DISTRICT COURT OF QUEENSLAND

CITATION:	*Wilson v The Commissioner of Police* [2022] QDC 15
PARTIES:	**CONNOR JOHN WILSON** (appellant) **v** **THE COMMISSIONER OF POLICE** (respondent)
FILE NO:	APPEAL NO: 143/21
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Cairns
DELIVERED ON:	4 February 2022
DELIVERED AT:	Cairns
HEARING DATE:	27 January 2022
JUDGE:	Morzone QC DCJ

ORDER:

1. **Appeal allowed.**
2. **The sentence and orders of the Magistrates Court made in Cairns on 8 September 2021 will be varied as follows:**
   - **(a) For Charge 1 - the period of disqualification from driving of six months will be substituted in lieu of eight months; and no conviction is recorded;**
   - **(b) For Charge 2 – the period of the probation order of 12 months will be substituted in lieu of 18 months.**
   - **(c) The sentence and orders are otherwise affirmed.**

CATCHWORDS: CRIMINAL LAW - appeal pursuant to s 222 Justices Act 1886 - conviction – [offence] – mode of hearing of appeal –

error of law – witness credit – whether conviction unreasonable and unsupported – whether sentence manifestly excessive.

LEGISLATION: *Justices Act* 1886 (Qld) s 222, s 223(1) & 227
Penalties and Sentences Act 1992 (Qld) ss 9, 9(1), 12(1), 12(2), 13(1)(a)

CASES: *Allesch v Maunz* (2000) 203 CLR 172
Collishaw v Commissioner of Police [2016] QDC 25
Fleming v The Queen (1998) 197 CLR 250
Fox v Percy (2003) 214 CLR 118
House v The King (1936) 55 CLR 499
Kentwell v R (2014) 252 CLR 60
Lovell v Lovell (1950) 81 CLR 513
Manitzky v Ryan [2005] QDC 178
Mill v The Queen [1988] 166 CLR 59
Parker v Commissioner of Police [2016] QDC 354
R v Briese [1997] QCA 010
R v Morse (1979) 23 SASR 98
R v Safi [2015] QCA 13

COUNSEL: J. Benjamin for the appellant
E. Thambyah for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Office of the Director of Public Prosecutions for the respondent

Summary

[1] On 8 September 2021 the appellant was convicted after his own plea of guilty in the Magistrates Court held in Cairns of two charges and was sentenced by an $800 fine and disqualification from driving for eight months with a conviction recorded for charge 1 – Did drive under the influence of liquor; and 18 months' probation with no conviction recorded in relation to Charge 2 – possessing dangerous drugs.

[2] The charges arise from a random breath test and roadside police search of the defendant's car at about 7.00 pm on 30 of July 2021. The breath test resulted in a reading of 0.151 grams of alcohol in 210 litres of breath (Charge 1), and police found a clip seal bag containing 455 grams of cannabis in his possession (Charge 2).

[3] The appellant appeals the sentence on the grounds that errors in the exercise of the sentencing discretion resulted in a manifestly excessive sentence. The respondent opposes the appeal and argues that the sentence was not erroneous and was within the permissible range.

[4] After my review on appeal, and with the benefit of submissions, in my respectful opinion the learned sentencing acting magistrate erred in exercising the sentencing discretion by acting upon a wrong principle as to recording a conviction, allowed

erroneous or irrelevant matters to guide or affect him in recording a conviction for the driving charge, failed to take into account material considerations of the appellant's plea of guilty, nature and seriousness of the offending, totality of the sentence, and the impact of recording a conviction on his social and economic wellbeing. As a result His Honour imposed a manifestly excessive sentence outside the permissible range in the circumstances of the case.

[5] For these reasons, I will allow the appeal, and order that the sentence and orders of the Magistrates Court made in Cairns on 8 September 2021 be varied for Charge 1 by substituting 6 months in lieu of 8 months as the period of disqualification from driving and ordering that no conviction be recorded, and for Charge 2 by substituting 12 months in lieu of 18 months as the period of probation. The orders are otherwise affirmed.

Appeal

[6] The appellant appeals pursuant to s 222 of the *Justices Act* 1886 (Qld). Pursuant to section 222 the appeal is by way of rehearing on the original evidence, any new evidence is adduced by leave. However, the District Court may give leave to adduce fresh, additional, or substituted evidence (new evidence) if the court is satisfied there are special grounds for giving leave. The rehearing requires this Court to conduct a real review of the evidence before it (rather than a complete fresh hearing), and make up its own mind about the case.[1] Its function is to consider each of the grounds of appeal having regard to the evidence and determine for itself the facts of the case and the legal consequences that follow from such findings. For an appeal by way of rehearing, "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,"[2] and thereby resulting in a manifestly excessive sentence.

[7] But this Court ought not interfere with a sentence unless it is manifestly excessive, that is, "beyond the acceptable scope of judicial discretion" or "so outside the appropriate range as to demonstrate inconsistency and unfairness".[3] Even if the appellate court finds that the sentence was at the extreme end of a permissible range, or has a different opinion about the way in which the discretion should be exercised, these are not sufficient justifications for review; it must be shown that the discretion miscarried resulting in a manifestly excessive sentence.[4] In that context, it may be vitiated by an error of principle, if there has been a failure to appreciate a salient feature or there is otherwise a miscarriage of justice.[5]

---

1 *Fox v Percy* (2003) 214 CLR 118; *Warren v Coombes* (1979) 142 CLR 531; *Dwyer v Calco Timbers* (2008) 234 CLR 124; applied in *Forrest v Commissioner of Police* [2017] QCA 132, 5 and *McDonald v Queensland Police Service* [2017] QCA 255, [47].

2 *Allesch v Maunz* (2000) 203 CLR 172, [22] – [23] followed in *Teelow v Commissioner of Police* [2009] QCA 84, [4]; *White v Commissioner of Police* [2014] QCA 121, [8]*, McDonald v Queensland Police Service* [2017] QCA 255, [47]; contrast *Forrest v Commissioner of Police* [2017] QCA 132, 5.

3 *R v Morse* (1979) 23 SASR 98; *R v Lomass* (1981) 5 A Crim R 230; *R v McIntosh* [1923] St R Qd 278; *Lowe v The Queen* (1984) 154 CLR 606.

4 *Lovell v Lovell* (1950) 81 CLR 513 at 519 per Latham CJ, 533-534 per Kitto J; see also *Gronow v Gronow* (1979) 144 CLR at 519, 525, 534 and 537.

5 *House v The King* (1936) 55 CLR 499, 504-505; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 176-178; *Norbis v Norbis* (1986) 161 CLR 513, 517-519

[8] The decisions of *House v The King*[6] and *Kentwell v R*[7] 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.

Appeal Grounds

[9] The appellant appeals the sentence as being manifestly excessive because:

1. The learned acting magistrate erred and His Honour's discretion miscarried in relation to the recording of a conviction for Charge 1 because His Honour confined his considerations exclusively to how the recording of a conviction would impact the appellant's future;

2. The learned acting magistrate erred in failing to take the appellant's plea of guilty into account;

3. The learned acting magistrate erred in failing to consider whether the sentence imposed for Charge 2 was adequate to reflect the totality of the criminality involved in the appellant's conduct; and

4. The learned acting magistrate erred in failing to afford the appellant procedural fairness by neglecting to advert to both a fine and an eight-month disqualification period and consequently denying the appellant the opportunity to be heard further.

[10] As to the last ground of procedural fairness, it is remedied by each party being afforded the opportunity to be heard in this Court's review. It is not necessary to deal with that ground further.

Did the learned acting magistrate err, and his discretion miscarry, by recording a conviction for Charge 1 of driving under the influence of liquor?

[11] The appellant contends that the learned acting magistrate misdirected himself by approaching the exercise of the discretion to record a conviction differently for a traffic offence as distinct from other criminal offences. On the contrary, the respondent argues that the learned acting magistrate applied the test consistently but specifically found that a conviction for that traffic offence would not impact the appellant's future employment prospects.

[12] As foreshadowed during his exchange with the defence counsel, the learned acting magistrate reasoned his disparate approach to recording convictions for the drug charge and traffic charge as follows:

> "I am not going to record a conviction for that [drug] charge, however, regarding the offence under the Transport Operations

---

6 (1936) 55 CLR 499, 504 and 505

7 *Kentwell v R* (2014) 252 CLR 60, [35], adopting *AB v R* (1999) 198 CLR 111, [130] per Hayne J (minority).

> Act, I am going to fine you $800. You are going to be disqualified for a period of eight months, and a conviction is recorded. I have heard what Mr Rigdon had to say on your behalf, I do not accept that it is going to have any impact whatsoever on your future. I do accept that the drug charges – a conviction for that – will have an impact on your future. You need to know that I have, before me, the history which indicates that you have not been – had convictions recording in the past. There will be another entry after today, saying no conviction. I cannot see this happening again, so it is to be hoped that the assistance you are getting, and the assistance you get from probation, will assist you with that, and it is a credit to you that you are taking action, and I note that you are."

[13] Section 12(1) of the *Penalties and Sentences Act* 1992 (Qld) provides that the court may exercise a discretion to record or not record a conviction. By virtue of s 12(2), in considering whether or not to record a conviction, the court must have regard to all circumstances of the case, including:

(a) the nature of the offence; and

(b) the offender's character and age; and

(c) the impact that recording a conviction will have on the offender's economic or social wellbeing; or chances of finding employment.

[14] The provision recognises that the recording of a conviction has considerable potential public impacts on an offender's social and economic wellbeing and work prospects.[8] The identified considerations are not exhaustive. And while the application of the relevant considerations may differ, having regard to the circumstances of the particular case, this Court has dispelled the legal fiction of distinguishing a traffic offence conviction to a conviction recorded for any other type of criminal offence.[9] The recording of a conviction is both a legal and social censure, which results in a diminution of a defendant's character in the community.[10]

[15] The nature and seriousness of the appellant's traffic offending falls in the low end of the high range drink driving. His impaired capacity did not bring him or his driving to police attention, instead, he was subject of a routine random breath test. Traffic accidents, injuries and fatalities caused by drunken driving is a significant concern to the community, especially in relation to young and inexperienced drivers.

[16] The appellant was a young man, 23 years old at the time of the offence. He is of generally good character with some minor drug and driving offences, but with no like prior drunk or drug driving offending. He had positively engaged in self-rehabilitation before sentence in a relevant program of *Lives Lived Well*. Having regard to the appellant's youth, character, and stage of life, it is likely that the stigma of a conviction for drunk driving will have some impact on his social wellbeing in public.

---

8 Cf. *R v Briese* [1997] QCA 010

9 *Parker v Commissioner of Police* [2016] QDC 354

10 Arie Freiberg, 'Sentencing: State and Federal Law in Victoria', 3rd ed, Thomson Reuters, [1.260].

[17] But it seems to me, contrary to the finding below, that the recording of a conviction will significantly negatively impact his employment prospects. After graduating from school, the appellant worked in pool maintenance before undertaking a refrigeration apprenticeship, with tethered work, in the last three years. His future work, as a refrigeration mechanic, necessarily requires driving from job to job in his own car and his employer's cars. It is true that the reference by the appellant's current employer is silent about the effect of any conviction. However, it seems to me that disclosure of a recorded conviction of the traffic offence will likely cause any employer concern about the appellant's qualification and capacity to drive to worksites to fulfill a necessary requirement of his employment. It seems to me that this will unduly impact the appellant's employment prospects.

[18] In my view, the relevant considerations in the circumstances of this particular case, favour that a conviction not be recorded in relation to traffic offence in Charge 1. I am bound to conclude that the recording of the conviction does render the sentence manifestly excessive.

Did the learned acting magistrate err by failing to take the appellant's plea of guilty into account?

[19] Section 13(1)(a) of the *Penalties and Sentences Act* 1992 (Qld) requires the court to take account of a defendant's guilty plea when imposing a sentence. Section 13(3) further mandates that the court must state in open court that it took account of the guilty plea in determining the sentence imposed.

[20] In *R v Safi*,[11] Fraser JA described and explained the rationale of the 'obligation' this way:

> Where leniency is afforded on account of a plea of guilty, a statement to that effect serves the particularly important purpose of informing offenders of that fact. The publicity given to such statements encourages guilty offenders to plead guilty, thereby saving victims and witnesses of offences the trauma, disruption, and expense which may be involved in giving evidence and it saves the State the expense of prosecuting offences."

[21] Unless the reasons show, expressly or by implication, that the principle was applied, it should be taken that the principle was not applied, rather than applied but not recorded.[12]

[22] Whilst the learned sentencing magistrate acknowledged that the defendant's pleas of guilty – saying "So Mr Wilson, you have pleaded guilty here to two charges", I am unable to discern from the sentencing remarks how the plea of guilty was taken into account, if at all.

[23] In my respectful view, the failure to explicitly consider the defendant's plea of guilty to determine the sentence bespeaks an error in the exercise of the sentencing discretion.

---

[11] *R v Safi* [2015] QCA 13 at [15] & [16].
[12] *Fleming v The Queen* (1998) 197 CLR 250 at [30]; *R v Safi* [2015] QCA 1 at [15];

Did the learned acting magistrate err by failing to consider whether the sentence imposed for Charge 2 was adequate to reflect the totality of the criminality involved in the appellant's conduct?

[24] The appellant contends that the sentence also offends against the totality principle in that the magistrate failed to review the aggregate sentences and consider whether it was just and appropriate, pursuant to s 9 of the *Penalties and Sentences Act* 1992 (Qld).

[25] While not immutable, the preferred approach is to consider a sentence for each offence, then consider their aggregated effect before taking the next step of determining the appropriate overall sentence that is just and appropriate for the total criminality. In *Mill v The Queen*,[13] the High Court referred, with approval to the passage in Thomas, Principles of Sentencing 2nd Edition, page 56 to 57:

> "The effect of the totality principle is to require a sentencer who has passed a series of offences, each properly calculated in relation to the offence for which it is imposed, and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and to consider whether the aggregate is, 'just and appropriate.' The principle has been stated many times in various forms. 'When a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the Court to take a last look at the total, just to see where it looks wrong.'; when cases of multiplicity of offences have come before the Court, the Court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences?"

[26] In this case, it seems to me that the learned acting magistrate quarantined the exercise of the sentencing discretion to impose sentences for each offence, and in doing so, he did not explicitly consider the aggregate sentences in order to determine whether a total sentence is just and appropriate. In my view the combined effect of the relevant sentences of a $800 fine, 18 months of probation and an eight month period of disqualification is disproportionate to the overall criminality.

[27] The combined imposition of a fine and a period of probation was not foreshadowed by the court or the subject of submissions by the parties. The prosecutor did not address the court about the nature or extent of any sentence, save for replying about recording a conviction for the driving offence. During the exchange with the defence representative, the learned sentencing magistrate did not address any prospect of imposing a fine but he foreshadowed "going longer" than 12 months, which was not resisted by defence. The defence had contended for a "short period of probation" in preference to a fine, with a particular emphasis on not recording a conviction for either offence.

---

[13] *Mill v The Queen* [1988] 166 CLR 59.

[28] Manifest excess is revealed by a consideration of all of the matters that are relevant to fixing the sentence, particularly the nature of the offending and the sentences imposed in the most closely comparable cases, drawn from those referred to by the parties.[14]

[29] In *Manitzky v Ryan* [2005] QDC 178 the defendant pleaded guilty to one charge of drunk driving with a blood/alcohol reading of 0.138%. He was fined $800 and disqualified from driving for eight months. In contrast to the appellant here, the defendant was mature, held an open driver's license, with no previous alcohol driving related offences or other serious criminal convictions. While more youthful, I think that the appellant's offending here is more serious, and it also involved the drug offending driven by addiction.

[30] In *Purcell v Commissioner of Police* [2016] QDC 342, the defendant entered an early plea of guilty to one charge of drunk driving with an alcohol reading of 0.149%. The defendant cooperated with police. He was sentenced by an $800 fine and an eight month disqualification, which was reduced on appeal to six months. While the reading is comparable to the appellant, the defendant's offending occurred in the unusual circumstance when the defendant went through a drive-through fast food outlet, enroute to driving a friend home after she had been sexually assaulted. It seems to me that the appellant's driving offence is more serious.

[31] In *Schwarz v Commissioner of Police* [2013] QDC 105, the defendant pleaded guilty to one charge of drunk driving with an alcohol reading of 0.244 percent. He was fined $2,000 and disqualified for 14 months, which was upheld on appeal. He had previous traffic offences but no entries for the last 11 years. It seems to me that the appellant's driving offence is less serious, but his history was more recent.

[32] The nature of the penalty in the form of a fine, provides little by way of rehabilitation rather than punishment and denunciation, which is relevant for Charge 1. Rehabilitative measures were more relevant to the drug offence in Charge 2. The gravity of traffic offending can be gleaned from the relative minimum penalty, with due regard to the factors of general and personal deterrence and public denunciation. In my view, the imposition and quantum of the fine, even in conjunction with the other orders, is not excessive as being too heavy and outside the permissible range.

[33] However, I opine that the period of disqualification of eight months is excessive in the circumstances of this case. The offending attracted a mandatory minimum of six months of disqualification from obtaining or holding a driver's licence. By the time of sentence, the appellant's license had been suspended for just over five weeks. The nature and circumstances of his driving offence was at the low end of the high range reading. Clearly, any period of disqualification will impact the appellant's capacity to fulfil his work requirements of driving and render him dependant on others to travel to and from job sites. Coupled with the period of pre-sentence suspension and the absence of any overt conduct and previous like

---

[14] *Manitzky v Ryan* [2005] QDC 178, *Waldron v Dearden* [2009] QDC 244, *Riordan v Grohl* [2000] QCA 487, *Purcell v Commissioner of Police* [2016] QDC 342, *Eastwood v Commissioner of Police* [2015] QDC 182, *Schwarz v Commissioner of Police* [2013] QDC 105.

offences, I think that the disqualification period should be set in the low end of the range.

[34] In relation to the drug offence, I have been referred to *Collishaw v Commissioner of Police* [2016] QDC 25. In that case, the defendant was sentenced to six months probation for possession 514 grams of cannabis after declaring it to police during a search. At first instance, he was sentenced to six months imprisonment, immediately suspended for two years, together with a fine of $750 in relation to a related charge for possessing things used in connection with smoking. The 25-year-old defendant had no relevant history of drug offending. He had started using cannabis at 16 years old. He had a consistent employment history. His sentence was reduced to six months of probation on appeal. By comparison, circumstances of the appellant's drug offending bear a striking similarity to the defendant in respect of drug quantity, use, and youth.

[35] The appellant's drug possession was for personal use and there was no allegation or evidence of commerciality. Personal deterrence and rehabilitative considerations in the sentence were particularly relevant to the drug offence in Charge 2, having regard to his entrenched longstanding drug problem and past drug offending. He has previous convictions for drug offending – on 15 December 2015, the appellant was convicted of two charges of possessing dangerous drugs. He was sentenced to a good behaviour bond for a period of three months, with a recognisance of $250, and no conviction was recorded. It seems to me that an order for probation was appropriate, but the period of 18 months is, in my respectful opinion, excessive and beyond the permissible range demonstrated by the available comparable case. By the time of sentence, the appellant had demonstrated a reformative capacity by a period of good behaviour and engaging with the *Lives Lived Well* program. A period of 12 months' probation is more apt to the circumstances of this case.

[36] In my view the aggregate of the relevant sentences, having regard to the combined and multifactorial components of an $800 fine, eight months of disqualification and 18 months' probation, is too crushing and disproportionate to the overall criminality. In my respectful opinion the sentence is manifestly excessive as being too heavy and lies outside the permissible range.

Resentence

[37] Having reached my conclusions above, it is incumbent on this Court to re-exercise the sentencing discretion.

[38] The only purpose for which a sentence may be imposed by virtue of s 9(1) of the *Penalties and Sentences Act* 1992 (Qld) is to punish an offender to an extent or in a way that is just in all of the circumstances, facilitate avenues of rehabilitation, deter the offender and others from committing a similar offence, make it clear that the community denounces the conduct in the offending and to protect the community. The relevant factors to which the court must have regard are in the subsequent subsections of section 9 of the *Penalties and Sentences Act* 1992 (Qld). For this offending, it is relevant that imprisonment should only be imposed as a last resort and a sentence that allows the appellant to stay in the community is preferable.

[39] It is trite to say that the appropriate sentence will depend on the particular circumstances of the offending and the degree of culpability of the offender, about which I have already discussed above.

[40] For these reasons, I will allow the appeal, and make the following orders:

1. Appeal allowed.

2. The sentence and orders of the Magistrates Court made in Cairns on 8 September 2021 will be varied as follows:

   (a) For Charge 1 - the period of disqualification from driving of six months will be substituted in lieu of eight months; and no conviction is recorded;

   (b) For Charge 2 – the period of the probation order of 12 months will be substituted in lieu of 18 months.

   (c) The sentence and orders are otherwise affirmed.

Judge DP Morzone QC