QDC [2009] 435

DISTRICT COURT

APPELLATE JURISDICTION

JUDGE ROBIN QC

No 1005 of 2009

CHRISTOPHER MATTHEW VICKERS	Appellant
and	
DAVID TIMOTHY	Respondent

BRISBANE

..DATE 26/06/2009

JUDGMENT

HIS HONOUR: This has been an unusual sentence appeal under section 222 of the Justices Act.

Mr Vickers pleaded guilty to an offence of disqualified driving which was his thirteenth, or something like that. He'd previously been sentenced to imprisonment for 12 months for that offence, although the Court had made an order which might lead to early release. Trouble in respect of other matters led to the appellant being without his liberty for the full 12 months. Within a couple of months after release came the new offence which was dealt with by an Acting Magistrate at Caboolture on a guilty plea. The appellant also pleaded guilty to driving an unregistered vehicle which was also uninsured.

Those are adverse features of the circumstances but there were no others to make the case more serious by way of driving in a dangerous manner, breaching road rules, apart from those to do with vehicles being properly registered and insured, and the like.

Traffic matters aren't the only ones in the appellant's history. The Magistrate imposed for the disqualified driving offence a sentence of 18 months' imprisonment, which is the maximum available. He ordered release on parole at the eight month point, which might be seen as a recognition of mitigating factors which he was specific about noting. These concern favourable developments in the appellant's circumstances.

He is a 44 year old who undertook training to enhance his employability and sought employment to the extent of making some 61 job applications. In some circumstances, the Court mightn't take a lot of notice of that but the appellant's circumstances are favourable in that one of those applications was successful. Employment was commenced and carried out in a way sufficiently satisfactory to the employer to lead him to offer the appellant that same or similar employment back on his release from custody. Contrary to the Magistrate's expectations, $1,000 or more of a huge SPER debt was liquidated by the appellant by recourse to his earnings.

He, it's said, is the carer of his elderly mother. The contents of Mr Stoker's psychological report were referred to in some detail by the Magistrate. I'm inclined to go along with what I take to be his attitude, that the difficulties of depression and the like, of inability to think clearly about the consequences of one's actions aren't likely to impress the ordinary thinking member of the public too much if the consequence is that the community's requirement for safety and order on the roads is to be recognised. To an extent the community is driven to be rather unimaginative and penalise in appropriate ways those who offend.

In respect of the other offences dealt with by his Honour, fines were imposed, no time being allowed to pay, and default imprisonment being ordered. The Magistrate's clearly expressed intention was that that imprisonment be concurrent with the principal sentence of 18 months. The Court hears

that for some reason or other the sentence management arrangements, so far as Corrective Services are concerned, treat that default imprisonment as being cumulative. That is an error and it ought to be made clear now that, treating the default imprisonment as concurrent, it has now been served.

You've been in custody since the 27th of March 2009. The Prosecutor fairly replaced her original outline of submissions with a new one which didn't seek to rely on the driving on the day in question being attributable to the appellant's travelling to the beach. The Court was informed that for employment purposes, he had managed to avail himself of the services of a cooperative driver.

Originally, as I understand it, that circumstance was presented as one indicating there was no reasonable excuse for the driving as sometimes there might be for a medical emergency or the like. I'm not likely to have been influenced by the original form of that submission. It seems to me the appellant's problem is that he's proved close to incorrigible in respect of disqualified driving, presuming to be the judge for himself of whether he should be driving or not.

I sympathise with the Magistrate's approach but, as I said this morning, there seems to be a real problem given his imposing a sentence at the maximum level for what, in the circumstances, seems a relatively ordinary instance of disqualified driving, and it has to be accepted that if that kind of offence continues to be committed there'll be

escalating penalties. The question remains whether the proper sentencing discretion would lead to imposition of the maximum.

In Mackenzie's Queensland Sentencing Manual, paragraph 12.110, can be found authorities which are under the heading "Guilty Plea and Maximum Penalty". Those include Veen v. The Queen (No. 2) [1988] 164 CLR 465 and Marshall [1993] 2 QdR 307. The judgment of the Chief Justice at page 312 and following is helpful. It is consistent with the view that where an offender pleads guilty, it might well be expected that he won't face suffering the maximum sentence but that is not the universal rule, as the Chief Justice, Macrossan CJ, said. The outcome in Marshall was that the appellant was given a double credit for time which he had actually served in custody.

There are helpful comments as well in Galley [1997] QCA 479, in particular, from Thomas J who said at page 9, "The applicant's offences fall within the worst category of offences of this kind and I agree that a maximum sentence would prima facie be justifiable for the present circumstances. The sentence, however, must be tempered by the fact that he pleaded guilty and cooperated with the police once the matters were investigated."

You're in that situation, although I accept Ms Litchen that the police would not have had a great deal of difficulty establishing their case against you.

In my opinion, notwithstanding the Magistrate's careful reasons, the sentencing discretion appears to have miscarried because his Honour has failed to justify, in circumstances where I think that justification was appropriate, imposition of the maximum penalty.

However strong the prosecution case was, it remains the situation that where an offender pleads guilty, rather than put the prosecution to proof, there is an undeniable saving to the prosecuting authorities and the Court and indirectly the community.

Of course, I accept that there are cases in which the maximum sentence ought to be imposed, but where it is, particularly in the case of a guilty plea, I think that ought to be accompanied by a clear explanation of the sentencing Court's reasons.

Also in Mackenzie work, paragraphs 9.70 and 9.80, a recent Court of Appeal matter which may be seen as pertinent to these questions, although it involved a maximum sentence of life, is Robinson 2007 QCA 99 especially at paragraph 38.

As indicated to counsel this morning, before the matter was adjourned so that the appellant could participate in the hearing by video link from where he's in custody, my view was that an appropriate head sentence was one of 15 months. While it would be open to the Court to offer mitigation only in respect of the head sentence, it's, on many occasions,

appropriate and I think this is one, to mitigate as well by some recommendation which will return the offender to the community earlier than at the ordinary half-way point, which those convicted by a jury or a Magistrate following not guilty pleas can normally expect.

That is traditionally done at the one-third mark, see Hoad [2005] QCA 92, which seems to me the appropriate mark in this case against a 15 month head sentence.

It's of some satisfaction to me to note that that arrangement would have seen the appellant under supervision on parole conditions in the community for 10 months after release from custody. That 10 months would apply under what his Honour did as it would have under what I proposed.

At both ends of the Bar table, the view was expressed that parole might be advantageous from the appellant's point of view. That is indeed so.

In the end, I was persuaded by Ms Hillard's submissions that there were reasons to do with remorse, reformation and the like for considering seriously the prospect of releasing the appellant into the community right away.

I could not, to my mind, justify release on parole today which is what Ms Hillard suggested and therefore contemplated the possibility of an intensive correction order which is available against a sentence of up to 12 months.

Added to the three months the appellant has been in custody, that would produce a finalisation or final discharge date at the 15 month point after sentence, which I've concluded is appropriate.

Ms Litchen, in particular, responding to the appeal, favoured parole over an intensive correction order but submitted it would be wrong to fix parole as early as today.

The appellant is in court, which is why I'm addressing him, after the usual exchange was had, explaining the intensive correction order to him and getting an agreement to it. Given the indicia that there are important changes in his life which, hopefully, will see him avoid further trouble and in particular, for disqualified driving, I've come down in the end in favour of the intensive correction order arrangement.

The appeal is allowed and the 18 month sentence imposed by the Magistrate at Caboolture is set aside. In lieu of that, I take into account that the appellant has already served three months in custody.

The Court pronounces now a new sentence, effective from today, of 12 months' imprisonment. The Court also makes an intensive correction order. The appellant will be required to report to community corrections for purposes of that order, immediately on his release from custody. No doubt the custodial authorities where he is will assist him to attend to that.

Perhaps I should declare that the default imprisonment which the Magistrate attached to the fines has been served.

MS HILLARD: Your Honour, you haven't actually declared the three months in custody as time served.

HIS HONOUR: I'm not going to.

MS HILLARD: I don't think that you can. That's right.

HIS HONOUR: I can but I'm not going to.

MS HILLARD: If we leave the default imprisonment as it is, he won't be released today because he will have to serve that time.

HIS HONOUR: No, I've declared he's served it already.

MS HILLARD: I don't think - I haven't got the legislation.

HIS HONOUR: Well, given that he has served it already, I'll remove the order.

MS HILLARD: It can be record conviction and no further punishment.

HIS HONOUR: All right, well, in that event, I'll set aside the fines.

MS HILLARD: Yes.

HIS HONOUR: I set aside the fines imposed by his Honour in recognition of the fact that, in this Court's view, Mr Vickers has served the default imprisonment.
