DISTRICT COURT OF QUEENSLAND

CITATION:	*Castle v Director of Public Prosecutions (Cth)* [2019] QDC 49
PARTIES:	**CASTLE, Trent Shane** (appellant) **v** **DIRECTOR OF PUBLIC PROSECUTIONS (CTH)** (respondent)
FILE NO/S:	D6/2018
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Mount Isa
DELIVERED ON:	30 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	20 February 2019
JUDGE:	Dearden DCJ
ORDERS:	**1. The application for leave to amend grounds of appeal is granted.** **2. The application to adduce additional evidence contained in affidavits of Peter Collings and Trent Shane Castle is granted.** **3. Appeal granted.** **4. The sentence imposed by the learned magistrate on 16 October 2018, namely, a single fine (in respect of both charges) of $1300 with convictions recorded for both offences, is set aside.** **5. In lieu, order that the appellant be discharged, without proceeding to conviction, on each charge, upon him entering a recognisance in respect of each charge in the sum of $650 to be of good behaviour for a period of twelve months from 30 April 2019.**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL – APPEAL-GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE – OTHER MATTERS – where defendant charged with two offences under the *Civil Aviation Regulations* 1988 (Cth) – where additional evidence sought to be relied upon by the appellant in s 222 *Justices Act* 1886 (Qld)

rehearing – whether appellant would suffer miscarriage of justice if additional evidence was not admitted

AVIATION – OFFENCES IN RELATION TO AVIATION – COMMONWEALTH OFFENCES – PENALTY – where defendant charged with two offences under the *Civil Aviation Regulations* 1988 (Cth) – where learned magistrate erred in imposing a single, aggregate penalty for both offences – whether learned magistrate erred in his application of s 19B *Crimes Act* 1914 (Cth) – whether the conduct constituting the offences was "trivial" – whether "extenuating circumstances" existed at the time of offending – whether it was inexpedient to inflict punishment – whether the sentence was manifestly excessive in all the circumstances

Civil Aviation Regulations 1988 (Cth) r 99A(5), r 133(1)(c)(i)
Crimes Act 1914 (Cth) s 4AA, s 4B, s 4J, s 4K(3), s 4K(4), s 16A(2), s 16C, s 19B, s 19B(1)(b)
Justices Act 1886 (Qld) s 223

AB v The Queen (1999) 198 CLR 111, cited
Cady v Smith (1993) 117 FLR 132, cited
Chief Executive Officer of the Australian Customs Service v Karam (No 2) [2013] NSWSC 33, cited
Cobiac v Liddy (1969) 119 CLR 257, cited
Commissioner of Taxation v Baffsky (2001) 192 ALR 92, cited
Crafter v Schubert [1934] SASR 84, cited
Guerrero v Dickson [2013] WASC 246, cited
Hamilton v Commissioner for Taxation (Cth) (2007) 68 ATR 375, cited
Mancini v Vallelonga (1981) 28 SASR 236, cited
McDonald v Queensland Police Service [2018] 2 Qd R 612, cited
Pavlovic v Commissioner of Police [2007] 1 Qd R 344, cited
R v Maniadis [1997] 1 Qd R 593, cited
Scott v Chief Executive Office of Customs [2012] WASC 203, cited
W v Marsh (1983) 25 SASR 333, cited
Walden v Hensler (1987) 163 CLR 561, cite

COUNSEL: C Grant for the appellant
C Ferguson (sol) for the respondent

SOLICITORS: Anderson Telford Lawyers for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

Introduction

[1] The appellant, Trent Shane Castle, appeals the sentence imposed on 16 October 2018 at the Mount Isa Magistrates Court. On 15 October 2018, the appellant pleaded guilty to the following charges: -

(1) 1 x Conditions to be met before an Australian aircraft may fly (9 December 2016);[1]

(2) 1 x Broadcasts to be made at certain aerodromes (14 October 2017).[2]

[2] On 16 October 2018, the learned magistrate imposed a single fine (in respect of both charges) of $1300 with convictions recorded for both offences and referred the fine to the State Penalties Enforcement Registry.[3]

Grounds of Appeal

[3] The original grounds of appeal were as follows: -

- The learned Magistrate erred in his application of s 19B of *Crimes Act* 1914 (Cth); and
- The learned Magistrate erred in not considering all matters that must be taken into account pursuant [to] s 16A(2) of the *Crimes Act* 1914 (Cth) applicable to the discretion pursuant to s 19B; and
- The sentence was excessive by the recording of a conviction.[4]

[4] The appellant sought leave to amend the grounds of appeal so that it read:-

- The sentence imposed was manifestly excessive because it involved the mandatory recording of a conviction.[5]

[5] The appeal was conducted on the basis of the amended ground, so it is appropriate that leave be granted accordingly.

Additional evidence

[6] The appellant sought the court's leave to rely upon the affidavit of Peter Collings[6] and the affidavit of Trent Shane Castle.[7] The respondent Director of Public Prosecutions (Cth) opposed the applicant's application to rely on additional evidence.

The law – appeals

[7] In *McDonald v Queensland Police Service* [2018] 2 Qd R 612, Bowskill J stated: -

> "It is well established that, on an appeal under [*Justices Act*] s 222 by way of rehearing, the District Court is required to conduct a real review of the trial, and the Magistrate's reasons, and make its own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight to the Magistrate's view. Nevertheless, in order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error [citations deleted]."[8]

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1 *Civil Aviation Regulations* 1988 (Cth) r 133(1)(c)(i).
2 *Civil Aviation Regulations* 1988 (Cth) r 99A(5).
3 Transcript p. 3, ll 21-23, Exhibit ART04 – Affidavit of Anderson Robert Telford, sworn 11 February 2019 (Appeal Exhibit 2).
4 Notice of Appeal to a District Court Judge, filed 16 October 2018 (Document 1).
5 Outline of submissions on behalf of the appellant, dated 11 February 2019 (Appeal Exhibit 1), p. 1.
6 Affidavit of Peter Collings, affirmed 4 April 2019.
7 Affidavit of Trent Shane Castle, affirmed 18 February 2019.
8 *McDonald v Queensland Police Service* [2018] 2 Qd R 612; [2017] QCA 255, [47] (per Bowskill J).

[8] It is common ground that the learned magistrate erred by imposing a single, aggregate fine in respect of the two charges before the court. The imposition of an aggregate penalty in respect of a sentence imposed under the *Crimes Act* 1914 (Cth) is only permitted, pursuant to *Crimes Act* s 4K(4), if a person is convicted of two or more offences "against the same provision of a law of the Commonwealth",[9] "if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character."[10] The appellant in these proceedings pleaded guilty to offences against two different provisions of the *Civil Aviation Regulations* 1988 (Cth) and consequently *Crimes Act* s 4K(4) has no application.[11]

[9] As Hayne J identified in *AB v The Queen*:

> "...Once an appellate court identifies an error, the sentence imposed below must be set aside and the appellate court is then required to exercise the sentencing discretion afresh."[12]

[10] The role of the appellate court in such circumstances was explained by the Queensland Court of Appeal (per Fraser JA) in *R v Stringer:*

> "Accordingly, it is not necessary to consider the ground of appeal that the sentence is manifestly excessive. Rather, the court is obliged to resentence afresh "unless in the separate and independent exercise of its discretion it concludes that no different sentence should be passed": *Kentwell v The Queen* (2014) 88 ALJR 947 at 956 [35], citing *AB v The Queen* (1999) 198 CLR 111, and at 957-958 [42]."[13]

Discussion

[11] What follows from the identified error of the learned magistrate is the necessity for this court to reconsider the sentencing discretion afresh based on the material placed before the learned magistrate and, if the appellant is granted leave, which is opposed by the respondent, the further material sought to be placed before the court in the affidavits of Peter Collings[14] and the appellant Trent Shane Castle.[15]

Additional evidence

[12] The *Justices Act* 1886 (Qld) s 223 provides:-

> "**223 Appeal generally a rehearing on the evidence**
>
> (1) An appeal under section 222 is by way of rehearing on the evidence (***original evidence***) given in the proceeding before the justices.
>
> (2) However, the District Court may give leave to adduce fresh, additional or substituted evidence (***new evidence***) if the court is satisfied there are special grounds for giving leave.
>
> (3) If the court gives leave under subsection (2), the appeal is—

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9 *Crimes Act* 1914 (Cth) s 4K(3).
10 *Crimes Act* 1914 (Cth) s 4K(3).
11 *Cady v Smith* (1993) 117 FLR 132.
12 (1999) 198 CLR 111, 160 [130].
13 [2014] QCA 342, [9].
14 Affidavit of Peter Collings, affirmed 4 April 2019.
15 Affidavit of Trent Shane Castle, affirmed 18 February 2019.

(a) by way of rehearing on the original evidence; and

(b) on the new evidence adduced."

[13] Ms Grant frankly acknowledges that the further material contained in the affidavits of Peter Collings and the appellant is not "fresh evidence",[16] given that, with reasonable diligence, it could have been produced by the appellant at the sentencing proceeding before the learned magistrate.[17]

[14] As I read the material, there is no issue with the material being "apparently credible,"[18] and it is clearly open to this court to consider that the additional evidence, if leave is granted, might reasonably have led the tribunal of fact to return a different verdict (or in this case, a different sentence).[19]

[15] In *R v Maniadis* [1997] 1 Qd R 593, Hellman J and Davies JA stated:-

> "Subject to what we say later about the decision of this Court in *R v Cornale* [1993] 2 Qd R 294 the power to admit evidence not adduced below appears to be at least as wide in an appeal against sentence as in an appeal against conviction. In an appeal against conviction the grounds of unreasonableness, that the evidence did not support the verdict and error of law all appear to relate to a verdict upon the evidence adduced at trial and the law existing at the time of trial. Only the ground of miscarriage of justice appears to allow the admission of evidence not adduced at trial. The sole ground in [*Criminal Code* (Qld) s 668E(3)] that some other sentence is warranted appears to allow at least the same latitude to an appellate court to admit such evidence.
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> That is not to say that the discretion to admit new evidence in an appeal pursuant to [*Criminal Code* (Qld) s 668E(3)] will be commonly exercised by an appellate court. But a court of appeal will admit new evidence on such an appeal, notwithstanding that it is not fresh in the above sense [a reference to the decision of the High Court in *Ratten v The Queen* [1974] 131 CLR 510 being 'evidence which was not actually available to the appellant at the time of trial, or which could not then have been available to the appellant by the exercise on his part of reasonable diligence in the preparation of his case'],[20] if its admission shows that some other sentence, whether more or less severe, is warranted in law; in this case, that the sentence in fact imposed was unwarranted in the sense that it was manifestly excessive.
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> … In the end, the reception of such [additional] evidence will depend on whether, if it were excluded, there would be a miscarriage of justice; and it would be undesirable, in our view, to state in advance

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16 Appeal Tr 1-7, ll 44.

17 See *Pavlovic v Commissioner of Police* [2007] 1 Qd R 344, 349, [31]; [2006] QCA 134, [31].

18 *Pavlovic v Commissioner of Police* [2007] 1 Qd R 344, 349, [35]; [2006] QCA 134, [35]; and see *Gallagher v The Queen* (1986) 160 CLR 392, 395.

19 *Pavlovic v Commissioner of Police* [2007] 1 Qd R 344, 350, [36]; [2006] QCA 134, [36].

20 *Ratten v The Queen* [1974] 131 CLR 510, 516.

> those matters which, in every case, must be proved in order to establish such a miscarriage [citations deleted]."[21]

[16] The appellant's argument, simply put, is that the appellant's counsel at sentence (who was not the counsel who appeared on the appeal before me), failed to appreciate the differences between the Commonwealth and the state sentencing regimes in respect of the recording of a conviction; accordingly failed to place sufficient material before the Magistrates Court in respect of the consequences of recording a conviction for the appellant; and in the context of sentencing proceedings where the learned magistrate also fell into error in the sentence imposed for the reasons identified in paragraph 8 of these reasons, an error which was not identified by either the appellant's counsel at the original sentence nor by the police prosecutor who appeared on that sentence.[22]

[17] Ms Ferguson, who appears for the respondent, correctly identifies that the additional evidence could, with reasonable diligence, have been produced in the court below.[23] She submits further that the appellant has not shown that it is reasonably arguable that he suffered a miscarriage of justice as a result of the error on the part of the court below, such as to warrant the granting of the application for leave to adduce the additional evidence.[24]

Discussion – additional evidence

[18] In the context of a sentencing process where there was error on the part of the learned magistrate, a failure by counsel at the original sentence to appreciate the differing requirements of the state and Commonwealth sentencing regimes in respect of the non-recording of convictions for Commonwealth offences, and a failure by the police prosecutor to identify the learned magistrate's error in imposing an aggregate fine contrary to the relevant provisions of the *Crimes Act*, it is, in my view, a situation where the cascading errors of all the legal actors raises the serious and appreciable risk that the appellant would suffer a miscarriage of justice, if the additional material relevant to the issue of whether or not a conviction should be recorded on the rehearing of this matter on appeal, were not admitted.

Conclusion – additional evidence

[19] Accordingly, the application for leave to adduce additional evidence contained in the affidavits of Peter Collings[25] and Trent Shane Castle[26] is granted.

The facts

[20] The facts as outlined by the police prosecutor in the Magistrates Court are as follows:-

> "Essentially, the defendant works for a gentleman who was charged with a number of these offences he procured, obviously, his staff to do so [sic]. The defendant was certainly in that position where he was a bit damned if you do, damned if you don't. He essentially, on one occasion, didn't complete the correct logbook entries. That was to

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21 *R v Maniadis* [1997] 1 Qd R 593, 596-597 (per Davies JA & Helman J).
22 Appeal Tr 1-4, ll 28 to Tr 1-5, ll 6.
23 Appeal Tr 1-9, ll 21-41.
24 Appeal Tr 1-10, ll 13 to Tr 1-11, ll 12.
25 Affidavit of Peter Collings, affirmed 4 April 2019.
26 Affidavit of Trent Shane Castle, affirmed 18 February 2019.

> obviously cover up what his employer was doing. And on a further occasion, he used a false call sign, essentially contravening the direction of the airport. Those are essentially what he's done. The owner was charged. The owner has done it to save the owner some considerable amount of money in relation to airport fees and thousands and thousands of dollars in maintenance fees. Essentially, the defendant hasn't really benefited at all other than to keep his employment, and that's perhaps, the basis on which your Honour will sentence him. He has been penalised by the Air Authority [CASA].[27]
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> …
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> So, unfortunately, it is the case that he [the defendant] was employed by the gentleman who runs the overall company, was acting in his direction and, on some occasions, the actual owner was on some of these flights, and he found himself in that position where he ought to have known better, but perhaps was pressured by the boss to do these things on those occasions."[28]

[21] The prosecutor submitted that the defendant could be dealt with by way of a fine.[29]

[22] The appellant's counsel in the Magistrates Court outlined the facts in these terms:

> "… they [the flights constituting each of the two charges] were flights on two occasions. These are the undisputed facts with respect to it, and to be fairer to Mr Castle, can I [indistinct] this before the court. …In relation to the offence of the 19 December 2016, Mr Castle was the pilot in command. He carried out the flight contrary to the conditions specified on the maintenance release. The maintenance release was issued in the aerial work category only and the flight couldn't be used as a charter flight.
>
> There is no evidence that Mr Castle handled the invoicing or was aware of anything in relation to the finances of the company and, relevantly, there's no evidence that Mr Castle attempted to conceal the [flight]. He was simply [flying] someone, effectively, as a charter when it was intended or meant for that purpose on that occasion. It's accepted as well, particularly relevant so for this offence, that Mr Castle acted under the instruction of his employer, that is, the chief pilot Mr Hock. In relation to charge 2, that is, the broadcast to be made at certain aerodromes, that is best summarised in this form: police had obtained landing data from Avdata and revealed that a call sign VHUMS had not been used during take-off at Mt Isa on the 14 October between … 6.14 am and 6.19 am. So simply in taking off, it didn't use the call sign, and that was the long and short of it.
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> …

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27 Tr 1-6, ll 44 to Tr 1-7, ll 8, Exhibit ART 03 – Affidavit of Anderson Robert Telford, sworn 11 February 2019 (Appeal Exhibit 2).

28 Tr 1-7, ll 20-24, Exhibit ART 03 – Affidavit of Anderson Robert Telford, sworn 11 February 2019 (Appeal Exhibit 2).

29 Tr 1-7, ll 13-14, ll 24-25, Exhibit ART 03 – Affidavit of Anderson Robert Telford, sworn 11 February 2019.

> That… is best explained by way of an oversight. It should have been used and it wasn't used."[30]

Plea in mitigation

[23] The appellant's counsel at the sentence submitted by way of plea in mitigation:-

> "Can I detail something in terms of Mr Castle's plea of guilty. Your Honour will have an appreciation that this matter has been ongoing for some time. There was always an end goal that if time were given, the matter could be resolved in the form that it has been, but what it has created for Mr Castle has been a considerable amount of time where there's been uncertainty with respect to his career as a pilot. That is, I'm not suggesting that's an element of any extra-curial punishment, but to some extent, he's been unable to take up employment until the resolution of these matters.
>
> As I alluded to… at the start of my submissions, had an aviation infringement notice… been given to him immediately and finalised in that manner… the outcome that we achieve today could have been done 18 months or so ago. The fact that he's been through this process has caused CASA [Civil Aviation Safety Authority] to issue him with a show-cause notice. He successfully showed cause. That took up, not only time, but also a considerable amount of money in terms of legal fees, but, thankfully, at the end of that proceeding, he was able to show-cause and thus retained his licence. What it did do, though, was because of the delay in the finalisation of the matters, though, was render Mr Castle unemployable. That is, aircraft carriers, airlines – they're not prepared to take on anyone – offer them employment until – while they're under this sort of player [sic]. So it's been about a year and nine months where he's endured not only the financial hardship of not being able to earn a living in his profession, but also hardship of having to go out and find other employment which, to his credit, he's been able to do.
>
> My submission is that the conduct engaged in by Mr Castle was not dishonest. There is nothing to suggest that it was. At worst they were oversights. Can I tell your Honour something about Mr Castle. He was 23 at the time of the commission of these offences. He's now 25. He grew up in Mount Isa and went to school here in Mount Isa. His mother also worked in the aviation industry. She worked for a local company here in Mount Isa before moving to the Gold Coast some time ago. Your Honour would be familiar with those who… have a yearning to progress themselves in another profession, in this case, Mr Hocks. He also wanted to become a pilot but the cost of a pilot's licence – Mr Castle rather.
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> …
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> The cost of a pilot's licence is not cheap. He, to his credit, was able to obtain various forms of employment, principally at Mount Isa

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[30] Tr 1-9, ll 1-23, Exhibit ART03 - Affidavit of Anderson Robert Telford, sworn 11 February 2019 (Appeal Exhibit 2).

> Mines where he saved the entire $95,000 to put himself through flight school, obtain his licence and become qualified. He did that over a significant number of years. He supplemented that income as well by also working at various aviation companies in menial capacities. What I'm submitting to your Honour is that it's been a long and arduous struggle for him to reach this point, to get qualified, to complete all his exams and now put himself in a position where he can get meaningful employment as a pilot.
>
> The references which I've tendered to your Honour speak volumes, in my submission, of Mr Castle's good character. These matters your Honour can accept as being aberrations in terms of that. The submissions made by my friend [the prosecutor] were certainly very fair. Candid to the point where it's accepted that he was under the supervision of his employer at the time. Can I persuade your Honour to sentence him on this basis: convict and fine him for those amounts that I've identified [a reference to an earlier submission that the appellant could have been dealt with by way of aviation infringement notices in the sum of $652.75 for each offence, a total of about $1,300], and in the exercise of your Honour's discretion, exercise it in his favour".[31]

[24] There was then a dialogue between the appellant's counsel and the learned magistrate, during which the learned magistrate indicated, correctly, that pursuant to the *Crimes Act* s 16C and s 4B, a conviction must be recorded for a Commonwealth fine. There followed some ongoing dialogue in respect of the issue of the automatic recording of a fine pursuant to the *Crimes Act*, and a discussion about the necessity for further research by the learned magistrate and the appellant's counsel, before the proceedings were adjourned to the following day.[32]

[25] However, when the sentencing process resumed on 16 October 2018, the learned magistrate appears to have moved immediately into the delivery of his sentencing remarks, which are reproduced below:-

> "Mr Castle, I've heard at length from your solicitor regarding the appropriate penalty and it seems that there's a flow-on effect from here; it may happen, I don't know. But under the Commonwealth sentencing legislation, for a fine, it's automatic for a conviction. And the only sentencing option that is available for no conviction is a s 19B [sic]. A s 20B [sic] is a bond with a conviction, a 19B carries no conviction. I'm of the view that after hearing submissions, I'm not satisfied that it's a trivial offence, and I don't think, after hearing the submissions, that a 19B [indistinct] bond is in range. In my view, it's a serious offence, having regard to the nature and circumstances of the offence. And I'm not satisfied that no conviction ought to be recorded. When one looks at the 19B test, it's a two-step test, as Mr Telford says.
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> From the Commissioner of Taxation and [indistinct] is the case [2001] ALR where Justice – Chief Justice [indistinct] spoke about – at length

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31 Tr 1-9, ll 23 to Tr 1-10, ll 28, Exhibit ART03 - Affidavit of Anderson Robert Telford, sworn 11 February 2019 (Appeal Exhibit 2).

32 Tr 1-10, ll 30 to Tr 1-15, ll 21, Exhibit ART03 - Affidavit of Anderson Robert Telford, sworn 11 February 2019 (Appeal Exhibit 2).

about the two stages. The first step is the identification of factors… of the characters identified in subparagraphs (1), (2) or (3) of the paragraph, that is, of 19B. And that is, character, antecedents, age, health or mental condition of the person. You're a young man, you have no criminal history. And you have no mental or health conditions. And the extent to which the offence is a trivial nature, that's an issue that I've taken into consideration. As I said already… and the second stage is the determination and having regard to the fact or factors so identified in… it's inexpedient to inflict any punishment or to reach the other conclusions for which [the] paragraph provides. That's what the s 19B states. At least one of these factors must be – must reasonably support the exercise of the discretion; that is, not to record a conviction. And that is taking into account the character, antecedents, age, mental health or health condition, and the trivial nature of the offence. As I've said, I don't think the offence is trivial in nature.

This involves an aeroplane and the safe use of an aeroplane in these circumstances. Nobody says you didn't use the plane safe [sic], but you didn't comply with your requirements as a pilot of that plane. It is relevant to ask whether those matters make the matter relatively atypical. And there must be something which clearly distinguishes the circumstances of the offence and the consideration from the typical offence or circumstances of an unusual nature, personal to you. You are… you've been a pilot for some time. You only have a couple of years… in your experience. And it is said that you've spent a considerable amount of money getting your pilot's licence; I accept that. Your antecedents; you're a man with no criminal history, as one would expect. And you have a good background. Your age; you're a young man you were 20… now… 23 years of age. And you are a man who would benefit from further experience in this profession; I understand that. The triviality of the offence as I've said, the conduct of you rather than the offence provision, and that's the case of [indistinct] Mr Telford exemplifies that point quite clearly – triviality must be ascertained by reference to the conduct which constitute [sic] the offence for which the offender is liable to be convicted in the actual circumstances in which the offence was committed. Reference his Honour Justice Brennan at the time [sic].

Also, it is, as I said, to some, it may seem not so serious; that is in the piloting industry or the aviation industry. But… as a person standing back having a look at this conduct, it is serious when one has regard to an aeroplane. Extenuating circumstances, at subparagraph 3, Mr Telford tells me that you acted under the direction of your employer, whose commonly known in these proceedings as Hock. That may be the case, and I accept that, but the problem is, you were a pilot of an aeroplane, and you were to make decisions based on your requirements as a pilot of that aeroplane. And… as I've said, I'm not satisfied that it's not [sic] a matter that's trivial in nature. And I am satisfied that deterrence is a factor in this matter. As I've said, you have no criminal history, and you're a young man. But a fineable offence, in my view, is within range.

> I must take into account the consequences of a conviction. Personal deterrents [sic] is a relevant factor, as I've said. The adequacy of a punishment and expediency, on my view, is that expediency shouldn't play such a basis for a sentence in this matter. This matter has been around since 2016, on the 14th October. You have not committed any further offences in that time. And I'm satisfied that one fine can be imposed. After hearing submissions yesterday, I'm satisfied that… you should be convicted, and that conviction is recorded. And you are fined $1,300. And I refer that to SPER.
>
> …
>
> Mr Castle, sir, you as a pilot, are in charge of a plane, and I took the view that it's serious conduct. And anything to do with an aeroplane, in my view, when these matters come before the court are serious. As I've said, it may not be serious to people in the aviation world, but to safety is an absolute concern [sic]. That's my view. And I hope you can get on with your life sir."[33]

Resentencing

[26] The appellant submits that in a resentence by the District Court, the appellant should be dealt with pursuant to *Crimes Act* 1914 (Cth) s 19B, which provides:

> **"19B Discharge of offenders without proceeding to conviction**
>
> (1) Where:
>
> (a) a person is charged before a court with a federal offence or federal offences; and
>
> (b) the court is satisfied, in respect of that charge or more than one of those charges, that the charge is proved, but is of the opinion, having regard to:
>
> (i) the character, antecedents, age, health or mental condition of the person;
>
> (ii) the extent (if any) to which the offence is of a trivial nature; or
>
> (iii) the extent (if any) to which the offence was committed under extenuating circumstances;
>
> that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation;
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> the court may, by order:

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33 Tr p. 2, ll 1 – p. 3 ll 31, Exhibit ART04 - Affidavit of Anderson Robert Telford, sworn 11 February 2019 (Appeal Exhibit 2).

(c) dismiss the charge or charges in respect of which the court is so satisfied; or

(d) discharge the person, without proceeding to conviction in respect of any charge referred to in paragraph (c), upon his or her giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that he or she will comply with the following conditions:

(i) that he or she will be of good behaviour for such period, not exceeding 3 years, as the court specifies in the order;

(ii) that he or she will make such reparation or restitution, or pay such compensation, in respect of the offence or offences concerned (if any), or pay such costs in respect of his or her prosecution for the offence or offences concerned (if any), as the court specifies in the order (being reparation, restitution, compensation or costs that the court is empowered to require the person to make or pay):

(A) on or before a date specified in the order; or

(B) in the case of reparation or restitution by way of money payment or in the case of the payment of compensation or an amount of costs—by specified instalments as provided in the order; and

(iii) that he or she will, during a period, not exceeding 2 years, that is specified in the order in accordance with subparagraph (i), comply with such other conditions (if any) as the court thinks fit to specify in the order, which conditions may include the condition that the person will, during the period so specified, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer so appointed.

(1A) However, the court must not take into account under subsection (1) any form of customary law or cultural practice as a reason for:

(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or

(b) aggravating the seriousness of the criminal behaviour to which the offence relates.

(1B) In subsection (1A):

criminal behaviour includes:

> (a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and
>
> (b) any fault element relating to such a physical element.
>
> (2) Where a court proposes to discharge a person in pursuance of an order made under subsection (1), it shall, before making the order, explain or cause to be explained to the person, in language likely to be readily understood by him or her:
>
> (a) the purpose and effect of the proposed order;
>
> (b) the consequences that may follow if he or she fails, without reasonable cause or excuse, to comply with the conditions of the proposed order; and
>
> (c) that any recognizance given in accordance with the order may be discharged or varied under section 20AA.
>
> (2A) A person is not to be imprisoned for a failure to pay an amount required to be paid under an order made under this section.
>
> (3) Where a charge or charges against a person is or are dismissed, or a person is discharged, in pursuance of an order made under subsection (1):
>
> (a) the person shall have such rights of appeal on the ground that he or she was not guilty of the offence or offences concerned with which he or she was charged as he or she would have had if the court had convicted him or her of the offence or offences concerned; and
>
> (b) there shall be such rights of appeal in respect of the manner in which the person is dealt with for the offence or offences concerned as there would have been if:
>
> (i) the court had, immediately before so dealing with him or her, convicted him or her of the offence or offences concerned; and
>
> (ii) the manner in which he or she is dealt with had been a sentence or sentences passed upon that conviction.
>
> (4) Where a person is discharged in pursuance of an order made under subsection (1), the court shall, as soon as practicable, cause the order to be reduced to writing and a copy of the order to be given to, or served on, the person.

Discussion

[27] The appellant was aged 23 at the time of the commission of the offences, was aged 25 at sentence, and did not have a criminal history. The appellant grew up in Mount

Isa and attended school there. Through his employment, he saved $95,000 to put himself through flight school, obtain his pilot's licence and qualify as a pilot. In order to do so, he worked in menial capacities at various aviation companies and undertook a "long and arduous struggle" to complete exams, get qualified and obtain employment as a pilot.[34]

[28] The references tendered on the original sentence[35] attest to the appellant's good character, his capacity for hard work, reliability and passion for his aviation career. They comment favourably on the unlikelihood that he would offend again in the future. Other referees also attested to his strong family support, his generosity, community mindedness and the out-of-character nature of his conduct.

[29] It is clear then, pursuant to the *Crimes Act* s 19B(1)(b)(i), that the appellant is a young man (aged 23 when the offence was committed, aged 25 at sentence) of otherwise good character, without criminal history, in good health and with no mental health issues. The critical matters that then have to be considered pursuant to the *Crimes Act* s 19B are as follows:

> "Section 19B(1)(b)
>
> …
>
> (ii) "the extent (if any) to which the offence is of a trivial nature;
>
> or
>
> (iii) the extent (if any) to which the offence was committed under extenuating circumstances;"

[30] When considering the above factors of s 19B and deciding whether to dismiss the charges[36] or discharge without a conviction,[37] the court must be satisfied:-

> "That it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation…"[38]

[31] As previously noted, charge 1 is a breach of r 133(1)(c)(i) of the *Civil Aviation Regulations* 1988 (Cth) – flight not to be in contravention of any conditions set out or referred to in the maintenance release; and charge 2 is a breach of r 99A(5) of the *Civil Aviation Regulations* 1988 (Cth) – to identify aircraft. The maximum penalty for each offence is 50 penalty units.[39] The issues then are the extent (if any) to which the offence is of a trivial nature, or the extent (if any) to which the offence was committed under extenuating circumstances.[40]

[32] I am grateful to both the appellant and the respondent for providing supplementary submissions in respect of the issues of triviality and extenuating circumstances.

[33] As Hall J identified in *Guerrero v Dickson* [2013] WASC 246:

> "In determining whether it is open to make a [*Crimes Act*] s 19B order a court must first consider whether there is information that falls under any of the criteria listed in s 19B(1)(b)(i),(ii) or (iii). If there is, it is

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34 Tr 1-10, ll 18-20, Exhibit ART03 - Affidavit of Anderson Robert Telford, sworn 11 February 2019 (Appeal Exhibit 2).

35 Exhibit ART02 – Affidavit of Anderson Robert Telford, sworn 11 February 2019 (Appeal Exhibit 2).

36 Pursuant to *Crimes Act* 1914 (Cth) s 19B(1)(c).

37 Pursuant to *Crimes Act* 1914 (Cth) s 19B(1)(d).

38 *Crimes Act* 1914 (Cth) s 19B(1)(b).

39 *Civil Aviation Regulations* 1988 (Cth) s 133(1), s 99A(5).

40 *Crimes Act* s 19B(1)(b)(ii), s 19B(1)(b)(iii).

> then necessary for the court to consider whether, having regard to those matters, it is inexpedient to inflict any punishment or to inflict only nominal punishment or to release the offender on probation without recording a conviction. Thus there is what has been referred to as a two-stage test."[41]

[34] Hall J goes on to note:

> "It is not necessary that all three of the factors referred to in s 19B(1)(b)(i), (ii) and (iii) exist in a particular case. Evidence of any one of those factors is sufficient to raise the second stage question. It will then be necessary to consider whether it is inexpedient to inflict any punishment. This second stage necessarily involves a consideration of the seriousness of the offence, the prevalence of the offence and general deterrence: *Lanham v Brake* (1983) 34 SASR 578."[42]

'Trivial'

[35] In *Crafter v Schubert* [1934] SASR 84, 86, it was held that an offence was "trivial" where the contravention was "unintentional" or "due to inadvertence" and/or "of a trifling nature".[43] The court in *Guerrero v Dickson* [2013] WASC 246 considered that the offences the subject of that appeal (four counts of obtaining a financial advantage in circumstances where the appellant knew or believed she was not eligible to receive that financial advantage contrary to s 135.2(1) of the *Criminal Code Act* 1995 (Cth), resulting in a New Start Allowance overpayment of $16,277.81) were "clearly… not offences of a trivial nature".[44]

[36] As Ms Grant for the appellant has correctly identified, the offences in *Guerrero v Dickson* involved a degree of deliberate dishonesty, a feature not present in the charges faced by the current appellant in these proceedings.[45]

[37] Brennan J in *Walden v Hensler* (1987) 163 CLR 561 stated:

> "Triviality must be ascertained by reference to the conduct which constitutes the offence for which the offender is liable to be convicted and to the actual circumstances in which the offence is committed. It was erroneous to ascertain the triviality of the offence by reference simply to the statutory provision which prescribes the maximum penalty."[46]

[38] Dawson J, in examining the issue of "the trivial nature of the offence" pursuant to *Criminal Code* (Qld) s 657A stated:

> "… it is sufficient to say that the offence to be considered in determining triviality is clearly the offence committed by the offender and not the offence in the abstract."[47]

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41 *Guerrero v Dickson* [2013] WASC 246, [32].
42 *Guerrero v Dickson* [2013] WASC 246, [35].
43 *Crafter v Schubert* [1934] SASR 84, 86 (per Napier J).
44 *Guerrero v Dickson* [2013] WASC 246, [2], [10], [36].
45 Supplementary Submissions of behalf of the Appellant, dated 11 February 2019, pp. 1-2.
46 *Walden v Hensler* (1987) 163 CLR 561, 577.
47 *Walden v Hensler* (1987) 163 CLR 561, 595.

[39] In *Mancini v Vallelonga* (1981) 28 SASR 236, Mitchell J, in the context of a statutory provision that referred to an offence of "so trifling a nature that it (was) inexpedient to inflict any punishment",[48] observed that an offence is not trifling "if it is a typical offence of the class prescribed," where it was a deliberate breach, or where there was a belief that an exemption applied; as opposed to a "merely technical or casual breach of a by-law, if there be no deliberate intention to commit a breach thereof" that could be classed as an offence that was "in its nature trifling."[49]

[40] However, the particular circumstances of the offending may justify the exercise of the discretion under *Crimes Act* s 19B. Windeyer J in *Cobiac v Liddy* (1969) 119 CLR 257 observed that "…recognising the offence [of driving while drunk] as serious, and that a conviction of it must bring a heavy penalty upon the offender, is not to say that such an offender can never be dealt with under the *Offender's Probation Act* [which required a conclusion that the offence was of a "trivial nature"]."[50] The use of the term "trifling" can be considered synonymous with the term "trivial".[51]

Extenuating circumstances

[41] In *Chief Executive Officer of the Australian Customs Service v Karam* (No 2) [2013] NSWSC 33, McCallum J addressed the issue of "extenuating circumstances" pursuant to the *Crimes Act*s s 19B, in these terms:-

> "As to the circumstances under which the offences were committed, Mr Gollan submitted, as I have accepted, that the offender's moral culpability may be assessed as being low. In my view, the circumstances considered above do serve to extenuate the offences. Having played no part in planning the importation, Ronnie Karam was placed in an extremely difficult position by his brothers and Mr Cheikho. It must not be overlooked that his failure to react appropriately to the information he received from them amounted to a serious criminal offence and cannot be dismissed as mere poor judgment. However, the simple fact is that, as one who became caught up in the undertaking rather than being one of those who planned and implemented it, and paying due regard to the natural pull of fraternal care, his conduct can readily be seen as being of significantly lesser seriousness than many of the other decided cases in this field."[52]

[42] In *Scott v Chief Executive Office of Customs* [2012] WASC 203, Hall J stated at [20]:

> "It is necessary to note that extenuating circumstances in [*Crimes Act*] s 19B(1)(b)(iii) must be circumstances which excuse, to some appreciable degree, the commission of the offence: *O'Sullivan v Wilkinson* [1952] SASR 213 at 218 and *O'Brien v MR Norton Smith* [1995] TASSC 78; (1995) 31 ATR 128. Such circumstances must contribute in some causative way to the offending conduct."

[43] Spigelman CJ in *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92, at 102 stated:

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48 *Mancini v Vallenlonga* (1981) 28 SASR 236, 239.
49 *Mancini v Vallenlonga* (1981) 28 SASR 236, 239 (citations deleted).
50 *Cobiac v Liddy* (1969) 119 CLR 257, 268.
51 *W v Marsh* (1983) 25 SASR 333, 337-338.
52 *Chief Executive Officer of the Australian Customs Service v Karam* (No. 2) [2013] NSWSC 33, [38].

> "[*Crimes Act*] s 19B(1)(b)(iii)… does not permit the court to have regard to 'extenuating circumstances'. The provision commits the court to have regard to 'the extent to which *the offence was committed under* extenuating circumstances. "This subparagraph requires some kind of link between the circumstance said to be extenuating and the commission of the offence" [emphasis in the original].

[44] In *Hamilton v Commissioner for Taxation* (Cth) (2007) 68 ATR 375 at 377, [9] White J stated:

> "Ordinarily, [*Crimes Act*] s 19B will be invoked only in those cases in which the circumstances of the offending are atypical, or when there are circumstances of an unusual kind which are personal to the offender [*Kelton v Uren* (1981) 27 SASR 92 at 93; 11 ATR 534 at 535-536; *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92 at 104-105 [71]-[72]; (2001) 48 ATR 76 at 87]."

Re-sentencing

[45] As Spigelman CJ (Simpson J and Einfeld AJ agreeing) identified, applying *Crimes Act* s 19B(1)(b) is a two-stage process, as follows:-

> "[*Crimes Act*] s 19B(1)(b) itself consists of two stages. First is the identification of a factor or factors of the character specified in sub-paragraphs (i), (ii) and/or (iii) of the paragraph. The second stage is the determination that, having regard to the factor or factors so identified, it 'is inexpedient to inflict any punishment' or to reach the other conclusions for which the paragraph provides."[53]

[46] Dealing with the appeal before me, as previously identified:

> "The appellant was aged 23 at the time of the commission of the offences, was aged 25 at sentence, and did not have a criminal history. The appellant grew up in Mount Isa and attended school there. Through his employment, he saved $95,000 to put himself through flight school, obtain his pilot's licence and qualify as a pilot. In order to do so, he worked in menial capacities at various aviation companies and undertook a "long and arduous struggle" to complete exams, get qualified and obtain employment as a pilot.[54]

> The references tendered on the original sentence[55] attest to the appellant's good character, his capacity for hard work, reliability and passion for his aviation career. They comment favourably on the unlikelihood that he would offend again in the future. Other referees also attested to his strong family support, his generosity, community mindedness and the out-of-character nature of his conduct.

> It is clear then, pursuant to the *Crimes Act* s 19B(1)(b)(i), that the appellant is a young man (aged 23 when the offence was committed,

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53 *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92, 96 [10].

54 Tr 1-10, ll 18-20, Exhibit ART03 - Affidavit of Anderson Robert Telford, sworn 11 February 2019 (Appeal Exhibit 2).

55 Exhibit ART02 – Affidavit of Anderson Robert Telford, sworn 11 February 2019 (Appeal Exhibit 2).

> aged 25 at sentence) of otherwise good character, without criminal history, in good health and with no mental health issues."[56]

[47] The next step is to consider the extent (if any) to which the offence is of a trivial nature or the extent (if any) to which the offence was committed under extenuating circumstances.

[48] Although a trivial offence is usually one which is minor or technical in nature and carries a low degree of culpability,[57] even an offence of a serious nature can be considered "quite trivial" in the particular circumstances of the offending.[58]

[49] In the matter before me, the original prosecutor, in outlining the facts, identified that the appellant's employer had procured him to commit the offences, in respect of charge 1 (completing an incorrect logbook entry), and in respect of charge 2 (using a false call sign), to save his employer "some considerable amount of money in relation to airport fees and thousands and thousands of dollars in maintenance fees."[59]

[50] The offences themselves are offences under the *Civil Aviation Regulations* 1988 (Cth), which each carry a maximum penalty of $652.75 had they been dealt with by way of the relevant aviation infringement notices.[60] The maximum penalty in each case was 50 penalty units.[61]

[51] In respect of the issue of "extenuating circumstances" the original prosecutor clearly identified that the appellant had been procured by his employer to commit the offences;[62] and although the offences were done for the employer's benefit to save money, the appellant "hasn't really benefited at all other than to keep his employment" and had been "penalised by the air authority [CASA]".[63]

[52] In the circumstances, I am persuaded, taking into account the conduct which constituted the offence, the actual circumstances in which each offence was committed,[64] in particular, a young defendant acting on the directions of his employer, with no substantial personal benefit, that it is appropriate to conclude that each of the offences in this matter was "trivial".

[53] Even if I am incorrect in respect of the identification of each of the offences as "trivial", I also consider that each of the offences has been committed under "extenuating circumstances."[65] Those circumstances include the following:-

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56 His Honour's reasons at [27]-[29].

57 *Crafter v Schubert* [1934] SASR 84, 86; *Mancini v Vallelonga* (1981) 28 SASR 236, 239.

58 *Cobiac v Liddy* (1969) 11 CLR 257, 268 (per Windeyer J).

59 Tr 1-6, ll 47 to Tr 1-7, ll 5, Exhibit ART03 - Affidavit of Anderson Robert Telford sworn 11 February 2019 (Appeal Exhibit 2).

60 Tr 1-7, ll 45 to Tr 1-8, ll 7, Exhibit ART03 - Affidavit of Anderson Robert Telford sworn 11 February 2019 (Appeal Exhibit 2).

61 For Charge 1, the maximum penalty is $9000 pursuant to *Crimes Act* 1914 (Cth) in force from 30 Nov 2016 – 6 June 2017, s 4AA (50 penalty units at $180 per penalty units); For Charge 2, the maximum penalty is $10,500 pursuant to *Crimes Act* 1914 (Cth) in force from 20 Sept 2017 – 10 May 2018, s 4AA (50 penalty units at $210 per penalty unit).

62 Tr 1-6, ll 44 to Tr 1-7, ll 1-24, Exhibit ART03 - Affidavit of Anderson Robert Telford sworn 11 February 2019 (Appeal Exhibit 2).

63 Tr 1-7, ll 6-8, Exhibit ART03 - Affidavit of Anderson Robert Telford sworn 11 February 2019 (Appeal Exhibit 2).

64 *Walden v Hensler* (1987) 163 CLR 561, 577.

65 *Crimes Act* s 19B(1)(b)(iii).

(1) That the offences were procured by the appellant's employer;[66]
(2) That the defendant did not benefit other than to keep his employment;[67]
(3) That the appellant was very young when the offences were committed (aged 23),[68] had spent significant time and some $95,000 to put himself through flight school, obtain his license and become qualified as a pilot;[69] and
(4) That the appellant was acting under the instruction of his employer, Chief Pilot Mr Hock.[70]

[54] Having concluded that the offences were "trivial" and/or committed in "extenuating circumstances", the court is then required to consider the second stage of the two-stage process,[71] that is, to decide whether any factor listed in paragraphs s 19B(1)(b)(i) – (iii) exists to such an extent as to make it:

- "Inexpedient to inflict any punishment; or
- Inexpedient to inflict any punishment other than a nominal punishment; or
- Expedient to release the offender on probation."[72]

[55] The material contained in the further affidavits of Peter Collings[73] and of the appellant Trent Shane Castle[74] identifies the following:-
(1) that convictions recorded would make it hard for the appellant to obtain a job as a licensed pilot even with companies that knew him and his work ethic;[75] and
(2) this would limit his practicality to the industry as a pilot;[76] and
(3) that would limit the appellant's ability to pilot international charter flights and to travel overseas for training where type-specific training was not available in Australia;[77] and
(4) the appellant would face difficulties with his employment and international travel, in particular as a commercial pilot, undertaking charters for mining companies or government agencies and employment with any of the large airlines.[78]

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66 Tr 1-6, ll 44 to Tr 1-7 ll 24, Exhibit ART03 - Affidavit of Anderson Robert Telford sworn 11 February 2019 (Appeal Exhibit 2).
67 Tr 1-7, ll 6-8, Exhibit ART03 - Affidavit of Anderson Robert Telford sworn 11 February 2019 (Appeal Exhibit 2).
68 Tr 1-10, ll 3-4, Exhibit ART03 - Affidavit of Anderson Robert Telford sworn 11 February 2019 (Appeal Exhibit 2).
69 Tr 1-10, ll 13-20, Exhibit ART03 - Affidavit of Anderson Robert Telford sworn 11 February 2019 (Appeal Exhibit 2).
70 Tr 1-9, ll 12-13, Exhibit ART03 - Affidavit of Anderson Robert Telford sworn 11 February 2019 (Appeal Exhibit 2).
71 *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92, 96 [10].
72 *Crimes Act* 1914 (Cth) s 19B(1)(b).
73 Affidavit of Peter Collings, affirmed 4 April 2019.
74 Affidavit of Trent Shane Castle, affirmed 18 February 2019.
75 Affidavit of Peter Collings, affirmed 4 April 2019, [6]; Affidavit of Trent Shane Castle, affirmed 18 February 2019, [8]-[9].
76 Affidavit of Peter Collings, affirmed 4 April 2019, [6].
77 Affidavit of Trent Shane Castle, affirmed 18 February 2019, [8]-[12].
78 Affidavit of Peter Collings, affirmed 4 April 2019, [7]; Affidavit of Trent Shane Castle, affirmed 18 February 2019, [11]-[12].

[56] In the light of these circumstances and the nature of the offences themselves,[79] I consider it would be inexpedient to inflict any punishment other than nominal punishment.

Conclusion

[57] In all of the circumstances, I consider the appeal should be granted and that the appropriate sentence is a bond pursuant to *Crimes Act* 1914 (Cth) s 19B, discharging the appellant without proceeding to conviction on each charge, upon him entering a recognisance in respect of each charge in the sum of $650 to be of good behaviour for a period of twelve months from the date of the delivery of these reasons. Practically, arrangements will need to be made for the appellant to enter into that recognisance at an appropriate court registry.

Orders

1. The application for leave to amend grounds of appeal is granted.
2. The application to adduce additional evidence contained in affidavits of Peter Collings and Trent Shane Castle is granted.
3. Appeal granted.
4. The sentence imposed by the learned magistrate on 16 October 2018, namely, a single fine (in respect of both charges) of $1300 with convictions recorded for both offences, is set aside.
5. In lieu, order that the appellant be discharged, without proceeding to conviction, on each charge, upon him entering a recognisance in respect of each charge in the sum of $650 to be of good behaviour for a period of twelve months from 30 April 2019.

Costs

[58] I will hear the parties on costs.

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79 *Cobiac v Liddy* (1969) 119 CLR 257, 268.