

CHILDRENS COURT OF QUEENSLAND

CITATION: *TKA v Director of Public Prosecutions* [2023] QChC 35

PARTIES: **TKA**
(applicant)

v

DIRECTOR OF PUBLIC PROSECUTIONS
(respondent)

FILE NO/S: CCJ 212/22

DIVISION: Childrens Court of Queensland

PROCEEDING: Sentence Review Application

ORIGINATING
COURT: Brisbane Childrens Court

DELIVERED ON: 5 June 2023 (delivered *ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 5 June 2023

JUDGE: Dearden DCJ

ORDER:

- (1) **Application for extension of time to file sentence review granted.**
- (2) **Application for sentence review granted.**
- (3) **Order that the three month conditional release order imposed 3 February 2023, and revoked in chambers on 21 April 2023, be reinstated.**
- (4) **Order that the reinstated three month conditional release order imposed 3 February 2023, be revoked, effective 29 March 2023, and that the sentence imposed of four months detention be reduced by 12 days, pursuant to YJA s 248, and that the release date be set at 50%.**
- (5) **Confirm the sentence of six months detention imposed on 23 March 2023, and order that it be served concurrently pursuant to Youth Justice Act s 212, and that the release date be set at 50%.**

CATCHWORDS: CRIMINAL LAW – APPEAL AGAINST SENTENCE – SENTENCING JUVENILES – where the applicant was

sentenced to six months detention to serve 70% - where the detention period was to be served cumulatively - whether by imposing a cumulative sentence the learned magistrate failed to recognise the low level nature of the offending – whether the learned magistrate failed to consider whether special circumstances arose which would justify a release order earlier than the default 70%

Youth Justice Act 1992 (Qld) ss 118, 119, 122, 123, 150, 211, 212, 221, 227, 242, 246, 246A, 247 & 248.

COUNSEL: PS Dent for the applicant

MF Christensen for the respondent

SOLICITORS: Legal Aid Queensland for the applicant

Office of the Director of Public Prosecutions for the respondent

Introduction

- [2] This is an application for sentence review filed 24 May 2023 in respect of offences of attempted enter a dwelling with intent at night (12/2/2023); enter premises and commit indicatable offence by break (13/2/2023); enter premises and commit indicatable offence by break (13/2/2023); fraud – dishonest application of property (13/2/2023); fraud – dishonest application of property (13/2/2023); and attempted enter dwelling with intent at night (20/2/2023); for which the applicant was sentenced at the Brisbane Childrens Court on 29 March 2023 to a sentence of six months detention, to serve 70%, served cumulatively, with no convictions recorded.
- [3] Although the learned magistrate referred to the revocation of an existing conditional release order, no order was made in respect of that conditional release order on 29 March 2023,¹ but on 21 April 2023, the learned magistrate made an order in chambers, without any appearances, revoking that conditional release order, originally imposed on 3 February 2023.²
- [4] The applicant also filed an application to extend time for sentence review on 24 May 2023, given that the application for sentence review was filed outside the 28-day time limit.³ Pursuant to *Youth Justice Act 1992* (Qld) ('YJA') s 119(2), an

¹ Exhibit 2 – Affidavit of Peta Dent filed 2 June 2023, exhibit A, p.1.

² Exhibit 4 – Outline of submissions on behalf of the applicant child, [1]–[2] & [4].

³ *Youth Justice Act 1992* (Qld) (YJA) s 119(2).

application can be made for time to be extended as allowed by a Childrens Court judge. The applicant's counsel has in my view adequately explained the delay,⁴ and it is clear that the delay is not attributable to the applicant (for the applicable test see *R v Tait* [1998] QCA 304).

- [5] The respondent does not oppose the application for an extension of time.⁵ The applicant submits, and the respondent accepts, that it is in the interest of justice to grant the application for extension of time, given the merits of the substantive application, and of course the explanation for the delay.

The law

- [6] A Childrens Court judge may review a sentence order made by a Childrens Court magistrate.⁶
- [7] The review is a re-hearing on the merits;⁷ and the Childrens Court judge may have regard to the proceedings before the Childrens Court magistrate and further submissions and evidence by way of affidavit or otherwise.⁸ The review must be conducted expeditiously and with as little formality as possible.⁹
- [8] The Childrens Court judge, on reviewing a sentence order, may confirm, vary or discharge the order and substitute another order within the jurisdiction of the Childrens Court magistrate to make;¹⁰ and can make any other order a Childrens Court magistrate could have made with the sentence order as confirmed, varied or substituted.¹¹
- [9] A court imposing a sentence on a juvenile must take into account the sentencing principles contained in YJA s 150 as well as general sentencing principles and the Youth Justice principles contained in YJA schedule 1.¹²

⁴ Exhibit 3 – Outline of submissions on behalf of the applicant child, [4] – [7].

⁵ Exhibit 5 – Outline of submissions for the respondent Crown, [1].

⁶ YJA s 118.

⁷ YJA s 122(1).

⁸ YJA s 122(2).

⁹ YJA s 122(3).

¹⁰ YJA s 123(1).

¹¹ YJA s 123(2).

¹² YJA ss 150(1) & (2); sch 1.

- [10] The sentence review process is a re-hearing on the merits, and it is not necessary to demonstrate error (see, for example, *R v JM* [2013] QChC 11, [9]; *R v MKH* [2014] QChC 3, p.2; *KLP v R* [2017] QChC 5, [3]; *MOJ v R* [2019] QChC 45, [7]; *RSS v R* [2022] QChC 29, [26]).

The offences

- [11] The applicant has helpfully summarised the offending the subject of this application as follows:¹³

4. *On 29 March 2023, the applicant was sentenced before the Brisbane Childrens Court for the following six offences. A schedule of facts was tendered and the facts of five (5) charges were read into the record by the police prosecutor.*

Attempted enter a dwelling with intent at night (12/2/2023)	At 11.54 am, the applicant attempted to open the front door of the victim's house.
Enter premises and commit indicatable offence by break (13/2/2023)	At 12.20 am the applicant, in the company of another, entered the victim's unlocked vehicle and stole a remote control for the front gate.
Enter premises and commit indicatable offence by break (13/2/2023)	At 1 am the applicant, in the company of four others, entered the victim's unlocked vehicle and stole a Gucci bag and ANZ Bank card.
Fraud – dishonest application of property (13/2/2023)	At 1.50 am the ANZ credit card was used to pay \$42 to a rideshare service.
Fraud – dishonest application of property (13/2/2023)	At 2.03 am the applicant and four others used the ANZ credit card to make five purchases at McDonald's totalling \$132.60
Attempted enter dwelling with intent at night (20/2/2023)	At 1.09 am the applicant opened an unlocked gate and attempted to open a locked front door.

- [12] The applicant pleaded guilty on 13 March 2023 and a pre-sentence report was ordered.¹⁴

¹³ Exhibit 4 - Outline of submissions on behalf of the applicant child, [4].

¹⁴ Exhibit 5 – Outline of submissions on behalf of the respondent, [7].

[13] The applicant's counsel outlined the background and antecedence of the applicant child as follows:¹⁵

5. *The applicant child has a relevant criminal history, commencing when he was sixteen (16) years of age and consisting largely of property offences. The criminal history was before the court at the time of the sentence.*
6. *The offences were committed whilst the child was subject to numerous community-based orders, including a conditional release order.*
7. *The applicant had twenty-two (22) days pre-sentence custody in relation to the six (6) new offences, eight (8) [days] of which were spent in the Brisbane City Watchhouse.*
8. *The applicant is presently sixteen (16) years of age [and] he was sixteen (16) years old at the time of the offending and sentence.*
9. *A thorough pre-sentence report was prepared for the court, which details the applicant's antecedents and highlights a number of factors that contributed to the applicant's offending behaviour.*
10. *The report speaks to:*
 - (a) *The applicant's diagnosis in grade seven (7) of neurodevelopmental disorders, namely Attention Deficit Hyperactivity Disorder (ADHD) combined with Autism traits. The negative impact this had on social relationships, ability to engage in mainstream education and other pro-social activities [as outlined].*
 - (b) *Difficulty forming friendships and a feeling of acceptance among pro-criminal peers.*
 - (c) *Ongoing substance misuse, cannabis and intravenous use of methylamphetamine as a significant contributor to offending behaviour.*
 - (d) *The applicant's recognition of the impact on primary victims and appeared more reflective around offending, compared with prior pre-sentence report interviews.*

¹⁵ Exhibit 4 - Outline of submissions on behalf of the applicant child, [5]-[10]; Exhibit 2 - Affidavit of Peta Dent filed 2 June 2023, exhibit F pp.23-29; Exhibit 2 - Affidavit of Peta Dent filed 2 June 2023, exhibit G pp.31, 33, 34, 40, 41, & 62.

Sentence

[14] The respondent's outline of submissions tracks the progress of this sentencing process from 29 March, 2023, helpfully as follows:¹⁶

8. *On 29 March 2023, the applicant child was sentenced to six months detention with release after serving 70% of the order. The detention order was made cumulative on the four-month detention order imposed in the Brisbane Childrens Court on 3 February 2023 to be served by way of a conditional release order. The cumulative sentence was made pursuant to section 213 of the Youth Justice Act 1992 (Qld.)*
9. *The presiding magistrate did not revoke the conditional release order made on 3 February 2023 as required pursuant to s 246(2) of the Youth Justice Act.*
10. *On 21 April 2023, the applicant child's lawyers received correspondence from the Department of Children, Youth Justice and Multicultural Affairs ("Youth Justice") stating they had applied to re-open the sentence to "clarify the intentions of the court regarding the conditional release order imposed on 3 February 2023."*
11. *On 4 May 2023, the applicant child's lawyers became aware that the QWIC court system showed that the re-opening application was heard and granted on 21 April 2023 in Judicial Chambers.*
12. *The QWIC court system showed that there were no appearances by any party to the application.*
13. *On 10 May 2023, the verdict and judgement record from the 21 April 2023 sentence re-opening was received by the applicant child's lawyers.*
14. *The verdict and judgment record shows that the applicant was resentenced on the 3rd of February 2023 sentence (not the sentence on 29 March 2023 subject to the original application to re-open the sentence).*
15. *The effect of the re-opening was that the applicant's conditional release order imposed on 3 February 2023 was revoked pursuant to section 247 of the Youth Justice Act and that the applicant child serve the period of four months in detention.*
16. *The verdict and judgment record reflects that special circumstances were noted but is silent as to the period of detention the child is to serve before being released.*

¹⁶ Exhibit 5 - Outline of submissions on behalf of the respondent, [8]-[17]; Exhibit 1 - Affidavit of Peta Dent filed 24 May 2023, exhibit A; Exhibit 1 - Affidavit of Peta Dent filed 24 May 2023, exhibit B.

17. The applicant child's lawyer has affirmed that they have spoken to a Ms Indiana Evans, acting court coordinator for the Youth Justice Department, and were informed that the Youth Justice Department had not applied to vary the conditional release order in the interests of justice per section 47 of the Youth Justice Act.

Grounds of review

[15] The applicant submits that the sentence was manifestly excessive, in all of the circumstances, and further, that the learned magistrate misconstrued the mechanism for revoking the conditional release order and was in error in the way that the order was revoked.¹⁷

[16] In respect of the ground of manifest excess, the applicant's position is set out in exhibit 4 – outline of submissions on behalf of the applicant child, [15]–[28] as follows:-

15. The applicant was sentenced for six (6) offences that occurred across two (2) dates in February 2023, with most of the offending occurring on one (1) day. It is submitted that the criminality of the offending is at the lower end, trying doorhandles, stealing from unlocked cars, and using a stolen bank card to make purchases.

16. It is accepted that the applicant's recidivism is [a] pertinent factor, which is not favourable to the applicant. However, it is submitted that in structuring the sentence the learned magistrate placed excessive weight on the applicant's reoffending whilst on orders, non-cooperation with police at arrest and the interpretation that the applicant's offending was increasingly desperate, and [that] he had abandoned any attempt to change.

17. The prosecutor submitted that a period of detention between four (4) and six (6) months be imposed, cumulative upon the four (4) months owing on the conditional release order and that the applicant be released at seventy percent (70%). The applicant's legal representative submitted that the court impose four (4) months detention and did not make submissions on whether the term should be cumulative or whether there [were] special circumstances to justify release prior to seventy percent (70%).

18. Whilst it is conceded that detention is appropriate, it is submitted that the combined effect of imposing six (6) months detention, ordering that it be served cumulatively and setting the release at seventy percent (70%), has resulted in the sentence that is disproportionate to the gravity of the

¹⁷ Exhibit 4 – Outline of submissions on behalf of the applicant child, [13]–[14].

offending, does not reflect the plea of guilty, and does not balance the [relevant] sentencing principles.

19. *The court did not provide reasons for the impositions of a cumulative order, which is a departure from the ordinary position in [the Youth Justice Act]. The effect of the order is that the applicant would serve seven (7) months in custody in relation to ten (10) offences, the six (6) new offences, and the four (4) offences that were subject to the conditional release order.*
20. *When ordering that the period of detention commence at the end of the time owing on the order from 3 February 2023, the court was unaware of the time owing and as such was unable to properly consider the global penalty.*
21. *The Youth Justice Act requires that any period of detention be a last resort and for the least time justified in the circumstance (YJA schedule 1, principle 18). It is a special consideration on sentence that a non-custodial order is better at promoting a child's ability to re-integrate (YJA s 150(2)).*
22. *The applicant is young, sixteen (16) years of age, and has not previously been sentenced to a period of actual detention.*
23. *The applicant's offending is linked to his drug use. His criminal history commences in 2022 which coincides with when he first started [using] methylamphetamine. The applicant is engaged in substance misuse programs while in custody and in the community and has expressed a willingness to engage in further drug and alcohol counselling.*
24. *It is submitted that the diagnosis of ADHD, with autism traits is a relative factor in which led to his engagement with pro-criminal peers and drug use. Further, the applicant has demonstrated increased insight into his offending, the impact on primary victims and his. It is of note that he has the enduring support of his family.*
25. *The applicant child had served twenty-two (22) days in pre-sentence custody in relation to the six (6) fresh offences, eight (8) [days] of which [were] more onerous having been spent in the watch-house.*
26. *In accordance with section 227 of [the Youth Justice Act] the child would be required to serve seventy percent (70%) of the order unless special circumstances apply. In R v NMQ [2019] QChC 6, the court noted that special circumstances are broad and can include; that it is the first actual detention order imposed; the nature of the offence; and a plea of guilty (R v NMQ [2019] QChC 6, [23]).*
27. *It is not evidenced from the transcript that the [learned magistrate] had considered whether special circumstances applied. It is submitted that*

factors exist which would constitute the release date being set at fifty percent (50%).

28. It is ultimately submitted that the combination of orders has resulted in [a] sentence that is disproportionate [to] the offending and longer than what can be justified in normal circumstances.

[17] The respondent's submissions in respect of the issue of manifest excess are addressed at exhibit 5 – outline of submissions on behalf of the respondent [31] – [37], as follows:-

31. The applicant child was sentenced for six offences that occurred across two separate dates in February 2023.

32. It is conceded that the criminality of the offending is at the lower end of the scale of seriousness that comes before the courts.

33. The applicant child has quickly compiled an extensive criminal history that demonstrates concerning recidivism.

34. The applicant child has offended while subject to three probation orders.

35. The applicant child re-offended within nine days of receiving a detention order on 3 February 2023 while subject to a conditional release order.

36. It is submitted that a detention order of six months is appropriate in all of the circumstances.

37. Pursuant to section 212 of the Youth Justice Act, the detention order ought to be served concurrently with the detention order from the 3 February 2023 sentence.

[18] The applicant's submissions in respect of the steps taken in relation to the conditional release order imposed on 3 February 2023, and subsequently revoked on 21 April 2023, is set out in exhibit 4 – outline of submissions on behalf of the applicant child [29] – [38], as follows:-

29. In the course of sentence proceedings, the following exchange took place between the prosecutor and the learned magistrate.

PROSECUTOR: "...the conditional release order that was made of the 3rd, it must be revoked and TKA ordered to serve the remainder of the sentence in detention"

HER HONOUR: "But that's automatic, isn't it?"

PROSECUTOR: “It is, your Honour. It’s by virtue of 246A of the Youth Justice Act”

30. *This [submission by the prosecutor] was not corrected by the applicant’s legal representative.*
31. *The learned magistrate acted on the erroneous belief that revocation of the conditional release order was automatic. Consequently, the court did not consider its discretionary powers under section 242 or section 246 of [the Youth Justice Act] and made no order accordingly.*
32. *Youth Justice sought the sentence be reopening to clarify. On 21 April 2023 the learned magistrate made an order in chambers under section 247 of [the Youth Justice Act] revoking the conditional release order.*
33. *It is submitted that the order under section 247 of [the Youth Justice Act] was unlawful. Section 247 is only enlivened upon an application by the applicant or Youth Justice to vary or discharge the order in the interests of justice [and] this was not the case [here].*
34. *In considering the revocation of a conditional release order, the court must, under section 248 of [the Youth Justice Act], reduce the period of detention by the period considered just to reflect any compliance with the order. Whilst the amended Verdict and Judgment record notes that the “child has successfully performed 12 days of the original conditional release order” – there was no order that the period of detention be reduced accordingly.*
35. *Furthermore, in revoking the conditional release order, the court may consider whether there are special circumstances, and what percentage of the order the applicant should serve prior to release (WFA v Commissioner of Police [2019] QChC 33).*
36. *The parties did not address the court on the release period or varying the period to reflect compliance in the sentence proceedings, and the applicant child was not afforded the opportunity [to] be heard in the re-opening.*
37. *It is conceded [that] the conditional release order should be revoked, however it is submitted that the period of detention ought to have been reduced to three (3) months and eighteen (18) days to reflect the twelve (12) days compliance, and the release date set at fifty percent (50%).*
38. *Lastly, as a result of how and when the order was revoked it is unclear whether the period between 29 March 2023 and the re-opening on 21 April 2023 is time served towards this 4-month detention period. If the court reviews the sentence, section 211(3) of [the Youth Justice Act] states that the period of detention will take effect from the start of the child’s custody on sentence.*

[19] YJA s 246A does not apply in this matter: under YJA s 221(1)(b)(i) it is a condition of a conditional release order that the child abstain from offending. YJA s 242 empowers the court to find a community-based order breached upon a finding of guilt for offences during the operational period. The instant offences occur prior to YJA amendments coming into force on 22 March 2023. YJA s 410 (inserted by *Strengthening Community Safety Act 2023* (Qld) s 38) states that YJA s 246A applies to a breach of the [conditional release order] that occurs after commencement).

[20] The respondent relevantly submits at exhibit 5 – outline of submissions on behalf of the respondent, [40] – [45], as follows:

40. *Section 247(2) provides that any application must be made in writing. The affidavit of Peta Samantha Dent affirmed on 22 May 2023 indicates that no request [was made] by the chief executive or child to vary the order [that] was made under section 247.*

41. *The combined effect of section 247(3) and (4) is that it is that if it is in the interests of justice, the application may be granted, but that the application cannot be made on the basis that the child has contravened the order.*

42. *The intention of the learned sentencing magistrate on 29 March 2023 when considering the transcript of proceedings. Her Honour stated (affidavit of Peta Dent affirmed 21 May 2023, exhibit B):*

“So taking those aspects of the matter into account, I order a period of detention of six months. I order he be released from detention after serving 70 per cent, and I order that the period of his detention is to take effect from the end of the detention he is currently ordered to serve from that 3 of February order made in the Brisbane Childrens Court.”

43. *The learned magistrate intended to revoke the conditional release order that the applicant child was subject to, and have him serve the remainder of that sentence, before serving 70% of the six-month detention order on 29 March 2023.*

44. *However, the sentencing magistrate did not provoke the conditional [release] order as required under section 246. Revoking the order under section 247 is a mistake as the order explicitly cannot be revoked under section 247 by way of contravening the order (Youth Justice Act s.247(4)).*

45. *It is submitted the sentence order from 3 February 2023 would be re-instituted as it should not have been interfered with by the learned magistrate.*

Alternatively, the amendment made in judicial chambers to the sentence order be set aside.

Discussion

- [21] The detailed and helpful submissions of counsel for both the applicant and the respondent have been quoted by me at length in these reasons, and, as identified, the relevant flaws in the sentencing process, and what followed in respect of the revocation of the conditional release order imposed on 3 February 2023, have been highlighted. In the circumstances, then, this court's conclusions can be expressed succinctly.
- [22] It is clear that, given the applicant's extensive criminal history; and given the fact that the offending occurred while subject to three probation orders and a detention order being served as a conditional release order; then despite detention being a sentence of last resort,¹⁸ it was, I accept, the only appropriate sentence in the circumstances, and the almost immediate breach of the conditional release order from 3 February 2023, is not only another reason for the imposition of a detention order, but it also indicates that a further conditional release order was not appropriate in the circumstances. The sentence of six months detention is, I accept, an adequate and proportionate sentence, in the context of this offending.
- [23] However, by ordering that the six months detention be served cumulatively, the learned magistrate has failed to recognise the lower level nature of the offending, the plea of guilty, and the matters raised in the pre-sentence report, including the applicant's ADHD diagnosis with autism traits, drug use, developing insight and family support.¹⁹ It follows that the learned magistrate fell into error in imposing six months detention, cumulatively.
- [24] The learned magistrate also fell into error in failing to consider whether there were special circumstances which would justify a release earlier than the default 70% pursuant to YJA s 227. As *R v NMQ* [2019] QChC 6 noted, those circumstances can include, as here, that this was the first time an actual detention order had been

¹⁸ YJA s 208.

¹⁹ Exhibit 4 – Outline of submissions on behalf of the applicant, [24].

imposed, the lower-level nature of the offending, and the pleas of guilty.²⁰ There is nothing to indicate that the learned magistrate considered whether there were special circumstances, which in my view clearly exist, as I have identified above. It follows that in these circumstances, the release should be set at 50% to recognise those special circumstances.

- [25] In respect of the revocation of the conditional release order, which did not occur during the sentence proceedings on 29 March 2023, but subsequently, in chambers on 21 April 2023, without any appearances from the parties, and without an application in writing from either the writing of the child or Youth Justice, as required by YJA s 247, this in my view was dealt with in a way that was clearly an error by the learned magistrate. Because the matters were dealt with in chambers and without appearances, the learned magistrate was not able to be assisted with submissions, either in respect of the reduction in the detention period to reflect partial compliance, nor in respect of the percentage of the detention order that should be served in actual custody (ie in the range between 50% – 70%).
- [26] I accept the submission that the four month detention order imposed 3 February 2023 should be reduced to 3 months and 18 days, to reflect the 12 days compliance, and, for the reasons identified above in respect of the 23 March 2023 detention order, that detention order also should be served at 50%.

Orders

- [27] In light of my conclusions, I make the following orders:
- (1) Application for extension of time to file sentence review granted.
 - (2) Application for sentence review granted.
 - (3) Order that the three month conditional release order imposed 3 February 2023, and revoked in chambers on 21 April 2023, be reinstated.
 - (4) Order that the reinstated three month conditional release order imposed 3 February 2023, be revoked, and that the sentence imposed of four months detention be reduced by 12 days, pursuant to YJA s 248 and that the release date be set at 50%.

²⁰ Exhibit 4 – Outline of submissions on behalf of the applicant, [26].

- (5) Confirm the sentence of six months detention imposed on 23 March 2023, and order that it be served concurrently pursuant to *Youth Justice Act* s 212, and that the release date be set at 50%.