DISTRICT COURT OF QUEENSLAND

CITATION:	*EH v QPS; GS v QPS* [2020] QDC 205
PARTIES:	**In Appeal No. 36 of 2020:** **EH** (appellant) v **QUEENSLAND POLICE SERVICE** (respondent) **In Appeal No. 37 of 2020:** **GS** (appellant) v **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	36/20; 37/20
DIVISION:	Criminal
PROCEEDING:	Appeal under s 222 *Justices Act 1886*
ORIGINATING COURT:	Magistrates Court, Bowen
DELIVERED ON:	28 August 2020
DELIVERED AT:	Cairns
HEARING DATE:	6 August 2020
JUDGE:	Fantin DCJ
ORDER:	**1. The appeals are allowed.** **2. The sentences imposed on each of the appellants by the Acting Magistrate on 12 February 2020 are set aside.** **3. The appellants are each resentenced as follows:** **(a) A single fine of $1000 is imposed for all the offences:** **i. obstructing a railway, contrary to section 477 of the *Criminal Code 1899*;**

ii. trespassing on a railway, contrary to section 257 of the *Transport Infrastructure Act 1994*;

iii. using a dangerous attachment device to interfere with transport infrastructure, contrary to section 14C(1) of the *Summary Offences Act 2005*; and

iv. contravening a direction or requirement, contrary to section 791(2) of the *Police Powers and Responsibilities Act 2000*,

to be referred to the State Penalties Enforcement Register.

(b) No convictions are recorded.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellants were each charged with offences of obstructing a railway, trespassing on a railway, using a dangerous attachment device to interfere with transport infrastructure, and contravening a direction or requirement – where the appellants pleaded guilty to all charges and were sentenced to three months imprisonment, wholly suspended for two years for the use of a dangerous attachment device – where appellants appeal against the sentence of imprisonment pursuant to section 222 of the *Justices Act 1886* (Qld) on the grounds that it is manifestly excessive – where the Crown concedes that sentence of imprisonment was manifestly excessive – where the appellants are resentenced – where the dangerous attachment device offence is a new offence – relevance of motive on sentence

Legislation

Criminal Code Act 1899 s 477
Transport Infrastructure Act 1994 s 257
Summary Offences Act 2005 s 14B, s 14C
Police Powers and Responsibilities Act 2000 s 791(2)
Justices Act 1886 s 222
Penalties and Sentences Act 1992 s 9, s 12, s 48,
Summary Offences and Other Legislation Amendment Act 2019
Summary Offences and Other Legislation Amendment Bill 2019

Cases
R v Muirhead; R v Muirhead; Ex parte Attorney-General (Qld) [2019] QCA 244
R v Pham (2015) 256 CLR 550
Hili v The Queen (2010) 242 CLR 520
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507
Avery & Ors v Queensland Police Service [2019] QDC 2
Nolin v Commissioner of Police [2019] QDC 171
Attorney-General for the State of Queensland v Sri & Ors [2020] QSC 246
Commissioner of Police, New South Wales v Gibson [2020] NSWSC 953
Cuadrilla Bowland Ltd & Ors v Lawrie & Ors [2020] EWCA Civ 9
R v Roberts [2018] EWCA Crim 2739; [2019] 1 WLR 2577
R v Jones (Margaret) [2006] UKHL 16; [2007] 1 AC 136
R v Swan [2006] NSWCCA 47

COUNSEL: R O'Gorman for the appellants

SOLICITORS: The Environmental Defender's Officer for the appellants

Queensland Police Service, Legal Division for the respondent (M O'Brien)

[1] The appellants are young people concerned about the impacts of climate change. They were involved with an activist group opposing new coal mines. During the catastrophic bushfires last summer, the appellants travelled from Victoria to Queensland to protest the proposed expansion of coal mines in the Bowen basin.

[2] Early in the morning of 7 January 2020, they went with about 20 others to a railway line on a private road north of Bowen. The line provides access to the Abbott Point bulk coal loading facility. There the appellants attached themselves to a device known as a "dragon's den".

[3] They each sat either side of a 44 gallon drum filled with concrete. They each secured their arm inside a tubular steel attachment device, which had a connection pin located inside the drum. Once fitted, the device could only be removed in two ways: by them voluntarily releasing the clip, or the device being cut from them. Cutting them from the device carried a risk of injury to the appellants.

[4] The appellants and the device were within one metre of the railway line. Their presence stopped the operations of that railway line until they were removed. Police arrived, asked the appellants to remove themselves from the device, and directed them to cease trespassing on, and obstructing, the railway. They declined to do so. Police eventually released them from the device. They were taken to the watchhouse, charged and released on bail.

[5] From that incident, the appellants were charged with four offences:

1. obstructing a railway, contrary to section 477 of the *Criminal Code Act 1899* (Qld) ('the Code');

2. trespassing on a railway, contrary to section 257 of the *Transport Infrastructure Act 1994* (Qld);

3. using a *dangerous attachment device* to interfere with transport infrastructure, contrary to section 14C(1) of the *Summary Offences Act 2005* (Qld); and

4. contravening a direction or requirement, contrary to section 791(2) of the *Police Powers and Responsibilities Act 2000* (Qld).

[6] The maximum penalty for each of the most serious offences (obstructing a railway and using a *dangerous attachment device*) was 50 penalty units (which equated to a fine was $6,672.50) or two years' imprisonment. The maximum penalty for the other two offences was 40 penalty units.

[7] The *dangerous attachment device* offence was a new offence introduced in late 2019. The parties informed me that this is the first appellate decision on the offence.

[8] The appellants were 21 and 23 years old, with no criminal histories and favourable antecedents. They pleaded guilty at the first mention. For the offence of using a *dangerous attachment device*, the Acting Magistrate convicted and sentenced them to three months imprisonment, wholly suspended for two years. For the other offences, they were convicted and no further penalty imposed. Convictions were not recorded for the other offences.

[9] The appellants appeal against the sentence of imprisonment pursuant to section 222 of the *Justices Act 1886* (Qld) on the ground that it is manifestly excessive.

[10] The Crown concedes that the sentence imposed was manifestly excessive.

[11] On 6 August 2020, I made orders allowing the appeal and resentencing the appellants. These are my reasons for that decision.

Principles

[12] The principles applicable on such an appeal are well settled and it is unnecessary to restate them in detail. They were recently summarised in *R v Muirhead; R v Muirhead; Ex parte Attorney-General (Qld)* [2019] QCA 244 at [63]-[65] (Buss AJA, Fraser and McMurdo JJA agreeing).

[13] In an appeal on the ground of manifest excess, the Court must consider whether the sentence fell outside the range of the proper sentencing discretion. Appellate intervention on the ground of manifest excess is not warranted unless having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the court is driven to conclude that there must have been some misapplication of principle. The result of the impugned sentence must be unreasonable or plainly unjust, and the court must infer that in some way there has been a failure to properly exercise the discretion which the law reposed in the Court at first instance.[1]

[1] See *R v Pham* (2015) 256 CLR 550 and *Hili v The Queen* (2010) 242 CLR 520.

[14] It is not sufficient that the sentence is severe or that a different judge might have imposed a lesser sentence. That is because there is no one right penalty. In any case, there is always a range of permissible sentences. In order to succeed on appeal, the appellant must demonstrate that the sentence imposed was beyond the permissible range.

The hearing in the Magistrates Court

[15] In the Magistrates Court, the police prosecutor submitted that the appropriate penalty was a good behaviour bond for a period of 12 months with a recognizance in the amount of $1000. He said "given the prevalence of this type of offending, your Honour, it appears that fines are not acting as a sufficient deterrent."

[16] The Acting Magistrate interrupted him, saying:

> "Yes, look, I can probably say now that it won't be a good behaviour bond. In my view, it's far too serious for that. Imprisonment's not – not out of range, in my view, but a good behaviour bond, in my view, is just not an appropriate penalty for this sort of behaviour. Two of those offences carry a maximum penalty of two years imprisonment. And there's obviously a degree of planning involved. **So I can say now, Sergeant, it won't be a good behaviour bond. And that's – Mr Bakewell, if you make those submissions that won't be the case either**." [emphasis added].

[17] In ruling out the possibility of a bond before hearing any further submissions including defence submissions, the Acting Magistrate erred by unduly fettering his sentencing discretion. That was an error. In addition, a fair-minded lay observer might reasonably have apprehended from those remarks that the Acting Magistrate might not bring an impartial mind to the resolution of the question to be decided,[2] because he had prejudged the matter. The remarks showed more than a mere disposition to a particular view. They suggested that the Acting Magistrate's mind was not 'open to persuasion'[3] on this penalty option and that he had formed a conclusion incapable of alteration, whatever evidence or arguments may be presented by the defence. A reasonable apprehension of prejudgment is a denial of procedural fairness, and an error of law.

[18] The police prosecutor then submitted that "**these sorts of offences** causes [sic] extreme inconvenience and disruption to the Aurizon network and their course of business" [emphasis added]. There was no evidence of any kind about the extent to which the particular circumstances of this offence had caused inconvenience and disruption to the rail network or to Aurizon's course of business. Nor did the prosecutor make any submissions about that issue other than to say that "the defendants' presence on the rail crossing caused all rail crossing [sic] caused all operations of that line to be halted until she was removed."

[19] There was no evidence or submission quantifying the rail movements affected. In the character references tendered on the appellants' behalf, there was a reference to the appellants' actions blocking a coal train destined for Abbott Point.

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[2] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] (Gleeson CJ)

[3] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [71]-[72] (Gleeson CJ and Gummow J)

[20] There was no evidence of "extreme inconvenience and disruption" to Aurizon's business or to anyone else, including members of the public. There was no evidence of, or submission about, harm or loss suffered (financial or otherwise).

[21] Without a proper evidentiary foundation or agreed facts, the prosecutor's submission about "these sorts of offences" causing "extreme inconvenience and disruption" incorrectly characterised the objective gravity of the offending.

[22] The police prosecutor also submitted that the offending was "prevalent". But no information was provided on hearing to support that submission, and no evidence was adduced of the prevalence of the offending.

[23] The Acting Magistrate did not refer in his sentencing remarks to the prevalence of the offences. Therefore I am not persuaded that he sentenced the appellants on the basis of an increasing prevalence of the offences in the Bowen area. Indeed, he noted that the offence for the *dangerous attachment device* was a new charge introduced in 2019 and that, so far as he was aware, this was the first time a court had dealt with the offence.

[24] With respect to the appellants' antecedents, neither had any criminal history in any Australian jurisdiction. This was the first time they had taken any action of this kind.

[25] EH was 21 years old and lived in Melbourne. She had been employed part-time for the Australian Youth Climate Coalition for two years and was studying full time at the University of Melbourne. She had had significant community involvement including volunteering at a food cooperative and a homeless persons' shelter. She was motivated to protest by, and the offending occurred in the context of, the bushfires in south eastern Australia.

[26] GS was 23 years of age, and also lived in Melbourne. She had completed a Certificate IV in horticulture and also did significant volunteer work in the community including training and mentoring others in surf lifesaving.

[27] Character references were tendered which spoke of their good character, family support, and commitment and contributions to their communities, the environment and "climate justice issues".

[28] One referee spoke of EH's remorse for her offending and her intention for her future campaigning actions to be lawful. One referee said that GS had "grown and matured" as a result of being charged and that she now considered that "protests should be undertaken within the constraints of Australian laws".

[29] The defence solicitor emphasised that imprisonment was a sentence of last resort for these offences. He submitted that a probation order was inappropriate, because the appellants lived in Victoria and would not be able to comply with the conditions of such an order unless they relocated to Queensland.

[30] He emphasised that they had pleaded guilty at the earliest opportunity and submitted that a modest fine of $1,000 to $2,000 was the appropriate penalty. The appellants' financial circumstances were such that neither had the capacity to pay a significant fine. EH had a very modest income from a part time job. GS was on Newstart allowance.

[31] The defence solicitor referred the Acting Magistrate to the decisions of this court in *Avery & Ors v Queensland Police Service*[4] and *Nolin v Commissioner of Police*.[5] He submitted that the appellants' offending was more similar to that in *Nolin*, notwithstanding that the *dangerous attachment device* offence had only commenced after those decisions.

[32] The defence solicitor submitted that convictions should not be recorded. He relied upon the appellants' lack of criminal history, their early pleas, the burden that a conviction would have on them as young people, and the significant implications for their careers or their capacity to travel.

[33] The Acting Magistrate said he intended to adjourn the sentence to the following afternoon, to check whether the *dangerous attachment device* offence had been dealt with in any other court and to give consideration to the penalty "rather than rushing into it". He said that imprisonment was within range.

[34] In response, the defence solicitor emphasised that imprisonment was reserved for "the worst-case scenarios of such offending". He pointed to the absence of significant aggravating features. There was no suggestion that the appellants were offensive in their behaviour. He described the offending as an act of civil disobedience or a political act, not based on any malicious intent. He submitted that the appellants' motivation should be considered in terms of the sentencing.

[35] The defence solicitor asked the Acting Magistrate to consider imposing sentence the same day, because the appellants had flown from Melbourne and driven to Bowen for the sentencing hearing, and had a return flight booked from Cairns the next day.

[36] The Acting Magistrate declined to do so. He considered whether to remand the appellants in custody overnight because he was considering a term of imprisonment. Ultimately he decided to enlarge their bail until the following day.

The Acting Magistrate's decision

[37] The appellants were sentenced the following afternoon. In his sentencing remarks, the Acting Magistrate expressly took into account:

1. their young ages, early pleas of guilty and lack of criminal history;
2. provisions of the *Penalties and Sentences Act 1992* (Qld);
3. the facts of the offending;
4. that the *dangerous attachment device* offence was the most serious charge, and its maximum penalty; and
5. that the rail operation had to be halted until the defendants were removed.

[38] He correctly described the offences as "deliberate and involved a fairly high degree of planning", rather than being a spur of the moment decision.

[39] He took into account that the motivation for the offending was protest action against the development of a proposed coal mine. He noted that persons in Queensland have a right to lawful protest but went on to say:

> "Now, the Penalties and Sentences Act … does not provide that a person who takes part in unlawful protest action on moral or social grounds should receive more lenient treatment

[4] [2019] QDC 21 ('*Avery*').
[5] [2019] QDC 171 ('*Nolin*').

> than other offenders, that is, it's not a factor under that legislation which should be taken into account in reduction of penalty. So the reality is: the persons who commit these offences of the type now before the court should expect to suffer the same consequences for their unlawful behaviour to the same degree as any other member of the community without any reduction in penalty based on their behaviour being on the basis of some social or moral obligation to behave as they did."

I have considered this issue in more detail below.

[40] The Acting Magistrate described the offending as "blatant criminal behaviour intentionally designed to disrupt a lawful business operation, namely, Aurizon and in doing so they exposed both themselves **and others** to risk of injury and **damage to property**" [emphasis added].

[41] It was accepted that the offending disrupted operation of the rail line and that the appellants were exposed to risk of injury in the removal of the device because of the use of tools to cut them free. But no party submitted, and there was no evidence of any kind, that any other person (including police or other first responders) was exposed to a risk of injury in this particular case. To the extent that the Acting Magistrate found that others were exposed to a risk of injury and that there was a risk of damage to property, there was no evidence or submission to support those findings. Those findings were not open. That constituted an error.

[42] The Acting Magistrate went on to find that train drivers were exposed to the potential danger of serious personal injury or death from a serious accident, including a train derailment. He referred to whether the operator had been telephoned and advised of the protest actions in advance, the possibility of a breakdown in communication and a train being on the line. There was no evidence at all of these matters, nor were any submissions made about them. Those findings were not open.

[43] The Acting Magistrate further found that because the appellants were part of a group of protesters, it was reasonable to assume that any fine imposed would not be paid by the appellants, and therefore would not act as a deterrent to them or others. There was no evidence of that, nor was any submission made to that effect. The finding was not open.

[44] The Acting Magistrate said that if a more severe penalty such as imprisonment or community service were imposed, the appellants and like-minded people might think twice before committing the offences. In my view, he elevated the relevance of general deterrence and denunciation above the other considerations on sentence including the objective gravity of the offending and the features personal to the appellants.

[45] The Acting Magistrate considered that only two options were appropriate: community service and imprisonment. Despite the earlier defence submission that the appellants could not comply with a community based order because of their residence interstate, the Acting Magistrate proposed a community service order of 100 hours. The defence solicitor informed the Acting Magistrate that the appellants could not agree to perform community service because they were not able to relocate to Queensland and did not have the financial means to do so.

[46] The Acting Magistrate noted that, community service having been offered and not accepted, he intended to impose a term of imprisonment. He sentenced each appellant

to three months' imprisonment wholly suspended for two years for the dangerous attachment device offence. That necessarily meant convictions were recorded.

Legislative context for the *dangerous attachment device* offence

[47] Section 14C of the *Summary Offences Act* 2005 states, relevantly*:*

> **"14C** Use of dangerous attachment device to disrupt lawful activities
>
> a. A person must not use a dangerous attachment device to unreasonably interfere with the ordinary operation of transport infrastructure, unless the person has a reasonable excuse.
>
> *Example of unreasonably interfering with transport infrastructure—*
> placing an obstacle, on a railway, that stops the passage of rolling stock
>
> *Penalty–*
> Maximum penalty—50 penalty units or 2 years imprisonment."

[48] *Dangerous attachment device* is defined in s 14B, relevantly:

> **"14B** What is a *dangerous attachment device*
>
> (1) An attachment device is a ***dangerous attachment device*** if it—
> (a) reasonably appears to be constructed or modified to cause injury to a person who attempts to interfere with the device; or
> (b) reasonably appears to be constructed or modified to cause injury to a person if another person interferes with the device; or
> (c) incorporates a dangerous substance or thing.
>
> (2) Also, a sleeping dragon, dragon's den, monopole and tripod are each a ***dangerous attachment device***.
>
> (3) An attachment device is a ***sleeping dragon*** if it incorporates—
> (a) an anchor point for a person to hold or to which a person's hand can be bound or locked; and
> (b) a casing that shields the person's hand, or the binding or lock, from being released by another person.
>
> *Example of a sleeping dragon—*
> two large steel pipes welded together at an angle with a thick pin fixed in the centre
>
> (4) An attachment device is a ***dragon's den*** if it—
> (a) incorporates 1 or more sleeping dragons or tubes large enough to pass a person's hand through; and
> (b) reinforces the casing of the sleeping dragon or tube by adding bulk and weight.
>
> *Example of a dragon's den—*
> a 44-gallon drum incorporating a sleeping dragon and otherwise filled with concrete

…

(7) To remove any doubt, it is declared that a device is a dangerous attachment device under this section regardless of whether—
  (a) persons using the device can release themselves from it; or
  (b) the device would automatically deactivate or release itself after a period of time; or
  (c) protective clothing or other shielding would prevent injury to any person.

(8) In this section—

attachment device see section 14A.

dangerous substance or thing, for a dangerous attachment device, means—
  (a) any thing likely to explode, when struck or compressed, causing injury to a person; or
  (b) any thing likely to cut a person's skin while a person is being extricated from the dangerous attachment device; or
  (c) any substance or thing that requires a person to wear protective clothing to safely handle, cut or break up the thing while a person is being extricated from the dangerous attachment device.

Example for paragraph (c)—
a pipe or casing made of asbestos

interfere, with a thing, includes to cut, damage, deactivate, move or release the thing.

protective clothing means clothing, eyewear or masks designed to protect the wearer from infection or injury caused by chemicals, electricity or heat.

support riggings, for a thing, means the cables, chains, ropes or other materials used to stabilise the thing in a particular position."

[49] These sections are part of Division 2A, entitled *Offence involving use of dangerous attachment devices*. Division 2A was inserted into the Act by the *Summary Offences and Other Legislation Amendment Act 2019* and commenced on 30 October 2019.

[50] The Explanatory Notes ('the EN') to the *Summary Offences and Other Legislation Amendment Bill 2019* ('the Bill') include the following statements:

"Protest activity has been used as a vehicle by many Australians to advocate for legal and social change. Peaceful assemblies allow interest groups to express their views to the wider public and, in particular, may allow the concerns of minorities to be voiced, heard and potentially acted upon. The right to peacefully assembly has been held as a defining characteristic of a democratic society as it encompasses a number of fundamental rights including the freedom of expression, the right of peaceful assembly and the freedom of association.

The right of peaceful assembly has long been recognised in international human rights law through Article 21 of the International Covenant on Civil and Political Rights. This right has been enshrined in Queensland through the *Peaceful Assembly Act 1992* (PAA) and is also acknowledged within the *Human Rights Act 2019* (HRA).

The PAA provides that a person has the right to assemble peacefully with others in a public place. This right is subject only to those necessary and reasonable restrictions required to ensure public safety, public order; or the protection of the rights and freedoms of other persons."

[51] The EN states that the Bill was introduced in response to protests against coal mining in regional communities such as the Bowen area and the Galilee basin, and protests about climate change in metropolitan areas.

[52] The EN notes that *dangerous attachment devices* are designed to prevent police from easily reaching either the connection pin or the rope, chains or handcuffs used to prevent the person from being safely removed from the device:

> "Safely extricating a person from these devices is difficult and dangerous and may require an assortment of tools … The use of such equipment or tools in such close vicinity to a person's body represents a real risk of injury. … Great care needs to be taken by attending police to avoid any injury to any person…. Alarmingly, some people have made use of attachment devices that have also been constructed or designed in such a way as to endanger themselves, emergency service workers and potentially members of the public.
>
> …
>
> These types of devices (dangerous attachment devices) represent a real risk of injury or death to a person, emergency service workers and the public as the incorrect disassembly or removal of these devices may lead to serious injuries, not only for the person attached to the device but anyone in the vicinity.
>
> As the health and safety of Queensland's first responders including police officers and Fire and Emergency Services personnel is paramount, all reasonable measures to mitigate the risks presented by dangerous attachment devices is considered appropriate.
>
> In addition to the potential risk of injury or loss of life that may result from the use of these dangerous attachment devices, the direct and indirect costs caused by persons who block major transport routes or impact upon vital infrastructure can have a major effect upon individual businesses and the community generally. For example, a person using an attachment device cost freight company Aurizon $1.3 million dollars in April this year, when that person delayed five coal trains at the Port of Brisbane for 14 hours. Similarly, traffic disruption to thousands of commuters as a result of protests held in the Brisbane CBD caused direct costs though delays in services, business deliveries etc. and social costs by adversely impacting on people's quality of life. Disruptions to transport infrastructure also hampers the ability of emergency services to provide support to the community.
>
> …
> The Bill introduces a range of measures to deter people from using dangerous attachment devices that endanger themselves, emergency services workers and members of the public and to assist police officers in minimising the disruption caused to the community through the employment of these devices."

Objective gravity of the offending

[53] Each case will turn upon its own facts. But it is clear that a number of the concerns that the legislation is directed towards were not present in the particular circumstances of this offending.

[54] The device in this case fell within the definition of a "dragon's den" in s 14B(4), and was therefore a *dangerous attachment device* as defined in s 14B(2). It was **not** alleged that the device in question was caught by other aspects of the definition in s 14B(1) which included a device that: reasonably appears to be constructed or modified to cause injury to a person who attempts to interfere with it (s 14B(1)(a)); or incorporates a dangerous substance or thing (s 14B(1)(c)). There was no evidence of those matters in this case.

[55] Obviously a device designed to injure a third party or which carries a real risk of doing so because it incorporates dangerous components, would render the objective gravity of the offending more serious. The offender would have a higher degree of moral culpability than in the present case where (on the information before the court) removal of the device presented a risk only to the offenders.

[56] Here there was no suggestion that the device was "booby-trapped" with materials that could injure someone who tried to cut the appellants free. There was no suggestion, or evidence, that the police or others were endangered. On the material before the court, the only risk of injury was to the appellants themselves.

[57] The appellants were engaging in protest on a railway line on a private road. There was no evidence of the extent of the obstruction of rail traffic. There was only the submission that use of the line was halted for the time taken to release the appellants. The appellants were found about 4:00am and taken to the police station about 9:00am.

[58] There was no submission about, or evidence of, any loss actually suffered, financial or otherwise, by the rail operator or anyone else.

[59] There was no suggestion that the rights of members of the public were burdened, interfered with or inconvenienced by the obstruction, nor was there any suggestion that members of the public were endangered.

[60] There was no evidence of violence or threat of violence.

[61] The fact that the appellants acted together rather than alone, and that their actions were deliberate and planned, committed in the knowledge that their commission would almost certainly lead to arrest and prosecution, were aggravating features.

[62] Notwithstanding those aggravating features, because of the matters referred to above, the objective gravity of the offending was at the lower end of the range for the particular offence.

Civil disobedience, and the relevance of political motivation

[63] There is no dispute that a significant number of people, including the appellants, have sincere and strongly held views that new coal mines ought not be approved by governments because of the impact of burning coal on carbon dioxide emissions and climate change. Those issues are global, rather than merely local. There was no dispute that the motive for the commission of the offences was to seek to persuade government to change its policy on these issues.

[64] One of EH's referees observed that "the chaotic energy of the nationwide bushfires and an accompanying sense of despair compelled [EH] to act in this extreme way".

[65] A referee for GS said that the appellant now agreed that protests should be undertaken with the constraints of Australian law and she was committed to alternative effective and legal means of expressing her concerns.

[66] It is also common ground that the appellants, like everyone else, have the right to express their views and to protest against an activity to which they object subject only to such restrictions as are prescribed by law and are necessary in a democratic society for (amongst other legitimate aims) the prevention of disorder or crime or the protection of the rights and freedoms of others.

[67] Recent decisions involving injunctive proceedings to restrain large scale protests in public areas[6] have recognised the public interest in free speech and the right of assembly in Australian democracy, which must be balanced against considerations of public health and inconvenience. Of course, the offending in this case involved trespass on private property rather than a public place.

[68] Sentencing for offences arising from protest activities has received relatively limited judicial and academic attention in Australia.[7] In *Avery* at [76] Lynham DCJ helpfully referred to some decisions from other Australian jurisdictions in which modest fines were imposed, as well as English decisions.

[69] In England, it is well established that the fact that acts of deliberate disobedience to the law were committed as part of a peaceful protest is a relevant factor in assessing culpability for the purpose of sentencing in a criminal case: most recently, *Cuadrilla Bowland Ltd & Ors v Lawrie & Ors* [2020] EWCA Civ 9 at paragraph 87 per Lord Justice Leggatt. He also said at paragraphs 97 and 98:

> "Civil disobedience may be defined as a public, non-violent, conscientious act contrary to law, done with the aim of bringing about a change in the law or policies of the government (or possibly, though this is controversial, of private organisations): see e.g. John Rawls, A Theory of Justice (1971) p.364. Where these conditions are met, such acts represent a form of political protest, both in the sense that they are guided by principles of justice or social good and in the sense that they are addressed to other members of the community or those who hold power within it. The public nature of the act in contrast to the actions of other law-breakers who generally seek to avoid detection is a demonstration of the protestor's sincerity and willingness to accept the legal consequences of their actions. It is also essential to characterising the act as a form of political communication or address. Eschewing violence and showing some measure of moderation in the level of harm intended again signal that, although the means of protest adopted transgress the law, the protestor is engaged in a form of political action undertaken on moral grounds rather than in mere criminality.
>
> It seems to me that there are at least three reasons for showing greater clemency in response to such acts of civil disobedience than in dealing with other disobedience of the law. First, by adhering to the conditions mentioned, a person who engages in acts of civil disobedience establishes a moral difference between herself and ordinary law-breakers which it is right to take into account in determining what punishment is deserved. Second, by reason of that difference and the fact that such a protestor is generally apart from their protest activity a law-abiding citizen, there is reason to expect that less severe punishment is necessary to deter such a person from further law-breaking. Third, part of the purpose of imposing sanctions, whether for a criminal offence or for intentional breach of an injunction, is to engage in a dialogue with the defendant so that he or she appreciates the reasons why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law or other people's lawful activities are contrary to the protestor's own moral convictions. Such a dialogue is more likely to be effective where authorities (including judicial authorities) show restraint in anticipation that the defendant will respond by desisting from further breaches. This is part of what I believe Lord Burnett CJ meant in the *Roberts* case at para 34 (quoted above) when he referred to "a bargain or mutual understanding operating in such cases"."

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[6] E.g. *Attorney-General for the State of Queensland v Sri & Ors* [2020] QSC 246 and *Commissioner of Police, New South Wales v Gibson* [2020] NSWSC 953.

[7] J Walvisch, *Lone anarchists and peace pilgrims: the relevance of political motivations to sentencing* (2018) 44(2) Monash University Law Review 428.

[70] In *R v Roberts* [2018] EWCA Crim 2739; [2019] 1 WLR 2577 ('*Roberts*') Lord Burnett of Maldon CJ considered the appropriateness of a custodial sentence for non-violent protest. He referred with approval to the observations of Lord Hoffmann in *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136, at paragraph 89:

> "My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account."

At paragraph 34 in *Roberts* the Lord Chief Justice said:

> "Paragraph 89 [above] echoes the understanding that the conscientious motives of protestors will be taken into account when they are sentenced for their offences but that there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing. When sentencing an offender, the value of the right to freedom of expression finds its voice in the approach to sentencing."

[71] Lynham DCJ in *Avery* cited with approval those extracts. I respectfully agree with his Honour's comments at [78] and [79] that when sentencing for offences committed in the course of protest actions, the legitimate democratic right to protest conferred on all Australian citizens as an incident of the implied freedom of political communication is a relevant consideration, but it is not unfettered. It is a freedom to communicate by lawful means, and it does not authorise unlawful acts (such as trespass or obstruction of transport infrastructure). It must be balanced against relevant sentencing considerations including deterrence and denunciation.

[72] I also respectfully agree with his observations in *Avery* at [81] that whilst offending committed in the course of a peaceful protest would not generally impute a high level of culpability, and while the conscientious motives of protestors are to be taken into account, whether the protestors have behaved with a sense of proportion by not causing excessive loss, damage or inconvenience by their protest actions will be an important consideration in assessing the objective seriousness of the offending and the culpability of the offenders involved. I would add to that whether the disruption caused was the intended aim of the protest, rather than merely a side effect or consequence of a protest held in a public place, may also be relevant.

[73] As a matter of general sentencing principle, the motive for the commission of the offence will often be relevant to the moral culpability of the offender, the weight to given to personal deterrence and it may affect the weight to be given to general deterrence.[8]

[74] Under the *Penalties and Sentences Act 1992* motive may arise in consideration of the nature and circumstances of the offence: s 9(2)(c); the presence of any aggravating or

[8] For example, see *R v Swan* [2006] NSWCCA 47 per Spigelman CJ at [61].

mitigating factor concerning the offender: s 9(2)(g); and any other relevant circumstance: s 9(2)(r).

[75] Motive may be a mitigating, aggravating or neutral factor. The motive of the offender will often be viewed less seriously if the crime is committed as a result of need or personal pressure, and as an aggravating factor if committed for greed, personal gain, revenge, racial hatred or prejudice. That is because an offender's motivations may be relevant to one or more of the purposes of sentencing: just punishment, rehabilitation, deterrence, denunciation and community protection: s 9(1).

[76] Different approaches have been taken to sentencing politically motivated offenders in the few reported cases in which the issue of political motivation have been considered.[9]

[77] Each case will turn upon its own particular facts. Of particular significance in this case are the absence of violence or the threat of violence or intimidation, the absence of risk of physical harm to others, the absence of evidence of loss suffered, financial or otherwise, the absence of disruption of members of the public, the sincerity of the appellants' beliefs (grounded in conscience and seeking to communicate disapproval of government policy,) and that the offences were committed in pursuit of that. My respectful view in this case is that the political motivation of the appellants was relevant to lessen their moral culpability in a way that reduced the need to focus on denunciation and rehabilitation as sentencing considerations.

Comparatives

[78] Before the Acting Magistrate and on appeal, both parties relied upon the decisions in *Avery* and *Nolin*.

[79] In *Avery*, nine protestors pleaded guilty in the Magistrates Court at Bowen to three offences: trespassing,[10] contravening a direction or requirement,[11] and intentionally or recklessly interfering with ports operation.[12] The offences arose out of two separate protest actions at the Adani Abbott Point Coal Terminal in January 2018. During the first incident, the appellants entered the port facility and climbed onto a coal loading trestle to a height of about 20 metres before locking themselves onto the trestle in an area which housed a conveyor belt, rollers, electric motors and open moving machinery. It was an inherently high risk area. The plant had to be shut down and was disrupted for seven and a half hours. Adani provided information suggesting that the "cost impact to terminal users" was about $3.9 million. The second incident, which occurred about a week later, involved the appellants engaging in substantially the same actions. The "cost impact to terminal users" on that occasion was, according to Adani, about $3.5 million. The Magistrate expressed reservations about those estimates. He elected to sentence the protestors on the basis of the demurrage costs incurred by Adani only, which were about $10,000 total. The Magistrate fined each appellant $8,000.

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[9] Examples of which are helpfully collected in J Walvisch, *Lone anarchists and peace pilgrims: the relevance of political motivations to sentencing* (2018) 44(2) Monash University Law Review 428.

[10] Contrary to section 11(2) of the *Summary Offences Act* 2005 (Qld). That offence was punishable by 20 penalty units or one years' imprisonment.

[11] Contrary to section 791(2) of the *Police Powers and Responsibilities Act* 2000. That offence was punishable by 40 penalty units.

[12] Contrary to section 292(1)(b) of the *Transport Infrastructure Act* 1994. That offence was punishable by 200 penalty units.

[80] On appeal, those fines were set aside and the appellants were re-sentenced to fines of between $2,000 and $3,000, depending on their financial circumstances and antecedents. Those who were resentenced to fines of $2,000 were generally youthful, first time offenders.

[81] In *Nolin*, the appellant pleaded guilty to offences of trespassing on a railway, obstructing a railway and obstructing police.The offences were committed in the context of a protest in a single incident. The appellant trespassed on a railway line at Bowen and locked her arms into a steel device which she locked onto the railway. She was there for three hours, during which time rail operations were obstructed. She refused a direction to leave the location and was removed by police. At first instance, the Magistrate imposed a fine of $10,000 and ordered restitution in the amount of $1,565.37, without recording the conviction. The appeal against sentence was successful, the fine was set aside and the appellant was re-sentenced to a fine of $1,000. The order for restitution was also set aside.

[82] The offending in the present matter is less serious than in *Avery*. Here, the offending was confined to a single incident, it was less dangerous and disruptive, and there was no identifiable loss or financial detriment caused by the appellants' actions.

[83] The offending here is comparable to that in *Nolin*. The personal circumstances of these appellants – their youth, good character and lack of criminal history – are also features present in *Nolin*.

[84] In *Nolin*, the offence of obstructing a railway under s 477 of the Code had the same maximum penalty: two years' imprisonment. The relevant distinction between *Nolin* and the present matter is that the *dangerous attachment device* offence was introduced after the offending in *Nolin*. The mere fact of that was not sufficient to warrant the imposition of a term of imprisonment in the present matter.

[85] On my review of those decisions and the cases referred to in them, the sentence imposed by the Acting Magistrate was so unreasonable or plainly unjust in the circumstances as to give rise to an inference that his discretion miscarried. The decisions demonstrate that the sentence imposed by the Acting Magistrate was so far above the permissible range in all of the circumstances of this case as to be manifestly excessive.

Conclusion

[86] In conclusion, the Acting Magistrate imposed a sentence that was manifestly excessive and made several errors which caused the sentencing discretion to miscarry by:

1. unduly fettering his sentencing discretion in a way which gave rise to a reasonable apprehension of bias on the basis of prejudgment of penalty;

2. finding that motive was not a relevant consideration on sentence;

3. finding, in the absence of any evidence or submissions, that:

    (a) the appellants exposed others to a risk of injury and damage to property;

(b) train drivers were exposed to a risk of serious personal injury or death from a serious accident, including a train derailment; and

(c) any fine imposed would not be paid by the appellants, and would not act as a deterrent;

4. taking into account irrelevant considerations; and

5. concluding that a sentence of imprisonment was the only penalty option available once the appellants did not agree to undertake community service.

Resentence

[87] Having found error, this Court must now resentence the appellants.

[88] In terms of individual culpability there was nothing to distinguish between the appellants' conduct.

[89] The appellants had a number of factors in mitigation. They were both youthful, first time offenders who pleaded guilty at the first available opportunity, had favourable antecedents and excellent prospects of rehabilitation. A sentence of imprisonment was a sentence of last resort.

[90] In my view, the appropriate penalty would have been a modest fine. Taking into account the matters in s 48 of the *Penalties and Sentences Act 1992*, the appellants' financial circumstances were modest; a significant fine would be beyond their reasonable capacity to pay and an excessive burden; there was no evidence or submission of any loss or destruction of, or damage caused to, a person's property because of the offence; and no suggestion that a person received a benefit because of the offence.

[91] By the time of the appeal hearing, the appellants had been subject to a suspended term of imprisonment for about seven months. There was no evidence of reoffending. The Crown abandoned its initial submission for a good behaviour bond and agreed that a fine was appropriate.

[92] The appellants submitted that no convictions should be recorded. The prosecution did not seek the recording of a conviction.

[93] In considering whether a conviction should be recorded under s 12 of the *Penalties and Sentences Act* 1992, the objective gravity of the offending was at the lower end of the range for this offence, and imprisonment was a sentence of last resort. The appellants are young people of otherwise good character with no criminal history. Recording a conviction would necessarily have an adverse impact upon their chances of finding employment and therefore their economic wellbeing. That is particularly so at a time when youth unemployment is rising in the wake of the coronavirus pandemic. There was no information upon which I could assess the impact of recording a conviction on their social wellbeing, although I infer that recording a conviction may adversely affect their rehabilitation. In all the circumstances, convictions should not be recorded.

Orders

[94] In those circumstances, I make the following orders:

1. The appeals are allowed.

2. The sentences imposed on each of the appellants by the Acting Magistrate on 12 February 2020 are set aside.

3. The appellants are each resentenced as follows:

   (a) A single fine of $1,000 is imposed for all the offences:

      i. obstructing a railway, contrary to section 477 of the *Criminal Code 1899*;
      ii. trespassing on a railway, contrary to section 257 of the *Transport Infrastructure Act 1994*;
      iii. using a dangerous attachment device to interfere with transport infrastructure, contrary to section 14C(1) of the *Summary Offences Act 2005*; and
      iv. contravening a direction or requirement, contrary to section 791(2) of the *Police Powers and Responsibilities Act 2000*,

      to be referred to the State Penalties Enforcement Register.

   (b) No convictions are recorded.