# Convictions and the Penalties and Sentence Act QLD

*R v Briese*; ex parte Attorney-General (1988) 1 Qd R 487

*R v Brown*; ex parte Attorney-General (1994) 2 Qd R 182

*R v Bain* (1997) QCA 035

*R v Pahoff* (2002) QCA 525

*R v Cay, Gersch & Schell*; ex parte Attorney-General (Qld) (2005) QCA 467

*R v Ndizeye* (2006) QCA 537

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**R v ZB** [2021] QCA 9

[10] A sentencing judge must consider the potential benefits and detriments to the community of adopting either course. That is what the opposing factors stated in s 12(2) of the Penalties and Sentences Act require. The nature of the offence might itself preclude a decision not to record a conviction. It is for this reason, for example, that the Act provides that a conviction must be recorded in all cases in which a sentence of imprisonment is imposed. This must be so because in any case in which an offender is sentenced to imprisonment the offence must have been of such a nature that not recording a conviction cannot sensibly be in contemplation. However, as is implied by the factors that are identified in s 12(2)(b) and (c), the offender's subjective circumstances so far as they relate to the offender's future prospects are also significant matters. They raise for consideration whether the promise of future rehabilitation calls for and justifies affording the offender the advantages that flow from not recording a conviction. To put it another way, the question is whether the community will be better served by not placing the obstacles created by a recorded conviction in the path of the offender towards rehabilitation. The issue is not one of tenderness to the offender.

In *Briese* the majority of the members of the Court of Appeal said the following with respect to the issue of a concealment of character that might result from the non-recording of a conviction:

> *"For present purposes it is enough to note that the making of an order under s 12 has considerable ramifications of a public nature, and courts need to be aware of this potential effect. In essence a provision of this kind gives an offender a right to conceal the truth, and it might be said, to lie about what has happened in a criminal court.*
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> *On the other hand the beneficial nature of such an order to the offender needs to be kept in view. It is reasonable to think that this power has been given to the courts because it has been realised some social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation, and it may be thought to be a reasonable tool that has been given to the courts to avoid undue oppression."*

This case is often used for the situation where the nature of the offence tends towards a conviction being recorded:

- Whether violence was used and if so to what extent
- Whether there was exploitation or abuse of trust
- The extent of economic loss to the victim
- The extent to which the circumstances of the offence suggest a propensity to offend or a risk that if given an opportunity, the offender may re-offend
- That prejudice may result in the offender being continually punished in the future in a way not commensurate with the punishment which is just for the offending. It might also stand in the way of rehabilitation, particularly by making it difficult for an offender to obtain employment

In *Brown* (supra, at page 185) Macrossan CJ referred to the proper approach to an exercise of this discretion:

> *"Where the recording of a conviction is not compelled by the sentencing legislation, all relevant circumstances must be taken into account by the sentencing court. The opening words of s 12(2) of the Act say so and then there follows certain specified matters which are not exhaustive of all relevant circumstances. In my opinion nothing justifies granting a general predominance to one of those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than other, may have claimed a greater weight."*

The discretion as to whether or not to record a conviction is not constrained by the matters set out in sub-paragraph (2) of section 12 and nor is any one matter required to be given more weight than any other, at 185 per Macrossan CJ and 193 per Lee J.

In *Cay, Gersch & Schell* (supra, at paragraphs 43 to 45) Keane JA referred to s 12(2)(c) (ii) in respect of the impact that recording a conviction would have on the offender's chances of finding employment:

*"[43] One complaint that is advanced by the appellant is that there was no specific identification of any employment option open to any of the respondents which might be hampered by the recording of the conviction. But the existence of a criminal record is, as a general rule, likely to impair a person's employment prospects, and the sound exercise of the discretion conferred by s 12 of the Act has never been said to require the identification of specific employment opportunities which will be lost to an offender if a conviction is recorded. While a specific employment opportunity or opportunities should usually be identified if the discretion is to be exercised in favour of an offender, it is not an essential requirement. Such a strict requirement would not, in my respectful opinion, sit well with the discretionary nature of the decision to be made under s 12, nor would the express reference in s 12(2)(c) to "the impact that recording a conviction will have on the offender's* ***chances of finding employment****" (emphasis added). In this latter regard s 12(2)(c) does not refer to the offender's prospects of obtaining employment with a particular employer or even in a particular field of endeavour.*

*[44] In R v Seiler the applicant had pleaded guilty to six counts of burglary and stealing as well as six counts of fraud. He was sentenced to perform community service, placed on probation and convictions were recorded. The applicant sought leave to appeal against the recording of the convictions. White J, with whom McPherson J A and Wilson J agreed concluded that the order to record the convictions should be set aside. In the course of considering the matters contained in s 12(2) of the Act, her Honour observed that:*

'No evidence was offered to the sentencing court about the impact that recording a conviction would have on the applicant's … chance of finding employment but it might be presumed with some confidence that the revelation could only have a negative impact upon his employability.'

*[45] The point to be made here is that the very nature of some offences means that the recording of a conviction will inevitably damage an offender's future employment prospects and, therefore, his or her prospects of rehabilitation. It is for this reason that, for example, a court might be quicker to record a conviction for offences that might only be relevant to certain employers, such as dangerous driving, than for offences that will concern all potential employers, such as fraud or stealing as a servant. Armed robbery, with its connotations of personal violence, falls squarely into the latter category. Of course, it may be accepted that*

*simply to point to a possible detrimental impact on future employment prospects will usually be insufficient, of itself, to warrant the positive exercise of the discretion to order that a conviction should not be recorded."*

*MacKenzie J also referred to the impact that recording a conviction might have on an offender's chances of finding employment:*

*"[74] Section 12(2)(c) speaks of the impact a conviction 'will' have on the offender's economic or social well-being or chances of finding employment. This involves an element of predicting the future. Ordinarily the word 'will' in that context would imply that at least it must be able to be demonstrated with a reasonable degree of confidence that those elements of an offender's life would be impacted on by the recording of a conviction. The notion of impact on the offender's 'chances of finding employment' is another way of describing the impact of a conviction on the opportunity to find employment in the future or the potentiality of finding employment in the future.*

*[75] In cases involving young offenders, there is often uncertainty about their future direction in life. Perhaps, because of this, the concept may, in practice, often be less rigidly applied than in the case of a person whose lifestyle and probable employment opportunities are more predictable."*

*The Chief Justice in Cay, Gersch & Schell (at paragraph 8) also referred to this consideration in the non-recording of a conviction in the following terms:*

*"[8] Prudence dictates that were this issue is to arise, counsel should properly inform the court of the offender's interests in relation to employment, and his relevant educational qualifications and past work experience, etc, so that a conclusion may be drawn as to the fields of endeavour realistically open to him; and provide a proper foundation for any contention a conviction would foreclose or jeopardise particular avenues of employment. Compare R v Fullalove (1993) 68 A Crim R 486, 492."*

*"[13] Mr Ndizeye was born in Rwanda and come to this country in 1998 with his family. He became a citizen in 1999 … he learned English and completed grade 12 … and persisted with his education, succeeding to the extent of obtaining a Diploma of Business Information Systems in December 2002. At the time of sentence he was studying for the degree of Bachelor of Business at the Queensland University of Technology.*

*[14] His ambition, described to the learned sentencing judge, was to obtain employment with the Department of Foreign Affairs and Trade and he had worked with both the Multicultural Development Association Inc and the Department of Immigration. His counsel submitted to the sentencing Judge that it is likely his employment*

*opportunities, given his skill with languages and the qualifications he is pursuing would be in a Commonwealth government department and that a recording of a conviction would potentially damage his future employment prospects. No evidence was lead in support of that submission, although on the information given to the judge it appears realistic.*

*…*

*[16] The learned sentencing Judge certainly referred to the nature of the offence and to Mr Ndizeye's age and character, but did not specifically refer to the impact that recording a conviction would have on Mr Ndizeye's economic or social well being or his chances of finding employment. Submissions had been made on the latter topic in terms of the impact that a conviction 'may' have, and the submission was also made that recording a conviction "would potentially damage his future employment prospects". No actual evidence or information was put before the learned judge other than that general submission.*

*[17] This court has not yet specified the extent to which information or evidence should be put before sentencing Judge to raise for consideration the matters in s 12(2)(c)(i) and (ii). In* R v Bain *[1997] QCA 305, the judgment of the Court included the statement:*

'There was, and is, no evidence that recording a conviction would have any impact on her economic or social wellbeing or her chances of finding employment. A bare possibility that a conviction may affect her prospects is insufficient.'

His Honour then referred to the judgments of the Chief Justice, Keane J A and MacKenzie J in *Cay, Gersch & Schell*, to which I have already referred. His Honour's judgment continued in the following terms:

*[20] The currently envisaged employment opportunities for Mr Ndizeye seemed to be with the Commonwealth government and with a limited number of departments. More could have been done by his legal representatives on his sentence to put evidence or information before*

*the court as to the effect that recording a conviction would have on his chances of finding his employment with the Commonwealth generally as an employer, or in the Departments of Immigration and Multicultural Affairs or of Foreign Affairs and Trade. Because it was probable on the information given to the judge that a conviction for making a false statutory declaration would adversely affect Ndizeye's chances of getting employment with those departments, I respectfully consider that the learned sentencing Judge erred in not having regard to that matter when considering whether or not to record a conviction. Even on the limited submissions made it was a matter to which the judge was obliged to have regard.*

*[21] It follows that that part of the sentencing discretion miscarried, and this Court should re-exercise the discretion …"*

**Convictions and Traffic History – Recording convictions on traffic history**

*Parker v Commissioner of Police* [2016] QDC 354:

was convicted of the offence of dangerous operation of a vehicle in the Magistrates Court at Caloundra and was fined $1,800, disqualified from holding or obtaining a driver licence for six months and a conviction was recorded. On appeal, the recording of a conviction was set aside. In that matter, the Toyota van was travelling on the Bruce Highway when it left the road and crashed into a culvert. There were three occupants in the vehicle which seated only two people. The appellant told police the crash occurred when the appellant and the front passenger attempted to swap seats whilst the vehicle was still in motion. A passenger was thrown about the cabin and suffered injury. The appellant was 34 years old with a criminal history with no convictions recorded and a dated traffic history

There is no distinction between traffic records and criminal records, where a conviction is recorded, regardless of the title of the document it is taken to a conviction recorded at paragraph 31. In *Parker,* the appeal regarding the conviction for dangerous operation was successfully appealed and no conviction was recorded.

*Wilson v The Commissioner of Police* [2022] QDC 15

The charges arise from a random breath test and roadside police search of the defendant's car at about 7.00 pm on 30 of July 2021. The breath test resulted in a reading of 0.151 grams of alcohol in 210 litres of breath.

**Errors of law when sentencing, what could amount to an appealable error**

*R v WAJ* [2010] QCA 87: A failure to engage with the sentencing provisions:

[15] In R v B [1995] QCA 231 the Court considered the similar provision then contained in s 124(1) of the Act. In that case both the existence and the exercise of the discretion were not the subject of submissions before the sentencing judge and the sentencing judge did not refer to those matters. Indeed that sentencing judge did not even order that convictions be recorded. The entry on the indictment was apparently made by a court officer in circumstances where the judge had not even adverted to it. McPherson JA and de Jersey J (as the Chief Justice then was) concluded that there was no basis for thinking that the sentencing judge turned his mind to the question at all, so that the discretion miscarried. In this case, the sentencing judge in terms ordered that convictions be recorded for all offences. It seems most unlikely that her Honour was unaware either of the prima facie position that convictions are not recorded for offences committed by children or of the relevant factors which enliven the discretion to record convictions. Nevertheless, in the absence of any sentencing remarks expressly directed to the discretion or to the relevant provisions it is appropriate to proceed on the footing that that the discretion miscarried and must be exercised afresh

R v D [1996] 1 Qd R 363 – Where the court sentences for charges that the defendant has not been convicted that amount to a separate offence.

Where the facts contain other offences, more serious than the once charged or circumstances of aggravation / Uncharged Acts.

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R v D[1996] 1 Qd R 363

The Court, after reviewing the laws of the country said where following the heading "conclusion":

> Sentencing judges ought experience little difficulty in practice if there is unqualified adherence to the fundamental principles which emerge from the decisions of the High Court in *De Simoni* and subsequent cases. We will try to summarise those principles in a manner which should be adequate for most purposes.
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> 1. Subject to the qualifications which follow:
>
> (a) a sentencing judge should take account of all the circumstances of the offence of which the person to be sentenced has been convicted, either on a plea of guilty or after a trial, whether those circumstances increase or decrease the culpability of the offender;
>
> (b) common sense and fairness determine what acts, omissions and matters constitute the offence and the attendant circumstances for sentencing purposes (cp. *Merriman* at 593, *R. v. T.* at 455); and
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> (c) an act, omission, matter or circumstance within (b) which might itself technically constitute a separate offence is not, for that reason, necessarily excluded from consideration.
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> 2. An act, omission, matter or circumstance which it would be permissible otherwise to take into account **may not be taken into account** if the circumstances would then establish:
>
> (a) a separate offence which consisted of, or included, conduct which did not form part of the offence of which the person to be sentenced has been convicted;
>
> (b) a more serious offence than the offence of which the person to be sentenced has been convicted; or
>
> (c) a "circumstance of aggravation" (Code, s. 1) of which the person to be sentenced has not been convicted; i.e., a circumstance which increases the maximum penalty to which that person is exposed.

3.An act, omission, matter or circumstance which may not be taken into account may not be considered for any purpose, either to increase the404penalty or deny leniency; and this restriction is not to be circumvented by reference to considerations which are immaterial unless used to increase penalty or deny leniency, e.g., "context" or the "relationship" between the victim and offender, or to establish, for example, the offender's "past conduct", "character", "reputation", or that the offence was not an "isolated incident", etc.

To withhold leniency by reference to offences of which a person being sentenced has not been convicted is, in our opinion, to punish that person for those offences as surely as if additional punishment were imposed by reference to those offences. A person who has only been convicted of an isolated offence is entitled to be punished as for an isolated offence, not on the basis that the only offence of which he or she has been convicted was not isolated but part of a pattern of conduct with which he or she has not been charged and of which he or she has not been convicted.

**Use of *R v D* in subsequent cases**

"A sentencing judge is required to take into account all of the circumstances of the offence. Common sense and fairness determine what those circumstances are. An act, which may technically constitute an offence, is not excluded from consideration. Such an act cannot be taken into account if the conduct does not form part of the offence of which the person to be sentenced has been convicted." - *Tobin v The Commissioner of Police* [2019] QDC 52, per Loury QC DCJ.

A plea of guilty to drug charges including importation of sassafrad oil, he had obtained ingredients necessary for his operation from Western Australia, France and, potentially, Sri Lanka. Where the facts of other conduct did amount to the facts and circumstances of the offences for which the offender was being sentenced at it went the commercial nature if the production of the drugs. *R v Cromwell* [2008] QCA 191 per Keane JA.

*Goltz v Commissioner of Police* [2021] QDC 220. Stealing offences, where one of the offences included an assaulted/threatened a 16 year old shop attendant. DC found the sentencing magistrate took into account the uncharged act.

*R v Pearce* [2020] QSC 114, Trial division, Davis J sitting - It is well-established that the Crown cannot seek to have an offender sentenced on the facts established by evidence if what is established is an offence more serious than the one to which the offender has been convicted, or is an offence of which the offender has not been convicted. (Citing *R v D*) Beyond that principle, the task of ascertaining what facts can, or cannot be taken, as a matter of law, into account on any particular sentence can be difficult. (Citing *De Simoni*).

*R v Armitage; R v Armitage; R v Dean* [2021] QCA 185, where the facts tended towards a charge of torture, convicted of murder after a trial, conviction for murder quashed and re-sentenced to manslaughter. Having regard to these principles (*R v D*), it may be accepted that the particulars of torture may constitute a relevant circumstance of the manslaughter by reason of the fact that those acts and omissions inform how manslaughter was a probable consequence of the prosecution of the common purpose.

*R v Boney; Ex parte Attorney-General* (Qld) [1986] 1 Qd R 190. The primary judge, sentencing for manslaughter, heard evidence of the facts surrounding the crime which included not only the killing by asphyxiation of an 85 year old person, but also that the defendant had assaulted and had sexual intercourse with the victim prior to killing her. Both Macrossan J and McPherson J (as their Honours then were) held that, in imposing sentence, it was impermissible to give consideration to the fact that the defendant may have raped the victim. Per Macrossan J "If in the circumstances of this case it is thought that the basis upon which the prisoner had to be sentenced was an artificially restricted one, then this is so simply because rape was not charged and a plea to a lesser charge than murder was accepted."