DISTRICT COURT OF QUEENSLAND

CITATION:	*Mitchell v Commissioner of Police* [2020] QDC
PARTIES:	**DENISE MAREE MITCHELL** (Appellant) v **COMMISSIONER OF POLICE** (Respondent)
FILE NO/S:	D63 of 19
DIVISION:	Appellate
PROCEEDING:	Appeal pursuant to s 222 of the *Justices Act* 1886
ORIGINATING COURT:	Magistrates Court, Southport
DELIVERED ON:	10 March 2020
DELIVERED AT:	Southport
HEARING DATE:	7 November 2019
JUDGE:	McGinness DCJ
ORDER:	1. **Appeal allowed.** 2. **Two years' probation order with special conditions as outlined in the original sentence to remain in place.** 3. **No convictions are recorded.**
CATCHWORDS:	APPEAL AGAINST SENTENCE – *JUSTICES ACT* 1886 – GROUNDS FOR INTERFERENCE – RECORDING OF CONVICTION - where the appellant pleaded guilty to one charge of sexual assault – where the sentence imposed included the recording of a conviction – where the applicant challenges the sentence on the ground that the recording of the conviction is manifestly excessive.
LEGISLATION:	*Justices Act* 1886 (Qld), Sections 222, 223 *Penalties and Sentences Act* 1992 (Qld), Sections 9, 12, *Criminal Code* 1899 (Qld), Section 210 *Sexual Offences (Protection of Children) Amendment Act* 2003 (Qld), Section 28 *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld)

CASES:	*R v Jones* [2003] QCA 450
	R v Bradford [2007] QCA 293
	R v Manser [2010] QCA 32
	R v Caulfield [2012] QCA 204
	R v SFD [2018] QCA 316
	R v Baldwin [2014] QCA 186
	R v Benjamin Elder – Smith DCJ Brisbane District Court 30/8/17
	R v Sammy Mechkor – McGinness DCJ Southport District Court 25/7/17
	R v David Poulton – Newton DCJ Rockhampton District Court 22/8/11
	R v Glen Pennington – Everson DCJ Bundaberg District Court 18/9/18
	R v Peters [2012] QCA 325
	Allesch v Maunz (2000) 203 CLR 172 at 182.
	Forrest v Commissioner of Police [2017] QCA 132
	House v R (1936) 55 CLR 499
	R v Ikin [2007] QCA 224
	R v Brieze ex-parte AG Queensland [1998] 1 Qd R 487
	R v Bunton [2019] QCA 214.
	R v Rogers [2013] QCA 192
	R v SBP [2009] QCA 408
	R v LAL [2018] QCA 179
COUNSEL:	M. McMillan (solicitor) for the appellant
	M. Mitchell for the respondent
SOLICITORS:	McMillan Criminal Law for the appellant
	Office of the Director of Public Prosecutions for the appellant

[1] This is an appeal pursuant to s 222 of the *Justices Act* 1886. On 22 March 2019, the appellant pleaded guilty in the Magistrates Court at Southport to two charges of sexual assault committed on 28 February 2018. In relation to both charges, the appellant was sentenced to two years' probation with special conditions that:

1. She submit to medical psychiatric or psychological assessment and treatment as directed; and
2. That she not consume alcohol and be tested as required and not be over .05 percent.

Convictions were recorded. The appellant submits the sentence was manifestly excessive on the basis that convictions were recorded. The appellant submits the learned Magistrate erred in failing to consider the relevant criteria in s 12 of the *Penalties and Sentences Act* 1992 (**PSA**) and in all the circumstances the recording of a conviction as part of the sentence was manifestly excessive.

Circumstances of the offending

[2] An agreed schedule of facts was tendered at the hearing. The appellant was born in Goondiwindi on 21 March 1969. She was 50 at the time of sentence and aged 48 at the time of the offences. The appellant has no criminal history, although she had traffic history. The traffic history was irrelevant apart from an entry on 12 March 2018, the same day as the present offences, for driving under the influence. The appellant had been pulled over at 2.20am, a couple of hours after the sexual assault offences, and returned a reading of .181. This confirmed she was significantly intoxicated at the time of the current offences.

[3] The complainant was born on 28 March 2002. She was aged 15 years and 11 months at the time of the offences. The appellant, the complainant's mother and the complainant were family friends.

[4] On 28 February 2018, the appellant was at the complainant's house with the complainant's mother. When the complainant came home from school, she had dinner with her mother and the appellant. They sat at the table talking for a few hours. At approximately 10.30pm, the complainant went to bed in her bedroom. She fell asleep facing the wall. At some point, the complainant heard her bedroom door being opened and saw the appellant walk into the room. The appellant got into the bed and laid down facing the complainant. The appellant began to rub the complainant's bottom and told her she had a cute bottom. The complainant told the appellant to go back to her own bed as she was trying to sleep. The appellant put her arm around the complainant and positioned herself so she was spooning the complainant. The appellant put her right hand down the front of the complainant's underwear and touched the skin on the top of her pubic hairline (Charge 1). The complainant immediately pushed her hand away thinking it may have been an accident. The appellant then tried to lift the complainant's underwear again and touched the top of her pubic hairline for a second time (Charge 2). The complainant forcefully pushed her hand away and told her to stop. The complainant got out of bed. The appellant grabbed at the complainant's underwear. The complainant pulled away and stood facing the appellant. She was holding a pillow in front of her. The appellant pretended to wake up and said "Oh no, what have I done". The complainant told the appellant to go back to her room and go to sleep. The appellant repeated "Sit down, we need to talk about this. Tell me what I have done". The complainant kept telling her to go back to her room.

[5] The complainant told the appellant she was going to go to her mother and the appellant followed. The complainant told her mother what had occurred and the complainant's mother asked the appellant to leave. The appellant began banging on the door asking if they could talk about it. She eventually left.

[6] The prosecution proceeded on the basis that the appellant did not know the complainant was under 16 years at the time of the offence, hence the charge of sexual assault.

[7] A victim impact statement was tendered by the prosecution in which the complainant outlined adverse emotional and psychological impact.[1] The prosecutor submitted the complainant appeared to be continuing to suffer anxiety and trust issues. The prosecution submitted that s 9(4) of the PSA applied even though the prosecution was accepting a plea on the basis that it was a sexual offence committed in relation to a child.

[8] I note that the prosecution proceeded to sentence on the basis it could not negative beyond a reasonable doubt that the appellant knew the complainant was under 16 years of age at the time of the offence.

[9] The prosecutor submitted that there is no defence to the charge of sexual assault such that is available under s 210(5) of the *Criminal Code* 1899, and that, as a result, the starting point was a sentence of actual imprisonment.[2] This submission was incorrect and is not persisted with on the appeal.

[10] The prosecutor submitted that because the appellant was a long standing family friend, there was a significant breach of trust, and that the substantial age disparity was an aggravating feature.[3] He submitted the offending was persistent because the appellant attempted to put her hands inside the complainant's underwear twice, despite the complainant resisting.[4]

Appellant's submissions at the original hearing

[11] The appellant's solicitor submitted s 9(4) of the PSA was inapplicable and the court did not need to find exceptional circumstances existed in order to impose a non-custodial sentence. As noted above, the respondent now accepts this submission is correct.

[12] The defence solicitor tendered a written outline of submissions, a psychological report under the hand of Professor James Freeman, a number of character references and documents relating to the appellant's employment.

[13] It was submitted the offending was opportunistic, did not involve violence, did not involve touching of the genitals and lasted seconds. As such, it was a low level of offending.

The appellant's antecedents and the psychological report.

[14] The appellant was examined on 7 March 2019 by Professor James Freeman, Consultant Psychologist and Forensic Clinician, for the purposes of providing a forensic psychological assessment to the court. Professor Freeman diagnosed the appellant as suffering persistent depressive disorder. He made a provisional diagnosis of unspecified trauma related disorder.[5]

[15] The appellant reported she had a long standing friendship with the complainant's mother although they had not socialised for a considerable period of time. On the day

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1 It doesn't appear that an exhibit was given to the victim impact statement but it is on the Magistrates Court file.
2 Magistrates Court (22 March 2019), p 5, ll 1-5.
3 Magistrates Court (22 March 2019), p 5, ll 9-15.
4 Magistrates Court (22 March 2019), p 5, ll 17-19.
5 Psychological report of Professor Freeman, p 3, under heading 'Clinical Assessment'.

of the offence she consumed a large quantity of alcohol, approximately three bottles of wine and some Tequila at the complainant's mother's home, and had limited recollection after about half way through dinner. She did recall the complainant's mother yelling at her, her fleeing the household and crashing her vehicle.

[16] Professor Freeman opined the appellant had struggled with persistent depressive disorder for a period of more than two years due to a number of stressors, including poor physical health, and found herself unable to cope with her employment as a social worker after the incident. He considered there was evidence to indicate the appellant was vulnerable to sporadic misuse of alcohol in a misguided attempt to manage ongoing depression and emotional distress.[6]

[17] The appellant is married with two adult children and a 13 year old daughter. Examination indicated the appellant was not suffering from any form of sexual arousal, desire or dysfunction disorder, and exploration did not reveal any elevated characteristic risk factors requiring psychological intervention.[7]

[18] Professor Freeman considered the appellant was likely struggling with a depressive episode; she became extremely intoxicated to such an extent she subsequently engaged in disassociated behaviours; she genuinely appeared to have limited recollection of the events; there was no evidence her behaviour originated from deviant ideation such as paedophilia; the risk of recidivism could be considered in the low risk category; and she should be encouraged to seek further treatment for the comorbid psychological disorders which will likely be long lasting and create impairments in her quality of life.[8]

[19] The appellant's solicitor submitted the appellant was happily married and a dedicated mother to three children with no criminal history, strong ties to her local community and with a strong work history. It was a guilty plea at the earliest opportunity after the charges were amended.

[20] The Magistrate was informed that the Northern New South Wales Local Health District Employment Guidelines required the appellant, when she applies for a job with the North Coast Cancer Institute, Lismore Cancer Care and Haematology Unit, to disclose a copy of her criminal history. It was submitted that it was likely that a recorded conviction would impede her application. It was submitted that the court could find the recording of a conviction would impact upon the appellant's chances of finding employment.[9]

[21] A joint letter from her 27 year old son and her husband confirmed the appellant's issues with drinking and depression. A letter from Senior Psychologist, Ms Saunders, confirmed the appellant had completed 24 counselling sessions every two weeks since approximately 5 March 2018, of which her husband attended approximately 80 percent. Ms Saunders confirmed that in a year since counselling commenced, the appellant's initial presentation, and throughout, was one of extreme shock, severe depression and remorse, all of which appeared genuine. Her sporadic alcohol consumption appeared to be related to self-medication. Ms Saunders was of the

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6 Psychological report of Professor Freeman, 7.3.

7 Psychological report of Professor Freeman, p 5, paras 10.5-10.7.

8 Clinical summary, para 13.

9 Original outline of submissions tendered at the original hearing, paras 20-22.

opinion that the appellant has made substantial progress in therapy to address and improve her depression.

[22] The appellant's solicitor at the original hearing submitted that having regard to the comparable decisions and the other factors, a sentence of probation with no conviction recorded was the appropriate sentence.

Magistrate's findings

[23] The learned Magistrate stated she took into account all of the submissions made on the appellant's behalf, including her plea of guilty after the charges had been changed, her lack of criminal history, her age, and her personal circumstances. She noted the support the appellant had from her family, and also that she was suffering from a "medical condition".[10] The Magistrate accepted Professor Freeman's opinion that the appellant was struggling with a depressive episode, was in an extremely intoxicated state and that there was no evidence her behaviour originated from any disorder such as paedophilia. The Magistrate considered the level of the sexual assault could be regarded as low end. On the other hand, the appellant was in the complainant's home as a trusted family friend. Relevant factors were that the complainant was in her own bed, had urged the appellant to leave her alone, and had forcefully pushed the appellant away. The matter was very serious with regard to the victim impact statement and the complainant described suffering terribly as a result of the incident. The appellant demonstrated remorse, shame and regret in all of the circumstances. The offending did not require a period of imprisonment. In the circumstances, a period of probation for two years was appropriate with special conditions for counselling and medical treatment.

[24] In relation to the recording of a conviction, the only thing said by the Magistrate was:

> "It is a very serious matter, and I have given a lot of thought to this, and I'm going to record a conviction against you."[11]

The appeal

[25] Pursuant to s 223 of the *Justices Act* 1886, subject to leave being given to adduce additional evidence, an appeal under s 222 is by way of a hearing on the evidence given in the proceeding before the Magistrate. In an appeal by way of rehearing, the powers of the Appellate Court are exercisable only where it can be demonstrated, having regard to all the evidence before the Appellate Court, that the order that is the subject of the appeal is the subject of some legal, factual or discretionary error.[12]

[26] Relevantly, s 222(1)(c) of the *Justices Act* 1886 provides that on an appeal against sentence, the appeal is on the ground that the punishment or penalty imposed is excessive or inadequate. The appeal is by way of rehearing of the original evidence given in the proceeding.[13] Insofar as this is an appeal against sentence, the principles in *House v R*[14] apply:

> "It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes

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10 Magistrates Court (22 March 2019) p 2, ll 8-9.
11 Magistrates Court (22 March 2019), p 3, l 10.
12 *Allesch v Maunz* (2000) 203 CLR 172 at 182.
13 *Forrest v Commissioner of Police* [2017] QCA 132.
14 (1936) 55 CLR 499 at 505.

> the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so".[15]

Grounds of Appeal

Application of s 12 by the Magistrate

[27] The appellant submits the Magistrate erred by failing to have regard to relevant considerations provided in s 12 of the PSA. The respondent submits the Magistrate had regard to the relevant factors under s 12. I have reviewed the Magistrate's sentencing remarks and, after considering her reasons, it appears that all she turned her mind to was the serious nature of the offences.

[28] Under s 12 of the PSA, the court must consider a number of factors when exercising a discretion whether or not to record a conviction. The court must have regard to all of the circumstances of the case including the nature of the offence, the offender's age and character, and the impact that the recording a conviction will have on the offender's economic or social wellbeing, or chances of finding employment.[16] In her Honour's reasons, the Magistrate appears to only have considered the nature of the offence, which she described as serious. Although submissions were made to the Magistrate in relation to the impact that the recording of a conviction may have on the appellant's chances of finding employment and economic and social wellbeing, the Magistrate made no reference to what are mandatory considerations under s 12 of the PSA. The apparent error is a material one, particularly where the appellant's character and antecedents are good, and there is evidence she wishes to re-enter the workforce in the area of health and social work.

Reportable offender

[29] One matter not raised during the original sentence is that of *R v Bunton*.[17] In that case, the applicant challenged a sentence of probation where a conviction was recorded on the basis that the recording of the conviction had the automatic result that the applicant became a reportable offender within the meaning of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld) (**ORA**). In that case, the Appellate Court granted leave to appeal, allowed the appeal and set aside the recorded conviction for offences of possession of child exploitation material. The applicant in that case was just over 18 years of age. At paras 27-31 of the judgment, Morrison JA stated:

> "[27] As counsel for the applicant points out, nowhere in the oral argument, outlines or in the sentencing remarks was the question of the impact of the ORA referred to. As will appear, the impact of that Act upon the applicant is such that it likely would have received a reference in the sentencing remarks had it been addressed or had it been considered by the sentencing judge. Those matters lead to the inference, which I draw, that it was not adverted to, either by Counsel or by the learned sentencing judge. The impact of that Act is a relevant

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15 *House v R* (1936) 55 CLR 499 at 505.
16 *Penalties and Sentences Act (Qld)* 1992 s 12(2).
17 [2019] QCA 214.

consideration on the sentencing for an offence of this kind.[18] There has therefore been a demonstrated error in the exercise of the sentencing discretion.

[28] The purposes of the ORA, as they appear in s 3, are as follows:

'(a) to provide for the protection of the lives of children and their sexual safety; and

(b) to require particular offenders who commit sexual, or particular other serious offences against children to keep police informed of the offender's whereabouts and other personal details for a period of time after the offender's release into the community—

(i) to reduce the likelihood that the offender will re-offend; and

(ii) to facilitate the investigation and prosecution of any future offences that the offender may commit.'

[29] The Act impacts upon the relevant offender in a variety of ways. They include:

(a) upon being sentenced for a 'reportable offence',[19] the offender becomes a reportable offender' unless a conviction is not recorded: s 5(1) and (2)(a);

(b) reportable offenders must be registered on a child protection register: s 68;

(c) the ORA imposes reporting obligations including an initial report of the offender's personal details, and monthly periodic reports to the police commissioner, until the reporting period ends: s 14, s 18(1) and s 19; the initial report has to be in person, and subsequent periodic reports in such ways as the Police Commissioner directs: s 26;

(d) the reporting obligations commence upon being sentenced, and continue for five years: s 35(1)(b) and s 36(1)(a);

(e) absent the finding of guilt or the conviction being quashed or set aside, a person stops a being reportable offender at the end of all reporting periods to which they are subject: s 8(b);

(f) a reportable contact with a child means having physical contact with a child, or oral or written communications with a child: s 9A(1);

(g) it is an offence to fail to comply with the reporting obligations: s 50; and there is no time limit set for prosecutions for such an offence: s 52;

(h) personal details which have to be reported include: the offender's name, date and place of birth, tattoos or distinguishing marks (whether existing or since removed), and details of where the offender generally resides; changes in residence; details of any child with whom the offender has a reportable contact; the nature

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18 *R v Rogers* [2013] QCA 192 at [41].

19 Which this offence is: Schedule 1, item 4 of the ORA.

of employment including the name of the employer and the place of employment; details of any club or organisation of which the offender is a member if there child members or child related activities; the make, model and colour of any vehicle owned or driven within a one year period; details of any telephone or internet services used; details of any social networking; details of any email addresses and internet usernames; passport details; and if travel is intended, the reasons for travel: schedule 2;

(i) any change in personal details must be reported, some within 24 hours: s 19A;

(j) any intention to leave Queensland for 48 or more consecutive hours must be reported, even if travel is only elsewhere in Australia: s 20;

(k) any change in travel plans must be reported if the offender is outside of Queensland while travelling, and the return to Queensland must be reported within 48 hours: s 21 and s 22;

(l) reports have to be made at a local police station where the offender is currently residing, or as directed: s 25;

(m) on the initial report, police have the power to take fingerprints: s 30;

(n) police have the power to compel photographs to be taken, and to retain documents, fingerprints and photographs indefinitely: s 32: s 31 and s 32; and reportable offenders can be given a notice to provide DNA to the police: s 40A; and

(o) a reportable offender must obtain the Police Commissioner's written permission before changing, or applying to change, that offender's name under the *Births Deaths and Marriages Registration Act* 2003 (Qld): s 74A.

[30] That review of the obligations demonstrates why this Court has described them as 'onerous'.[20] The onerous nature is demonstrated as well by the fact that any breach of the obligations renders the applicant potentially liable to five years' imprisonment: s 36(1)(a) and s 50.

[31] For present purposes, one of the most significant aspects about the effect of the ORA is that it changes the legal status of the offender. Here that change in legal status will endure three years beyond the end of the period of probation. Any breach of the reporting obligations exposes the applicant to prosecution, and a prospect of imprisonment well beyond the current sentence."

[30] In that case, the court found that the demonstrated error was that there was no demonstrable risk to other children; however, the reporting conditions meant the

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20 *R v SBP* [2009] QCA 408 at [20]; *R v Rogers* [2013] QCA 192 at [40]; see also *R v LAL* [2018] QCA 179 at [104].

applicant faced prosecution and imprisonment well beyond the sentence of probation.[21]

[31] The respondent concedes that an error has been made by the Magistrate by failing to have regard to the effect of ORA, and that the appeal should be allowed.[22] The respondent submits the learned Magistrate erred in failing to consider the impact of the ORA.

[32] The respondent accepts that, during sentencing submissions, neither the prosecution nor the appellant's representative raised that a consequence of the recording of a conviction was that the appellant would become a reportable offender within the meaning of the ORA.

[33] The result for the appellant in the present case of a conviction being recorded is that she became a reportable offender under the ORA from 22 March 2019 for a period of 5 years.[23] Given that this issue was not raised in submissions ,and not referred to in the learned Magistrate's decision, the respondent accepts that it should be inferred that this was not considered by the learned Magistrate and that consequently an error in the sentencing process has occurred.

Re-sentence

[34] I consider the errors identified in the Magistrate's sentencing remarks led her into error when exercising her discretion under s 12 PSA. The appellant and respondent submit this court should resentence the appellant. I have reached the conclusion that the errors identified render the sentence excessive.

[35] The respondent submits, notwithstanding the mitigating issues present, the aggravating features of the offending are such that convictions ought to be recorded for the offending. Those features include: the offending involved a breach of trust; the complainant was in her own bed where she was entitled to feel safe; the offending involved touching on the complainant's skin rather than through clothing; the complainant had to remove herself from her own bed to resist the appellant; the appellant refused to leave the complainant's bedroom after being asked to do so; and the adverse impact the offending has had upon the complainant.

[36] I have regard to all the circumstances of the case including the nature of the offence, the appellant's character and age, the impact that recording a conviction is likely to have on her economic or social wellbeing, and the impact it will have on her chances of finding employment as required under s 12(2) of the PSA. The relevant factors to which I have regard include:

- The serious nature of the offending, involving a breach of trust;
- The adverse impact upon the complainant;
- The appellant's lack of prior relevant criminal history, and that she is otherwise of good character;
- The offending occurred on one occasion and it was considered by the prosecution as low level touching;

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21 *R v Bunton* [2019] QCA 214, 31-33.

22 Respondent's Outline of Submissions, filed 27 June 2019.

23 *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 36(1)(a)(i) and (4) of the

- The appellant's extensive efforts to attend counselling and rehabilitate, as confirmed by the psychological material, and that there is no suggestion the appellant has paedophilic tendencies; and
- The reporting obligations the appellant will be under pursuant to the ORA if a conviction is recorded.[24]

[37] Similar to the case of *R v Bunton*,[25] the appellant's offending in the present case does not reflect a future risk of similar conduct. The appellant is subject to the stringent conditions of a probation order in the community with special conditions for medical and psychological treatment as directed, and a condition concerning abstention from alcohol over a period of two years. She has performed satisfactorily on the current order for a period of 10 months. I am satisfied on the evidence that there is a very real probability that the recording of convictions will impact upon her employment prospects. Weighing up these factors, I exercise my discretion and order no convictions are recorded.

Orders

[38] Appeal allowed.

1. Vacate the original sentence only in relation to the recording of convictions.
2. Two years' probation order with special conditions as outlined in the original sentence to remain in place.
3. No convictions are recorded.

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24 See *R v Rogers* [2013] QCA 192 at paras [40]-[42].

25 [2019] QCA 215.