



Sentencing Remarks & Judgments

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Independent Commissioner
Against Corruption
SOUTH AUSTRALIA

Settled by His Honour Judge Slattery 4 December 2020 – Internet version

IN THE DISTRICT COURT

CRIMINAL JURISDICTION

ADELAIDE

FRIDAY, 4 DECEMBER 2020 AT 9.02 A.M.

BEFORE HIS HONOUR JUDGE SLATTERY

NO.DCCRM-20-1182

R V CATHERINE JAYNE MOYSE

HIS HONOUR IN SENTENCING SAID:

Catherine Jayne Moyse you, with your co-defendant Robert Bruce Harrap, were charged on Information and Summons dated 3 July 2020 that between 10 May 2020 and 29 May 2020 at Adelaide you conspired with Mr Harrap and enabled him to improperly exercise his power or influence that he had by virtue of his public office contrary to the common law and s 251(1)(a) of the *Criminal Law Consolidation Act 1935*. The maximum penalty for an offence against s.251 of the *Criminal Law Consolidation Act* is imprisonment for seven years. The penalty for common law conspiracy is at large.

You entered a plea of guilty to this offence on 27 July 2020. You are entitled to a reduction of up to 40% on any sentence that I may impose. I have not received any submissions from the Director about the amount of discount and I will proceed on the basis that you are entitled to the full discount of up to 40%.

There are a number of preliminary matters that are not in contest between the parties. There is no suggestion that any of the orders made by Mr Harrap on the application, the subject of this sentence, is under challenge as being unreasonable in any way. Secondly, there is no assertion that as a result of anything done by you or Mr Harrap anyone has obtained an undue or unfair advantage. No suggestion to the contrary has been put to this court.

I turn to the circumstances of your offending. You were instructed to assist the son of a family friend, HNJ, in relation to a disqualification of his licence. He had been caught speeding whilst driving a motor vehicle and if he did not receive a reduction of demerit points he would lose his licence for a period of time. He was, at that time, undertaking an apprenticeship and a loss of licence would have put his employment in real jeopardy.

On or about 26 April 2020, you sought out the assistance of Mr Harrap about an appeal about disqualification of the licence of HNJ in order to obtain a reduction of one demerit point and so allow him, in those particular circumstances, to continue driving his motor

vehicle. You received assistance from Mr Harrap about the need to lodge an appeal against disqualification which you subsequently lodged at the Christies Beach Magistrates Court on 8 May 2020. At this time and throughout your career, you had not been generally involved in any criminal matters. You were a wills, estates and probate lawyer. Insofar as you had court related matters, you briefed them out to counsel. However, in this instance, you were instructed to assist the son of a family friend. You felt morally obliged to give assistance to that family friend even though you knew nothing of such matters.

As you were acting at the behest of a family friend, it is at least implicit that you were acting pro bono. That is the reason as to why you did not brief counsel but sought out the assistance of Mr Harrap. Different from your normal practice, you also intended to act as counsel at the hearing of the application at the Magistrates Court. Your understanding at the time was that this was criminal matter.

It is implicit from the outset that you understood that Mr Harrap would hear any such application. This is also apparent from the transcripts of the telephone calls between he and you which carry the assumption he was open to advise you on such matters and would hear any application. This explains why you had some concerns about whether Mr Harrap could sit on the matter if you were to appear on behalf of HNJ at the court. You were sufficiently concerned to raise the matter with the registry staff at the Christies Beach Magistrates Court at the time that the appeal was lodged. Unbeknown to you, a note was made upon the file by the registry staff after you provided that information to them.

You then thought it was necessary for you to obtain further assistance from Mr Harrap in the presentation of this appeal. It was necessary for you to set about serving documents upon various government departments, to obtain letters and to gather information to be put to the court to assist the court in exercising its discretion about whether it should grant the application to HNJ. As a result of your own inexperience, you sought out the assistance of Mr Harrap in relation to those tasks.

At the time of lodgement of the appeal, you understood that Mr Harrap would hear the appeal. In gathering all of this information and making preparations for the hearing, you followed the recommendations given to you by Mr Harrap. The first time you raised a question of Mr Harrap's position directly with him was on 10 May 2020 in a telephone call between you and he, the transcriptions of which I have read.

In the second call on 10 May 2020, you informed Mr Harrap that you had told the registry staff that he may not be able to hear the matter and you then said that you did not think you could appear in front of him. Mr Harrap intimated to you that he could see no difficulty. In the end, that was a matter for him.

You raised the matter again in a phone call with Mr Harrap on 13 May 2020. Mr Harrap, again, informed you that it was not an issue of any concern to him personally. In that call, you said that the application was to be heard on the following Friday. By then you had raised the issue of potential conflict of interest on three separate occasions. First, with the court in the absence of Mr Harrap and then informing him of what you had told the court and then, again, when you reminded Mr Harrap that the matter was coming on in the court on the following Friday. In that context, you were still seeking assistance from Mr Harrap about the matters that needed to be put before the court to give HNJ the best possible prospects of making a successful application for the reduction of demerit points.

You were reassured on each occasion that you spoke to Mr Harrap that he did not see any problems with him hearing the matter. You accepted the expression of opinion from Mr Harrap. Your counsel, Mr Barnett, suggested that this clouded your judgment. I consider that as well as clouding your judgment, it is apparent that you were seeking guidance from Mr Harrap. You had concerns, you raised the concerns and those concerns that you had were assuaged by what Mr Harrap said to you.

You were doing the solicitor's work and the counsel work implicitly on a pro bono basis. These events were occurring in the background of your imperfect understanding of the rule of judicial conduct in appearing before someone with whom you have had related connection. You were not aware of there being a judicial code of conduct but it is clear that you had a discomfort about the actions of Mr Harrap.

However, I do accept that at the time, Mr Harrap was a source of guidance and support for you. This was both in a professional and personal sense because of the relationship that you had with him. Over the years you had had discussions with him about issues of your practice involving wills and estates. He had been involved in that area of practice prior the time of him becoming a magistrate. Conversely, any conduct of such an application in the court was an area with which you had no familiarity and so you sought out his assistance. You have not worked on such an appeal before. You were seeking guidance as to how the matter should proceed and how it should be prepared and presented.

You were reassured by what was said to you by Mr Harrap and you did not challenge the issue again. You set about to properly prepare for the appeal, to gather the relevant documents and letters and serve documents. This remained your mindset from that time.

This aspect of the matter was challenged by the Director. The prosecutor, Mr Longson, pointed to a telephone call on 24 May 2020 in which you asked Mr Harrap to ensure that he was the person hearing the appeal and that he should make sure he was the person that you appeared before for the appeal hearing. This occurred in the context that you read the cause list and could not identify the matter in the criminal cause list. This was a result of your misunderstanding because you were looking for the matter in the criminal list, not in the civil list. You then realised the matter was listed before Magistrate Duncan. This was the consequence of your identification to the registry staff of the concerns that you had about the position of Mr Harrap. You made a number of telephone calls and sent a number of text messages to Mr Harrap. However, in the end, it was the decision of Mr Harrap as to whether he heard the matter.

The Director described this matter as serious because you are a practitioner of the Supreme Court of South Australia. This was in the context that a conviction should be recorded in relation to your conduct. However, for the reasons which follow, I am unable to accept that submission.

In my opinion, having regard to all of the documentation put before me, your activity immediately prior to the hearing was much more indicative of your reliance upon Mr Harrap in the circumstances of that particular case, your inexperience in that area of law and your fear of bar work. I am satisfied that your concerns became elevated to a level of panic and that you wanted to ensure that you would not need to address another judicial officer. This was because of your high level of insecurity about what you were doing. You did not want to

do barrister's work and you were seeking any assistance you could get from Mr Harrap in order to ensure the smooth passage of the application.

Your misunderstanding about whether it was a civil matter or a criminal matter is symptomatic of both your inexperience and your reliance upon Mr Harrap. Notwithstanding, your plea of guilty to the charge indicates your acceptance that your conduct involved your agreement with Mr Harrap for him to improperly exercise the power or influence that he had by virtue of his public office.

In retrospect, you would now accept that your position was foolish and that it amounted to a failure to properly exercise your skill as a solicitor. However, I consider that there are a number of matters that contribute to that position. It is to those to which I now turn.

In his report of 16 September 2020, Mr Richard Balfour, psychologist, opined that as between you and Mr Harrap there was a professional power imbalance because Mr Harrap was a senior and very authoritative member of the legal profession with extensive experience. You did not have a broad range of legal knowledge and expertise and you certainly lacked confidence in bar work. This was because you considered yourself not to be good at thinking on your feet in a courtroom. He also opined that there was an interpersonal power imbalance between you and Mr Harrap and this has continued throughout your relationship with Mr Harrap notwithstanding the events that occurred between you. You were entrapped in a controlling relationship with Mr Harrap and you were in a constant state of insecurity and anxiety about the status of that relationship because of the behaviour of Mr Harrap and the connection that his behaviour had to the welfare of your son.

Your son was conceived at the time Mr Harrap was married to his second wife. Mr Harrap has not lived with you as a life partner. You have always been a fully self-sufficient and sole supporting parent. Mr Harrap has limited role as a parent for that reason. Despite that, you rely upon him to contribute to the cost of your son's school fees and you wish for your son to have a relationship with Mr Harrap as his father.

Mr Balfour opined, and I accept, that your offending behaviour can be explained by the psychological process known as “destructive obedience” which results from an adverse influence upon a person who was misled by a trusted, authoritative figure who led that person to feel pressured to act in ways contrary to that person's conscience and which can cause harm.

At p.20 of his report, Mr Balfour recorded that you explained to him that you offended because you believed and trusted Mr Harrap; he was a senior member of the profession and he was a magistrate. I accept those opinions and those explanations.

I turn first to the question of whether I should record a conviction.

At the outset of his submissions, your counsel invited me to apply s.24 of the *Sentencing Act* and to impose a monetary penalty. He urged me to consider whether good reason exist to not record a conviction in respect of your offending. The Director opposed that submission and contended that a conviction should be recorded against you.

In determining whether good reasons exist under s 24 of the *Sentencing Act*, I must be satisfied that you meet the threshold of two tests under s 24 of the *Sentencing Act*. The first is that you are unlikely to commit such an offence again and the second is that, having regard to your character, antecedents, age or your physical or mental condition or any other extenuating circumstances, good reason exists for not recording a conviction. If I form the opinion that both of those tests have been satisfied, my discretion whether to impose a penalty without recording a conviction is then enlivened.

I have had regard to counsels' submissions and all of the material filed on your behalf. I have read all of the references provided on your behalf. Each of those references speak of you as a person who is very professional in your dealings with clients, that you are diligent, conscientious, hard-working and a very decent person. You are regarded as efficient, effective, honest and beyond reproach. Your referees did not express any reservations about your character, reputation and integrity and in relation to the members of the practicing bar, each of them would have no hesitation in working with you in the future. Each of them expressed a sincere hope that you be permitted to return to legal practice, however, that is not a matter for me.

The question for me is whether you are unlikely to commit an offence again. Having regard to the submissions that have been put on your behalf, the material that has been filed and reviewed by me and the very strong recommendations of your character made within them, I am completely satisfied that there is no likelihood that you would commit such an offence again. The first limb of the test under s 24 is therefore satisfied.

I turn to the second limb. I am required to describe whether, having regard to your character, antecedents, age or any other extenuating circumstances, good reason exists for not recording a conviction. In most cases, a conviction is recorded and my task is to weigh the potential benefits to you, Ms Moyses, of not recording a conviction when compared to the public interest in convictions being recorded.

Even if I am satisfied that the matters to which I am required to have regard are weighed in your favour, it is not necessary that I exercise my discretion in your favour. I am mindful that emotional and psychological difficulties for you are other extenuating circumstances and the test for me is whether I am satisfied that there is good reason for not recording the conviction. It has not been put to me that the offence is trifling and I would not consider that basis further.

I consider that there are a number of aspects of your age, your character, your antecedents and other extenuating circumstances which may be taken into account by me in deciding whether or not the discretion is to be exercised.

The first is the history of your relationship with Mr Harrap which I have outlined above. It has been described by Mr Balfour as one of an interpersonal power, that you were dealing with a very authoritative member of the legal profession with extensive experience, that you were involved in a controlling relationship and in that relationship you were in a constant state of insecurity and anxiety about the status of the relationship.

In the context of all of those circumstances, you placed significant trust and confidence in Mr Harrap. You made it very clear to him from the outset of your lack of experience in the area of which he was already aware. You told him of your reliance upon him in dealing with

the application and in doing all of that, you were labouring under the deleterious effects of the psychological process of destructive obedience.

You were adversely influenced and misled by a trusted authority figure and you felt pressured to act in a way contrary to your conscience. You had assuaged your own professional position by raising the matter with the court and on two occasions, raising the matter with Mr Harrap. On those occasions, when you raised the question of his position with Mr Harrap, he informed you that he could see no difficulties arising.

In all of those circumstances, I consider that my discretion is enlivened because I am satisfied that the threshold for not recording a conviction has been met.

In the exercise of my discretion on the question of recording a conviction, I am aware of your position as a solicitor. On one view, it may be said that a conviction is an appropriate penalty or disposition of this matter. However, there are a number of answers to that submission. The first is that you were reliant entirely upon Mr Harrap and that you were undertaking this task as a person without any real experience in this area of bar work. The closer you got to the day of the hearing of the matter, the more agitated you became. This is borne out by the material that has been put before me. I am satisfied that the flurry of activity in the days and the day before the hearing of the application may be explained by your inexperience, your nervousness about doing bar work and your unfamiliarity with the process. It reflected a state of panic. That is borne out by your misunderstanding of the list in which this matter would appear.

I am satisfied that in your connection with Mr Harrap about this matter, you were doing no more than ensuring that you were properly prepared for the hearing of the matter and that Mr Harrap was the person who would hear the application. In that context, it may be said that you were ensuring that Mr Harrap would hear the matter, however I think that that is too limited a view in light of the whole of your conduct in this matter and it does not take into account the whole of the circumstances.

I also take into account the fact that a conviction for you as a professional person will have an extraordinarily deleterious effect. I take into account that you enjoy the support and confidence of a very broad cross-section of the legal profession and this is very evident from the references that I have received and read. I have also taken into account that at the time you lodged the application, you identified to the registry that Mr Harrap may not be in a position to hear the matter. As I have said, you raised the matter twice more to Mr Harrap on 10 and 13 May 2020. On each occasion, Mr Harrap told you that he did not consider it to be a problem. You did not specifically know the applicable rules particularly in relation to judicial conduct. You were sufficiently aware of the situation that you did raise it with registry and then raised it with Mr Harrap. You were apparently following your own legal intuition as much as anything else.

You then accepted what Mr Harrap said to you; you did so in the background of the whole of the circumstances that I have already adverted to and in particular when you were labouring under the psychological process of destructive obedience. You had previously received guidance from Mr Harrap in a professional and personal sense and you were relying upon his guidance in this matter with which you had no familiarity.

An issue for my consideration is the question of public denunciation of your conduct by the imposition of a conviction. I have been made aware of your show cause application to the Supreme Court; that matter has been put to one side until such time as my sentence has been brought down. You have already suffered a very high level of public denunciation and you are very contrite. You have yet to deal with the denunciation of your professional position when your application is to be heard in the Supreme Court. I consider that there has already been a very high level of public denunciation for your conduct. You will be associated with the conduct of Mr Harrap for a very long time. This is a millstone which is not easily removed for a host of reasons, all of which are exacerbated by the fact that he is the father of your son and despite Mr Harrap's deficiencies as a parent, you are committed to your son having a father figure in his life.

I have weighed the beneficial nature of an order to proceed without a conviction to the offending with the public interest inherent with convictions being recorded. I have had full regard to the judgment of the Full Court in *R v Stubberfield* [2010] 106 SASR 91 at [44] and following. I consider that the social prejudice resulting from a conviction for you would be so grave that you would be continually punished in the future well after appropriate punishment has been received. I do not consider that this is the type of offence which will always call for the recording of a conviction. I have had full regard to the decision of Stanley J in *Police v Watson* [2016] 125 SASR 212, the decision of Sulan J in *Police v Sherritt* [2015] SASC 43 at [19], the decision of Napier CJ in *Webb v O'Sullivan* (1952) SASR 65 at [66] and I have reached the conclusion that the absence of the recording of a conviction would still mean that the punishment fits the crime.

I consider that because of all of the circumstances that I have set out, your case falls into the exceptional category and that this is an occasion to “temper justice with mercy” (*Police v Watson* at [35]). I am of the view that in all of those circumstances, good reason exists for not recording a conviction. I may therefore impose a penalty without recording a conviction.

I turn to your personal circumstances. You were born and educated in South Australia. Your parents are both deceased. Your father was a former Chief Inspector with the South Australian Police. He was involved in a drug related offence and went to gaol. You enjoyed a very close relationship with him. To your great credit you maintained your contact with him whilst he was in gaol. Your mother became ill in 2009 and you became her personal carer. You were also extremely close to your mother. You have a brother with whom you share a very good and close relationship. You have had a passion for callisthenics and pursued that passion throughout your childhood and throughout your life. Your mother shared that passion. You first married in your early 20s but that marriage failed after about seven years.

You received your secondary education at a private school and you have undertaken a number of degrees. First, at the University of South Australia and a Law Degree at the University of New England. You have succeeded academically and you have diligently applied yourself to all of your studies. You have achieved a Bachelor of Arts and Communications and a Bachelor of Laws. You have completed an Honours year in Law and you were admitted to the profession in 2007. You have had continuous employment whether that be in public relations work or in the law. You have worked in the private legal sector as a solicitor since 2009 and for the last five years, you have been self-employed as a solicitor

specialising in wills and estates. As I have said, in any contested matters you briefed the independent bar.

As a result of a liaison with Mr Harrap, you have an 11 year old son, whom you support full-time. You have the full-time care of your son, who is very active in sport and is a leader in his school cohort. Mr Harrap sometimes pays school fees for that child. You have also been an active volunteer in the community for a number of service organisations including doing voluntary work for the elderly members of the community in relation to estate management matters and taking public speaker roles at a number of voluntary organisations. You have no prior offending.

Mr Balfour opined that you have a level of intelligence in the superior range with excellent literacy and numeracy skills. You are a high achiever and you have always led a productive and lawful lifestyle in the community. You have had an extensive history of pro-social behaviour and you have been a conscientious sole parent to your son. You are a good and decent person. You are willing to accept responsibility for your critical error of judgment and to learn from your offending behaviour. You have been pro-active in seeking professional mentoring from trustworthy senior members of the legal profession and you are being mentored by a former judge of this court.

I turn to sentence. For all the reasons set out, I am of the opinion that the appropriate sentence is that I impose a fine upon you rather than any other penalty. As I have decided not to record a conviction, it is my decision that the appropriate penalty is a fine of \$1000 which is reduced by 40% to \$600 which is payable within 56 days of this day. I so order.

ADJOURNED 9.28 A.M.