QUEENSLAND
COURTS

POTENTIAL PITFALLS FOR MAGISTRATES

Queensland Magistrates' Conference
Friday, 2nd August 2013 at 11.45pm
Banco Court, Brisbane

Judge Marshall Irwin
District Court of Queensland

[1] It is always problematical for a Judge who sits in an appellate capacity to address members of the court appealed from about this topic, particularly when the Judge has recently sat as a member of that court. As has been suggested by a US appeal Judge, it has been said that appellate Judges are: "… generals safely remote from the line of battle, who wait until the fight subsides and then come down to count – or worse still, – lecture the wounded."

[2] Later it became more graphic as stated by a US Federal Chief Judge of Appeals:

> "… After the trial lawyers and Judges have fought the good fight back and forth across the field of honour and then retired for the day the appellate Judges come down onto the field of battle and shoot the wounded!"

[3] Another variation of this is:

> "In the cool of the evening appellate Judges leisurely undo what trial Judges have sweated blood to achieve in the heat of the day."

[4] You can always look at appellate decisions in the way of a Canadian trial Judge who when told by an appellate Judge, "We had to reverse you again yesterday. If this continues we will lose confidence in you", replied, "That's all right. I lost confidence in you people years ago."

[5] Appellate courts recognise that a trial Judge is out there in the public day in and day out, making tough calls by the seat of the pants. This takes real talent, dedication and experience. At least with the District Court, the Judges who hear appeals are also trial Judges who have generally been overturned on appeal. I try to adopt the approach of being grateful somebody can straighten things out. It is just a different opinion, nothing personal.

[6] Not all the issues I intend to raise for consideration arise from decisions by the Magistrates Court. For example, the Court of Appeal has identified errors by other courts of imposing one sentence of imprisonment for more than one offence. As you know, separate penalties of imprisonment should be imposed for each State offence on the authority of *R v Crofts* [1999] 1 Qd R 386; (1998) 100 A Crim R 503; [1998] QCA 60, and must individually reflect the criminal liability for each separate offence (*R v Flynn* [2010] QCA 254). This may be easy to overlook when a single probation order or community service order as well as a single fine may be imposed for two or more offences.

[7] Speaking of fines, as you know under the *Regulatory Offences Act* 1985 (Qld) the penalty is a fine. Therefore it is an error of law to fine the defendant without giving time to pay when it is apparent from the defendant's personal circumstances that he/she has no realistic way of paying the fines with the result that he/she is

effectively sentenced to a term of imprisonment for offences for which only a monetary penalty could be imposed.

[8] As you will be aware under s 51 of the *Penalties and Sentences Act* 1992 (Qld) if the court does not make an instalment order under s 50(a) to pay for the fine it must order the offender be allowed time to pay the fine or that the proper officer give particulars of the fine to SPER for registration. And further under s 48(1) in determining the amount of the fine and the way in which it is to be paid, the court must take into account the offender's financial circumstances and the nature of the burden the payment of the fine would have on him/her.

[9] I have been involved in a number of appeals where there has been no statement as required by s 13(3) of the *Penalties and Sentences Act* that the defendant's plea of guilty has been taken into account in determining the sentence imposed. This is an essential part of transparency in the sentencing process.

[10] Although it may be understandable this has not been done because of the need to deal with the matter expeditiously in a busy court list, as stated in *R v Mallon* [1997] QCA 58 one result of this is to place the sentence in jeopardy and cause the appellate court to examine it more closely because it does not appear clearly the court has taken the plea into account. Although this may not be fatal in every case, and the section does not require the court reduce the sentence of an offender who pleads guilty, it may also raise the question of whether this or other circumstances of mitigation which have been taken into account, have been given sufficient weight. It is important to expressly refer to all circumstances of mitigation which have been taken into account in the offender's favour. The chances of not stating

the plea of guilty has been taken into account will be greatly reduced if the Magistrates Court Bench Book sentencing forms are referred to as a guide during the imposition of a sentence.

[11] In *R v Marsden* [2003] QCA 473 it was noted the provisions of the *Penalties and Sentences Act* relating to probation and community service contemplate not only consent to the general proposition that probation or community service should be imposed but also to consenting to perform it in the terms ordered e.g. as to the duration of the probation order or the number of hours of community service.

[12] In relation to Commonwealth sentencing an appeal was conceded where an appellant was sentenced to 12 months' imprisonment to be released on parole after four months. The reason for the concession was the sentence was less than three years' imprisonment. Section 19AB of the *Crimes Act* 1914 (Cth) states that a court is only empowered to fix a non-parole period where the aggregate head sentence exceeds three years' imprisonment. In all other cases where imprisonment is imposed the only mechanism by which the offender can be offered early release is by a recognisance release order. The case in which this issue arose also illustrates the importance of ensuring the endorsement on the court file is consistent with the order made. This is because the endorsement on the file was that the offender be released on a recognisance. A recognisance release order was in fact prepared and signed by the offender. Therefore the endorsement on the file and the recognisance signed by the offender was completely at odds with the sentence actually imposed. This confirmed that the court fell into error in the sentence imposed.

[13] This was illustrated by another case where the respondent conceded there was a discernable error by a court because of a disparity between the statement as part of the sentencing remarks that presentence custody had simply been taken into account and the pro forma "reasons for imprisonment" document attached to the bench charge sheet, endorsed "See attached sheet" which suggested the time in presentence custody was intended to be declared as time already served under the sentence. The sentencing remarks were also inconsistent with the order of commitment which was to the effect that it was imprisonment already served under the sentence.

[14] The attached document had to be regarded as being incorporated in the record of decision, endorsed on the bench charge sheet, pursuant to s 14(4) of the *Justices Regulation 2004* (Qld). Under that provision notations on a bench charge sheet must be regarded as the record of the Magistrate's decision. By virtue of that section the bench charge sheet is the formal record of the court's sentencing decision.

[15] As I have said the use of pro forma documents can be of considerable assistance in ensuring that matters relevant to sentence are not overlooked. However if such documents are to be incorporated in the record of decision, it is important to ensure the reasons contained in them reflect the sentencing remarks, e.g. by ruling a line through statements which are irrelevant to the exercise of the sentencing discretion in the particular case.

[16] It was decided in *R v Kitson* [2008] QCA 086 that where an appellant has a claim upon the discretion for an order that he be released after serving less than half of the

sentence in view of his plea of guilty and other personal circumstances, a parole release date which is significantly beyond the midpoint of the head sentence is very unusual. If such an unusual order is made, reasons for doing so are required to be given. Further, where such an unusual aspect of the sentence was not sought or contemplated in the submissions of either party, it should not be imposed without the sentencing Judge or Magistrate adverting to it and giving the opportunity to be heard.

[17] The failure to allow this opportunity and the failure to give any reasons for making the order have been held to amount to errors. This has been emphasised in a number of other decisions of the Court of Appeal such as *R v Leu and Togia* [2008] QCA 201 and *R v Mayall* [2008] QCA 202. It has been applied on a number of occasions by District Court Judges.

[18] Having regard to another appeal which came before me I commend to you the decision in *R v Baker* [2011] QCA 104 which conveniently cites the leading authorities about the effect of the totality principle and its application in practice. In that case Atkinson J with whom the other members of the court agreed at [36] said with reference to the High Court of Australia decision of *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70:

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, 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 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 whether it looks wrong'; 'when ... cases of multiplicity of offences 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'."

[19] At [39] her Honour referred to the Western Australian Court of Appeal decision of *Stubley v The State of Western Australian* [2010] WASCA 36 in which it was said:

> "Secondly, the total effective sentence imposed on an offender should not constitute a 'crushing' sentence; that is, it should not destroy any reasonable expectation of useful life after release from custody."

[20] As McMurdo P said in *R v Hamilton* [2009] QCA 391 at [21]:

> "… applying the totality principle requires that, to ensure the overall effect of the cumulative sentence is not crushing, the sentence must be appropriately moderated."

[21] Where a defendant is charged and convicted of an offence under s 123(1) of the *Penalties and Sentences Act* for breaching a probation order it is not mandatory to record a conviction unless the court deals with the offender for the same offence under s 125(4)(a). If this is not the case, the court has a discretion as to whether or not to record a conviction. Therefore where a defendant was fined for the breach, and a conviction was recorded because the Magistrate believed there was no choice in the matter, the sentencing discretion miscarried.

[22] It is an irregularity for a matter to be dealt with ex parte in circumstances where the matter has been called on prior to the time at which the applicant was required to appear before the court. If this has occurred, it would also be an irregularity for a Magistrate not to exercise his/her discretion to order a rehearing applied for pursuant to s 142(6) of the *Justices Act* 1886 (Qld) when the appellant appears before the court at the required time.

[23] It is important to give reasons why you prefer the evidence of one witness over another.

[24] As you would know, under s 14A of the *Bail Act* 1980 (Qld) on adjournment of the hearing of a charge there is a discretion to permit the defendant to go at large without bail on the condition he/she surrender into custody. However this does not apply to an indictable offence or an offence specified in the Schedule. Section 79 of the *Transport Operations (Road Use Management) Act* 1995 (Qld) is specified in the Schedule i.e. vehicle offences involving liquor or drugs. If a defendant is permitted to go at large in such circumstances an issue arises as to what power the court has in the event the offender does not appear and surrender into custody when required to do so.