SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBV* [2019] QCA 21
PARTIES:	**R** **v** **HBV** (applicant)
FILE NO/S:	CA No 294 of 2018 DC No 16 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Bundaberg – Date of Sentence: 19 October 2018 (Clare SC DCJ)
DELIVERED ON:	Date of Orders: 7 December 2018 Date of Publication of Reasons: 19 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	7 December 2018
JUDGES:	Sofronoff P and Philippides JA and Davis J
ORDERS:	**Date of Orders: 7 December 2018**

1. Leave to appeal granted.

2. Appeal allowed.

3. The sentence of detention of nine months is confirmed.

4. The detention order be immediately suspended and that the applicant be immediately released from detention upon a conditional release order for a period of three months.

5. The requirements of the conditional release order are that the applicant:

(a) must participate as directed by the Chief Executive of Youth Justice Services in the conditional release program.

(b) must abstain from violation of the law during the period of this order.

(c) must comply with every reasonable direction of the chief executive.

(d) must report and receive visits as directed by the chief executive.

(e) must either personally or by a parent notify the chief executive within two business days of any change of address, employment or school.

(f) must not leave, or stay out of Queensland without prior approval of the Chief Executive.

6. A conviction is not recorded.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was a juvenile – where the applicant was convicted of one count of armed robbery with actual violence committed in company and sentenced to nine months detention – whether the trial judge erred by considering irrelevant matters – whether the sentence was manifestly excessive

Youth Justice Act 1992 (Qld)

Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46, cited
R v SCU [2017] QCA 198, cited
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL: P Wilson for the applicant
C N Marco for the respondent

SOLICITORS: Howden Saggers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Davis J.

[2] **PHILIPPIDES JA:** The reasons of Davis J reflect the basis for my joining in the orders made on 7 December 2018.

[3] **DAVIS J:** The applicant is an indigenous boy who has just turned 16 years of age. He sought leave to appeal against a sentence of nine months detention with release from custody after serving four-and-a-half months which was imposed upon him in the Childrens Court sitting at Bundaberg on 19 October 2018, upon his conviction on his plea of guilty to one count of armed robbery with actual violence committed in company. He challenged the sentence and submitted that he should be immediately released on a conditional release order.[1]

[4] On 7 December 2018, I joined in the making of the following orders of the Court:

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1 *Youth Justice Act* 1992 (Qld) Part 7, Division 10, Subdivision 2.

1. Leave to appeal granted.

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   (d) must report and receive visits as directed by the chief executive

   (e) must either personally or by a parent notify the chief executive within two business days of any change of address, employment or school

   (f) must not leave, or stay out of Queensland without prior approval of the Chief Executive.

6. A conviction is not recorded.

7. Reasons reserved.

[5] The applicant and two others formed a plan to steal from backpackers. The applicant was unknown to the victim. While armed with a nunchaku, the applicant rode his bicycle near the complainant and demanded money. One of the applicant's accomplices then kicked the complainant in the back before punching him on the nose. The applicant also punched the complainant and all three then left without stealing anything.

[6] The applicant has a criminal history starting with a conviction in the Hervey Bay Childrens Court on 24 September 2014. At that point, he was 11 years of age. Over the following four years, the applicant has accumulated an unenviable criminal history. Before the sentences the subject of this application, he had been dealt with by courts on 10 separate occasions.

[7] The applicant was removed from his parents' care by Child Safety Services in 2008 when he was six years of age. He had been subjected to physical and sexual abuse and exposed to domestic violence, drug use and neglect.

[8] The applicant has been diagnosed with intellectual impairment together with Attention Deficit Hyperactivity Disorder and Conduct Disorder. During the hearing of the application, the applicant was asked a number of questions by the President and by Philippides JA. The applicant answered those questions clearly and with conviction. The answers demonstrated insight into his past behaviour and his current predicament. It was also obvious to me during the hearing that the applicant was carefully following the argument. His answers given to the President in particular reflected his understanding of the issues that had been raised. While I do not dispute the diagnosis of intellectual impairment, it is clear that the applicant is intellectually capable of understanding the requirements of the

orders made by the Court, and is no doubt intellectually capable of complying with suitable programs designed for his rehabilitation.

[9] Specialised education to meet his particular needs has effectively failed. Prior to the current offending, he had been smoking cannabis and the Youth Justice case workers consider this to be a factor contributing to his aggression.

[10] The offence occurred on 15 May 2018. A few days later, the applicant was involved in an accident where his leg was quite severely injured. He expressed fear at the prospect of detention as he considered himself vulnerable to other inmates as a result of the injury.

[11] Between the time of the commission of the offence and sentence (a period of about five months), the applicant was on bail and complying with conditions. There is no suggestion of any offending whilst on bail.

[12] While the applicant has in the past been unable to take advantage of rehabilitative programs, he told the Childrens Court through his counsel that he understood that cannabis was a contributing factor to his offending and that he realised that it was necessary for him to engage in drug and alcohol counselling. He also instructed his counsel about various matters that showed insight. These included:

(i) he understood the importance of employment and wished to seek employment as a fisherman;

(ii) he had previously been prescribed medication for his Attention Deficit Hyperactivity Disorder but had stopped taking that medication. He now realises that the medication has a calming effect and it was a mistake to stop taking it. He now has the intention to resume that medication; and

(iii) he previously undertook psychological counselling and now realises that he should resume that treatment so he can better deal with the impact that his childhood trauma has had upon him.

[13] The applicant, in answer to questions from the President and Philippides JA, made what I assess as genuine statements which were consistent with the instructions he gave his counsel.

[14] Various sentencing options were explored in the pre-sentence report which was before the learned sentencing judge. One option was a conditional release order. Under the *Youth Justice Act* 1992 (Qld), a conditional release order is made once a detention order is made. In the pre-sentence report, there is no suggestion that the applicant was not suitable for such an order and indeed the report said:

> "A suitable program proposal has been generated and is attached to this report marked "C" for Your Honour's consideration.
>
> The conditions of a Conditional Release Order and the consequences of failing to comply has been explained to [the applicant] and he has indicated a willingness to comply with such an order."

[15] In the Childrens Court, the prosecutor noted that the present offence was committed whilst on probation and submitted that a detention order was appropriate. She pointed to various matters noted in the pre-sentence report which contributed to the offending and then said "… those features could perhaps be mitigated on this occasion with respect to a release then on a conditional release order." She observed "His offending has in the

larger scheme of things seemed to have decreased in its regularity compared to 2015 through 2017." That submission was obviously correct. Then she submitted:

> "He clearly is very fearful of going to detention and despite the fact that he's continued to re-offend and committed this very serious offence during the currency of a probation period, balancing all of those features, whether a conditional release order with the impending consequence of spending actual time in detention might provide some catalyst with respect to his rehabilitation."

[16] A Child Safety officer addressed the Childrens Court on the occasion of the sentencing. That officer confirmed that a residential placement was available for the applicant. She pointed to aspects of his behaviour and then said: "But, you know, we do have concerns about our capacity to keep the community safe."

[17] The application for leave to appeal against sentence states one ground which is "the sentence was manifestly excessive in all of the circumstances…". Counsel for the applicant sought and was given leave to add a second ground of appeal, namely that "the learned sentencing judge erred by considering irrelevant matters."

[18] The matter that is submitted to be irrelevant is the protection of the community. The passage from the sentencing remarks relevant to this new ground is as follows:

> "Officers from the [D]epartment of Child Safety are clearly concerned about its capacity to keep the community safe. That is a frank concession and it is one that is completely understandable in light of the way that you have behaved up to now. This is a serious offence. If you were an adult, you would be sentenced to a period of perhaps something in the vicinity of three years imprisonment. It seems to me, notwithstanding the compassionate submissions of the Crown, that there ought to be a sentence of actual and immediate detention for you today …".

[19] Principle 1 of the Charter of Youth Justice Principles which is Schedule 1 to the *Youth Justice Act* specifically makes protection of the community a relevant factor in sentencing a child. Counsel for the applicant though, submitted that the subjective belief of a Child Safety officer as to the applicant's risk of reoffending is irrelevant and the learned sentencing judge ought not to have taken that belief into account.

[20] As the argument developed, the real complaint emerged, namely that the learned sentencing judge equated "protection of the community" with preventative detention, and the latter is an irrelevant consideration.

[21] In *Veen v The Queen [No 2]*,[2] the High Court explained that protection of the community is a relevant consideration in sentencing but a sentence should not be increased beyond what is proportionate to the offence, in reliance upon considerations of preventative detention. That statement of principle was repeated in *Fardon v Attorney-General (Qld)*.[3] Protection of the community as a sentencing consideration under the *Youth Justice Act* should be understood in that way.

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[2] (1988) 164 CLR 465.

[3] (2004) 223 CLR 575, see [20] per Gleeson CJ.

[22] Her Honour did not expressly say how she took into account the consideration of the protection of the community. However, actual detention of a child is a last resort measure. There is no need to explore the principles here as they were analysed in depth in *R v SCU*.[4]

[23] Here, there is clear evidence of the applicant demonstrating insight into his conduct and there is evidence of rehabilitation being underway. The Crown prosecutor appearing in the Childrens Court recognised and acknowledged as much. In those circumstances, I draw the inference that her Honour has been distracted, impermissibly, by considerations of preventative detention. The result is a sentence which is manifestly excessive.

[24] Given the applicant's history a detention order is appropriate but only upon recognition of special factors which require the making of a conditional release order. Those special factors are:

(i) the applicant's disadvantaged upbringing;

(ii) the applicant's intellectual disabilities;

(iii) the applicant's recent insight; and

(iv) the applicant's efforts at rehabilitation.

(v) Before the Court made its orders, the applicant expressed a willingness to comply with the conditions of a conditional release order.[5]

[25] For those reasons I joined in the orders which were made.

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4 [2017] QCA 198.

5 See *Youth Justice Act* 1992 (Qld) s 222.