DISTRICT COURT OF QUEENSLAND

CITATION:	*Purcell v Bateup & Ors* [2009] QDC 430
PARTIES:	**MIRANDA ASHLEY PURCELL**
	(Applicant)
	V
	NICHOLAS JOHN BATEUP
	(Respondent)
	AND
	SARAH JOSEPHINE MARTIN
	(Respondent)
	AND
	KRISTEN THOMAS
	(Respondent)
	AND
	CLAIRE ELIZABETH VALKOFF
	(Respondent)
FILE NO/S:	782/2009
DIVISION:	Appellate
PROCEEDING:	Appeal against sentence
ORIGINATING COURT:	Magistrates Court at Richlands
DELIVERED ON:	24 August 2009 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2009
JUDGE:	Irwin DCJ
ORDER:	**1. Appeal allowed.**
	2. (a) The sentence imposed on 6 March 2009 and associated orders are set aside.
	(b) The appellant is re-sentenced as follows:
	(i) Convicted, and a conviction recorded, on all counts;

(ii) On the four charges of receiving stolen property, two charges of possession of dangerous drugs, and one charge each of possession of utensils and possession of tainted property, released under the supervision of an authorised corrective services officer for a period of three years under s 92(1)(a) of the *Penalties and Sentences Act* 1992 on the requirements under s 93(1) of that Act;

(iii) On the three charges of contravening a direction, two charges of unauthorised dealing with shop goods, and one charge of failing to appear, not further punished;

(iv) On the charge of driving over the general but under the high alcohol limit, and the charge of unlicensed driving, one fine of $600 for both offences, and it is ordered that the proper officer of the court give, under s 34 of the *State Penalties Enforcement Act*, particulars of the fine to SPER for registration, and disqualified from holding or obtaining a licence for 6 months.

(c) In relation to the charge of possession of tainted property, it is ordered that the appellant pay to the State a pecuniary penalty assessed in the sum of $41.55 forthwith, being the monies held by the prosecuting authority.

3. No order as to costs.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERING – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant was convicted on her guilty plea of four charges of receiving stolen property – three counts of contravening a direction, two charges each of possession of dangerous drugs and unauthorised dealing with shop goods, and one charge each of possession of utensils, possession of tainted property, failure to appear, driving over the general but under the high alcohol limit and unlicensed driving – where in relation to the four charges of receiving, the two charges of possession of dangerous drugs and one charge each of possession of a utensil and possession of tainted property the appellant was sentenced to 4 months imprisonment and probation for 3 years under s 92(1)(b) of the *Penalties and Sentences Act* 1992 (Qld) – where in relation to the charge of failure to appear the appellant was sentenced to 16 days imprisonment

cumulative – where it was declared that 15 days was time already served under the sentence – where the total effect of these sentences was that the appellant serve 4 months and 16 days imprisonment and probation for 3 years – where the appellant was 18 years and had a limited criminal history at the time of the most serious offences – where the appellant was in the grip of drug addiction and was under the influence of an older more serious criminal offender who was the instigator of the more serious offences – where the appellant was 21 years at the time of sentence, pleaded guilty, expressed remorse, cooperated with the administration of justice, had not previously been sentenced to actual imprisonment, had 15 days pre-sentence custody, had spent 40 days in custody before admission to bail pending appeal, had been back in the community for almost 5 months pending appeal and had compelling personal circumstances which would benefit from supervision – whether sentence imposed was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – where in relation to the two unauthorised dealing with shop goods charges one fine of $600 was imposed on the appellant in default 6 days imprisonment with no time to pay – where the default imprisonment was to be served concurrently with the other terms of imprisonment imposed – where it was apparent form the appellant's personal circumstances that she had no realistic means of paying the fines – whether an error of principle to effectively sentence the appellant to imprisonment on offences for which only a monetary penalty could be imposed – whether an error of principle to fail to have regard to appellant's financial circumstances and the nature of the burden that the payment of the fine would have on her

Bail Act 1980, s 33(1)(a), s 33(1)(b), s 33(4)

Justices Act 1886, s 222(1), s 222(2)(c), s 225(3)

Penalties and Sentences Act 1992, s 48(1), s 48(3), s 49(1), s 51, s 92(1)(a), s 92(1)(b), s 97, s 182A(2)(b)

Regulatory Offences Act 1985, s 9

State Penalties Enforcement Act 1999, s 34

House v The King (1936) CLR 499, applied

Parry v Mayfield Holdings (Qld) Pty Ltd [2006] QDC 250,

cited

R v Briese (1997) 92 A Crim R 75, cited

R v Crofts (1998) 100 A Crim R 503; (1999) 1 Qd R 386, cited

R v Melano, ex parte Attorney-General [1995] 2 Qd R 186, cited

R v Mladenovic, ex parte Attorney-General [2006] QCA 176, cited

R v Sittcenzko, ex parte Cth DPP [2005] QCA 461, cited

COUNSEL: K.M. Hillard for the appellant

M.J. Litchen for the respondents

SOLICITORS: Legal Aid Queensland for the appellant

Director of Public Prosecutions for the respondents

HIS HONOUR: This is an appeal pursuant to section 222 subsection (1) of the Justices Act 1886 against the sentence imposed by a Magistrate at the Richlands Magistrates Court on 6 March 2009 for 16 offences to which the appellant pleaded guilty on that date.

These sentences which I set out to the extent possible in chronological order were one charge of drive a motor vehicle over the general alcohol limit but under the high alcohol limit on the 7th of June 2006; one charge of unlicensed driving on the same date; four charges of receiving stolen property, the first of those charges alleging that this happened between the 1st of February 2006 and the 16th of June 2006 and the other charges alleged to have occurred on or about the 25th of March 2006, the 9th of May 2006 and the 10th of June 2006; one charge of possessing tainted property on the 16th of June 2006; one charge of possession of dangerous drugs on the same date; and one charge of unauthorised dealing with shop goods on the 25th of June 2006.

I observe that it is readily apparent that these nine offences were committed in the first half of 2006 with the majority committed at or about May or June.

The other offences with which the appellant was dealt with by the Magistrate were two counts of contravening a direction on the 26th of June 2008 and the 27th of August 2008; one charge of unauthorised dealing with shop goods between the 26th of August 2008 and the 27th of August 2008. I note that one of

the contravene direction charges related to that offence; and one charge of failure to appear in accordance with an undertaking on the 19th of November 2008.

This is a total of four offences committed in 2008 although I note that the bench charge sheet for the last of these charges has the charge crossed out with the addition of the handwritten words "see attached charge and proceedings". This appears to be a reference to a pro forma bench charge sheet in which there is handwritten a charge under the same section of the Bail Act in the following terms:

"That on the 6th day of March 2009, or as soon as reasonably practicable thereafter, she, the said Miranda Ashley Purcell, without reasonable cause failed to surrender into custody of the Magistrates Court at Richlands in accordance with an undertaking entered into by the said Miranda Ashley Purcell."

It is recorded on that bench charge sheet that the appellant pleaded guilty. The original charge was under section 33(1)(a)of the Bail Act 1980. The substituted charge was under section 33(1)(b).

The Magistrate referred to the latter charge at page 3 of the transcript, however the Prosecutor put the facts before the Court on the basis of a failure to appear before the Brisbane Magistrates Court on the 19th of November 2008. However, no point is made about this and I proceed on the basis that the substance of the charge is the same in either case.

There were three charges committed in 2009 which were dealt with by the Magistrate. These were one charge of possession of dangerous drugs on the 18th of February 2009 and one count each of possession of a utensil and contravening a direction on the 19th of February 2009. The contravening a direction charge was related to the two drug offences.

The Magistrate recorded convictions on all offences.

In relation to the four charges of receiving, the two charges of possession of dangerous drugs and one charge each of possession of a utensil and possession of tainted property, the Magistrate sentenced the appellant to imprisonment for a period of four months and required her to be under the supervision of an authorised Corrective Services officer for three years from that date. In other words the Magistrate made a probation order under section 92(1)(b) of the Penalties and Sentences Act 1992.

The effect of this order was that the appellant was sentenced to a term of imprisonment for four months and at the end of that term she was to be released under supervision of an authorised Corrective Services officer for the reminder of the term of imprisonment. This is often referred to as a prison probation order.

In relation to the offence against the Bail Act she was sentenced to imprisonment for a term of 16 days. It was

stated that she had been in presentence custody for these offences and for no other reason on and from the 19th of February 2009 to and including the 5th of March 2009, namely 15 days, and it was declared that the whole of this period was to be time already served under the sentence. It was directed that this term of imprisonment be served cumulative to any other period of imprisonment that she was ordered to serve. This direction was required by section 33(4)(a) of the Bail Act.

From the documents attached to the file, being the order for imprisonment which is incorporated as part of the bench charge sheet, and the order for commitment of the appellant, it would appear that it was intended that the time served was declared only in relation to this sentence of imprisonment and not the period of four months. There is no reference to this declaration in the probation order and the orders for commitment in relation to the other terms of imprisonment.

That this was the intention of the learned sentencing Magistrate is apparent from his summary of the order at the end of his sentencing remarks as follows:

"Effectively my orders will take effect this way. In relation to your failing to appear you have effectively served all that time up to and including today. You will now go back to prison to serve a period of four months. After that time you will be released on this probation order which continues for a period of three years from today." Although it is doubtful

that the appellant was in custody for this offence and for no other reason as her remand related to all the offences on which she was sentenced.

In addition there is the peculiar feature that the order for imprisonment and order for commitment in relation to this offence only purport to fix a parole release date as 6 March 2009. While this may indicate an intention on the part of the Magistrate that the appellant be released on parole immediately upon completing the four month terms of imprisonment, it is inconsistent with those orders because she could not be released on that date.

In relation to the two unauthorised dealing with shop goods offences, the Magistrate noted that they did not attract any term of imprisonment. He imposed one fine for each of these offences under section 49 subsection (1) of the Penalties and Sentences Act of $600 in default six days' imprisonment with no time to pay.

Pursuant to section 182A(2)(b) of the Act he ordered that the default period be served concurrently to the term of imprisonment imposed in relation to the prison probation order.

In relation to what can conveniently be described as the drink driving and unlicensed driving offences, the Magistrate again imposed one penalty for both offences of $600 with 10 months to pay in default 10 months' imprisonment being six months

after her release from prison. She was disqualified from holding or obtaining a driver licence for a period of six months.

Because the magistrate had taken the contravene direction charges into account in dealing with the other sentences he imposed, he simply recorded a conviction with no further penalty in relation to those offences. The appellant was also ordered to pay restitution to the proper officer of the Court of $5,770 and ordered to pay a pecuniary penalty order of $41.55 of moneys held by the prosecuting authorities.

Therefore, despite the prison calculation document which was placed before the Court on an application for bail pending this appeal I consider that the total effect of sentence which the Magistrate intended to impose was four months and 16 days' imprisonment and three years' probation subject to the fines that I have referred to. I note that the appellant was admitted to bail on the 31st of March 2009 after serving 40 days' imprisonment from the 19th of February 2009.

She has now been on bail for four months and three days.

In the normal course of events, even on the basis of the prison calculation document, her full-time release date was the 12th of July 2009 which has now passed.

This appeal is brought under section 222(2)(c) of the Justices Act on the basis that the sentence imposed was manifestly excessive.

It was acknowledged in R v Melano, ex parte Attorney-General, [1995] 2 QdR 186 in relation to Attorney-General appeals under section 669A of the Criminal Code that the application of this provision is generally consistent with the established principals relating to appeals against discretion referred to in House v. The King [1936] 55 CLR 499 with particular reference to the judgments of Dixon, Evatt and McTiernan JJ at 504 to 505.

It follows from House that before an appellate Court will interfere with the exercise of a sentencing discretion the appellant must demonstrate that the judicial officer acted upon a wrong principle, allowed extraneous or irrelevant material to guide or affect him, mistook the facts or did not take into account some material consideration.

The principle in Melano is that unless the sentencing Judge had erred in principle, either because an error is discernible or demonstrated by a manifest inadequacy or excessiveness, the sentenced he or she has imposed will be proper. Although Melano was an Attorney-General's appeal I consider that this is what is involved in demonstrating in accordance with House that a judicial officer has acted upon a wrong principle.

As stated by Dearden DCJ in Parry v. Mansfield Holdings Queensland Pty Ltd 206 QDC 250 at [29], "The question is whether the sentence appealed against was outside the sound exercise of the sentencing Court's discretion."

To adapt what McMurdo P said in R v Mladenovic ex parte Attorney-General [2006] QCA 176 at [15] the appellant must establish error in the exercise of the sentencing Judge's discretion, here that the sentence is manifestly excessive before this Court can intervene and re-exercise the sentencing discretion.

I also refer to R v. Sittczenko ex parte Commonwealth DPP [2005] QCA 461 with particular reference to the judgment of Keane JA at paragraphs 25 and 26, while appreciating that both this case and Mladenovic concerned appeals by the Attorney-General against sentence.

The appellant was 18 years of age at the time of the 2006 offences. She was 20 and 21 at the time of the subsequent offending and is now aged 21. I rely upon her criminal history as placed before the Court on the bail application as that which was placed before the Magistrate does not appear on the Court file. There is, however, a traffic history on the Court file.

Prior to the commission of the majority of the June 2006 offences, the appellant had committed in New South Wales one count each of dealing with suspected proceeds of crime on the

5th of May 2006, possession of a prohibited drug on the same date and failure to appear in accordance with a bail undertaking on 9 June 2006. She was therefore in breach of a bail undertaking at the time that she committed some of the June 2006 offences.

On the 26th of July 2007, again in New South Wales, she was admitted to a 12 month bond for dealing with specified proceeds of crime offences. She was fined $400 for the drug offence and $400 for breaching the bail undertaking together with $400 for a similar offence committed on the 20th of April 2007.

In Queensland on the 6th of April 2006 she committed one count each of unauthorised dealing with shop goods, public nuisance and obstruct police for which she was fined on the 21st of April 2006. She committed another unauthorised dealing with shop goods on the 16th of May 2006 and was fined on the 2nd of June 2006.

Therefore her criminal history as an 18 year old before she committed the majority of her most serious offences was one count each of dealing with suspected proceeds of crime, possession of dangerous drugs and breach of a bail undertaking and two counts each of unauthorised dealing with shop goods, and street offences. These were also committed at or about the time of the 2006 offences with which the Magistrate was concerned. She had been fined in respect of all of these offences. With the exception of the street offences these were all like offences to the offending for which she was

sentenced.

Subsequently she came before the Courts on one count of unlawful possession of shop goods on the 23rd of March 2007. On 14th of May 2007 she was fined for this offence. As I have observed, on the 26th of July 2007 she was dealt with for the earlier New South Wales offences.

On the 6th of August 2007 in New South Wales she committed one count each of shoplifting, receiving or disposing of stolen property and common assault. On the 28th of August 2007 she was fined for these offences. On the 21st of December 2007 she committed one count each of failing to hold a valid rail ticket and giving a false name and two counts of assaulting a law officer, not a police officer.

In relation to the assault offences, she was sentenced to six months' imprisonment, suspended on entering into a bond for six months. She was fined on the other offences.

It does not appear that she committed any offences in contravention of the suspended sentence order because the first of her 2008 offences was committed on the 25th of June 2008.

In addition to her criminal history, it was stated by the Prosecutor at page 6 of the transcript that on the 28th of August 2008 she was fined $100 for a failure to appear on the 26th of June 2007. Finally on the 28th of October 2008 she

was dealt with for a breach of a bail condition on the 15th of September 2008. This cannot have been regarded as a serious breach because she was convicted and not further punished.

Accordingly, after the commission of the 2006 offences she was convicted of one count of receiving or disposing of stolen goods; one count each of unlawful possession of stolen goods, shoplifting and giving a false name; and three counts each of breaches of bail undertaking and for assaults. Therefore, her total previous offending of a like nature when she was sentenced on the 6th of March 2009 were three counts of unlawful possession of stolen goods or dealing with suspected proceeds of crime or receiving or disposing of stolen goods as those charges are variously described; two counts of unauthorised dealing with shop goods; one count of shoplifting; and four counts of breaching bail undertakings; and one count each of possession of dangerous drugs and giving a false name for which she had not been sentenced to imprisonment. There were also two street offences and three assaults, including those assaults on which she received a suspended sentence, but not an actual term of imprisonment.

She had an insignificant traffic history to September 2006 with three offences of travelling without paying the correct fare and one of supplying a false name and address.

The facts of the offences which were dealt with by the Magistrate appeared in a schedule tendered to the Court with the exception of the 2009 offences. These can be summarised

with the aid of a summary in the appellant's outline of submissions as follows: in relation to the offences arising on the 7th of June 2006 in relation to driving a motor vehicle whilst over the general alcohol limit and driving without a licence, she told police that her then partner, who on the facts appears to have been a major influence on her offending, was the driver of the vehicle, but told her to jump into the driver's seat when it appeared that he was about to be arrested. Her blood alcohol content was .066. She was unable to produce a driver's licence because she had never held one. She gave the reason for her driving as wanting to obtain some cigarettes from a service station. She was released on a notice to appear in relation to those offences.

On the 16th of June 2006 the police conducted a search of a caravan that the applicant occupied. An ornate gold necklace was located with a heart padlock. The applicant participated in an interview with police and admitted to receiving the necklace from her partner knowing it to be stolen. She did not know where it was stolen from. As a result she was charged with receiving stolen property between the 1st of February 2006 and the 16th of June 2006.

In relation to the charge of receiving stolen property on or about the 25th of March 2006, $4,000 had been stolen from a safe at about that time from the premises of Mount Louisa Mighty Mart. The offenders involved in the break and enter were unknown. During the interview with police after the search of the caravan the appellant admitted to receiving an

undetermined sum of money from that premises. She stated that the money was used to purchase food and other necessities at the time.

The charge of receiving stolen property on or about the 9th of May 2006 related to money stolen from the premises of Upper Ross Hotel. The money was taken from a safe on the 9th of April 2006, although as I recall it was agreed at the sentencing hearing that the date was, in fact, the 9th of May 2006.

Following the search of the caravan the applicant participated in an interview with police. She admitted that she received an undetermined sum of money to purchase food and other necessities from her de facto. The amount of money stolen from the hotel had been $5,600.

With reference to the charge of receiving on or about the 10th of June 2006, which must have been committed whilst she was subject to the notice to appear in relation to the driving offences, this related to the location of $660 in a wallet during the search of the caravan. During her interview with police she admitted that she was present when her de facto partner had stolen $2,600 from a business of Warwick Friendly Society Chemist. She admitted to receiving the money knowing it was stolen. She said the money was used to buy food and other necessities. It is not clear how much money she actually received.

The charge of possession of tainted property on the 16th of

June 2006 again committed whilst she was subject to the notice to appear for the earlier offences related to $41.55 in coins which was located during the search of the caravan. Although she initially told the police she had won the money from poker machines, she later admitted that she thought it was stolen. She stated that she didn't know where it had come from.

The charge of possessing dangerous drugs on the 16th of June 2006 which again would have been in breach of the notice to appear related to 17.9 grams of cannabis sativa which was located during the search of the caravan. The appellant admitted to the possession of the cannabis, but at the sentencing hearing her plea was put on the basis that she had knowledge that the cannabis belonging to her partner was present in the caravan at the time.

In relation to the charge of unauthorised dealing with shop goods, on the 25th of June 2006 a vehicle occupied by a number of persons filled up with $48.96 worth of petrol at a service station. Police made inquiries with the owner of the vehicle and someone implicated the appellant. The appellant admitted to filling the car up with petrol and getting back into the car, leaving without paying. She was located in relation to this offence on the 10th of November 2006.

The first of the contravene a direction charges was on the 26th of June 2008 and also must have been committed when she was subject to the notice to appear in relation to the other offences to which reference has been made arising out of the

search of the caravan and the subsequent interview, because she was also released on a notice to appear in relation to those offences.

The contravene direction offence arose when she was arrested on an unrelated matter and issued with a further notice to appear. The appellant failed to state her correct name to police. Fingerprints were taken and she was later identified as a result of that.

The second charge of unauthorised dealing with shop goods was between the 26th of August and the 27th of August 2008. The appellant entered a convenience store and selected items from the shelf. Some items were paid for, however, the appellant had hidden some items under her clothes. When asked to pay for the additional items, she said she belonged to the Mafia, she'd pull a gun out and that there were 20 people outside who would smash up the shop. That obviously did not impress the attendant who called the police as she was saying this. As a result, the appellant fled and police located her and found property of the store in her possession valued at $33.40. She was located a short distance away from the store with two males. She initially denied taking the items, but later told police, "I live on the street. What do you expect?" She was intoxicated at the time of speaking to police and did not participate in an interview due to that intoxication.

In connection with that offence she contravened a direction on the 27th of August 2008. This again was a failure to state her correct name to police in relation to the offence of unauthorised dealing with shop goods. When asked why she provided an incorrect name when she was apprehended, she said, "You don't know how I feel. My father dies and then my boy died. You wouldn't understand." This is relevant to the appellant's personal circumstances to which I will refer.

The breach of bail of 19 November 2008, which as I observed was the subject of a substituted charge by the Magistrate, came to light when police attended a house on the 19th of February 2009 to conduct a search. During the search at which drugs and drug utensils were located she said that she didn't go to Court because she was sick, but did not have a doctor's certificate. Her lawyer at the sentencing proceedings advised that she was sick because she was withdrawing from heroin.

As I have said, on the 19th of February 2009 the police located drugs and drug utensil. As a result she was charged with possessing dangerous drugs on the 18th of February 2009 and possessing a utensil on the 19th of February 2009. In relation to the former offence, she told the police that she had given a friend $50 to buy some heroin and that when she received it she smoked the heroin.

The possession of utensil charge related to the location of an aluminium can with burnt residue during the search. She

admitted that the item was hers and had been used by her to smoke the heroin.

Finally, on the 19th of February 2009 in relation to those offences she failed to provide her correct name to the police. She later told police that she provided her sister's name because she knew she had a warrant for her arrest. Her lawyer submitted at the sentencing proceedings that the appellant had a real concern about being taken into custody because she was responsible for two children.

In addition to the matters that I have already referred to, when the sentence proceeded before the Magistrate the appellant's lawyer said that she had been raped by a family member when she was seven years of age and she had a baby when she was 14 years of age whom she now had in her care. When around 17 years of age she commenced a relationship with an older man Lincoln who was a serious criminal offender. He was the instigator of the offences and was currently serving a sentence. This man also introduced her to heroin to which she became addicted. It was asserted that her propensity to reoffend had significantly diminished as he was now serving the term of imprisonment.

The Court was also told that when she was around 17 or 18 years of age her father died and she was involved in a car accident and suffered a miscarriage losing twins. This lastmentioned event came immediately on top of the passing of

her father. That provides some context to one of the things that she said to the police.

As well as the appellant having care of her young son before her remand in custody, she also had care of her 13-year-old brother. She was also assisting with the care of mother. Her son was a severe asthmatic and suffered a number of attacks since her remand in custody.

As I have indicated, the appellant was said to have attempted to evade remand due to the concerns of her family.

In addition it was submitted that she was remorseful, that given her circumstances it would have been difficult to extricate herself from the offending behaviour and its consequences. She had been clean of heroin for a period of two months. The period in custody had given her time to reflect. It was submitted that a noncustodial sentence should be imposed along the lines of probation.

The Learned Magistrate stated in his decision that he was satisfied that it was appropriate and no more severe in all of the circumstances, particularly when one had regard to the significant sums of money involved in relation to the dishonesty that a period of imprisonment should be imposed.

The appellant submits that the appropriate sentence in the circumstances was that the appellant be sentenced to three years' probation in respect of each of the receiving offences

and each of the possession of dangerous drug offences, fined $600 for the driving offences with the fines to be referred to SPER with 10 months to pay and that she be convicted and not further punished for each of the remaining offences.

It is also submitted that the appropriate penalty was not to order restitution or the pecuniary penalty although the initial submission in relation to the pecuniary penalty has since been withdrawn given that it is appreciated that this was simply an order to dispose of the $41.55 cents which had been found in the appellant's possession.

The respondent concedes that it is appropriate that this Court resentence the appellant in light of the structure and substance of the original sentences. The submission is that the appellant should be resentenced to a period of three years' probation in relation to each of the receiving offences. It is submitted that a community-based order is also in range in relation to the tainted property offence and that the Court has the discretion to order that the appellant be similarly admitted to probation.

It is submitted that the drug offences and the possess utensil offences would ordinarily attract fines, particularly the offence in 2006. It is submitted that fines in the amount of $400 to $700 are appropriate in relation to the possess dangerous drug charges and that $150 to $300 are appropriate in relation to the possession of utensils charge.

The respondent submits that the failure to appear offence should not be further punished in recognition that the appellant has already served 40 days of actual custody.

With regard to the contravene direction offences, the respondent submits that as two of the contravene direction offences are related to the appellant's other subject offences there is no need for further punishment other than convictions be recorded.

The respondent submits that the fine for the unauthorised dealing of shop good charges ought to remain or be apportioned between each offence so that it remains in the same amount.

It is submitted that the sentence in relation to the driving offences should also remain unaltered.

It is submitted that it is not appropriate for the appellant to be subject to compensation orders. The respondent also submits that all the fines should be immediately referred to SPER at least after a short period so that the appellant can commence to meet her obligations in a fashion suited to her ability to pay and does not have those amounts lingering over her head.

Both the appellant and the respondent submit that the Magistrate was in error in fixing one order of four months' imprisonment rather than separate orders of imprisonment for

each offence. The respondent describes this as a global penalty.

The respondent concedes that separate penalties in relation to the receiving, dangerous drug and tainted property charges should be imposed upon resentencing on the authority of R v. Crofts (1998) 100 ACrimR 503; (1999) 1 QdR 386 at 387.

The appellant submits that the most serious offences are the receiving offences from 2006 when the appellant was only 18 years of age. These offences occurred in circumstances when the appellant was in the grip of a drug addiction and she was under the influence of an older criminal offender. The appellant made admissions to police in circumstances where she admitted to receiving sums of money greater than located during the search. It is submitted that the appellant was not afforded the usual discount for her early plea of guilty.

It is submitted that the less serious offences are those from 2008 and 2009 involving relatively minor sums of money and less serious conduct. It is also submitted that the appellant has not been provided the opportunity to undertake community-based rehabilitation in the past. It is submitted that probation would have been the appropriate sentence to impose.

Although the appellant's counsel upon the sentence did not argue against the making of the compensation orders, it is submitted that the appellant had no realistic means by which

to pay the monetary penalties consisting of $5,770 restitution and the $600 fine for the driving offences. As I have said, reference was originally made to the $41.55 cent pecuniary penalty order however this is not pressed for the reasons that I have given. It is noted that with the exception of the fines, no time to pay is specified.

The appellant also submitted that while no submissions were made to the Magistrate in relation to the appellant's capacity to pay the monetary penalties, the Magistrate was informed that the appellant had no work history. It is submit that the Magistrate did not give sufficient regard to the appellant's financial circumstances and the burden of paying the fine of $600 as required by section 48 of the Penalties and Sentences Act. It is submitted that the appropriate penalty was not to order restitution or the pecuniary penalty although as I say the last issue is not pressed.

In respect of the $600 fine, it is submitted that it is open for the amount to be reduced by the Court or that it be deferred to the State Penalties Enforcement Registry in the event of non-payment.

In relation to the fines imposed for the two offences of unlawfully dealing with shop goods, it is submitted that the maximum penalty for this offence is six penalty units which at the relevant time was $75. It is submitted that the Magistrate's intent that the appellant serve time in custody for these offences was impermissible as it was contrary to the

legislative penalty that a fine be posed for this type of offence. It is submitted that it was also contrary to the mandatory requirement to allow time to pay the fine required by section 51(a) of the Penalties and Sentences Act and was otherwise an improper exercise of the sentencing discretion.

It is submitted that the appropriate penalty was to record a conviction and that the appellant receive no further punishment for these offences.

The respondent agrees with this submission, however, it submits that the fine of $600 for both offences was not manifestly excessive particularly having regard to section 9 of the Regulatory Offences Act 1985. However, there is nothing to suggest that the Magistrate was acting under that provision in setting the amount of the fine. It is submitted that it is open for me to fine the appellant $200 for the 2006 offence, and $400 for the 2008 offence, in light of her New South Wales criminal history for shoplifting in 2007 for which she was fined $400.

It is submitted that the drug offences would ordinarily attract fines as would the contravene direction and driving offences. It is also submitted that the failure to appear offence can attract imprisonment.

It is acknowledged that had the respondent been sentenced in 2006 she would have had a limited criminal history at the time

and at least some of the receiving offences may have predated any of her Queensland offending, and as such she was likely to have been sentenced to community-based orders.

Further it is acknowledged that in relation to the tainted property offence, it is likely that the appellant would have received a fine or a community-based order.

The respondent acknowledges that in circumstances where the appellant has addiction issues and where it was submitted at sentence that the appellant was in the thrall of an older and more serious offender, that supervision is appropriate and warranted.

The respondent submits that the offence against the Bail Act is one that was committed where the appellant was aged 20 and has one previous offence against the Bail Act on her Queensland history and two other failure to appear offences on her New South Wales history. I note that reference was made by the prosecutor to a further Bail Act offence that does not appear on the history.

The appellant was fined in relation to her New South Wales offences and was convicted but not further punished with regard to the Queensland offences. It is submitted that in these circumstances that a short period of imprisonment was open to the Magistrate's Court. It is acknowledged that the appellant has spent 40 days in custody, and when seen in light of the time already served the respondent is not submitting

that further punishment is warranted. Accordingly, the respondent concedes that the appellant should not be returned to actual custody.

I do not agree with the submissions by both parties that the learned Magistrate erred in principle by fixing one order of four months' imprisonment for the offences rather than separate orders of imprisonment for each offence, or imposing a global penalty.

Although it was decided in R v. Crofts that there is no power to impose a single period of imprisonment for a number of offences, it was recognised that a single probation order may be made in respect of two or more offences under section 97 of the Penalties and Sentences Act.

A probation order for the purposes of this provision includes a prison probation order under section 92 (1)(b), as I have described it. This is the order that the Magistrate made in this case. All he was purporting to do was to make one probation order for all the offences on which he imposed imprisonment as he was entitled to do. This is confirmed when the language he used and the orders on the Court file are closely examined. It must be remembered that the transcript of the sentencing remarks have not been revised.

However, at page 5 of that transcript his Honour said:

"In respect to the following offences, the receiving - on four receiving charges, the possess tainted property, the possess dangerous drugs on the 19th of February, possess utensil on 19th of February, and possess dangerous drug on the 16th of June 2006, I make one order in relation to all of those offences.

You are convicted of each of those offences and the convictions are recorded.

You are sentenced to imprisonment for a period of four months and you are required to be under the supervision of an authorised Corrective Services officer for a period of three years from today."

I consider that the terms of imprisonment of four months, like the conviction, relate to each offence, and this is not a single sentence of imprisonment for all of those offences. When the file is examined, there is a separate order of commitment for each offence with a statement in each case that the Court ordered that the offender be sentenced to imprisonment to a term of four months. The probation order forms are simply to make one probation order for all offences in accordance with section 97.

I note that the probation order form which is attached to the Court file and is in turn incorporated as part of the bench charge sheet includes a statement note, "When more than one offence, each term of imprisonment must be noted on the

relevant Court file." This confirms that a separate term of imprisonment has been made for each offence.

The passage relied on by the respondent at the conclusion of the sentencing remarks to support the proposition that this was an impermissible global order are, in my view, no more than an attempt by the Magistrate to explain the effect of the order to the defendant. Such an approach is both sensible and permissible.

However, I consider that both parties are correct when they submit that there has been an error of principle with reference to the penalties imposed for the two offences of unlawfully dealing with shop goods where the Magistrate fined the appellant and gave her no time to pay in circumstances whereas the appellant submits it must have been apparent from her personal circumstances that she had no realistic means of paying these fines with the result that she was effectively sentenced to a term of imprisonment for the offences for which only a monetary penalty of a maximum of $450 could be imposed in each case.

In my view, it is irrelevant that the default terms of imprisonment were ordered to be served concurrently. It was, therefore, an error of principle to impose a penalty which was effectively a term of imprisonment. This is particularly so when the order was contrary to section 51 of the Penalties and Sentences Act which provides that "If a Court does not make an instalment order under section 50(a), it must at the

time of imposing the fine order that - (a) the offender be allowed time to pay the fine or, (b) the proper officer give under the State Penalties Enforcement Act section 34 particulars of the fine to SPER for registration under that section." This was not a case where an instalment order had been made and accordingly the section applied.

In addition, there has been a failure to have regard to the appellant's financial circumstances and the nature of the burden that the payment of the fine would have on her as required by section 48(1) of that Act in the circumstances to which I have referred. I also do not consider that as required by section 48 subsection (3) of the Act in considering her financial circumstances, the Court took into account its restitution orders and the pecuniary penalty order.

Another error which appears on the face of the record is fixing a parole release date on the day of sentence in respect of the cumulative period of 15 days' imprisonment for the failure to appear in accordance with an undertaking when having regard to the prison probation order this could not be given effect.

The existence of these errors entitle me to re-exercise the sentencing discretion having regard to section 225(3) of the Justices Act. Even if there was no discernible error of principle, I consider that the sentences imposed were outside

the sound exercise of the Court sentencing discretion as they are manifestly excessive.

On this basis also I consider that it is demonstrated that there has been an error of principle by virtue of which the sentencing discretion miscarried and that I should resentence the appellant.

The most serious offences are the receiving offences which were committed in 2006 when the appellant was 18 years. It is clear that this was the Magistrate's approach having regard to what he said at page 3 of his sentencing remarks to which reference has already been made.

As the respondent acknowledges, at this time the appellant had a limited criminal history and some of the receiving offences could have been her first offences. Her first Queensland offences were committed on the 6th of April 2006 being two street offences and one count of unauthorised dealing with shop goods. Her first New South Wales offences of dealing with property suspected to be proceeds of crime and possessing a prohibited drug were committed on the 5th of May 2006.

The first two receiving offences in particular could have been committed before this. As I have previously observed, even if this was not the case, prior to the majority of the offences being committed her previous criminal history was two offences of unauthorised dealing with shop goods and one each of dealing with suspected proceeds of crime, possession of a

prohibited or dangerous drug, breaching a bail undertaking and a street offence.

She was fined in relation to the majority of these offences and admitted to a recognisance in relation to the dealing with property suspected of being proceeds of crime. Although some of the 2006 offences would have been committed whilst subject to notices to appear on other offences, I consider that if she had been sentenced on the receiving offences and the other 2006 offences, being nine of the 16 charges to which she pleaded guilty, at the time that she normally would have been expected to have been dealt with for them, she would have been likely to have been given the opportunity of release on a community-based order in relation to at least the most serious offences.

This is in circumstances where she was a young person aged 18 years of age, had limited previous offences. The previous offences were committed at or about the same time. All of the offences committed around this period were consistent with her being in the grip of drug addiction and under the influence of an older and serious criminal offender. The older offender was the instigator of the most serious criminal offences and her drug addiction. On her account he was also the driver of the vehicle immediately prior to telling her to swap seats as a result of which she was convicted of the driving offences.

The drug offences related to his drugs and she pleaded guilty on the basis of her knowledge of its presence in the premises.

She had compelling personal circumstances which could benefit from some supervision.

She pleaded guilty. She expressed remorse. She cooperated with the administration of justice by admitting her involvement in interviews with the police, and although she was sentenced on the basis that she had received half the proceeds of the three most serious receiving offences, other than the necklace and the $660 and the $41.55 found in her possession, the schedule of facts stated that she received an undetermined sum of money, therefore, the sum of money that she received is unclear.

Although it must be accepted that she was not sentenced at that time as a result of her own failure to appear before Courts and exacerbated this by giving a false name on occasions when she was subsequently questioned by police, as well as committing further breaches of bail and other offences while she was at large, these were still relevant factors for the Magistrate to take into account.

At the time he sentenced her, she was still only 21 years. Her total offending at this stage was three unlawful possession of stolen goods or dealing with suspected proceeds of crime offences, two counts of unauthorised dealing with shop goods and also of giving a false name if her traffic history is considered, four counts of breaches of bail undertakings and one count each of shoplifting and possession

of a dangerous drug. In addition there were two street offences and three assaults.

She had not been sentenced to a term of actual imprisonment. She had been sentenced to a wholly suspended sentence in relation to two of the assaults on New South Wales law officers. As I read her history, she did not breach the suspended sentence.

She had also been subject to a 12-month recognisance in New South Wales imposed on the 26th of July 2007. It would have expired on the 25th of July 2008. Although she committed offences in New South Wales during that period, that culminated in the suspended sentence, the only breach offence in Queensland was contravention of a direction on the 26th of June 2008.

These circumstances are not sufficient for me to conclude that I should exercise the sentencing discretion in any different manner to that which it is likely to have been exercised in relation to the most serious offences if she had been sentenced in 2006.

The same circumstances were relevant. Although she did not have the benefit of an early plea of guilty in light of her bail breaches which had delayed the resolution of the case for over two years, she was still entitled to some benefit for the plea of guilty. Further it was an early plea in relation to

the breach of bail and two drug offences for which she was apprehended on 19 February 2009.

These were all offences for which imprisonment should only be imposed as a last resort and for which a sentence that allowed her to stay in the community was preferable. She had been in custody for 15 days which had provided punishment and her personal circumstances made her rehabilitation an important principle of sentencing.

For his part the Magistrate took into account the impact that a custodial sentence would have on her family unit. This is not a case where this impact would overwhelm the circumstances of the offending and the other circumstances relevant to imposing penalty.

In balancing the need for a sentence that provides personal and general deterrence with a need to provide her with an opportunity of rehabilitation including, as the Magistrate recognised, with reference to her illicit drug use which had occurred as recently as 18 February 2009, I consider that the only appropriate penalty for the offences for which imprisonment was imposed as part of a prison probation order is that she be given an opportunity to be released under a probation order pursuant to section 92(1)(a) of the Penalties and Sentences Act.

In coming to this conclusion, it is also relevant that she has now spent 40 days in custody, the additional time being the period before she was released on bail pending appeal. She

has now been back in the community for one week short of five months.

In these circumstances the respondent concedes that she should not be returned to custody. It is noted that in the normal course of events the appellant's full-time release date would have been the 12th of July 2002. This has also now passed.

It is to be remembered that probation is a serious sentence as it involves significant restrictions on the appellant who must comply with the conditions of the order. In addition, the seriousness of the conduct is conveyed by the consequences of recording a conviction which is to be considered as part of the whole sentence with reference to the statements by Thomas and White JJ in R v. Briese (1997) A Crim R 75 at 77.

In these circumstances I consider that the Magistrate erred in principle in that he imposed a sentence that was manifestly excessive. This is further emphasised by the fact that sentences of imprisonment were imposed for the possession of tainted property offences and the three drug offences which involved knowledge in one case and personal use in the other cases and for which fines would normally be expected to be imposed.

In re-exercising the sentencing discretion I set aside the sentences in relation to the four receiving charges, the possession of tainted property charges, and the three drug charges, and subject to the agreement of the appellant I will

release her on probation for a period of three years commencing from the time when she complies with a notice issued by the Court in accordance with the terms of her bail release to attend the Court to sign the undertaking.

I note that despite the terms of the bail release it does not appear that she has been notified by the Court personally as to the requirement that she attend for the hearing of the appeal today. That advice has been given to the Legal Aid Office Queensland who is representing her and which, whilst in contact with her, has not been able to directly advise her of her requirement to appear before the Court today.

Once the sentence of imprisonment is set aside for these offences and probation substituted, it would be counterproductive to require the appellant to serve a short term of imprisonment on the offence against the Bail Act. As the appellant has spent 40 days in custody, I agree with the respondent that no further punishment is warranted.

In these circumstances without this being a precedent for future cases, I consider it is appropriate to record a conviction and not further punish her in relation to this offence. I am of the same view and make the same order in relation to the offences of unauthorised dealing with shop goods for which in the usual course of events a fine would be an appropriate penalty. I consider that the time spent in custody is also sufficient punishment for this offence.

In relation to the two driving offences, I consider that in light of the appellant's financial circumstances which are implicit in the submissions made as to her personal circumstances that the appropriate order is that under section 51(b) of the Penalties and Sentences Act the proper officer give under the State Penalties Enforcement Act section 34 particulars of the fine to SPER for registration under this section.

The fine that I impose is one penalty for both offences of $600.

In relation to the three offences of contravening directions, as they are taken into account in imposing the sentences for the other offences, the appellant is convicted and not further punished.

In relation to the offence of possession of tainted property, I order that the appellant pay the State a pecuniary penalty assessed in the sum of $41.55 forthwith being moneys held by the prosecuting authorities.

This is the same order as the Magistrate. There is no issue of it being unrealistic for her to pay this amount because these are funds which are seized by the police from her possession in relation to which the offence was committed.

There is no additional payment sought from her in relation to it and as I have indicated, the appellant's counsel does not press that no such order be made in those circumstances.

However, I agree that the situation is different in relation to restitution. I consider that similar considerations apply as apply for fines and that the appellant's incapacity to pay the fines is a relevant factor and the onerous nature of such an order in these circumstances makes this an unrealistic requirement. This is especially the case where it cannot be proven even on the balance of probabilities how much he received in each case with the exception of the $660 which was found in her possession.

The evidence was that the indeterminate amount of money she received was used to buy food and other necessities. It cannot be expected that this was half of $4,000 or $5,600 or the balance of $2,600 minus the $660 as the case may be.

Accordingly, I set aside the orders for restitution.

As the sentences imposed on the appellant and the associated orders will be set aside, it will also be necessary for me to disqualify her from holding or obtaining a driver's licence for a period of six months.

I might ask you, though, that would be suspended, wouldn't it, pending the outcome of this appeal?

MS LITCHEN: I don't know.

MS HILLARD: Your Honour, it should be, but sometimes they don't.

HIS HONOUR: Yes. Well, at this stage I will proceed on that basis and I won't order that the disqualification dates from the date of the original sentence by the Magistrate, but in accordance with the bail order it will be necessary that she be advised of a time by the District Court to appear and surrender herself into custody so that she can be given the option of entering into the probation orders. If inquiries are made in the meantime, I can make whatever necessary amendments are required to the order on that date.

Accordingly, I set aside the orders for restitution. The orders of the Court will be:

(1) The appeal is allowed;

(2) (a) The sentence imposed on 6 March 2009 and associated orders be set aside.

(b) The appellant is resentenced as follows:

(i) convicted and a conviction recorded on all counts;

(ii) on the four charges of receiving stolen property, two charges of possession of dangerous drugs, and one charge each of possession of utensils and possession of tainted property, released under the supervision of an Authorised Corrective Services Officer for a period of three years under section 92(1)(a) of the Penalties and Sentences Act 1992 (Queensland) on the

requirements under section 93(1) of that Act;

(iii) on the three charges of contravening a direction, two charges of unauthorised dealing with shop goods and one charge of failure to appear, not further punished;

(iv) on the charge of driving over the general but under the high alcohol limit and the charge of unlicensed driving, one fine of $600 for both offences and it is ordered that the proper officer of the Court give under the State Penalties Enforcement Act (Queensland) section 34 particulars of the fine to SPER for registration, and disqualified from holding or obtaining a driver's licence for a period of six months. I will make it clear that that last order involving the disqualification of the driver's licence is in relation to the charges relating to the driving of motor vehicles;

(c) In relation to the charge of possession of tainted property, it is ordered that the appellant pay the State a pecuniary penalty assessed in the sum of $41.55 forthwith being the moneys held by the prosecuting authorities.

There will be no order as to costs.

As to the probation orders taking effect, as I have indicated they will take effect from the time when the appellant attends

before the Court and indicates her agreement to the period in terms of those orders. In the event that she does so and signs the orders, they will take effect from that date.

I adjourn these proceedings to a date to be fixed.

HIS HONOUR: Well, I direct that in accordance with the appellant's bail undertaking that she appear and surrender herself into custody in the District Court at Brisbane at a date and time to be advised by the Court for the purpose of giving her the opportunity to enter into the probation order. That date will be at a time that is mutually convenient to counsel and the Court.

Is there anything further? I don't think there is anything other than that?

MS HILLARD: No, your Honour.

MS LITCHEN: No, your Honour.

HIS HONOUR: All right. Thank you for your assistance. I am sorry that went so long, but there seemed to be a bit in it once it all got boiled down.
