

**COURT OF APPEAL**

**PHILIPPIDES JA  
DOUGLAS J  
APPLEGARTH J**

**CA No 306 of 2016  
DC No 10 of 2016  
DC No 13 of 2016**

**THE QUEEN**

**v**

**FAM**

**Applicant**

**BRISBANE**

**THURSDAY, 13 APRIL 2017**

**JUDGMENT**

**PHILIPPIDES JA:** The application before the Court is for leave to appeal against sentence. The only identified error concerns the recording of convictions in relation to the offences where detention orders were made. The absence of any sentencing remarks by the sentencing judge expressly directed to the discretion of whether or not to record a conviction, or, indeed, to s 184 of the *Youth Justice Act*, being the relevant provision, is such that it is appropriate to proceed on the footing that the discretion to record convictions miscarried.

In those circumstances, it is appropriate for this Court to exercise that discretion afresh. As was noted in *Cunningham* [2014] QCA 88, the Court is slow to record a conviction. Section 184 sets out the considerations relevant in deciding whether or not to record a conviction as including the nature of the offence, the child's age and previous convictions, if any, the impact the recording of a conviction will have on the child's chances of rehabilitation generally or finding or retaining employment. The relevant principles are set out in length in the decision of *Cunningham*.

In the present case, the nature of the offences in respect of which detention orders were made were serious matters of offending, in particular, the offence of arson. The repetitive use and driving of vehicles whilst unlicensed is also significant in this regard. The offending represented a concerted course of conduct on the part of the applicant in disregard of Court orders, and despite repeated contact with the authorities.

The applicant's age is, of course, relevant, as is his disadvantaged background, and efforts to remove himself from an unsavoury group of peers. All of that is pertinent to rehabilitation generally. It can be assumed that the recording of a conviction will have a negative impact, in many cases, on employment. However, it is unlikely to have a deleterious impact on an offer of assistance with employment from the applicant's brother. There was no evidence before the Court of any other particular employment offers which the applicant would not be able to take up if a conviction were recorded.

Exercising the discretion afresh, in relation to the recording of convictions, I would take the same approach that the sentencing judge did and would record convictions in relation to offences where detention orders were made. In the circumstances, I would grant the application for leave to dismiss the appeal.

**DOUGLAS J:** I agree with the reasons of the learned presiding judge and with the orders proposed. I merely wish to say, in addition, that the learned sentencing judge, when exercising his discretion to impose detention orders on the applicant in respect of certain of the offences,

addressed a number of issues also relevant to the discretion to record a conviction under s 184 of the *Youth Justice Act*. He then only recorded convictions in respect of the offences where he imposed detention. Nonetheless, he did not address, explicitly, the criteria under s 184 in deciding whether or not to record convictions. The discretion to impose a detention order is based on different criteria, although no doubt overlapping with those relevant to s 184.

In the circumstances, it is preferable, as the learned presiding judge has indicated, that that discretion should be exercised by reference to the statutory criteria, and, in the absence of reasons addressing that, it seems to me that that does give scope, based on the authorities, to reconsider the exercise of the discretion, but for the reasons advanced by her Honour, I agree that the same result should follow.

**APPLEGARTH J:** I agree with the learned presiding judge, and with Justice Douglas. I would simply add some matters by way of amplification, particularly concerning the nature of the offences and the applicant's age and previous convictions. On 13 October 2016, the applicant was sentenced in the Childrens Court for 20 offences committed over a nine-month period. He was aged between 15 and 16 at the date of the offences, and 16 at the date of being sentenced. The most serious offences concerned entering a dwelling and stealing car keys, the unlawful use of a motor vehicle, and the arson of a motor vehicle, which occurred on 9 November 2015.

There were other concerning offences, particularly offences of a similar character which occurred on or about 23 March 2016 when the offender entered the dwelling of an elderly lady. He stole her car keys and the car was written off. I will not delay to detail his other offences. These observations outline the serious nature of the offending, which was correctly characterised as a spree of offending over a nine-month period.

The learned sentencing judge paid careful attention to the nature of the offending, the applicant's age and previous convictions and prospects of rehabilitation. However, he did not expressly refer to the consideration in s 184(1)(c), namely "the impact the recording of a conviction will have on

the child's chances of rehabilitation generally or finding or retaining employment." It is improbable that his Honour did not have regard to that matter, because he received a submission, albeit a short and simple one, that a conviction should not be recorded. There were important points of distinction between the applicant and his co-accused who had quite different circumstances. There were specific submissions in relation to the effect that recording a conviction would have upon the co-accused. Therefore, the fact that his Honour did not descend in detail to the matter referred to in s 184(1)(c) is perhaps understandable in the light of the little that was said on the applicant's behalf. It was simply an invitation by the applicant's counsel at the sentencing hearing not to record a sentence.

I am prepared to proceed on the basis that the omission of any reference to the matter referred to in s 184(1)(c) caused the discretion to miscarry. In retrospect, his Honour might simply have said that, "I now take into consideration all I have already said about the nature of the offence, your age and antecedents, and the absence of any specific evidence about the impact of recording a conviction upon you". Unfortunately, his Honour did not do so.

The task of re-exercising the discretion falls to the Court. There was no specific evidence about the impact of recording a conviction. There was simply an allusion to the fact that that applicant's legal representative at the hearing had been instructed that he wanted to take up work with his brother. It did not go much further than that. It was indicated that he was making inquiries about employment and was taking steps in those directions. His Honour took account of that fact more generally.

The circumstances, including the applicant's deprived upbringing and the absence of any evidence that recording a conviction upon him would have any greater effect than it would have on any other 16 year old, leads me to conclude that the result reached by his Honour was correct. Having regard to the nature of the offending, including the fact that the offending took place over a substantial period and included offending while the applicant was on bail, and while he had

been subject to probation orders, this was serious offending. The nature of the offending, his age, previous convictions and the absence of any evidence that recording convictions could have a greater effect upon him than anyone else, all, on balance, lead to the same conclusion as reached by the learned and experienced sentencing judge. I join in the orders proposed by the learned presiding judge.

**PHILIPPIDES JA:** Yes. The orders of the Court will be that the application for leave be granted and that the appeal be dismissed. Adjourn the Court.