# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v PBD* [2019] QCA 59 |
| PARTIES: | **R**<br>**v**<br>**PBD**<br>(applicant) |
| FILE NO/S: | CA No 30 of 2019<br>DC No 30 of 2018 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Childrens Court at Maroochydore – Date of Sentence: 23 January 2019 (Cash QC DCJ) |
| DELIVERED ON: | 12 April 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 11 April 2019 |
| JUDGES: | Sofronoff P and McMurdo JA and Wilson J |
| ORDERS: | **1. Application for leave to appeal against sentence granted.**<br>**2. Appeal dismissed.** |
| CATCHWORDS: | CRIMINAL LAW – SENTENCE – SENTENCING OF JUVENILES – RELEVANT FACTORS – where the applicant pled guilty to one count of grievous bodily harm – where the applicant was sentenced to 12 months detention to be released after serving 50 per cent – where s 162(2) of the *Youth Justice Act* 1992 (Qld) requires the sentencing judge to consider referring the offence to the chief executive for a restorative justice process to assist in imposing an appropriate sentence – whether the sentencing judge considered the referral under s 162(2) of the *Youth Justice Act* – whether another sentence should have been passed<br><br>*Criminal Code* (Qld), s 668E(3)<br>*Youth Justice Act* 1992 (Qld), s 35, s 36, s 162, s 163<br><br>*Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37, cited |
| COUNSEL: | E P Mac Giolla Ri for the applicant<br>N Rees for the respondent |
| SOLICITORS: | Legal Aid Queensland for the applicant<br>Director of Public Prosecutions (Queensland) for the respondent |

[1] **SOFRONOFF P:** This is an application for leave to appeal against sentence.

[2] The applicant is a juvenile who was sentenced under the *Youth Justice Act* 1992 (Qld). At the hearing of the appeal the applicant was granted leave to amend his ground of appeal to the following ground:

> "The learned sentencing judge erred by failing to consider referring the offence to the Chief Executive for a restorative justice process or, alternatively, failed properly to consider such a referral."

[3] The applicant was charged with doing unlawful grievous bodily harm to Nicholas William Donaldson on 22 July 2017. He pleaded guilty and Cash QC DCJ ordered that the applicant be detained for 12 months but that he be released from custody after serving 50 per cent of the period of detention.

[4] The circumstances of the offence were these. The complainant, Mr Donaldson, had spent the evening of 21 July 2017 at the Wharf Tavern in Mooloolaba. He left at about 2.00 am on 22 July 2017. He was approached by the applicant and another male. They asked him for cigarettes. Mr Donaldson said he did not have any and continued walking. He walked for some distance and then, changing his mind about his destination, he turned around and this caused him to walk past the applicant and the other male again. The applicant said "Give me your pouch. Do you want to get bashed?" The complainant had a pouch of tobacco. He gave the pouch to the applicant. He then walked into a service station where he made a phone call to alert police. They were not interested in attending. The complainant then left the service station. He saw that the applicant was now lying on the ground unconscious. Seizing the opportunity, he bent over the applicant's body and looked for his pouch of tobacco.

[5] He then stood up and spoke to three people who had approached. He did not know them. The applicant then regained consciousness, jumped up and punched Mr Donaldson several times in the face. Mr Donaldson fell to the ground. One of the three people to whom Mr Donaldson was speaking, Mr Bella, grabbed the applicant and tried to pull him away from Mr Donaldson. Mr Donaldson got to his hands and knees. The applicant then kicked him in the face and Mr Donaldson fell to the ground. The applicant ran away.

[6] This time police attended. An ambulance took Mr Donaldson to hospital. The applicant had left his mobile phone behind on the ground and this was given to police.

[7] Mr Donaldson suffered serious injuries. The beating that the applicant gave him caused multiple fractures to his left eye socket and nose. He now suffers from numbness to the left side of his forehead. There is a remaining deformity to the left side of his head. He suffers from double vision.

[8] Mr Donaldson provided a victim impact statement. He said that he underwent two sessions of surgery to repair the injuries. He had to take time off work. His face has been changed because of the distortion caused by the injuries.

[9] Mr Donaldson suffered severe anxiety while waiting for surgery. Afterwards there was a great deal of pain. After the first operation he could not eat or talk properly

because the smallest facial movements caused a lot of pain. The prospect of a second operation was very daunting. The treatment applied was uncomfortable.

[10] Apart from the pain caused by any facial movement Mr Donaldson suffered from constant pounding headaches.

[11] Since his recovery from the immediate effects of surgery Mr Donaldson's life continues to be affected. He is anxious about the consequences to him if he were to suffer another injury to his head. He used to ride a bicycle as a form of transport and for recreation. The prospect of suffering a fall and injuring his head yet again means that he is not prepared to take the risk of further injury. Mr Donaldson has suffered a loss of confidence and feels fear at the thought of going to places where he might be assaulted again.

[12] The applicant was not arrested until 17 March of the following year. He was interviewed. He denied stealing the pouch of tobacco. Instead, he said that the complainant and his friends had accused him of stealing the pouch and that one of Mr Donaldson's friends had "choked him out" from behind. He said that when he had regained consciousness he picked up his belongings but noticed that his phone was missing. In his anger at being choked for no reason he had punched Mr Donaldson in the head. When Mr Donaldson fell to the ground he had kicked him in the head again.

[13] Even on that version, which is falsehood, the applicant had committed a serious and unprovoked assault.

[14] The applicant has a criminal history. On 19 October 2016 he was convicted before the Childrens Court of one count of assault occasioning bodily harm, one count of serious assault on police causing bodily harm and one count of assault or obstruct police. The applicant was then 15 years old. A fight broke out at a party between two girls. The complainant, another 15 year old boy, tried to stop that fight but the applicant grabbed him around the neck and punched him in the face. When the complainant moved back the applicant followed him and punched him again two times to the face. The complainant tried to defend himself and said that he did not want to fight. The applicant head-butted him on the nose and struck him in the ribs. The complainant fell unconscious to the ground. When the applicant was arrested on the following day he struggled and hit a female officer in the thigh.

[15] He expressed no remorse for that offending. He was sentenced to a 12 month probation order and 100 hours of community service with no conviction recorded. He was serving that probation when he committed the offence the subject of this grant.

[16] Between November 2016 and the date he committed this offence the applicant committed further offences. These included entering premises and committing an indictable offence, several assaults, several stealing offences, unlawful use of a motor vehicle, unlawful possession of suspected stolen property and trespass.

[17] After committing the present offence, but before being arrested for it, he also committed a series of offences of the same kind including assaults.

[18] No convictions were recorded for any of those offences and the penalties were all of a kind that could be served within the community.

[19] A presentence report was prepared. The applicant is a member of a large family that identifies as both Aboriginal and Maori. His mother said that her own and her husband's parenting style was overly permissive. She had to devote a large part of her attention to caring for her grandchildren and to caring for the applicant's younger sibling who was autistic. The applicant has had difficulty regulating his emotional distress and was prone to engage in aggressive reactions. These difficulties with control of temper continued through his childhood. They resulted in his exclusion from school in 2015.

[20] The applicant began to drink alcohol when he was 14 and to use cannabis shortly after that. After being excluded from school he began to associate with older boys who were able to give him alcohol and cannabis. At the time of this offence he was regularly drinking and using other mind altering substances. The author of the report said that "[the applicant's] abuse of alcohol and other substances reduced his ability to make informed decisions". Undoubtedly they reduced his inhibitions also.

[21] At the time of the offences the applicant was not living at home because of conflicts with his parents. He was without any guidance or influence from appropriate adults.

[22] The applicant continued to assert to the author of the presentence report that he had been assaulted first and that his response had been proportionate. He showed no concern for Mr Donaldson.

[23] Between the time of the offence and sentencing the applicant had made efforts to address his substance abuse. It is not clear that he was successful. He had participated in certain programs including a program that sought to address his aggression.

[24] The learned sentencing judge referred to most of these matters in his sentencing remarks. He then said:

> "The principles that I need to consider are those set out in the *Youth Justice Act*, and in particular, the Charter of Youth Justice Principles. The most important, so far as what's to happen today, is the principle that can be expressed in this way: when dealing with a juvenile, sending a juvenile to jail is to be the sentence of last resort. That is, it should only be done when all of the other options are considered and it is thought that it is the only appropriate sentence in the circumstances, weighing up your own personal circumstances, but also the seriousness of what you have done and the consequences to your victim. If detention is to be imposed, it is to be for the shortest time which is appropriate in the circumstances, again having regard to those same matters. The view that I take is that detention is the only appropriate sentence, having regard to the seriousness of your conduct, the violence that you inflicted, the damage that you caused, and the consequences of your actions."

[25] Section 162(1) and (2) of the *Youth Justice Act* provide as follows:

> "(1) 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.
>
> (2) If a finding of guilt for an offence is made against a child before a court, the court must consider referring the offence to the chief executive for a restorative justice process to help the court make an appropriate sentence order."

[26] Mr Mac Giolla Ri, who appeared for the applicant on the appeal but not on sentence, pointed out that s 162 contains two ways in which the restorative justice process can be used. Section 162(1) provides for its use as an alternative to any sentence being imposed by the court. Section 162(2) provides for its use as a source of information to assist a judge in imposing an appropriate sentence.

[27] The process is that there is to be a conference attended by certain persons. Section 34 provides that certain persons are entitled to attend the conference. They are the child, the victim, the convenor, a representative of the commissioner of police, a parent of the child and some others. In the case of a child who is an Aboriginal or Torres Strait Islander, or who is from an Aboriginal or Torres Strait Islander Community, the convenor must consider inviting certain representatives of such a community. Section 35 provides that a conference can only be convened if the victim is willing to participate in one of a number of ways. Section 36 provides that the object of such a conference is to make a "conference agreement". This agreement is one in which the child admits the offence and undertakes to address the harm caused by the commission of the offence. Section 35 provides that a conference ends when an agreement is made or in certain other circumstances, including if the convenor considers that no agreement will be reached within an appropriate time.

[28] Mr Mac Giolla Ri accepts that s 162(1) was not a reasonable option in this case. However, he submits that the purpose of s 162(2) is to give a sentencing judge the advantage of information relevant to sentencing that might not otherwise be available and that this was an advantage that the learned judge should have considered but that he did not do so.

[29] The applicant submits that the requirement contained in s 162 is mandatory and that it obliged the sentencing judge to consider the exercise of the discretion to refer the offence. That submission is correct. Mr Mac Giolla Ri submits that his Honour's sentencing remarks do not refer to s 162 and make no mention of any consideration of restorative justice process. He submits that his Honour's reasons should have stated the fact that he had considered a referral and should have expressed his reasons for declining to exercise his discretion in favour of a referral. The applicant submits that his Honour's statement that a sentence of detention was a penalty of last resort that should only be imposed "when all of the other options are considered and it is thought that it is the only appropriate sentence in the circumstances" should not be read as an indication that his Honour had given any consideration to s 162(2).

[30] Mr Mac Giolla Ri submits that his Honour's failure to consider the exercise of the discretion was an error of law that vitiated the sentence.

[31] In most cases the absence of an express reference to a particular matter in reasons for judgment need not mean that the matter was not considered. However, in this case I do not think that the learned judge's reference to "options", in the context in which that word was used, signified that he had considered the discretion conferred by s 162(2) and had decided not to exercise it. The word appears in connection with

his Honour's rejection of options for a penalty other than detention. Section 162(2) is not concerned with a sentencing option. It is concerned with generating relevant information. Section 163(1)(d)(ii) provides that one of the matters to be considered is whether a referral would "help the court make [a] … detention order". Such a referral is termed a "presentence referral". The learned judge's rejection of other "options" was, in my view, a rejection of sentencing options and not a rejection of this particular method of gaining information by means of a possible conference.

[32] The requirement to give consideration to undertaking this process is mandatory but it was not considered. As a consequence, there has been an error of law in the applicant's sentencing process. The result is that leave to appeal should be granted and the sentencing discretion must be exercised afresh.[1]

[33] The circumstances of the offence have already been set out. The applicant submits that the Court should allow the appeal even if the Court would not impose a different sentence. That submission cannot be accepted. The task of this Court is to consider whether another sentence "is warranted in law and should have been passed".[2] A sentence that has been imposed as the result of a legally flawed determination is not "warranted in law" unless in the exercise of its own discretion, this Court determines that it is the appropriate sentence.[3] If, in the exercise of its own discretion, the Court concludes that the same sentence was the appropriate sentence then it is not required to resentence[4] and the appeal would be dismissed.

[34] The applicant's case is not that the sentence that was imposed was so excessive as to connote an implicit error in the exercise of the sentencing discretion. It is that the discretion miscarried because the learned judge did not consider whether a referral under s 162(2) might assist him in imposing an appropriate sentence. I do not see how that can automatically give rise to a conclusion that the sentence that was imposed was not warranted.

[35] By way of answer, Mr Mac Giolla Ri points out that, according to the presentence report, the applicant had difficulty thinking or talking about the offence. He points out that, although the applicant had shown no remorse, the contents of the victim impact statement had affected him. Mr Mac Giolla Ri submitted that the conference required by the restorative justice process would provide information about whether the applicant was remorseful and the extent of any remorse, whether he understood the harm that he had caused and what he applicant might undertake to do under any agreement that resulted.

[36] The process for which s 162(2) is one that is to be undertaken if, in the circumstances of a particular case, it can be seen that there might be some point to it. This was not such a case. The learned judge had before him a presentence report that had been prepared only a week before the sentence hearing. It dealt with the subjects that are now said to justify a referral. The report informed the judge fully about the applicant's upbringing and his family circumstances. It informed him about the applicant's present attitude to his behaviour and his ongoing propensity to

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1 *Kentwell v The Queen* (2014) 252 CLR 601 at [42] per French CJ, Hayne, Bell and Keane JJ.
2 s 668E(3) *Criminal Code* (Qld).
3 *Kentwell*, *supra*, at [42].
4 *Kentwell*, *supra*, at [43]; and *cf. AB v The Queen* (1999) 198 CLR 111 at [130] per Hayne J (in dissent, but not on this point).

justify his offence. Although the applicant had been given the victim impact statement, he evinced no real remorse for what he had done to Mr Donaldson.

[37] The applicant was granted leave to adduce evidence in the appeal. His affidavit states that he would have been willing, and remains willing, to engage in a conference.

[38] There is a theoretical possibility in every case in which a juvenile commits an offence that a conference might bear fruit. That is not enough. There must be something in the material on sentence that could justify the exercise of discretion to make a referral otherwise its consideration by a sentencing judge, mandated though it is, will be a brief one. In this case it is not surprising that the requirement in s 162(2) was overlooked. It was not in issue so neither party referred to it. As I have said, there was already ample fresh material about the applicant's personal circumstances. Nobody suggested that Mr Donaldson would be at all interested in participating in a conference with his assailant and without his involvement, there could be no conference.[5] The time for the applicant to demonstrate germinations of insight, or developing remorse or real preparedness to change was at the sentence hearing but he did not take that opportunity. That was also the time for him to show that he was prepared to engage in a process of reconciliation. He did not have to be aware of the legal position under s 162 in order to do any of those things. Knowing these things, his counsel accepted that this was a case in which detention for about 12 months was not inappropriate.

[39] Nevertheless, Cash QC DCJ found several facts in favour of the applicant. Despite his history of violence and failure to comply with court orders, his Honour found that the applicant seemed to have gained more maturity in recent times. His Honour detected some positive indications in the presentence report that this maturity was helping the applicant to control his drinking. His Honour referred to family support that was being offered. His Honour referred to the applicant's success in obtaining employment. His Honour noticed that the applicant's ability to comply with court orders was getting better. His Honour specifically considered whether to record a conviction, as he was obliged to do, and decided not to record one in order to give the applicant a final opportunity, before becoming an adult, to lead a life free of recorded convictions.

[40] In these circumstances, and having regard to the circumstances of the offence and the other matters to which reference has been made, the learned judge's omission to consider resort to the process permitted by s 162(2) leads nowhere.

[41] In my view, the applicant has not shown that any different sentence was warranted and the appeal should be dismissed.

[42] **McMURDO JA:** I agree with Sofronoff P.

[43] **WILSON J:** I agree with Sofronoff P.

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5 s 35(1)(b) *Youth Justice Act* 1992 (Qld).