

IN THE COURT OF APPEAL

[1997] QCA 010

SUPREME COURT OF QUEENSLAND

C.A. No. 390 of 1996

Brisbane

[A-G v. Brieze]

THE QUEEN

v.

BRETT RAYMOND BRIESE

Respondent

ATTORNEY-GENERAL OF QUEENSLAND

Appellant

Thomas J
Dowsett J
White J

Judgment delivered 21 February 1997

Joint reasons for judgment, Thomas and White JJ; separate concurring reasons by Dowsett J.

APPEAL ALLOWED; CONVICTIONS TO BE RECORDED ON EACH COUNT

CATCHWORDS: CRIMINAL LAW - armed robbery - attempted stealing - no conviction recorded - Attorney-General's appeal against sentence - whether discretion to record conviction may be exercised independently of other sentencing orders - effect of decision not to record conviction - "criminal history" - "nature of the offence" - relevant criteria - *Penalties & Sentences Act s.12.*

Counsel: Mr D. Bullock for the Appellant
Mrs K. McGinness for the Respondent

Solicitors: Queensland Director of Public Prosecutions for the Appellant
Legal Aid Office (Qld) for the Respondent

Hearing Date: 20 November 1996

JOINT REASONS FOR JUDGMENT - THOMAS J AND WHITE J.

Judgment delivered 21 February 1997

The respondent, who pleaded guilty to two armed robberies and attempted stealing was ordered to undergo probation for three years, to serve 240 hours community service and to make \$834 compensation. It was directed that no conviction be recorded. The object of this appeal by the Attorney-General is to reverse that part of the order directing that no conviction be recorded.

The respondent, who was nineteen years old, committed three offences over fifteen days, two of them comprising armed robberies in moderately serious circumstances. The circumstances of these offences and of his attempted stealing are contained in the reasons of Dowsett J.

For practical purposes the respondent may be taken to have had no previous convictions. Prior to committing these offences he had been an inmate at the "Mirikai" centre for treatment necessitated by abuse of illicit drugs.

On an appeal by the Attorney-General, the question is whether the sentences were outside the range of a proper sentencing discretion (R v. Milano ex parte Attorney-General [1995] 2 Qd.R. 186). Counsel for the Attorney-General does not submit that it was of itself unreasonable to impose non-custodial sentences, but contends that the added circumstance of the non-recording of any conviction renders the sentences as a whole unreasonable, and that that component of it ought to be set aside.

Nature of the Discretion under Section 12

Section 12 of the *Penalties & Sentences Act* gives the court "a discretion to record or not record a conviction".

"12. Court to consider whether or not to record conviction. (1) A court may exercise a discretion to record or not record a conviction as provided by this Act.

(2) In considering whether or not to record a conviction, a 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 -

- (i)economic or social wellbeing; or
- (ii)chances of finding employment.

(3) Except as otherwise expressly provided by this or another Act -

(a)a conviction without recording the conviction is taken not to be a conviction for any purpose; and

(b)the conviction must not be entered in any records except -

(i)in the records of the court before which the offender was convicted; and

(ii)in the offender's criminal history but only for the purposes of subsection (4)(b).

(4) A conviction without the recording of a conviction -

(a)does not stop a court from making any other order that it may make under this or another Act because of the conviction; and

(b)has the same result as if a conviction had been recorded for the purposes of -

- (i)appeals against sentence; and
- (ii)proceedings for variation or contravention of sentence; and
- (iii)proceedings against the offender for a subsequent offence; and
- (iv)subsequent proceedings against the offender for the same offence.

(5) If the offender is convicted of a subsequent offence, the court sentencing the offender may disregard a conviction that was ordered not to be recorded but which, under subsection (3)(b)(ii), is entered in the offender's criminal history.

(6) If -

(a)a court -

- (i)convicts an offender of an offence; and
- (ii)does not record a conviction; and
- (iii)makes a probation order or community service order for the offender; and

(b)the offender is subsequently dealt with by a court for the same offence in any way in which it could deal with the offender if the offender had just been convicted by or before it of the offence;

the conviction for the offence must be recorded by the second court."

The exercise of the discretion is partially controlled by the criteria mentioned in s.12(2), and is also to some extent regulated by later sections in the act. Thus ss. 16 and 22 (orders for release and recognisances for property-related offences) provide that if a court makes orders of those kinds, it must not record a conviction. Sections 29, 34, 44, 90 and 100 (other recognisances, restitution and compensation, fines, probation, and community service) permit the court to make orders of those kinds whether or not it records a conviction. Sections 111, 143 and 152 (intensive correction order, suspended imprisonment and imprisonment) permit the court to make orders of those kinds only if the court records a conviction.

In the sentencing process a court must consider all available sentencing options and impose that option or combination of options that is most appropriate in the particular case. In the end it is the total order that matters to the offender and community alike. It is impossible in our view to consider the discretion that is involved in s. 12 in isolation from the particular sentencing option that is being considered under ss. 16, 22, 29, 34, 44, 90, 100, 111, 143, 152 or any other section. And it is likewise inappropriate to consider those sentencing options in isolation from the circumstance whether the conviction will be recorded or not. The combined effect of the orders needs to be looked at before a court decides that a sentence is appropriate. If it is not appropriate the court should not make it and should look for some other option or combination of options. In these respects we respectfully differ from the views expressed by Dowsett J.

In our view the decision whether to record or not to record a conviction affects the offender, and is part of the sentence. The term "sentence" is defined in s. 4 as follows:
 "'Sentence' means any penalty or imprisonment ordered to be paid or served, or any other order made, by a court after an offender is convicted, whether or not a conviction is recorded."

That is very similar to the definition of "sentence" in s. 668 of the Code, which gives a convicted person an appeal by leave "against the sentence passed on the person's conviction". That definition is as follows:

"'Sentence' includes any order made by the court of trial on conviction of a person with reference to the person's person or property whether or not the person is adversely

affected thereby and whether or not the order is made instead of passing sentence."

It has been accepted in this court, although the point may not have been expressly argued, that an appeal may be brought by the Attorney-General against a failure to record a conviction (R v. Brown ex parte Attorney-General [1994] 2 Qd.R. 182; R v. Jackson ex parte Attorney-General CA 276 of 1994, 2 February 1995), and that an appeal may be brought by a convicted person against that part of an order that directs that a conviction be recorded (Lang CA 181 of 1992, unreported, 23 July 1992).

In our view a direction under s. 12 of the *Penalties & Sentences Act* is part of an order and if the exercise of that discretion is outside the range of proper exercise of discretion, this court may interfere on an appeal of this kind.

Principles upon which the Discretion should be Exercised

Some of the factors, which may be taken to be the main factors to be considered, are set out in s. 12(2), namely

- "(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 -
 - (i) economic or social wellbeing; or
 - (ii) chances of finding employment."

It is difficult to make any useful assessment of the impact that recording a conviction will have unless one knows what is meant by the reference to "the offender's criminal history" in s. 12(3)(b)(ii). In the absence of more detailed submissions we shall state only a provisional view on this point. The reference to the "criminal history" in s. 12(3)(b) contemplates a document that will be brought to the attention of a sentencing court on a subsequent occasion (see s. 12(4)). It would seem that the drafting of this section was based upon the practice that existed when the act was passed, and that the central names index-based criminal history prepared by the Queensland Police Service is the document to which reference is made. It is difficult to think that anything else was intended by s.12(3)(b)(ii) than the "criminal history" which is supplied to the courts

many times every day for the purposes of proving antecedents during the sentencing of offenders. So far as we are aware such "criminal history" documents have no particular legal parentage and are prepared by the Queensland Police Service, presumably under responsibility or direction for the efficient and proper administration management and functioning of the police service under ss. 4.8 and 4.9 of the *Police Service Administration Act* 1990. Such documents are made available to the Director of Prosecutions who tenders them as evidence during sentencing procedures. They are the only organised criminal history documents of which we are aware in this state. The "criminal history" in s.12(3)(b) is to be distinguished from the records of the particular courts which impose the sentences.

The consequence is that when there is a non-recording of conviction, there is a prohibition upon entering the conviction into any records whatsoever (s. 12(3)(b)) other than the Court's own record and the offenders "criminal history". Further, as under s. 12(3)(a) the conviction "is taken not to be a conviction for any purpose", it would seem that an offender who declared, even in a statutory declaration, that he had no previous conviction, or expressly denied having been convicted of the relevant offence, could not later be charged with perjury. In short, although s. 12 lacks the detail of the *Criminal Law (Rehabilitation of Offenders) Act* 1986, it appears to have a similar effect to s. 8 of that act which permits an offender, after the rehabilitation period, to deny ever having been convicted.

It is therefore obvious that the effect of such an order is capable of considerable effect in the community. Persons who may have an interest in knowing the truth in such matters include potential employers, insurers, and various government departments including the Immigration Department. The *Adoption of Children Act* 1964 defines "criminal history", and provides in s. 14(b) for a person to be required to disclose his or her criminal history to the extent required by the department when that person seeks to become the adopter of a child. Whether the later s. 12 of the *Penalties & Sentences Act* overrides that right of the department may be an arguable question. For present purposes it is enough to note that the making of an order under s. 12 has considerable ramifications of a public nature, and courts need to be aware of this potential effect.

In essence a provision of this kind gives an offender a right to conceal the truth, and it might be said, to lie about what has happened in a criminal court.

On the other hand the beneficial nature of such an order to the offender needs to be kept in view. It is reasonable to think that this power has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation, and it may be thought to be a reasonable tool that has been given to the courts to avoid undue oppression.

The existence of a conviction sometimes involves direct disadvantage under the law, as for example under the *Corporations Law*. A person who has been convicted on indictment of any offence, or of other prescribed offences is prohibited for five years from being a director of or taking part in the management of any corporation (*Corporations Law* s 229). However "it is not the position that a conviction should never be recorded if it will have an adverse impact upon an applicant because of the consequences attached to a conviction by other legislation" (R v. Hagan CA 442 and 443 of 1996, unreported 15 November 1996). The court in that case added: "That section exists to protect the public, and it is not appropriate that this Court should routinely fashion a special order with the object of defeating the operation of such a section."

In R v. Beisse CA 424 and 425 of 1996, unreported 12 November 1996, McPherson JA observed:

"In my opinion it really misapprehends the purpose and function of provisions like section 12 (of the *Penalties & Sentences Act*) to suppose that the provisions they confer are designed to enable the fact that criminal convictions have been sustained to be concealed from bodies or authorities whose duty it is to determine whether or not an applicant is a fit and proper person to be licensed under a particular statute."

In that case White J observed:

"The applications against recording of a conviction also seem to me to give an unwarranted benefit to the applicants which will have the effect of seeking to hide from the liquor licensing authority and the Department of Consumer Affairs

which administers the *Auctioneers and Agents Act* conduct which really ought to be taken into account by them when considering the issue of any such licences."

Those observations should not be taken as laying down a rule that the court must not grant an offender the benefit of non-recording of a conviction whenever it is likely that the offender might come before such a board; it is a stricture to look at the matter carefully and to bear in mind the potential public harm that may result from the court's authorising concealment of the truth.

Application to Present Case

In R v. Bainbridge Cullen and Ludwicki (1994) 74 A Crim R 265 this court allowed an appeal by youthful first offenders for offences including armed robbery in company. It reimposed probation and further ordered that convictions be recorded in respect of each offence. In R v. Jackson ex parte Attorney-General, CA 276 of 1994, unreported 2 February 1995 this court allowed an Attorney-General's appeal against a sentence for robbery with personal violence of 240 hours community service with no conviction recorded. The court considered that a non-custodial term was justified, but was of the view that the discretion miscarried in failing to record a conviction. The court therefore allowed the appeal and ordered that a conviction be recorded, commenting that this was required by "the seriousness of the offence". The Chief Justice observed:

"The serious category into which the offence falls, the fact that it was committed with some deliberation in the circumstances actually attending its commission and having in mind the necessity to maintain a desirable degree of consistency in the treatment of such serious offences taken in combination with the absence of substantial reason for proceeding otherwise, means that the decision of the sentencing judge not to order the recording of a conviction must be regarded as falling outside the scope of a proper sentencing discretion."

Similarly in R v. Watters CA 475 of 1993, 3 February 1994, the court allowed an appeal by a youthful first offender against a prison sentence for armed robbery, and in substituting sentence ordered that convictions should be recorded. The Chief Justice commented:

"There are advantages for everyone in the courts behaving reasonably consistently."

In the present matter, advertent to the criterion in s. 12(2)(a), the "nature of the offence" was serious, both in relation to the inherent seriousness of armed robbery and in the circumstances of the commission of the particular offences.

The express mention in s.12(2)(a) of the nature of the offence as a factor to which a court must have regard in the exercise of the discretion whether or not to record a conviction suggests that there are certain types of offences which will call for the recording of a conviction. Dowsett J has suggested certain categories of case which with respect we agree. A court will be more easily persuaded against the recording of a conviction where there are no prior convictions or a very minor history and where the offence in question is a so called "victimless" crime. The approach to be taken to the exercise of the discretion pursuant to s.12 was expressed by the Chief Justice in R v. Brown, ex parte Attorney-General [1994] 2 Qd. R. 182 at p. 185 where his Honour observed

"... all relevant circumstances must be taken into account by the sentencing court. The opening words of s.12(2) of the Act say so and then there follows certain specific matters which are not exhaustive of all relevant circumstances. ... Nothing justifies granting a general predominance to one of those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than the other, may have claimed a greater weight."

It is difficult to obtain a clear picture of the offender's "character" (s. 12(2)(b)). He has had a difficult life which has been dominated in recent times by drug problems; he has attempted to cure himself of these, but nothing special in his favour appears in that factor. With respect to "age", his youth helps his case. So far as the impact of recording a conviction upon his "economic or social wellbeing or chances of finding employment" (s. 12(2)(c)) is concerned, very little can be said for the respondent. The evidence does not suggest that he has devoted much attention to the matter of employment, and his economic and social wellbeing appear to depend upon provision by the state.

In our view the above factors, particularly the nature and seriousness of the offence, make this a very clear case calling for the recording of a conviction.

The appeal should be allowed and the sentence varied by a direction that convictions be recorded in each matter.

REASONS FOR JUDGMENT - DOWSETT J.

Judgment delivered 21 February 1997

The respondent pleaded guilty to two counts of armed robbery with actual violence and one count of attempted stealing. The offences occurred on 20, 28 and 30 January, 1996 respectively.

The first offence occurred shortly before 11 p.m. when the complainant, who worked as a pizza delivery driver was returning from delivering a pizza. The respondent approached him, produced a knife from beneath his jumper and said, "Give me all the money you've got, notes." The complainant did so. The respondent said, "Now get in your car and get out of here." The complainant was unable to do this because he had forgotten his keys. The respondent said, "Don't fucking lie to me. Get in the car and drive off." The complainant got into the car and was again threatened. Eventually, the complainant left his car and ran away. The respondent also ran away. \$180 was stolen.

The second count occurred at about 7.30 p.m. on the night in question. The respondent entered a video store at Tugun, wearing a balaclava over his head and holding a knife. He pointed the knife at the complainant saying, "Hurry up. Give me the money." The complainant said, "Steady on. There's no problem." The respondent went behind the counter and held the knife to his neck, saying, "Hurry up. Give me the money." The complainant opened the till and gave him \$654 in notes.

The third count occurred at a shopping centre in Tugun. The complainant on count 1 was at the Red Rooster store and recognised the respondent as the person who had robbed him. He called the police. When they arrived, they saw the respondent walk away from the Red Rooster store and enter a nearby shop/restaurant. He went behind the counter and looked under it. He was then apprehended by the police. He later said that he was looking for money to steal. He

admitted the offences and told police that he had used the money to purchase heroin, to which he was addicted. At an early stage, he indicated that he would plead guilty.

The respondent was born on 1 July, 1976 and was therefore 19 at the time of these offences. He was convicted in April, 1994 of possessing a pipe used in connection with smoking a dangerous drug. He was fined \$200, and no conviction was recorded. He has no other previous criminal record. Not long before the present offences, he had been an inmate or patient at Mirikai Residential Drug and Alcohol Rehabilitation Centre at the Gold Coast. He was then diagnosed as having a marked personality disorder with significant depression. This was treated with medication, but his condition worsened. There was fear that he was suicidal. According to a report dated 8 August, 1996, which was before the learned sentencing Judge, he departed suddenly from the clinic but was re-admitted on 17 November, 1995. The reporting person wrongly understood that this was after commission of the current offences. It was said that since his re-admission on 17 November, 1995 he had made significant progress and that it would be detrimental to remove him from that environment.

The respondent had an unsettled family life, his parents separating when he was young. His father was an alcoholic, and the respondent was subjected to emotional, verbal and sometimes physical violence. He commenced to use marijuana shortly after his parents separated. He was then aged about 13. He progressed to other drugs and commenced injecting amphetamines at age 16. About a year later, he started using heroin.

The learned sentencing Judge identified correctly the prevalence of offences of this kind and the need to protect persons engaged in the provision of services at night time. His Honour recognised the respondent's cooperation and his early plea, his youth and that he had, "no relevant criminal history". His heroin addiction was said to be, "not a mitigating factor". His Honour referred to s.9(4) of the Penalties and Sentences Act, said that imprisonment was a sentence of last resort and inferred from the Mirikai report that with continued attendance there, the respondent's prospects of complete rehabilitation were good. In those circumstances, his Honour ordered that he be admitted to probation for a period of three years with special

conditions that he undergo therapy and treatment for drug addiction and that he pay compensation in respect of the amounts referred to in counts 1 and 2, \$180 and \$654 respectively. He was also ordered to perform 240 hours of community service. His Honour noted that should the respondent carry out the terms of the orders, he would be able to regard himself, "for most purposes, as having no convictions in respect of these matters. You will have basically a clean record for most purposes." His Honour did not record convictions.

The Attorney-General appeals against the exercise of the discretion not to record convictions. Section 12 of the Penalties and Sentences Act provides as follows:

"12.(1) A court may exercise a discretion to record or not record a conviction

(2) In considering whether or not to record a conviction, a 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 -

(i) economic or social wellbeing; or

(ii) chances of finding employment.

(3) Except as otherwise expressly provided by this or another Act -

(a) a conviction without recording the conviction is taken not to be a conviction for any purpose; and

(b) the conviction must not be entered in any records except -

(i) in the records of the court before which the offender was convicted; and

(ii) in the offender's criminal history but only for the purposes of subsection (4)(b).

(4) A conviction without the recording of a conviction -

(a) does not stop a court from making any other order that it may make under this or another Act because of the conviction; and

(b) has the same result as if a conviction had been recorded for the purposes of -

- (i) appeals against sentence; and
 - (ii) proceedings for variation or contravention of sentence; and
 - (iii) proceedings against the offender for a subsequent offence; and
 - (iv) subsequent proceedings against the offender for the same offence.
- (5) If the offender is convicted of a subsequent offence, the court sentencing the offender may disregard a conviction that was ordered not to be recorded but which, under subsection (3)(b)(ii), is entered in the offender's criminal history.
- (6) If -
- (a) a court -
 - (i) convicts an offender of an offence; and
 - (ii) does not record a conviction; and
 - (iii) makes a probation order or community service order the offender; and
 - (b) the offender is subsequently dealt with by a court for the same offence in any way in which it could deal with the offender if the offender had just been convicted by or before it of the offence;

the conviction for the offence must be recorded by the second court."

The section says little or nothing about the purpose served by recording a conviction and where, relevantly, that recording is to be made. Prima facie, the recording of a conviction is simply the act of recording the outcome of the proceedings, including the verdict or plea of guilty and the orders made as a consequence thereof. This is the apparent limit of the duty of the court, save for the further duty of remitting the appropriate calendar to the Queensland Corrective Services Commission pursuant to O. VIII r. 3 of the Criminal Practice Rules. However, s.12(3)(b)(i) of the Penalties and Sentences Act indicates that the court is to record the conviction in its own records whether or not a conviction is recorded under s.12. Some clue as to the significance of recording a conviction is to be found in subs.(3)(b)(ii), which refers to entries in the offender's "criminal history". That term is not defined in the Penalties and Sentences Act, but is defined in other legislation, to which I will refer later.

Under the Penalties and Sentences Act, some orders may be made only if a conviction is recorded; some may be made only if a conviction is not recorded; and others may be made in either case.

Section 16 provides:

"Subject to section 20(2), if a court makes an order under section 19, it must not record a conviction."

A similar provision occurs in s.22, dealing with orders made under Part 3 Division 2. These provisions suggest that the court must first consider whether it is appropriate to make an order of either kind, and that if so, the court may not exercise its discretion to record a conviction. This is, however, unlikely to have been the intention as it would be inconsistent with the requirement that in exercising the discretion, the court is to consider the matters prescribed in s.12(2). Sections 29, 34, 44, 90 and 100 permit certain orders whether or not a conviction is recorded. Section 111 provides:

"A court may make an intensive correction order only if it records a conviction."

Section 143 (concerning orders of suspended imprisonment) and s.152 (concerning imprisonment) are to similar effect. These sections suggest that the court should first consider whether or not to record a conviction, and that only if the discretion has been exercised in favour of doing so may the court make any of these types of order.

If the exercise of the discretion under s.12 is treated as an exercise separate from the balance of the "penalty phase", its exercise may operate to limit the sentencing options. Alternatively, if it is treated as part of the wider sentencing process, the formulation of all orders should proceed simultaneously, but in a "synchronised" way so that the resulting exercise of the s.12 discretion and the other orders are not inconsistent, having regard to the limitations imposed by ss. 16, 22, 111, 143 and 152. This approach might lead to the belief that the recording of a conviction renders the sentence "heavier" than if a conviction is not recorded. This, in turn, might lead to courts "trading off" the recording of a conviction against other orders. For example, a court may impose a higher fine if no conviction is recorded than it would otherwise have done. The location of this provision in Part 2, dealing with "Governing Principles", and the

prescription of considerations relevant to the exercise of the discretion strongly suggest an intention that the discretion be exercised separately from the balance of the "penalty phase". Sections 11, 143 and 152 also suggest this approach. I consider that on the proper construction of s.12, the discretion is to be exercised independently of the determination of other appropriate orders.

Such exercise must involve a consideration of the respective consequences of the two options for the offender and for the community. The Penalties and Sentences Act does not, however, identify the community purpose served by recording a conviction. Although there is no express link between that Act and the Criminal Law (Rehabilitation of Offenders) Act 1986 (the "Rehabilitation Act"), the language of each suggests that a recording of a conviction under the former is intended to serve that purpose under the latter.

Three definitions are relevant to an understanding of the Rehabilitation Act. They are:
 "'charge' means an allegation formally made in court that a person has committed an offence where -

- (a) the allegation is not pursued to a final determination in a court; or
- (b) a conviction is not recorded by a court in respect of the allegation; or
- (c) a conviction recorded by a court in respect of the allegation is to be deemed pursuant to law not to be a conviction.

'conviction' means a conviction by or before any court for an offence, whether recorded, in Queensland or elsewhere, before or after the date of commencement of this Act.

'criminal history' means, in relation to any person, the convictions recorded against that person in respect of offences."

Section 5 of the Rehabilitation Act provides:

- "(1) It is declared that a conviction that is set aside or quashed and a charge are not part of the criminal history of any person. (my underlining)
- (2) A person shall not be obliged or asked to disclose and, if so required or asked, shall not be obliged to disclose for any purpose a conviction that is not part of a person's criminal history or of the criminal history of another person or a charge made against the person or another person. (my underlining)

(3) Subsection (2) does not apply where the requirement or request to disclose a conviction or charge therein referred to is made -

- (a) for the purposes of an inquiry being conducted pursuant to authority conferred by or under an Act; or
- (b) in criminal or civil proceedings before a court if the fact of the conviction or charge is relevant to an issue in the proceedings or the court has granted permission for the requisition or request to be made."

Although the Rehabilitation Act is rather more complex in other respects, it is clear that in cases where no conviction is recorded, the offence does not become part of the criminal history of the person in question. Further, subject to a few exceptions, such person may not be asked about, and is not obliged to disclose for any purpose the fact that he or she has committed the offence. Therefore a decision not to record a conviction will seriously limit public access to that information. Generally speaking, the more serious the offence, the greater the legitimate public interest in knowing that a person has been convicted of it. Of course, with time, the significance of past misconduct abates, at least if there is no fresh misconduct. Other provisions of the Rehabilitation Act recognize this. See s.6. However, to treat the recent commission of serious offences as being of no legitimate interest to persons dealing with the offender is to expose members of the public to the risk of serious physical, moral or economic loss of which risk a recorded conviction might well have warned them.

Section 12(2) expressly contemplates a consideration of the offender's background and the effect of recording the conviction on him or her. The section does not mention the effects on the community of not doing so, but those considerations are inherent in the "nature of the offence" (s.12(2)(a)). They must not be overlooked. Specific considerations might include:

- (i) whether violence was used and if so, to what extent;
- (ii) whether there was exploitation or abuse of trust;
- (iii) the extent of economic loss to victims;
- (iv) the extent to which the circumstances of the offence suggest a propensity to offend or a risk that if given an opportunity, the offender may re-offend.

The seriousness of some types of offence dictates the recording of a conviction in all but the most exceptional circumstances. Armed robbery, in my view, is a case in point. That a person has resorted to such conduct for whatever reason must be a matter of legitimate concern to any person dealing with him or her in the future. As far as I can see, the circumstances in this case do not justify withholding the convictions from the public record. No doubt, the respondent's interests would be better served by doing so, but that is not the only consideration. In this case, the seriousness of the offences, particularly counts 1 and 2, dictate that convictions should be recorded.

I would therefore allow the appeal and record convictions on each count.