SENTENCING IN QUEENSLAND

A paper presented at the Magistrates Conference held in Brisbane on 30 May 2006
by Judge J.M. Robertson, District Court of Queensland

As a continuation of our approach to look at recent developments in sentencing law that may impact on our work, I will look at the latest discussion in the Court of Appeal on s. 12(2); and a number of miscellaneous cases that remind us of the importance of always going back to the wording of the *Penalties and Sentences Act* when in doubt.

Recording of Convictions

R v Cay & Ors; ex parte A-G [2005] QCA 467 was an Attorney's appeal against a sentence for armed robbery of 2 years probation, without a conviction being recorded. Does this decision effect any change to the previously established principles applicable to the exercise of discretion. In my opinion, it does not, although I certainly agree with McKenzie J's statement in his judgment that the authorities as to the approach that should be taken to s. 12(2) (c) are not always easy to reconcile.

The Court unanimously dismissed the appeal. There is nothing in the judgments of the Chief Justice, Keane JA, or McKenzie J which, in my opinion, effects any change in the approach to s. 12(2) previously taken. The discretion is a wide one to be exercised by reference to the matters contained in s.12(2) and Keane JA in his judgment confirmed the correctness of the comments of Macrossan CJ in R v Brown; ex parte Attorney-General [1994] 2 Qd R 182 at 185 :

"Where the recording of a conviction is not compelled by the sentencing legislation, 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 follow certain specified matters which are not exhaustive of all relevant circumstances. In my opinion nothing justifies granting a general predominance to one of those specified features rather than another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than another, may have claim to greater weight."

(a) The nature of the offence

It remains the law, that the more serious the offence the more likely it is that a conviction will be recorded (*R v Briese* – referred to at 13.110 of the Queensland Sentencing Manual). Keane J adopted with approval a statement of the Acting Chief Justice of Victoria Winnke P in *DPP v Candanza & Ors* (2003) VSCA 91 (a case of armed robbery by a group of youthful offenders) where his Honour said:

> "*in all but the most exception case, persons who plead guilty to armed robbery should expect to have convictions recorded against them*"

and then went on to point to features of the case which made it exceptional e.g. young offenders of "essentially" good character (two did have minor previous), an amateurish offence, no serious harm to the victim etc and went on to distinguish *R v Briese*.

(b) Impact on economic or social wellbeing on chances of finding employment

In this case there was no specific evidence of specific employment options that would be hampered by the recording of a conviction. He distinguished previous cases such as *R v Seiler* [2003] QCA 217 where the Court had held:

> "*No evidence was offered to the sentencing court about the impact that recording a conviction would have on the applicant's … chance of finding employment but it might be presumed with some confidence that the revelation could only have a negative impact on his employability."*

Keane J said (at 43):

> "*But the existence of a criminal record is, as a general rule, likely to impair a person's employment prospects, and the sound exercise of the discretion conferred by s. 12 of the Act has never been said to require the identification of specific employment opportunities which will be lost to an offender if a conviction is recorded. While a specific*

employment opportunity or opportunities should usually be identified if the discretion is to be exercised in favour of an offender, it is not an essential requirement. Such a strict requirement would not, in my respectful opinion, sit well with the discretionary nature of the decision to be made under s. 12, nor with the express reference in s. 12(2)(c) to "impact that recording a conviction will have on the offender's chances of finding employment". In this latter regard, s. 12(2) (c) does not refer to the offender's prospects of obtaining employment with a particular employer or even in a particular field of endeavour."

He also said at 45:

"*Of course, it may be accepted that simply to point to a possible detrimental impact on future employment prospects will usually be insufficient, of itself, to warrant the positive exercise of the discretion to order that a conviction should not be recorded.*"

(c) Misleading Members of the Public

The Attorney-General argued that the failure to record a conviction was apt to mislead members of the public who have dealings with the respondents as to their character. This is a reference to what the Court had said on earlier occasions in cases such as *Briese* and *R v Beissel* (1996) 89 A Crim R 210 (see 13.90 of the Queensland Sentencing Manual).

Keane JA said that the issue did not arise in this case because the prosecution at first instance made no submission to this effect and, in fact, made no submission in reply to the effect that a conviction should not be recorded.

I would urge you at all times to refer back to the words of s. 12(2) which requires a court to "*have regard to all the circumstances of the case*" including the specific matters set out in (a), (b) and (c).

All Members of the Court in *Cay* stressed that this was an appeal against an exercise of discretion and that the sentencing judge appeared to take all relevant circumstances into account in reaching the decision he did.

Other Issues

(d) Natural Justice

The case of *R v Cunningham* [2005] QCA 321 is a salutatory reminder to us all that no matter how busy you are, on how big the list is, it is imperative that the defendant be given the right to respond in relation to any penalty that might be imposed.

The appellant had pleaded guilty to a number of offences, at least one of which was in connection with the driving of a motor vehicle. The offences were not ones that would attract a mandatory license disqualification. Neither party made any submission about license disqualification, and the Judge, without reference to the defendant's counsel imposed a penalty which included a license disqualification.

Keane JA (with whom Jerrard JA and Fryberg J agreed) said (at 5):

> "*To impose a penalty without allowing the person affected to have an opportunity to respond is a clear breach of the rule of natural justice that a court is required to follow. As Lord Fraser of Tullybelton, in a passage approved by this Court in Re Criminal Proceeds Confiscation Act 2002 [2004] 1 Qd R 40 at 49, said in In re Hamilton; In re Forrest [1981] AC 1038 at 1045:*
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> > *"One of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he, or someone acting on his behalf, may make such representations, if any, as he sees fit. That is the rule of audi alteram partem which applies to all judicial proceedings, unless its application to a particular class of proceedings has been excluded by Parliament expressly or by necessary implication."*
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> > *It has been recognised in previous decisions of this Court that the principle described by Lord Fraser is as applicable to sentencing as it is to any other judicial proceeding. See, for example, R v Moodie [1999] QCA 125; CA No 439 of 1998, 14 April 1999.*"

In the same vein, it is very important to ensure that when imposing community based orders you comply with the requirements of those sections that make it

mandatory to explain or cause to be explained to the offender the purpose and effect of the order, what may occur with contravention, and that the order may be amended or revoked on application of the offender, the authorised corrective services officer or the DPP, and the sections that require the agreement of the offender e.g. in relation to probation ss. 95 and 96.

Combination of community based orders and prison

You are all aware of the confusion that followed *R v Hughes* [1999] 1 Qd R 389. The Court ruled that a probation order for one offence could not operate concurrently with a sentence of 2 ½ years imprisonment with a recommendation for parole after 6 months). In so doing, the Court applied the long held principle that inconsistent sentences could not be imposed contemporaneously, however in accordance with that decision subsequent Courts of Appeal held that an intensive correction order could not be imposed at the same time as probation for another offence: *R v M; ex parte A-G* [1999] QCA 442 (the correctness of which decision I have always doubted) and then in *R v Craig Hughes* [2000] QCA 16 the Court held that sentences of imprisonment suspended on the day of sentence could not stand with probation orders for other offences. *R v Hood* [2005] QCA 159 overruled this later decision so that at present:

- Provided the requirements of ss. 92(4) and (5) are met, concurrent sentences of up to 12 months imprisonment followed by probation pursuant to s. 92(1)(b) can stand with probation for other offences. A term of imprisonment imposed pursuant to s. 92(1) (b) cannot be suspended: see s. 92(5): *Sysel v Dinon* [2005] 1 Qd R 212.

- An intensive correction order cannot be made concurrent with a probation order: *R v M; ex parte A-G* [1999] QCA 442.

- A wholly suspended sentence, or a sentence suspended on the day of sentence can be made at the same time as probation: *R v Hood* [2005] QCA 159.

- A sentence suspended for up to 12 months can operate with a sentence of the same length (as the time to be served before supervision) imposed pursuant to s. 92(1) (b).

- Orders for community service can be made concurrently with orders for short terms of imprisonment wholly or partly suspended: *Vincent* (2000) 112 A Crim R 433 at 436, where a wholly suspended term for one offence was held to be compatible with community service on another.

The test should always be:

(a) can this sentence be imposed as a matter of law;

(b) is the sentence on one, compatible and consistent with the other as a matter of law?