SUPREME COURT OF QUEENSLAND

CITATION:	*R v VL* [2018] QCA 339
PARTIES:	**R** **v** **VL** (applicant)
FILE NO/S:	CA No 254 of 2018 DC No 19 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Townsville – Date of Sentence: 12 September 2018 (Coker DCJ)
DELIVERED ON:	7 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2018
JUDGES:	Sofronoff P and Fraser JA and Mullins J
ORDERS:	**Leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – GROUNDS FOR INTERFERENCE – where the applicant pleaded guilty to one count of doing grievous bodily harm – where the applicant was a youth offender – where the applicant was sentenced to two years detention to serve 50 per cent of that period of detention – where the applicant and complainant were in a relationship – where the complainant believed that she was pregnant and the applicant urged her to get an abortion – where the applicant stabbed the complainant four times while she was sleeping – where the applicant was 16 years old at the time of offending and 17 years and nine months old at the time of sentence – where the applicant submits that the learned sentencing judge failed to take into account that the applicant would serve part of his sentence in an adult correctional facility – whether the learned sentencing judge ought to have expressly taken into account that the applicant would be removed to an adult facility while serving his sentence *Youth Justice Act* 1992 (Qld), s 276B, s 276D, s 276F *R v BBN* [2008] QCA 84, cited *R v CAC* [2006] QCA 191, cited *R v S* [1999] QCA 499, cited

COUNSEL: C Reid for the applicant
D Kovac for the respondent

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

[1] **SOFRONOFF P:** When the applicant was 16 years old he began a relationship with the complainant, a 15 year old girl. About six months later the complainant thought that she was pregnant. According to the agreed statement of facts, the applicant "freaked out" at this news and told the complainant that she needed to have an abortion.

[2] On 23 September 2017, the young couple had an argument. The applicant wanted to go to a basketball game but he had already promised the complainant that he would stay with her for the whole day. He decided to go to the basketball game anyway. He assured her that he would go back to her house after the game had finished. From the time of his departure until late that night they continued their argument by way of text messages. Partly, they argued about the pregnancy.

[3] Very late on that night, at about 12.30 am, the applicant arrived at the complainant's home. She lived there with her mother and father. In her room they continued arguing. The applicant asked the complainant for a glass of water and she brought him one. A short time later he wanted another drink of water but on this occasion he went to the kitchen on his own. The complainant began to fall asleep.

[4] The applicant took a knife from the kitchen and came back to the bedroom. He began to stab the complainant. He delivered four stab wounds, one in the abdomen and three in the mid-back area. He cut her thumb.

[5] The complainant woke in pain and felt her shirt wet with blood. She saw the applicant apparently asleep next to her. She looked in the mirror and saw blood all over her. She began to scream and woke her parents. She asked the applicant why she was covered in blood. He said he did not know. Her parents took her to Townsville General Hospital.

[6] There the following injuries were identified:

1. A full thickness laceration to the right thumb penetrating 10 mm;
2. Three other superficial lacerations to the right thumb;
3. A 6 cm penetrating wound in the upper quadrant that passed through the skin, ribs, pleura, diaphragm, peritoneum and liver;
4. Three penetrating wounds overlying the right paraspinal musculature;
5. Haemopneumothorax on the right side.

[7] The defendant was arrested early that morning. He denied causing the injuries. He said he had not seen anybody else in the room. Police found a knife on the ground at the rear of the complainant's home. It was lying in a line of sight from the windows of the complainant's bedroom. The applicant's right palm impression was found on the knife blade.

[8] The complainant's mother gave a victim impact statement. Not surprisingly, she said that the complainant has suffered severe physical and mental effects as a result of the stabbing. The whole family has also suffered. The complainant now has "full length ugly scars on her stomach and deep ugly scars on her back" as a result of the operation to deal with the injuries.

[9] The complainant has changed into a person that her parents no longer recognise. She is "very aggravated, she has problems at school, and her behaviour has resulted in dismissal from her Year 11 Tafe course". She is reliant upon the public health system and has been placed on a waiting list for counselling. At the date of sentence she had had no counselling except some offered to her by her school. The pressure at home as a result of the complainant's agitated and angry behaviour has become acute. There have been associated expenses that her family cannot afford brought on by reason of the attack upon the complainant. Although a modest sum has been paid by way of a grant, this is not nearly enough to cover the expenses.

[10] A pre-sentence report was ordered. The interviews that took place between the case worker who wrote the report and the applicant revealed that the applicant is the oldest of three children. He and his two younger brothers were born in Manila in the Philippines where the applicant spent his early childhood and early adolescence. The applicant's father obtained work in Australia in 2008 and moved here. The family followed in 2014. The applicant's upbringing in the Philippines was normal. He exhibited no remarkable behaviour and had shown no propensity for aggressive behaviour or violence. He was a normal boy. As can be expected for a young immigrant, settling in to this new country was difficult at first. However, he enrolled at the local high school and began to make friends. The applicant's relationship with the complainant was his first intimate relationship.

[11] A psychological report that formed part of the pre-sentence report showed that the applicant has borderline cognitive ability with lowered understanding. However, he suffers from no clinical psycho-pathology. Although he has an overly defensive attitude, the results of tests "suggest [the applicant's] interpersonal style is warm, friendly and sympathetic … [and] … suggests [the applicant] is more likely to avoid conflict where possible". The applicant has no history of violence and no previous criminal history.

[12] During the course of interviews with his case worker, the applicant accepted that he should have removed himself from the situation rather than stab the complainant. He did not attempt to minimise his offending behaviour. He expressly acknowledged his responsibility for his acts and for their consequences. He accepted that he cannot justify what he did. He expressed a fear of the possible consequences he may face by way of penalty but said that he accepted the sentence that would be handed down by the Court would be "a fair consequence of his actions".

[13] The applicant pleaded guilty to one count of doing grievous bodily harm. Coker DCJ sentenced the applicant to detention for two years with an order pursuant to s 227(2) of the *Youth Justice Act* 1992 that he be released after serving 50 per cent of that period of detention. His Honour ordered that a conviction not be recorded for this offence.

[14] The applicant seeks leave to appeal on two grounds. First, he contends that Coker DCJ failed to take into account that the applicant would serve part of his

sentence in an adult correctional facility. Second, he says that the sentence was otherwise manifestly excessive.

[15] Section 208 of the *Youth Justice Act* 1992 provides that a court may make a detention order against a child only if the court is satisfied, after considering all other available sentences, and after taking into account the desirability of a child in detention, that no other sentence is appropriate in the circumstances of the case. Section 210 of the Act provides that a child who is sentenced to serve a period of detention must serve that detention in a detention centre, that is to say, a correctional facility in which only children are detained.

[16] The circumstances of children who commit offences and who turn 18 years or older before they are sentenced, or during the period of detention, is dealt with by Division 2A sub-division 1 of the Act. Section 276B provides as follows:

> "**Particular detainees liable to be transferred to corrective services facility**
>
> (1) The following persons are liable to be transferred to a corrective services facility—
>
> (a) a person in detention who—
>
> (i) turns 18 years while serving a period of detention; and
>
> (ii) is liable to serve a remaining period of detention of 6 months or more;
>
> (b) a person beginning detention who—
>
> (i) is 18 years or older when beginning detention; and
>
> (ii) is liable to serve a remaining period of detention of 6 months or more.
>
> (2) For this section, the ***remaining period of detention*** for a person—
>
> (a) is taken to start—
>
> (i) if turning 18 years during detention—on the day the person turns 18 years; or
>
> (ii) if 18 years or older when beginning detention—on the day the person begins detention; and
>
> (b) is taken to end—
>
> (i) at the conclusion of all periods of detention that the person is liable to serve cumulatively; but
>
> (ii) no later than the day the person is required to be released from detention under section 227.
>
> (3) In this section—
>
> ***beginning detention*** includes returning to detention to continue or complete a period of detention because of a

contravention of a conditional release order or supervised release order."

[17] Notwithstanding those provisions, a detainee's transfer to an adult prison can be delayed by the court at sentence or upon separate application. Section 276D provides relevantly:

> "**Application for temporary delay of transfer**
>
> (1) If, when a court makes a detention order against a person for an offence, the person becomes liable to be transferred to a corrective services facility under section 276B, the person may immediately apply to the court for a temporary delay of the person's transfer to the corrective services facility.
>
> (2) …
>
> (3) …
>
> (4) The court may grant an application made under subsection (1) or (2) only if it is satisfied the delay—
>
> (a) would be in the interests of justice; and
>
> (b) would not prejudice the security or good order of the detention centre at which the applicant is, or is to be, detained; and
>
> (c) would not prejudice the safety or wellbeing of any detainee at the detention centre at which the applicant is, or is to be, detained; and
>
> (d) would not cause the person to be detained at a detention centre after the person turns 18 years and 6 months.
>
> (5) Without limiting the matters the court may have regard to, the court must have regard to the following matters in making a decision on an application made under subsection (1) or (2)—
>
> (a) any vulnerability of the applicant;
>
> (b) any interventionist, rehabilitation or similar activities being undertaken by the applicant and the availability of those activities if transferred.
>
> (6) ...
>
> (7) ...
>
> (8) …"

[18] In this case the applicant was 17 years and nine months old when he was sentenced. He will turn 18 on 8 December 2018. Consequently, he is a person in detention who turns 18 while serving that period of detention but who is liable to serve a remaining period of detention of six months or more. He cannot apply for a temporary delay because s 276D(4)(d) precludes a grant of an application that would extend beyond that period.

[19] Section 276F(1) of the Act provides:

> "This Act is subject to the overriding principle that it is in the best interests of the welfare of all detainees at a detention centre that persons who are 18 years and 6 months or older are not detained at the centre."

[20] The section goes on to provide for a prohibition against the presence in a detention centre of detainees who are 18 years and six months or older.

[21] The operation of these provisions means that the transfer of an 18 year old detainee to an adult facility is one of the normal incidents of a sentence of detention. It is an aspect of the punishment regime under the *Youth Justice Act* 1992 that exists for the benefit of detainees who are aged under 18 years.

[22] Although, when considering an application for a temporary delay of transfer, an applicant's vulnerability must be taken into account,[1] as must the availability of "interventionist, rehabilitation or similar activities", even those interests of an applicant yield to the "overriding principle" stated in s 276F that no detainee who reaches the age of 18 years and six months can remain in a detention centre.

[23] Consequently, in the absence of evidence to the contrary, the fact that a detainee will turn 18 during the period of detention and will be transferred to an adult facility cannot, ordinarily, constitute a relevant factor in mitigation of sentencing. Such a transfer is merely the consequence of a detainee reaching an age at which the law deems the offender to be an adult and, therefore, an inappropriate person to detain with children.

[24] Circumstances may alter cases. There may be reasons in the case of a particular offender why a period of imprisonment in an adult facility will constitute an extra hardship that ought to be taken into account in fixing the appropriate penalty. However, the operation of s 276B itself does not constitute a factor in mitigation of a sentence of detention that is otherwise the proper sentence that has been imposed, as the statute requires, because there is no other alternative.

[25] It follows that it was not necessary for the learned sentencing judge to take into account expressly that the terms of the Act would see the applicant's eventual removal to an adult facility. His Honour was not in error in omitting to take the operation of s 276B as a mitigating factor.

[26] Otherwise, the applicant submits that the sentence of detention for two years with release at the halfway mark was manifestly excessive. The applicant has no prospect of making good that submission should leave be granted and, for that reason, leave should be refused.

[27] It must be accepted that this offence was entirely out of character for the applicant and there is no evidence to suggest that there is any likelihood that the applicant will re-offend.

[28] Nevertheless, there are other factors to be taken into account apart from the personal circumstances of the applicant. Objectively, the attack was a premeditated and

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1 Section 276D(5)(a).

vicious attack upon a sleeping 15 year old girl. The effect upon her and upon her family has been horrific as can be expected having regard to what happened.

[29] *R v CAC*[2] involved an offender who used a knife to stab the complainant. *R v BBN*[3] was a case in which the applicant struck the complainant with a rock causing fractures of the face. *R v S*[4] concerned an applicant who had kicked the complainant in the head causing fractures. All of these cases, and other similar cases to which the Court has been referred, involved offenders who, with or without weapons, caused grievous bodily harm to their victims that involved lasting consequences. All of them were ordered to serve periods of actual detention. That is not surprising.

[30] Although the youth justice principles prescribed by the Act require that a sentence of detention should be imposed only as a last resort and for the least time that is justified in the circumstances, the same principles also require that the community should be protected from offences and that children who commit offences should be held accountable.

[31] I do not accept that a sentence that did not require a period of actual detention could have been justified in this case even having regard to the applicant's good character, his good prospects for the future and his family's loving support. Those personal factors were given effect by the learned judge's decision not to record a conviction, a weighty matter in the present circumstances and a significant leniency having regard to the nature of the offence. They were also reflected in his Honour's order that the applicant be released after serving 50 percent of his period of detention. In the case of a violent offence like this one, the community would be offered no protection against offences being committed by other boys in the future if the sentence that was imposed did not give any effect to the requirement for general deterrence. The requirement to deter others and the need for the sentence to reflect the community's denunciation of violence meant that a period of actual incarceration could not be said to be wrong.

[32] For these reasons, in my view an appeal against sentence would have no prospects of success. I would refuse leave to appeal.

[33] **FRASER JA:** I agree with the reasons for judgment of Sofronoff P and the order proposed by his Honour.

[34] **MULLINS J:** I agree with the President.

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2 [2006] QCA 191.
3 [2008] QCA 84.
4 [1999] QCA 499.