DISTRICT COURT OF QUEENSLAND

CITATION:	*Johnstone v The Commissioner of Police* [2019] QDC 109
PARTIES:	**JOHNSTONE, Brooke** (Appellant) **v** **THE COMMISSIONER OF POLICE** (Respondent)
FILE NO/S:	DC 4125 of 2018
DIVISION:	District Court
PROCEEDING:	Appeal against sentence
ORIGINATING COURT:	Magistrates Court at Wynnum
DELIVERED ON:	28 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2019
JUDGE:	Loury QC DCJ
ORDER:	**1. Appeal allowed to the extent that the sentence imposed on the appellant for the offence of driving whilst disqualified on 27 September 2018 is set aside. The parole release date is set aside.** **2. The appellant is re-sentenced to six months imprisonment such term of imprisonment to be served concurrently with the three month term imposed for the offence of driving whilst disqualified on 11 September 2018.** **3. The sentences are suspended after the appellant has served 28 days of the sentences for an operational period of eighteen months.** 4. **I declare that the period from 23 October 2018 to 19 November 2018 (28 days) be declared time served under this sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the appellant pleaded guilty to two offences of disqualified driving and two offences each of driving an unregistered and uninsured vehicle – where the appellant was sentenced to nine months imprisonment to be released after serving three months – where the appellant had served 28 days of the sentence before being granted appeal bail – whether the learned Magistrate considered

imprisonment as a last resort – whether the sentence was manifestly excessive

Justices Act 1886 (Qld), s 222
Transport Operations (Road Use Management) Act 1995 (Qld), s 78(2)

Angel v Commissioner of Police [2018] QDC 56, cited
Buse v Commissioner of Police [2018] QDC 90, cited
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219, cited
Hakas v Commissioner of Police [2014] QDC 230, cited
House v The King (1936) 55 CLR 499, cited
Low v McMonagle [2011] QDC 109, cited
Lythgoe v Queensland Police Service [2009] QDC 108, cited
Prew v Commissioner of Police [2012] QDC 178, cited
Queensland Police Service v Gregory [2010] QDC 388, cited
Robinson Helicopter Company Inc v McDermott (2016) 90 ALJR 679, cited
Souvlis v Commissioner of Police [2011] QDC 274, cited
Spencer v Commissioner of Police [2017] QDC 273, cited
Williams v Commissioner of Police [2019] QDC 86, cited
Williamson v Commissioner of Police [2019] QDC 56, cited

SOLICITORS: Legal Aid Queensland for the Appellant

Director of Public Prosecutions (Queensland) for the Respondent

[2] On 23 October 2018, the appellant pleaded guilty and was sentenced as follows:

Date of Offence	Offence	Sentence
11 September 2018	Disqualified driving	3 months imprisonment
11 September 2018	Drive unregistered vehicle	Convicted and not further punished
11 September 2018	Drive uninsured vehicle	Convicted and not further punished
27 September 2018	Disqualified driving	9 months imprisonment
27 September 2018	Drive unregistered vehicle	Convicted and not further punished
27 September 2018	Drive uninsured vehicle	Convicted and not further punished

The two sentences of imprisonment were ordered to be served concurrently. The appellant was disqualified from holding or obtaining a driver's licence for two years in respect of each offence of disqualified driving. She was ordered to be released on parole on 26 January 2019 (after serving three months of the sentence).

[3] The appellant appeals on the ground that her sentence was excessive as the learned Magistrate failed to consider imprisonment as a penalty of last resort.

[4] The appellant was released on bail pending the hearing of her appeal. She has served 28 days of the sentence.

Circumstances of the offending

[5] The appellant was intercepted by police driving a vehicle at 1.30pm on 11 September 2018. The vehicle was unregistered and uninsured with the registration having lapsed on 8 August 2018. The appellant had been previously disqualified from driving on 2 July 2018 for a period of three months. The appellant was given a notice to attend court.

[6] On 27 September 2018 (16 days later), the appellant was again intercepted by police driving the same vehicle at 11.30am. She was still a disqualified driver and the vehicle was still unregistered and uninsured. She told police that she knew that she was doing the wrong thing driving the car but she had to finish moving her property into a new house.

The appellant's antecedents

[7] The appellant was 38 years of age at the time of the offences and at sentence. She had a criminal history, which predominantly included convictions for drug-related offending. She had never been sentenced to a term of imprisonment. On 19 June 2018, the appellant was sentenced in the Richlands Magistrates Court for possessing dangerous drugs and utensils. She was sentenced to a 9 month period of probation. She was subject to that order when she committed the offences before the learned Magistrate.

[8] The appellant also had a lengthy traffic record. Some of her previous convictions were for driving with an expired learner's licence and of driving without an open licence holder beside her. She has twice been convicted of these offences. She was first suspended from driving as a consequence of the accumulation of demerit points in 2010 when she was the holder of a learner's licence. Subsequent to that suspension, she was again convicted of driving as a learner not under the direction of a person with an appropriate open licence. She has been convicted of driving an unregistered vehicle and driving with an expired open licence. In November 2017, the appellant was convicted of unlicensed driving and fined. In 2018, the appellant was convicted of two counts of speeding for which she was fined. On 2 July 2018, the appellant was convicted of driving under the influence of alcohol. She was fined and disqualified from holding or obtaining a driver's licence for three months.

[9] The offences before the learned Magistrate were committed whilst the appellant was subject to a probation order and two months into the licence disqualification period.

The Sentencing Remarks

[10] The learned Magistrate considered the gravamen of the conduct as continually driving in circumstances where the appellant knew she was disqualified. He did not refer to any other matters or give any other reasons before sentencing the appellant to an effective sentence of nine months imprisonment with an order for release on parole after serving three months.

The appellant's contentions

[11] The appellant contends that the learned Magistrate failed to consider the principle that a sentence of imprisonment was a sentence of last resort and a sentence which allowed her to stay in the community is preferable. She argues that she had a limited traffic

history and was not a habitual traffic offender. A period of imprisonment, it was argued could not be described as a penalty of last resort for the appellant. The appellant has not argued that the learned Magistrate failed to give proper or sufficient reasons for his decision.[1]

Legal framework

[12] The appellant appeals pursuant to section 222 of the *Justices Act* 1886 (Qld). Such an appeal is by way of rehearing on the evidence before the learned Magistrate. This court is bound to conduct a real review of the evidence and the reasons for judgement to determine whether the learned Magistrate erred in fact or law.[2] To succeed the appellant must establish some legal, factual or discretionary error by the learned Magistrate.[3]

Consideration

[13] Contrary to the submission made by the appellant, I consider that the appellant had quite a significant traffic record. She had 17 previous convictions for traffic offences. Her traffic record indicates that she has little regard for traffic laws. An aggravating feature of her offending was that 16 days after being charged with disqualified driving and the associated offences of driving an unregistered and uninsured vehicle that she again drove whilst still disqualified. That she was subject to a probation order at the time of her commission of all the offences is also an aggravating feature of her offending. In my view, a sentence of imprisonment was the appropriate penalty in the circumstances. However, the question still remains whether the sentence in fact imposed was excessive.

[14] I have been referred to a large number of previous decisions in support of the contention that a term of imprisonment, which required the appellant to serve three months in actual custody, was excessive. The respondent referred me to the matter of *Souvlis v Commissioner of Police,*[4] the appellant to the remainder of the decisions other than *Williams v Commissioner of Police.*[5]

[15] In *Souvlis v Commissioner of Police,* an appeal was allowed in part. Mr Souvlis pleaded guilty to disqualified driving and speeding. He was sentenced at first instance to nine months imprisonment with a parole release date set after he had served three months imprisonment. He was disqualified from driving for four years. The sentence was varied on appeal, to the extent that Mr Souvlis was ordered to be released on parole after serving 11 days of the sentence. He was 30 years of age when intercepted speeding whilst disqualified from driving. The offences were committed around one month prior to the expiry of the disqualification order. Mr Souvlis' traffic history was described as "dreadful and extending over four pages". His licence had been suspended eight times due to an accumulation of demerit points. He had been convicted of disqualified driving on two previous occasions. On one of those occasions, he had been sentenced to six months imprisonment with an immediate parole release date. Mr Souvlis' traffic record was otherwise dominated by speeding

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[1] The failure to provide adequate reasons is an error of law: *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [57].
[2] *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679.
[3] *House v The King* (1936) 55 CLR 499 at 504-505.
[4] [2011] QDC 274.
[5] [2019] QDC 86.

offences and unlicensed driving offences including driving on a learners licence without an appropriate licensed person being present.

[16] Whilst Mr Souvlis' traffic history is worse than that of the appellant, his offending was not as serious as that of the appellant, given that she drove twice during the period of a short disqualification and whilst subject to a notice to appear. The sentence of nine months imprisonment imposed on Mr Souvlis was said to be "at the high end of the range" but not manifestly excessive in the circumstances, provided he was not required to return to custody. Whilst this decision supports the head sentence imposed by the learned Magistrate on the appellant, it does tend to suggest that requiring her to serve three months imprisonment for her second offence of disqualified driving was excessive.

[17] In *Lythgoe v Queensland Police Service,*[6] an appeal was dismissed against a sentence of one month imprisonment followed by two years probation with a two year disqualification period for an offence of disqualified driving. This was Mr Lythgoe's fourth such conviction. Mr Lythgoe was 21 years of age. His criminal history commenced when he was 18 years of age. He had been admitted to probation, which he had breached and had been ordered to perform unpaid community service, which he also breached. He had been convicted of a large number of dishonesty offences and sentenced to a term of nine months imprisonment with immediate parole. He was on parole when he drove whilst disqualified. His traffic history also commenced when he was 18 years of age. He had convictions for 19 traffic offences. His licence had been suspended for an accumulation of demerit points and he had been convicted of unlicensed driving. Mr Lythgoe had also been convicted of disqualified driving on the same occasion as driving under the influence of alcohol and driving in a way to make unnecessary noise or smoke. Subsequent to those convictions, Mr Lythgoe was again convicted of disqualified driving. Whilst Mr Lythgoe was of a much younger age than the appellant, his criminal and traffic history together with the circumstances of his offending having been on parole, were worse than this appellant. Those factors tend to indicate that the sentence imposed on the appellant, requiring her to serve three months of the sentence, was excessive.

[18] In *Queensland Police Service v Gregory*,[7] the police appealed on the basis that a sentence of six months imprisonment with immediate parole was manifestly inadequate. Mr Gregory was 40 years of age. He had an extensive traffic history with five previous convictions for unlicensed driving, six previous convictions for disqualified driving and seven previous convictions for driving under the influence of liquor. He was first sentenced to imprisonment in 1996 for disqualified driving. The sentence imposed was three months imprisonment. For his third, fourth and fifth convictions for disqualified driving he was sentenced to imprisonment of two months, three months and six months respectively (the fourth and fifth convictions were dealt with on the same occasion). At the time of the last two disqualified driving offences he was also under the influence of liquor (0.214 percent and 0.225 percent). Of that six month sentence, he was required to serve four months prior to being released on parole. The appellate judge considered that error had been demonstrated as the learned Magistrate had not imposed a sentence which reflected the need for specific and general deterrence. He considered that Mr Gregory's continuing attitude of disobedience to the law meant that the principles of specific and general deterrence

[6] [2009] QDC 108.
[7] [2010] QDC 388.

warranted a more severe penalty. Earlier sentences imposed had been an insufficient deterrent including sentences of actual imprisonment. The appellate judge considered that a sentence of six months imprisonment with parole release after serving two months was the appropriate sentence. Due to Mr Gregory having already served the six month sentence the appeal was dismissed. Mr Gregory's very significant traffic history when compared to that of the appellant does tend to suggest that the sentence imposed on the appellant was excessive.

[19] In *Low v McMonagle*,[8] an appeal was allowed against a sentence of six months imprisonment suspended after serving two months for an operational period of two years. Mr McMonagle drove a car whilst under the influence of liquor and a drug and whilst disqualified. Mr McMonagle had crashed into the rear of a parked car and when police attended found that his blood alcohol content was 0.179 percent. The analysis also revealed the presence of amphetamine, methylamphetamine and morphine. Mr McMonagle had a "long and concerning" traffic history. He had eight convictions for driving under the influence of alcohol (ranging from 0.077 percent to 0.205 percent), three convictions for disqualified driving and convictions for 11 other traffic offences. Mr McMonagle had never been sentenced to imprisonment. A serious aspect to his offending was that it occurred less than seven months after his most recent conviction resulting in disqualification of his licence. Mr McMonagle had made some efforts towards his own rehabilitation including completing an alcohol court diversion program and seeking the assistance of Drug-Arm to assist in addressing issues he had with alcohol use. Upon error being demonstrated, the discretion to re-sentence was exercised by the appellate judge. He considered that having regard to the seriousness of the offending and the recalcitrant nature of it, a sentence of imprisonment of six months was warranted. He considered further that some actual custody was warranted in order to reflect the need for general and personal deterrence. However, the period of two months imposed was excessive in light of the Mr McMonagle's plea of guilty, his co-operation and his efforts at rehabilitation. The sentence was suspended after he had served 14 days of the term. Mr McMonagle's offending was more serious than that of the appellant and his traffic history, more extensive. The sentence imposed on the appellant requiring her to serve three months in actual custody does appear severe in comparison.

[20] In *Prew v Commissioner of Police*,[9] an appeal against an effective sentence of four months imprisonment with parole after serving two months was successful. Ms Prew pleaded guilty to a single charge of disqualified driving and was re-sentenced for breaching a community service order imposed at an earlier time for disqualified driving. She was sentenced to three months imprisonment for the offence of disqualified driving and one month imprisonment for the earlier offence. Those sentences were ordered to be served cumulatively upon one another. Ms Prew was 23 years of age and had a "very bad traffic history". She had convictions for unlicensed driving and driving under the influence of liquor. She had twice been convicted of disqualified driving. Error was demonstrated by the learned Magistrate not having taken into account the plea of guilty and by not having sufficiently taken into account that prison was a sentence of last resort, particularly when dealing with a young person. The appellate judge said that whilst a short period in actual custody could have been imposed, the seven days that Ms Prew had spent in custody prior to the hearing of her appeal was sufficient time. She was re-sentenced to four months

[8] [2011] QDC 109
[9] [2012] QDC 178.

imprisonment for the offence of disqualified driving (concurrently with one month for the earlier offence) suspended after she had spent seven days in custody. The appellant's offending is more serious than that of Ms Prew given the commission of exactly the same offence soon after having been charged with disqualified driving and given her offending whilst subject to probation. She is not a young woman and her traffic history is not dissimilar to Ms Prew. This case supports a more severe sentence being imposed upon the appellant than Ms Prew.

[21] In *Hakas v Commissioner of Police*,[10] an appeal was allowed against an effective sentence of six months imprisonment with parole release after serving one month of the sentence for offences of disqualified driving, contravening a direction or requirement and assault/obstructing police. Mr Hakas drove eight days after his licence had been disqualified. He provided a false name to police and a Latvian drivers licence in that false name. Error was demonstrated by the learned Magistrate not referring to imprisonment being a sentence of last resort, in circumstances where Ms Hakas had not previously been convicted of disqualified driving and by not accepting the tender of references. Mr Hakas was 28 years of age. His traffic history included two convictions for driving under the influence of liquor and a conviction for driving on a learner's licence without an open licence driver being with him. He had lost his job as a consequence of his convictions for disqualified driving and the related offences which was a significant matter taken into account in re-sentencing him. He had spent eight days in custody prior to being released on bail. Mr Hakas was re-sentenced to three months imprisonment suspended after he had served eight days in custody. Taken into account was that there were no previous offences of disqualified driving and that he had lost his job as a consequence. This case supports a higher sentence being imposed on the appellant in light of her having offended whilst on probation and shortly after having been charged with the offence of disqualified driving, particularly when considered against her significant traffic history.

[22] In *Spencer v Commissioner of Police*,[11] an appeal was allowed against a sentence of three months imprisonment with 18 months probation for driving under the influence of liquor, driving whilst disqualified and driving an unregistered and uninsured vehicle and using a vehicle with a cancelled number plate. Mr Scott was 41 years of age. He had a criminal and traffic history in Western Australia, which included three convictions for the equivalent offence of driving under the influence of liquor and two convictions for unlicensed driving. He drove with a blood alcohol level of 0.216 percent. His licence had been suspended in Western Australia. The car was unregistered and uninsured and the registration plate expired. Whilst it was said by the appellate judge that a term of imprisonment was warranted, three months imprisonment actually served was considered excessive when taking into account the circumstances of the offending, Mr Scott's employment and his commitment recently shown to his own rehabilitation. Mr Scott was re-sentenced to two months imprisonment, the period of 18 months probation remained. Mr Scott's sentence does not support the appellant's contention that the sentence imposed on her was excessive. Mr Scott's offending, whilst serious because it was his third instance of disqualified drink-driving, did not involve him driving on a second occasion very soon after being charged with the first offence. Nor was he subject to any other court orders at the time of his offending as was the appellant.

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[10] [2014] QDC 230.
[11] [2017] QDC 273.

[23] In *Buse v Commissioner of Police,*[12] an appeal against a sentence of 12 months imprisonment wholly suspended for five years for driving under the influence of liquor or a drug was dismissed. Mr Buse crashed his car into a dip between a roadway and a building. It could not be moved from that position and police were required to extract Mr Buse from the car. A specimen of his blood taken showed the presence of six drugs including methylamphetamine, amphetamine, gamma-hydroxyl butyrate acid, nordiazepam, tadalafil and benzocaine. His licence had been suspended six weeks earlier. He appeared incoherent, drowsy and disorientated at the scene and was falling asleep and only able to state his name and address as replies to police. The appeal against sentence did not relate to the sentence imposed for the offence of driving whilst suspended, which was six months imprisonment with parole release after serving two months. I do not consider this decision to be comparable. Mr Buse was not convicted of disqualified driving. The decision deals primarily with his driving whilst being heavily intoxicated by drugs.

[24] In *Angel v Commissioner of Police,*[13] an appeal was allowed against sentences of 12 months imprisonment and 9 months imprisonment for two offences of disqualified driving. The parole release date was set after Mr Angel had served four months. Mr Angel also pleaded guilty to other drug related charges for which he was fined. Mr Angel was intercepted by police driving a car at a time when his New South Wales licence was expired. The following day he was found in possession of two mobile phones, which contained messages relating to the supply of cannabis and methylamphetamine. Nine months later Mr Angel was again observed driving an unregistered car. The following day he was again found in possession of a mobile phone, which contained messages relating to the supply of drugs. He had also failed to attend a drug diversion program. Mr Angel had six previous convictions for disqualified driving and two convictions for driving whilst suspended. He had previously been sentenced to terms of detention and imprisonment in New South Wales for driving whilst disqualified. Error was established as the learned Magistrate had been wrongly informed as to the number of previous convictions Mr Angel had for disqualified driving. Mr Angel was resentenced to eight months imprisonment on each charge to be served concurrently. No change was made to the parole release date. Mr Angel had already served six months of the original twelve month sentence at the time he came to be re-sentenced. Because of that feature this decision does not provide any real guidance as to whether the appellant's sentence is manifestly excessive.

[25] In *Williamson v The Commissioner of Police,*[14] an appeal was allowed against a sentence imposed of four months imprisonment with parole release after serving one month for offences of disqualified driving and possessing a dangerous drug namely testosterone. Mr Williamson, who was 30 years old, had an extensive traffic history. He had three previous conditions for disqualified driving and one previous conviction for unlicensed driving. Mr Williamson's criminal history involved drug, property and weapons offences. He had never been sentenced to imprisonment. In New South Wales, Mr Williamson had also been convicted of disqualified driving and driving whilst suspended. Evidence was given of Mr Williamson's efforts at rehabilitation, which included completing an attitudinal driving course and enrolling in another program. It was conceded by the respondent that the sentence was excessive. Mr

[12] [2018] QDC 90.
[13] [2018] QDC 56.
[14] [2019] QDC 56.

Williamson was a relatively young man, self-employed with employees, supporting his family, driving in circumstances of medical necessity. The learned Magistrate failed to properly consider that imprisonment was a sentence of last resort and that a sentence, which required Mr Williamson to remain in the community, was preferable. He was fined for the drug offence and sentenced to three months imprisonment wholly suspended for three months. This decision supports a more severe sentence being imposed upon the appellant as she committed a second offence very soon after her commission of the first and she was not driving for the purposes of any medical necessity.

[26] A further decision not referred to by the parties is *Williams v The Commissioner of Police*.[15] Mr Williams was successful in appealing his sentence of three months imprisonment followed by 18 months probation for disqualified driving and driving under the influence of liquor. He was subject to a suspended sentence at the time of his offending. That three month sentence was activated in full. He was 23 and had taken significant steps towards his own rehabilitation. Error was established in that the learned Magistrate had failed to take his young age into account in imposing sentence. On re-sentencing, he was sentenced to six months imprisonment for the offence of disqualified driving concurrent with three months imprisonment for driving under the influence and three months imprisonment as a result of the activation of the suspended sentence. He was ordered to be released on parole after he had served 15 days of that sentence, which was the period of time he had served prior to release on appeal bail. The sentence I imposed on Mr Williams tends to suggest that the sentence imposed on the appellant, which required her to serve three months imprisonment, is excessive.

[27] Given the paucity of the learned Magistrate's reasons, it is difficult to give any proper consideration to the reasons for his judgement, as I am required to do in order to determine whether he has made an error. In light of comparable decisions referred to and in the absence of any reasons it does appear that the sentence imposed was "unreasonable or plainly unjust",[16] particularly given the requirement for the appellant to serve three months in custody prior to being released on parole.

[28] In exercising my discretion to resentence the appellant, I have had regard to the factors, which I am required to take into account in deciding the penalty as set out in section 78(2) of the *Transport Operations (Road Use Management) Act* 1995 (Qld), which include all the circumstances of the case including any circumstances of aggravation or mitigation; the public interest; the appellant's criminal and traffic histories; any material relating to the appellant's medical history (including her mental and physical capacity) and whether the offences were committed in association with other offences and the nature of those other offences and any other relevant matters. Very little material was placed before the learned Magistrate in relation to any matters in mitigation and no new evidence has been placed before me. In my view deterrence, both general and personal are paramount to the exercise of my discretion in the circumstances of this case. The appellant having driven only two months after being disqualified demonstrated her blatant disregard for the order of the court. She was further undeterred from driving after having been intercepted by police driving her unregistered car in breach of the court order. She had no emergent reason why she was driving. A sentence, which serves to punish her, to deter her and

[15] [2019] QDC 86.
[16] *House v The King* (1936) 55 CLR 499 at 504-505.

to deter others who breach court orders in this way warrants a sentence of imprisonment being imposed. Those principles are properly reflected, in my view, by ordering a term of imprisonment of six months for the offence of disqualified driving, which was committed on 27 September 2018 and suspending it after the appellant has served the 28 days that she has already served of that sentence. Such a sentence also pays regard to the principle that a sentence, which results in the appellant remaining in the community, is preferable. There is no reason that I can see that would require the appellant to be supervised on parole in order to assist in her rehabilitation. A suspended sentence serves all the purposes of sentencing in the circumstances of this case.

[29] My orders are:

1. Appeal allowed to the extent that the sentence imposed on the appellant for the offence of driving whilst disqualified on 27 September 2018 is set aside. The parole release date is set aside.
2. The appellant is re-sentenced to six months imprisonment such term of imprisonment to be served concurrently with the three month term imposed for the offence of driving whilst disqualified on 11 September 2018.
3. The sentences are suspended after the appellant has served 28 days of the sentences for an operational period of eighteen months.
4. I declare that the period from 23 October 2018 to 19 November 2018 (28 days) be declared time served under this sentence.