)(b) of the *Drug Rehabilitation (Court Diversion) Act*. If, as the first respondent ruled, the offence the subject of the charge is such an indictable offence the application should be refused. If it is not, then, subject to my being satisfied that the applicant has the requisite standing to bring this application and that there is no other reason to withhold the relief sought, the application should succeed.

[6] The applicant is not it appears the complainant in the proceedings against the second respondent, although one might have expected the applicant to have been the complainant rather than the commissioner. But as the commissioner is responsible for the efficient and proper administration, management, and functioning of the police service in accordance with law, as s. 4.8(1) of the *Police Service Administration Act* 1990 provides, he has standing to make this application because his interests as commissioner are, or would be, adversely affected in or by the matter to which the application relates: see s. 44 of the *Judicial Review Act*. Section 44 should not be read narrowly: cf., *Re Boe and Criminal Justice Commission* (1993) 1 Q.A.R. 167. I should add that no submissions were made to me challenging the applicant's standing.

[7] A serious assault is, as has been seen s. 340 of the *Criminal Code* provides, a crime, and so is an indictable offence, i.e., an offender cannot, unless otherwise expressly stated, be prosecuted or convicted except upon indictment: s. 3(3) of the *Criminal Code*.

[8] Chapter 58A (ss. 552A to 552J inclusive) of the *Criminal Code* provides, however, for the summary disposition of certain indictable offences. Section 552A provides in subsection (2) that a charge of an offence against certain sections of the *Criminal Code* listed in paragraph (a) of subsection (1) and certain other offences referred to in paragraphs (b) to (e) of subsection (1) 'must be heard and decided summarily, if the prosecution elects to have the charge heard and decided summarily'. Section 340 is one of the sections listed in subsection (1)(a). Subsection (3) provides that s. 552A is subject to s. 552D, to which I shall refer later. Section 552B, which by its subsection (6) is also subject to s. 552D, provides in subsections (2) and (5), that certain specified offences must be dealt with summarily 'unless the defendant informs the Magistrates Court that he or she wants to be tried by jury'. Offences against s. 340 are not, of course, among those specified. Section 552D(1) provides that a Magistrates Court must abstain from dealing summarily with a charge under s. 552A or s. 552B if satisfied, at any stage, and after hearing any submissions by the prosecution and defence, that because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished or on summary conviction. If the court abstains from jurisdiction, the proceeding for the charge must be conducted as a committal proceeding: s. 552D(2).

[9] From the court record it appears that at a hearing on 3 July 2001 the sergeant of police appearing for the prosecution announced that no election was to be made under s. 552A(2) of the *Criminal Code* to have the charge the subject of this application heard and decided summarily. There were further mentions of the case,

and then, after hearing argument on 17 August 2001, the first respondent made his ruling.

[10] The argument for the applicant rests upon the absence of election by the prosecution under s. 552A(2) of the *Criminal Code*. It was submitted on his behalf that, there having been no election by the prosecution, the charge the subject of the application is not of an indictable offence that may be dealt with summarily as those words are used in s. 8(1)(b) of the *Drug Rehabilitation (Court Diversion) Act*. Against that it was argued on behalf of the second respondent that a broader construction should be put upon the words, taking them to refer to that category of indictable offences that *can*, in certain cases, be dealt with summarily in contradistinction to those indictable offences that *can never* be dealt with summarily. The latter construction treats the circumstances of an individual charge as immaterial to the determination whether an offence is or is not a relevant offence: it is argued the words refer to a class of offences which are permitted to be dealt with summarily if certain conditions are met and are not confined to individual charges within that class which have met the conditions.

[11] The outcome of this application depends on the correct construction of the words in s. 8(1)(b) of the *Drug Rehabilitation (Drug Diversion) Act* as they apply to an offence provided for in the *Criminal Code*, but it is relevant to note that the *Drugs Misuse Act* 1986 provides a scheme similar to part of that found in Chapter 58A of the *Criminal Code* for the summary disposition of indictable offences. Section 13 of the *Drugs Misuse Act* provides that proceedings on charges of certain indictable offences provided for in that Act 'may be taken summarily'. Section 45(2) provides, however, that where an offence may be prosecuted on indictment or summarily the proceedings before a magistrate shall be proceedings with a view to the committal of the defendant for trial or sentence unless the prosecution elects that they shall be proceedings with a view to summary conviction. Section 45(4) provides that where proceedings are taken with a view to summary conviction of a defendant and the magistrate forms the opinion that the charge ought to be prosecuted on indictment, the magistrate shall abstain from determining the charge summarily and shall instead deal with the proceedings as proceedings with a view to the committal of the defendant for trial or sentence. The régime provided for in the *Drugs Misuse Act* is then similar to that in s. 552A of the *Criminal Code*.

[12] On behalf of the second respondent it was submitted that one reason for concluding that the wider construction is the correct one is that the *Drug Rehabilitation (Court Diversion) Act* provides a 'new framework based not on elections but on eligibility'. But while the offender's being an eligible person is one matter of which a pilot program magistrate must be satisfied, it is not the only matter. The magistrate must also be satisfied that the offence is a relevant offence, which brings one back to the question in issue on this application.

[13] Another argument advanced for the second respondent was that the wider construction is correct because the legislature had in other respects conferred on pilot program magistrates a wider jurisdiction than that of other magistrates. Reliance was placed on s. 8(1)(c) and (d) of the *Drug Rehabilitation (Court Diversion) Act*, which provide for prescribed drug offences and other prescribed offences, and also on provisions of the *Drug Rehabilitation (Court Diversion) Regulation* 2000 prescribing certain drug offences and other offences. While it is true that the provisions of the Act would allow for enlargement of

jurisdiction of the kind I have referred to, the fact that it is necessary to prescribe offences would tend to indicate that the intention of the legislature was to preserve the existing régime or framework and to enlarge it only as expressly provided for or as prescribed by regulation. Furthermore, reference to delegated legislation made under the Act for the purpose of interpreting the Act offends the general rule accepted in Australia that delegated legislation should not be taken into account for the purposes of interpreting the Act itself: *The Great Fingall Consolidated Ltd v. Sheehan* (1906) 3 C.L.R. 176 at p. 184 per Griffith C.J., with whose reasons Barton J. agreed; *John Burke Ltd v. The Insurance Commission* [1963] Qd. R. 587; *Webster v. McIntosh* (1980) 32 A.L.R. 603 at p. 606 per Brennan J., with whose reasons Deane and Kelly JJ. agreed; and Pearce & Geddes, *Statutory Interpretation in Australia* (4th ed., Butterworths, Sydney, 1996) para. 3.23, pp. 76-77. A further submission made on behalf of the second respondent that acceptance of the applicant's argument would lead to absurd results if one has regard to the prescribed drug offences also offends the rule.

[14] It was also submitted on behalf of the second respondent that the construction contended for on her behalf would be consistent with the objects of the *Drug Rehabilitation (Court Diversion) Act*. Particular reference was made to s. 3(1)(d) and to the goal of rehabilitation of offenders evident from the provisions of s. 3(2). While it may be accepted that the Act is intended to be remedial or beneficial, it is also clear that it is not intended to apply to all offenders. It follows that the general provisions of s. 3 can not assist in deciding the construction issue before me. That issue concerns the line of demarcation between those offenders who may be given the benefit of the legislation and those who may not. It is clear that it is the intention of the legislature to provide for some leniency for offenders in the former category, but it is also quite evident that there is to be a line beyond which that leniency will not extend. The general provisions of s. 3 give no guidance as to where the line is to be drawn.

[15] Reference to s. 340(b) of the *Criminal Code* in s. 7(1)(b) of the *Drug Rehabilitation (Court Diversion) Act*, also relied on on behalf of the second respondent, goes no further than removing such offences from the category of disqualifying offences, but does not include all such offences in the category of relevant offences.

[16] The word 'may' in the context of s. 8(1) of the *Drug Rehabilitation (Court Diversion) Act* should I think be taken to express 'permission or sanction: To be allowed (to do something) by authority, law, rule ..': *The Oxford English Dictionary* (2nd ed., 1989), vol. IX, p. 501. The offence the subject of this application is then not an indictable offence that may be dealt with summarily. I am not persuaded that there is any indication that the legislature intended in that provision to replace the régime provided for in s. 552A of the *Criminal Code*. It could have done so expressly if it had so intended; but it did not, and I do not accept the proposition that it has otherwise evinced such an intention.

[17] I therefore conclude that the application should succeed. I shall invite further submissions on the form of the order.