

CHILDRENS COURT OF QUEENSLAND

CITATION: *ERG v Director of Public Prosecutions* [2023] QChC 38

PARTIES: **ERG**
(applicant)

v

DIRECTOR OF PUBLIC PROSECUTIONS
(respondent)

FILE NO/S: CCJ 543/22

DIVISION: Childrens Court of Queensland

PROCEEDING: Sentence Review Application

ORIGINATING COURT: Pine Rivers Childrens Court

DELIVERED ON: 7 March 2023 (delivered *ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 24 February 2023

JUDGES: Dearden DCJ

ORDER:

(1) Application for sentence review granted.

(2) Set aside the order for 12 months' probation imposed at the Pine Rivers Childrens Court on 12 December 2022.

(3) Refer all offences to the chief executive for a restorative justice court diversion referral pursuant to YJA s 163(1)(b).

CATCHWORDS: CRIMINAL LAW – APPEAL AGAINST SENTENCE – SENTENCING JUVENILES – where the applicant was sentenced to 12 months' probation in respect of 16 offences – maximum sentence available in the circumstances - where the applicant had no criminal history – where the learned magistrate indicated disinclination of a court diversion referral but failed to provide reasons

LEGISLATION: *Youth Justice Act 1992* (Qld) ss 118, 122, 150, 162, 163, 164, 175

COUNSEL: M D'Arcy for the applicant
B White 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 23 December 2022 in respect of a sentence of 12 months' probation, with no conviction recorded, imposed at the Pine Rivers Childrens Court on 12 December 2022 in respect of the following charges:-

Date of Offence	Place of Offence	Offence
5/9/2022	Warner	1 x enter premises with intent
5/9/2022	Warner	1 x enter premises and commit indictable offence
4/9/2022	Bray Park	3 x fraud/dishonest application of property of another
9/9/2022	Warner	1 x enter dwelling and commit
9/9/2022	Warner	1 x unlawful use of motor vehicles, aircrafts or vessels – use
8/9/2022	Warner	1 x attempted enter premises with intent to commit indictable offence
10/9/2022	Warner	1 x attempted enter dwelling with intent
9/9/2022	Warner	1 x attempted enter premises with intent to commit indictable offence
10/9/2022	Warner	1 x enter premises and commit indictable offence
10/9/2022	Warner	1 x attempted enter dwelling with intent.
10/9/2022	Warner	1 x enter premises with intent.
10/9/2022	Warner	1 x enter premises and commit indictable offence.
10/9/2022	Warner	1 x attempted enter dwelling with intent.
25/9/2022	Warner	1 x enter premises and commit indictable offence by break.

The law

- [3] A Childrens Court judge may review a sentence order made by a Childrens Court magistrate.¹
- [4] The review is a re-hearing on the merits,² 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.³ The review must be conducted expeditiously and with as little formality as possible.⁴
- [5] 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,⁵ and can make any other order a Childrens Court magistrate could have made with the sentence order as confirmed, varied or substituted.⁶
- [6] 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 youth justice principles.⁷
- [7] 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]).
- [8] The court has the power to refer an offence to the chief executive for a court diversion restorative justice process,⁸ and the court must consider such a referral when a child enters a plea of guilty to an offence.⁹ A failure to consider such a referral is an error of law.¹⁰

¹ *Youth Justices Act 1992* (Qld) s 118 ('YJA').

² YJA s 122(1).

³ YJA s 122(2).

⁴ YJA s 122(3).

⁵ YJA s 123(1).

⁶ YJA s 123(2).

⁷ YJA s 150(1)(b); YJA s 150(2); YJA sch 1.

⁸ YJA ss 163 & 164.

⁹ YJA s 162.

¹⁰ *R v PPD* [2019] QCA 59, [29] – [32]; *CAK v DPP* [2022] QChC 31, [13].

The offences

[9] The applicant has helpfully summarised the facts of the offences as follows: -¹¹

Charge Number	Date	Offence	Facts
1	5/9/2022	Enter premises with intent to commit indictable offence – s.421(1) Criminal Code.	Between 6 pm on 3 September and 8 am on 4 September, the complainant's white Hyundai Tucson was entered through an unlocked door and an untidy search conducted. No items were alleged to have been stolen.
2	5/9/2022	Enter premises and commit indictable offence – s.421(2) Criminal Code	Between 6 pm on 3 September and 4.30 am on 4 September, the complainant's white Holden Commodore was entered and his wallet containing bank and personal cards stolen.
3	4/9/2022	Fraud – dishonest application of property of another – s.408C(1)(a)(i) Criminal Code	Between 4.15 am and 4.21 am on 4 September, three transactions were made at the 7-Eleven Bray Park [store] using the complainant's Westpac bank card. CCTV footage captures the offending and shows the transactions were made by a group of juvenile males. One of the offenders is described as being of a larger build and wearing a black cap with a Raiders logo. This offender was later identified as the applicant.
4	4/9/2022	Fraud – dishonest application of property of another – s.408C(1)(a)(i) Criminal Code	As per Charge 3
5	4/9/2022	Fraud – dishonest application of property of another – s.408C(1)(a)(i) Criminal Code	As per Charge 3

¹¹ Exhibit 1 – Outline of submissions on behalf of the child, [11].

<i>Charges 6 to 16 all occurred within Warner, between the evening of 8 September and morning of 9 September. The offences are alleged to have been committed by a group of juveniles, including the applicant.</i>			
6	10/9/2022	Burglary and commit indictable offence – s.419(4) Criminal Code (referred to in schedule as charge 13).	Between 12 am and 4 am on 9 September, offenders have entered the victim's dwelling through a rear door and stolen a handbag and vehicle keys.
7	10/9/2022	Unlawful use of motor vehicles, aircraft or vessels - use – s.408A(1)(a) Criminal Code. (Referred to in schedule as charge 14).	The offenders have subsequently left in the complainant's grey Holden Commodore which was parked in the driveway. On 15 September, the vehicle was located abandoned in Albany Creek.
8	10/9/2022	Attempted enter premises with intent to commit indictable offence – s.421(1) & 535 Criminal Code. (Referred to in schedule as charge 12).	At 11 pm, two males attempted to gain access to the complainant's white LDV utility. This was captured on CCTV. A security light came on, and the offenders left.
9	10/09/2022	Attempted enter dwelling with intent – ss.419(1) & 535 Criminal Code (Referred to in schedule as charge 6).	The offender has cut a small hole in the rear security screen to unlatch and open the door. A locked glass door behind the screen prevented them from entering.
10	10/09/2022	Attempted enter premises with intent to commit indictable offence – ss.421(1) & 535 Criminal Code.	At 2 am, a male offender tried to open the door of the complainant's white Toyota C-HR. The offending was captured on the complainant's CCTV.
11	10/09/2022	Enter premises and commit indictable offence –	Between the evening of 8 September and morning of 9 September, offenders have entered the complainant's black

		s.421(2) Criminal Code.	Toyota Hilux and stolen an iPhone and tobacco pouch. A witness observed two young males in nearby streets attempting to open other vehicles as well.
12	08/09/2022	Attempted enter dwelling with intent – ss.419(1) & 535 Criminal Code	Offenders used a knife to cut a hole in the rear flyscreen door and unlocked the security latch. They were unable to enter the house due to a locked glass door. The offenders have attempted to enter the house through the front and laundry doors.
13	09/09/2022	Enter premises with intent to commit indictable offence – s.421(1) Criminal Code.	The offenders have conducted an untidy search of the complainant's green Toyota Camry. No property is alleged to have been stolen.
14	09/09/2022	Enter premises and commit indictable offence – s.421(2) Criminal Code.	Between the evening of 8 September and the morning of 9 September, offenders have removed the window of the complainant's black Holden Acadia. The complainant's wallet was stolen from the console.
15	09/09/2022	Attempted enter dwelling with intent – ss.419(1) & 535 Criminal Code.	At 11.30 pm, the complainant's husband heard the verandah security door open. He called out and the offenders left. No entry was gained due to a locked glass sliding door. The next morning, the complainant noticed the mower had been moved from one spot to another.
16	25/09/2022	Enter premises and commit indictable offence by break – s.421(2) & (3) Criminal Code.	At 1.40 am, the applicant and co-offender have attended the complainant business, BWS Warner Village, and used a hammer as well as their feet to smash the front glass panel in. The co-offender has entered the store and placed two bottles of Captain Morgan's Rum and two bottles of Absolut Vodka into a backpack. The applicant has remained at the entryway. The offending was captured on TV.

The applicant's antecedents

[10] The applicant's antecedents are helpfully summarised by the applicant as follows:-

12

6. *The applicant was born on 26 September 2006. He was 15 years of age at the time of the offending, and 16 years of age at the time of sentence.*
7. *The applicant had no formal criminal history at the time of sentencing.*
8. *He has not previously had the opportunity of a restorative justice court diversion referral process.*
9. *He was assessed as suitable and willing for a restorative justice court diversion referral by the Department of Youth Justice [exhibit A to the affidavit of Molly D'Arcy affirmed 22 February 2023].*

[11] During the course of submissions, after outlining the nature of the offences, this exchange occurred between the prosecutor in the Childrens Court and the learned magistrate: – ¹³

PROSECUTOR: ... obviously, restorative justice for the vast majority of these charges would be an intervention that would see him coming face to face with some of his victims in order to be able to see the impact that it has actually had on him.

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Alternately, your Honour, given the serious nature of it, the fact that these are serious indictable offences, some sort of probation is likely warranted perhaps for a period of, I don't know, six to 12 months at least in order

HER HONOUR: I don't think that reflects his age

PROSECUTOR: No.

HIS HONOUR: and the severity of it. I think it would have to be something more than just probation when they are smashing a plate glass window at BWS – and where there's different gatherings of youthful offenders, and he is the consistent one in three episodes, so obviously that puts a different complexion on the whole matter when he's involved in three different groupings of bunches of juvenile offenders causing havoc in the community.

PROSECUTOR: Alcohol is clearly an issue

¹² Exhibit 1 – Outline of submissions on behalf of the child, [6]-[9].

¹³ Affidavit of Molly D'Arcy affirmed 22 February 2023, exhibit B, p.1 l 1128-45.

- [12] Subsequently, the following exchange occurred between the defence lawyer appearing for the applicant and the learned magistrate in the same submission phase of the sentencing process: —¹⁴

MR FOSTER:.... *this can be considered an early plea of guilty. He does – he does have no criminal history. In my submission, he is a prime candidate for restorative justice and try to divert him away from the courts and further criminal behaviour. It can be - - -*

HER HONOUR: *So you want a pre-sentence order and for him to come back.*

MR FOSTER: *No, your Honour. A pre-sentence report isn't required for a restorative justice order.*

HER HONOUR: *I'm not – you want a pre-sentence referral for restorative justice and then to be sentenced after that conference.*

MR FOSTER: *Your Honour can put him on a court diversion restorative justice without that report. My alternative - - -*

HER HONOUR: *I don't - - -*

MR FOSTER: *- - - submission is - - -*

HER HONOUR: *I don't think that's appropriate.*

MR FOSTER: *My alternative submission is because of the seriousness of the offences, which I acknowledge, probation would be an alternative sentencing option that - - -*

- [13] The learned magistrate then proceeded to sentence the applicant, and in my view it's appropriate to read all of that text of the sentencing into the record, as follows:¹⁵

HER HONOUR: Stand up, please. You have put yourself clearly in the space that this community cries out for you to be punished. Most members of the community would want to see you locked up today in the juvenile detention centre, and you know that. You look at Facebook; you look at the news; you hear people on the radio: young people breaking into people's houses, stealing car keys and taking their cars causes irreparable damage. When you get a job, and you work hard, and you buy yourself a car, you do not want someone coming in and just taking your car. Some of the people who you have affected: they are frightened now. They are frightened of what might happen. They have seen pictures of young people like you coming into their houses with hammers and threatening people.

¹⁴ Affidavit of Molly D'Arcy affirmed 22 February 2022; exhibit B, p.1-13 ll14-37.

¹⁵ Affidavit of Molly D'Arcy affirmed 22 February 2023; exhibit C, p.1-212-1-314.

And you have taken people's car – one man's car a Commodore, you had for a period of nearly a week before it was abandoned. So that person could not go to work, could not take their elderly parents for kidney dialysis or for treatment, could not take their kids to school, could not take anyone in the family for medical treatment because you selfishly and disrespectfully and criminally took their car. You got a real problem about these offending behaviour because it is very arrogant. The court really cannot consider you to be mature, and arrogance is what happens when young people behave selfishly and do not consider the impact of their behaviour on the victims. Hopefully, with a period of probation, you will be able to address these concerns and put yourself on the right track.

Obviously, you were involved in quite a lot of offending over a short period of time, culminating with you and another young person smashing a plate glass window to get into BWS to steal alcohol. It is not out of the ballpark that that would have cost BWS in excess of \$10,000. The man who you removed the passenger window from his car: he had to pay \$2000 for his excess on his car insurance. So members of our community have suffered because of your behaviour. If you do not work hard at probation and you continue to have the same friends and do the same thing, you will end up in jail. So I encourage you to work hard at probation and to make sure that you do not act in this criminal way again.

No conviction is recorded. You are placed on probation for 12 months. You must report to the Caboolture – sorry. Yes. The – at the Caboolture Youth Justice Service within two days. If you want to start today, you can. You can report there straight from Court. You have got to report to them and receive visits from them as they direct, not leave Queensland without their permission, tell them if you change your home or work address within two business days, undertake programs and counselling as they direct, and not break the law again during that period. You have got to comply with their reasonable directions. Please take it seriously and please apply yourself to it.

It is a hard thing to give yourself a good life when you do not even have a year 10 education. It is not just a matter of what piques your interest; it is about giving you the capacity to be a fully contributing member of our community. That is very hard if you do not have the basics. So I encourage you to think about doing some TAFE or other course before you get to your apprenticeship. You will find it hard doing the study component of your apprenticeship without a bit of support, seeing as you have not been able to apply yourself to school. So please think about that as an adult. Get ready to take your role in our community as an adult.

- [14] It is uncontroversial that in the learned magistrate's sentencing remarks, which I have reproduced in full, there is no reference to her consideration of the restorative justice referral as an option, nor any reasons provided for not dealing with the offences by way of a court diversion referral.

[15] At my request, both the applicant and the respondent provided detailed and helpful supplementary submissions in respect of how this court should approach a matter such as this, where the learned magistrate indicated her disinclination to utilise a court diversion referral during the course of submissions (without giving any more reasons other than she did not consider it “appropriate”), then failed to articulate any reasons whatsoever in respect of that issue in the sentencing remarks.

[16] The respondent, in their submissions, refers me to the decision in *R v MDD* [2021] QCA 235, quoting the Court of Appeal at [17] as follows:-

In the normal course, especially where the decision has been reserved, it is to be expected that a sentencing judge will reveal all of their reasoning for the sentence then being imposed, rather than leaving it to the parties to identify some of it in something said by the judge in the course of the argument.

[17] The respondent further quotes at [63] of *R v MDD*:-

Firstly, as Margaret Wilson AJA explained in R v Hyatt, exchanges between the bench and counsel during submissions are designed to draw out and test submissions so that the remarks of a judge in such exchanges may be at odds with the views eventually arrived at after hearing and giving due consideration to all submissions by both sides. The caution her Honour there counselled against in relying upon such exchanges on appeal is logically even more apt where, as here, the decision was reserved rather than given ex tempore. Secondly, the problem here is an absence of articulated consideration of a point of importance. Accepting that there may be cases in which regard to exchanges between bench and counsel could assist in explaining what is meant by scant reasons later given on a particular point, no such assistance can be gained here because the problem is not a paucity but an absence of articulated consideration of a material issue.

[18] The respondent at exhibit 5 – supplementary submissions on behalf of the respondent, [2.3] stated:

In R v Hyatt [2011] QCA 55 [13], her Honour Margaret Wilson AJA remarked that a cautious approach in relying on exchanges between the bench and counsel is warranted. Her Honour stated that a practice of relying unduly on exchanges between the bench and counsel should not be allowed to develop.

[19] The respondent makes the following further submissions arising from those decisions:-¹⁶

¹⁶ Exhibit 5 – Supplementary submissions on behalf of the respondent, [2.4]–[2.6].

- 2.4 *Ideally, sentencing remarks should contain all of the relevant considerations. While one can look to the submissions to see what might have been considered or to amplify the reasons, it is difficult to rely on those discussions which are designed to tease out the submissions. In the current matter, issues considered during sentencing submissions were absent from the magistrate's remarks.*

Those issues related to the defendant's mitigating features on why a period of probation was to be preferred over a restorative justice order.

- 2.5 *The magistrate should have articulated her reasoning in her remarks. However, when one looks at the magistrate's comments and the submissions, there does not appear to be any ambiguity about why she reached the decision that restorative justice was inappropriate.*
- 2.6 *Despite the magistrate being reticent in her remarks, it is submitted that the sentence arrived at was not excessive in the circumstances. It was accepted by both parties that a period of probation was an appropriate sentencing option. The offending was serious and protracted. There were 16 property-related offences committed over the course of three weeks and three distinct episodes. All were committed in company. A period of probation would recognise the seriousness of the offending, assist with the defendant's rehabilitation and address his delinquent peer associations.*

[20] The applicant, on the contrary, submits as follows:¹⁷

15. *Whilst the exchange between counsel and the bench should be approached with caution, given the absence of reference to a referral within the learned magistrate's sentencing remarks, in this case, it may be necessary to consider what was said during the course of submissions.*
16. *As previously stated, her Honour's only remark in respect of a referral under section 162 was that it was "inappropriate". Her Honour did not have regard to any of the factors outlined in section 163.*
17. *During the submissions, the learned magistrate considers a number of different sentencing options, including probation, a combined order of probation and community service, and compensation. Her Honour initially remarks that probation in isolation is inappropriate due to the severity of the offending and the applicant's age.*
18. *Even if regard is had to remarks made in the course of submissions, it is submitted these reasons are still insufficient so as to discharge the court's obligation under section 162.*

¹⁷ Exhibit 4 – Supplementary outline of submissions on behalf of the child, [15]-[18].

- [21] Both the applicant and the respondent agree that the approach mandated by *R v SDW* [2022] QCA 241 [16] – [17], arises from the specific provisions of YJA ss 208 & 209, in imposing sentences of detention.
- [22] However, in my view, it remains necessary for a court to articulate, in the sentencing remarks, that consideration was given to a YJA s 162 court diversion referral, and why such an order was not made.¹⁸
- [23] In this matter, although there were a significant number of offences (16), and some reasonably significant seriousness to the offending (including that there were three tranches of offending, with different co-offenders, and on three different occasions); the applicant was 15; had no criminal history; was about to commence full-time work, had demonstrated remorse; had complied with strict bail conditions for some months; had not offended before; had entered an early plea of guilty;¹⁹ and the offences had occurred over a three-week period, but with the bulk of the offences occurring over a much shorter period of one week.
- [24] The period of 12 months’ probation imposed was the maximum available in the circumstances,²⁰ and with respect, the learned magistrate has not only fallen into error by failing to articulate why a court diversion referral was not considered, but has also failed to reflect the mitigation identified in submissions, in the ultimate sentence imposed.

Conclusion

- [25] In all of the circumstances, although it was not necessary for the applicant to demonstrate error on the part of the learned magistrate, I consider that the sentencing process has fallen into error for the reasons set out above. I consider that the sentence imposed was excessive, and that a restorative justice court diversion referral is an appropriate “off-ramp” for this child in the context of this offending, and adequately addresses what I acknowledge is the seriousness of that offending. I am satisfied that the pre-conditions of YJA s 163(1) have been met.

Orders

¹⁸ *R v PBD* [2019] QCA 59, [32]-[38].

¹⁹ Exhibit 1 - Outline of submissions on behalf of the applicant, [34]

²⁰ YJA s 175(1)(e)(i).

[26] I make the following orders:

- (1) Application for sentence review granted.
- (2) Set aside the order for 12 months' probation imposed at the Pine Rivers Childrens Court on 12 December 2022.
- (3) Refer all offences to the chief executive for a restorative justice court diversion referral pursuant to YJA s 163(1)(b).