

CHILDRENS COURT OF QUEENSLAND

CITATION: *VGF v Director of Public Prosecutions* [2024] QChC 1

PARTIES: **VGF**
(applicant)

v

DIRECTOR OF PUBLIC PROSECUTIONS
(respondent)

FILE NO/S: CCJ 548/23

DIVISION: Childrens Court of Queensland

PROCEEDING: Sentence Review Application

ORIGINATING COURT: Redcliffe Childrens Court

DELIVERED ON: 24 January 2024 (delivered *ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 24 January 2024

JUDGES: Dearden DCJ

ORDER:

- (1) Application for sentence review granted.**
- (2) Discharge the order for six months' probation imposed in the Redcliffe Childrens Court on 24 November 2023.**
- (3) Substitute an order that the applicant be referred to a restorative justice conference pursuant to YJA s.163(1)(d).**

CATCHWORDS: CRIMINAL LAW – APPEAL AGAINST SENTENCE – SENTENCING JUVENILES – where applicant was sentenced to six months' probation in respect of three offences – whether sentence was manifestly excessive in the circumstances – where applicant had no criminal history and entered an early plea of guilty – whether learned magistrate failed to appropriately consider a referral to restorative justice

LEGISLATION: *Youth Justice Act 1992* (Qld) ss 3, 150, 162, 163, 164

COUNSEL: J Percy (sol) for the applicant
Z Eser (sol) for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Office of the Director of Public Prosecutions for the respondent

Introduction

- [1] This is an application for sentence review filed on the 5th of December 2023 in respect of a sentence of six months' probation, imposed at the Childrens Court at Redcliffe on the 24th of November 2023. The applicant then filed an amended application for sentence review to correct an error in the date of one of the charges to which the applicant child had pleaded guilty, and the amended application seeks a sentence review in respect of the following charges:

Date of Offence	Place of Offence	Offence
11/11/2023	Deception Bay	1 x enter dwelling and commit
11/11/2023	Deception Bay	1 x unlawful use of motor vehicles, aircraft, or vessels – use in the night
11/11/2023	Caboolture South	1 x attempted stealing

The Law

- [2] I refer to and adopt the exposition of the relevant law as set out in the decision of *ERG v DPP* [2023] QChC 38, [2] – [7].
- [3] I should note, at paragraph 7 of that decision, I identified that “...a failure to consider [a court diversion restorative justice process referral] is an error of law” and cited two decisions. It seems to me that in the circumstances of this case, a failure to properly consider such a referral is also an error of law, but I’ll address that issue further in the reasons.
- [4] The circumstances are helpfully addressed in the applicant’s outline¹ in these terms:

[1] On 24 November 2023, the child pleaded guilty to the following charges in the Redcliffe Childrens Court:

- (a) Enter dwelling and commit on 11 November 2023: at about 1.17 am on 11 November 2023, the child and a co-offender entered the downstairs front of a house in Deception Bay. It is unknown if the door was locked. They took two sets of car keys from a bench inside the front door.*
- (b) Unlawful use of a motor vehicle – use in the night on 11 November 2023: the child and co-offender used one set of keys to steal a Toyota Kluger. The vehicle was parked on the front yard. They were seen by the occupants of the house driving away and the police were contacted.*
- (c) Attempted stealing on 11 November 2023: footage from a Coles Express at Morayfield showed at 2.40 am the stolen Toyota Kluger pulled up next to the bowser. The child and co-offender exited the vehicle and attempted to fill the vehicle with fuel. Police sighted the vehicle and*

¹ Exhibit 2 – Outline of Submissions on behalf of the Applicant, [1]-[2].

pulled in behind. At that time, the child and co-offender entered the vehicle and decamped.

[2] The child was convicted and sentenced to a 6-month probation order, pursuant to s.175 of the Youth Justice Act 1992 (Qld) ('The Act') for the three charges. A conviction was not recorded.

(citations deleted).

Grounds of review

[5] The ground of review is:

In all of the circumstances of the matter, the sentence was excessive.

[6] The applicant submits that the Youth Justice Act (YJA)² provides a code for dealing with children who have committed offences, subject to the charter of Youth Justice principles which underpin the operation of the YJA.³

[7] The court is required to have regard to the sentencing principles contained within YJA s.150. The applicant (correctly, in my view) quotes Sofronoff P in *R v SCU* [2017] QCA 198 [53]:

The effect of the provisions of the Youth Justice Act that I have referred to is that the Act is emphatic about the requirement that a court give consideration to all statutory factors relevant to a particular case, as well as the facts of the case itself in the ordinary way, before deciding upon an appropriate sentence imposed upon a child.

[8] During the course of the applicant's legal representative's submissions, when a submission was made for restorative justice, the applicant's counsel having made that submission and it would seem a representative of youth justice also made submissions, in particular, in these terms:

- potentially probation might be on the little on the higher end. The legislation does say that your Honour has to consider restorative justice.

and the learned magistrate's response (noting, of course, that this was during submissions rather than during the sentencing remarks) was:

Legislation don't – don't – don't consider the victims. I consider victims. Probation will be good.⁴

[9] In the magistrate's sentencing remarks, the magistrate identified that:

² *Youth Justices Act 1992* (Qld) ('YJA').

³ YJA s. 3.

⁴ Affidavit of Jasmin Percy, affirmed 16 January 2024, exhibit JP6, 1-4 LL 26-30

...the main thing that I consider is the victim.

- [10] He went on to refer to the circumstances of the victim who may have had family and the circumstances of the offender who may have had a weapon, and then, without in any way considering in his reasons the option of a restorative justice diversion, proceeded to say:

*I am going to place you on probation.*⁵

- [11] As the applicant's counsel correctly identifies in her written submissions, the impact of an offence on the victim (although obviously relevant) is only one of many sentencing considerations. And as also identified, there was no evidence placed before the sentencing court of the actual harm suffered by the victim nor was it alleged that there was any violence, use of a weapon, nor even whether there was anyone – and if so, who – present at the house at the relevant time.
- [12] Further, in respect of the unlawful use, there was no allegation of dangerousness, the child was not alleged to be the driver and, in those circumstances, it is submitted (and I accept) that the learned magistrate placed too much weight on the victim and what could have happened to the victim, rather than sentencing the child for the actual offending conduct as per the facts placed before the court.⁶
- [13] The applicant also identifies that the learned magistrate has not, in the sentencing remarks, adverted to relevant mitigating factors, including the child's age (16), lack of criminal history, co-operation through an early plea of guilty, a recognition of the impact of the offending on the complainant and an expression of remorse, support by his mother and an expressed intention of getting into the workforce.⁷
- [14] The second aspect that the applicant addresses on the appeal is the obligation placed on a judicial officer pursuant to YJA s.162 to consider referring the offence to a restorative justice process instead of sentencing the child.
- [15] YJA s.162(1) provides:

*If a child enters a plea of guilty for an offence in a proceeding before a court, the court **must** consider referring the offence to the chief executive for a restorative justice process instead of sentencing the child.*

(My emphasis).

- [16] In the circumstances of this matter, it is clear that the learned magistrate closed their mind to the option of a restorative justice process pursuant to YJA s.162

⁵ Affidavit of Jasmin Percy, affirmed 16 January 2024, exhibit JP-7, 1-2 LL 1-10.

⁶ Exhibit 2 – Outline of Submissions on behalf of the Applicant, [12]-[15].

⁷ Exhibit 2 – Outline of Submissions on behalf of the Applicant, [16].

without in any way engaging in the process of considering whether it was appropriate in the circumstances.

- [17] Critically, the court was advised that the child understood the process and was willing to comply with the referral, had been assessed as a suitable person to participate and, as is submitted, given the nature of the offences, the harm if any suffered as a result of the offences and the interests of the community and the child, if the matter is dealt with under a restorative justice process, that it was appropriate.⁸
- [18] In circumstances where the learned magistrate stated that he would only refer the charges to restorative justice if he knew the victim was willing to speak to the child (unnecessarily constraining the discretion because restorative justice processes can, of course, occur without the participation of a specific victim) it is clear that the learned magistrate has failed to have proper regard to the relevant factors that must be considered in deciding whether to refer offences to a restorative justice process and instead (as the applicant submits) placed too much weight on “the interests of the victim” and, of course, the issue as to whether the victim would attend.
- [19] The applicant refers me to the now dated but still relevant decision of O v Commissioner of Police [2018] QChC 8, [6], where President Richards noted that:

...the sentencing of children requires a greater focus on rehabilitation than punishment and that diversion away from the criminal justice system is desirable when dealing with first time offenders.

- [20] I note that although I have adopted, with approval, the submissions of the applicant, the respondent (entirely appropriately and fairly, in my view) acknowledges that:

The learned magistrate placed undue weight on the impact of the offence on the victim and gave no other reasons for why a restorative justice referral was not suitable.⁹

- [21] The respondent’s counsel also identifies (entirely correctly) that:

...in imposing a sentence, the court must take into account the sentencing principles outlined in section 150 of the Act. The respondent agrees that given the applicant had no criminal history at the time of sentencing and had not previously engaged in a restorative justice process, that restorative justice would be a more appropriate outcome.¹⁰

Conclusion

⁸ YJA s. 163; Exhibit 2 – Outline of Submissions on behalf of the Applicant, [19].

⁹ Exhibit 3 – Outline of Submissions on behalf of the Respondent, [5.2].

¹⁰ Exhibit 3 – Outline of Submissions on behalf of the Respondent, [5.3].

- [22] It is clear that the learned magistrate fell into error in imposing a sentence that was in the circumstances manifestly excessive and, in particular, failing to appropriately consider and provide reasons the issue of a referral to restorative justice, pursuant to YJA ss 162, 163 & 164.

Orders

- [23] I make the following orders.

- (1) Application for sentence review granted.
 - (2) Discharge the order for six months' probation imposed in the Redcliffe Childrens Court on 24 November 2023 for the offences of enter dwelling and commit; unlawful use of motor vehicles, aircraft or vessels – use in the night; and attempted stealing.
 - (3) Substitute an order that the applicant be referred to a restorative justice conference pursuant to YJA s.163(1)(d).
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