DISTRICT COURT OF QUEENSLAND

CITATION:	*West v The Commissioner of Police* [2022] QDC 202
PARTIES:	**LYNETTE MICHELLE WEST** (Applicant) **v** **THE COMMISSIONER OF POLICE** (Respondent)
FILE NO:	Appeal No. 1550 of 2022
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court at Redcliffe
DELIVERED ON:	27 July 2022 (ex tempore reasons given)
DELIVERED AT:	Brisbane
HEARING DATE:	27 July 2022
JUDGE:	Farr SC DCJ

ORDER:

1. The appeal is allowed.
2. The sentence imposed on 20 June 2022 is set aside.
3. The appellant is sentenced to two-months imprisonment. The appellant has served 36 days imprisonment from the 20th June 2022 to the 26th of July 2022. It is declared to be time served under the sentence. The term of imprisonment be suspended immediately and the operational period during which the defendant must not commit any other offence potentially punishable by imprisonment is one of two months

CATCHWORDS: CRIMINAL LAW – APPEAL – Justices Act 1886 – section 222 – appeal against sentence – where the appellant pleaded guilty to one charge of wilful damage – whether the sentence imposed in the Magistrate's Court at Redcliff was excessive – where leave has been granted for the appellant to amend the notice of appeal by adding particulars to the ground – whether the magistrate placed undue weight on the appellant's criminal history which resulted in a sentence that was disproportionate to the gravity of the offence – whether the magistrate erred in

the characterisation of the nature and seriousness of the offending – whether the magistrate erred in the characterisation of the appellant's plea of guilty.

COUNSEL: R F Mann for the appellant
E V Duncan for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Office of the Director of Public Prosecutions for the respondent

Introduction

[1] This is an appeal pursuant to section 222 of the *Justices Act 1886*. It arises from a sentence imposed in the Magistrates Court at Redcliff on 20 June 2022. The appellant at that time pleaded guilty to one charge of wilful damage and was sentenced to six months imprisonment with a parole release date set after she had served two months. The ground of appeal is that the sentence was manifestly excessive. Leave has been granted to amend the notice of appeal by adding particulars to the ground. Those particulars are that the sentence imposed was manifestly excessive as a result of the following errors:

a. the magistrate placed undue weight on the appellant's criminal history which resulted in a sentence that was disproportionate to the gravity of the offence;

b. the magistrate erred in the characterisation of the nature and seriousness of the offending; and

c. the magistrate erred in the characterisation of the appellant's plea of guilty.

[2] An appeal pursuant to section 222 is by way of re-hearing pursuant to section 223 (1) of the *Justices Act 1886*. To succeed the appellant must establish some legal, factual, or discretionary error and the Court is empowered to intervene only if the sentencing discretion miscarried either by specific error or by the imposition of a sentence which was unreasonably or plainly unjust such that it demonstrates that the sentencing discretion must have miscarried even though no specific error can be identified; that is the House v The King test[1]. Section 225(1) of the Act states that:

> *The district Court may confirm, set aside, or vary the appealed order or make any other order in the manner that the judge considers just.*

[3] Insofar as the offending conduct the subject of the charge itself is concerned, it involved the following: the appellant attended the complaint's address on 22 May 2022 and bashed on her security door shouting, "Get out and fix this and pay my money" referring to a $30 debt. The complainant responded, "I've already paid your money". The appellant threatened to smash the complainant's car before throwing

[1] *House v The King* 1936 55 CLR 499.

the complainant's pot plant or plants over a veranda railing, I assume. The complainant asked the appellant to leave and reiterated that she had already paid her debt. The appellant then punched the closest glass window causing the windowpane to smash. I understand that was more than just one blow. The appellant reached into the complainant's window and then pulled on the curtains. She threatened to smash every window in the complainant's car, but ultimately walked away.

[4] No information was placed before the Court as to the cost of replacing that damaged pane of glass. Insofar as the appellant's antecedents are concerned, she is 44 years of age. She has a criminal history that dates back approximately 19 years. She has been convicted of what has been estimated as approximately 50 offences during that time. The history comprises, predominantly, dishonesty, property, and drug-related offences, but I note there are many convictions as well against the *Bail Act*. She has been the beneficiary of a variety of sentencing options including fines, an Intensive Correction Order, and two terms of imprisonment; both of which had immediate parole release dates. She has one prior conviction for the offence of wilful damage for which she was sentenced on the 24th of April 2018. At that time, though, she was convicted of 24 separate offences and received a head sentence of nine months imprisonment with an immediate parole release date. That sentence was attached to the charge of wilful damage. As I have indicated to the legal representatives, I infer that that was a sentence imposed to reflect the full criminality of all of the offending conduct and therefore is not indicative of the seriousness of the charge of wilful damage in and of itself.

[5] The appeal is opposed.

[6] The appellant's principal argument is that the learned magistrate placed too much weight on her criminal history resulting in an excessive sentence. It is a well-established principle of sentencing that an offender's criminal history cannot be given so much weight that a penalty imposed is disproportionate to the offence itself. In that regard I rely upon *Veen v R* no 2 [1988] 164 CLR 465.

[7] I note that no comparable decisions were placed before the learned magistrate, nor have any been placed before this Court. Notwithstanding that fact, however, a sentence of six months imprisonment requiring two months to be served for the breaking of a single pane of glass is demonstrably, strikingly and unambiguously

excessive and disproportionate to the offence itself. It would appear that the decision to impose such a heavy sentence was heavily influenced by the appellant's criminal history when one reads the transcript of the proceedings below. It follows that I accept that the learned magistrate erred in the sentencing discretion and that the sentence ought be set aside and the appellant sentenced afresh.

[8] It also follows that I need not, therefore, consider the other particulars of the ground of appeal relied upon by the appellant. The appellant has spent 36 days in custody since the date of sentence. Her legal representative has submitted that I should take that period of time into account, but not declare it and order that she pay a fine or that I make a community-based order. It is submitted on behalf of the appellant that the offending conduct is one which should not have resulted in a term of imprisonment being imposed. As I indicated during the course of submissions, whilst I accept that the sentence imposed was excessive, I do not necessarily agree that a term of imprisonment, albeit one that might have ordinarily been fully suspended, would not have been appropriate in the circumstances. There are aggravating features to the offending conduct. They being her criminal history which demonstrates a preparedness on her part to commit offences notwithstanding that she has reduced the rate of her offending conduct in recent times. Secondly, her criminal history demonstrates that the deterrent and rehabilitative aspects of previous sentences have failed to have affect. The next point is that the offending conduct the subject of this appeal occurred at the complainant's home and thus breached the sense of security of that person. The fourth point is the damage was occasioned in the context of the appellant behaving aggressively and threatening damage to property. And the last point is the damage was occasioned by more than one blow to the pane of glass; it was not just a single striking out. Taking all of those matters into account together with her antecedents and the nature of the offending conduct, and the fact, predominantly and importantly, that she has spent 36 days in custody, in my view, the appropriate sentence would be to impose a sentence of imprisonment but to order that the appellant be released immediately.

[9] The order of the Court is as follows:

1. The appeal is allowed.

2. The sentence imposed on 20 June 2022 is set aside.

3. The appellant is sentenced to two-months imprisonment. I declare that the appellant has served – well, I note that the appellant has served 36 days imprisonment from the 20th June 2022 to the 26th of July 2022 and I declare that to be time served under the sentence that I have just imposed. I order that that term of imprisonment be suspended immediately and the operational period during which the defendant must not commit any other offence potentially punishable by imprisonment will be one of two months.

[10] So, Ms West, you will be released today. Do you understand?

[11] DEFENDANT: Yes, your Honour. Thank you.

[12] HIS HONOUR: But you will have the balance of that sentence – so that is about three weeks – hanging over your head for two months.

[13] DEFENDANT: Yes, your Honour.

[14] HIS HONOUR: If you commit any other offence during that two-month period of time for which you can be sentenced to jail – it doesn't matter whether you are sentenced to jail or not, but if it's something that you can go to jail for, you will be breaching the order that I've just made. All that will happen is that you will be brought back to this Court and at that time you will have to try and show cause why it would be unjust to require you to serve the remaining three weeks. With your history you would have tremendous difficulties in that regard so it might very much in your best interests not to commit any more offences.

[15] DEFENDANT: Yes, your Honour.

[16] HIS HONOUR: All right. Anything else?

[17] MS MANN: No, your Honour. Thank you.

[18] HIS HONOUR: Thank you. All right. Adjourn the Court, please.