SUPREME COURT OF QUEENSLAND

CITATION:	*R v PBE* [2019] QCA 185
PARTIES:	**R** **v** **PBE** (applicant)
FILE NO/S:	CA No 347 of 2018 DC No 33 of 2018 DC No 38 of 2018 DC No 53 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Maroochydore – Date of Sentence: 11 December 2018 (Long SC DCJ)
DELIVERED ON:	13 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2019
JUDGES:	Gotterson and McMurdo JJA and Douglas J
ORDERS:	**1. Grant leave to appeal.** **2. Allow the appeal.** **3. For the offence of committing a public nuisance, set aside the order that a conviction be recorded and order that the applicant be reprimanded for that offence.** **4. For the other offences for which an order was made that a conviction be recorded, set aside that order in each case.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the 17 year old applicant was found guilty on his own plea of attempted armed robbery and 14 other offences in the Childrens Court – where the sentencing judge in effect sentenced the applicant to serve 16 months in detention and recorded a conviction for all offences – where the prosecutor mistakenly submitted at sentence that the applicant had had convictions recorded previously – where the sentencing judge ordered that convictions be recorded on the basis that detention was ordered for some of the offences – whether the sentencing judge erred in the exercise of the

sentencing discretion by considering the ordering of detention as a distinct reason to record convictions

CRIMINAL LAW – SENTENCE – SENTENCING OF JUVENILES – OTHER MATTERS – where the 17 year old applicant was found guilty on his own plea of attempted armed robbery and 14 other offences in the Childrens Court – where the sentencing judge in effect sentenced the applicant to serve 16 months in detention and recorded a conviction for all offences – where the sentencing judge did not consider in their reasons whether the offences should be referred to the chief executive for a restorative justice process under s 162 of the *Youth Justice Act* 1992 – whether the sentencing judge erred in the exercise of the sentencing discretion by failing to consider whether the offences should be referred to the chief executive for a restorative justice process

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the 17 year old applicant was found guilty on his own plea of attempted armed robbery and 14 other offences in the Childrens Court – where the sentencing judge in effect sentenced the applicant to serve 16 months in detention and recorded a conviction for all offences – where the sentencing judge, when considering whether to record a conviction, identified that the applicant had presently poor prospects of rehabilitation but acknowledged that the applicant's future chances of rehabilitation could be affected by the recording of convictions – where the sentencing judge in effect reasoned that the applicant was unlikely to improve in the short term but had chances of rehabilitation in the long term – whether it was appropriate for the sentencing judge to consider whether the applicant's rehabilitation might take some time, instead of considering the impact of the recording of convictions on his chances of rehabilitation generally

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the 17 year old applicant was found guilty on his own plea of attempted armed robbery and 14 other offences in the Childrens Court – where the sentencing judge in effect sentenced the applicant to serve 16 months in detention and recorded a conviction for all offences – where the applicant contends that no conviction should have been recorded for any offence but does not otherwise seek to disturb the orders made by the sentencing judge – where the applicant had a lengthy criminal history, a troubled personal history, and abused illicit drugs – where some of the offences were rightly categorised as serious – where it was established that the sentencing judge erred in the exercise of the sentencing discretion and the applicant should

be re-sentenced by the Court of Appeal – whether it is appropriate to record a conviction for any of the offences

Youth Justice Act 1992 (Qld), s 162, s 183, s 184

R v JO [2008] QCA 260, cited
R v PBD [2019] QCA 59, cited
R v SCU [2017] QCA 198, followed

COUNSEL: K E McMahon for the applicant
P J McCarthy for the respondent

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

[1] **GOTTERSON JA:** I agree with the orders proposed by McMurdo JA and with the reasons given by his Honour.

[2] **McMURDO JA:** This is an application for leave to appeal against sentences imposed in the Childrens Court, last December, against a 17 year old boy. The effect of the orders was that he was required to serve 16 months in detention, with release at the half-way mark which, taking account of the time he had been in detention before he was sentenced, meant that he was to be released on 8 April 2019. The only challenge which is made to his sentences is the order that, in each case, a conviction be recorded. For the reasons that follow, I would grant leave to appeal and allow the appeal by ordering that convictions not be recorded.

The offences

[3] The applicant pleaded guilty on an ex-officio indictment to an offence of attempted armed robbery and to 14 other offences that had been transferred to the Childrens Court. The offences were committed when the applicant was 16, or shortly after his 17th birthday.

[4] The offence of the attempted armed robbery was committed against a 73 year old woman who lived in a retirement village. The applicant, wearing a hood and a mask, approached her in her garage, wielding a knife at her and demanding her car keys. She ran into her house, closing a glass door behind her, leaving the applicant to kick against it. She escaped to a neighbour's house and the police were called. Two days later, police searched the applicant's residence where they found a large kitchen knife and a pair of sandals matching the description of the impression of a shoe on the glass door. The applicant participated in an interview, in which he admitted being the offender, although he said he could not remember the precise incident because he was on drugs at the time. He expressed remorse. There was a victim impact statement from the complainant, indicating that, the sentencing judge said, she had been "significantly emotionally impacted by the commission of this offence."

[5] When the police were at the applicant's residence, they found items which evidenced other offences. There was a bicycle, together with a helmet, which the applicant had stolen from a school. The applicant admitted that, after his friend had picked the lock, the applicant rode the bicycle home and kept it. That offence was committed on 22 June 2018.

[6] The police also found some cannabis seeds and items, such as a pipe, to be used with the cannabis. There was a medical bag containing medical equipment which the applicant said that he had been given by someone, suspecting that it had been stolen. There was also a chainsaw, which had been stolen.

[7] On the night of 10 August 2018, the applicant stole a set of car keys and a wallet, and a week later, he used the keys to steal the car which was parked in the driveway near the owner's house. It seems that the applicant may have stolen a spare key, which the owner had not realised was missing. Later that night, the applicant stopped the car at a service station, and then left without attempting to pay for fuel, costing about $40. Later again that night, police attempted to intercept the car. Another person got out of the car, leaving his telephone and wallet behind. The applicant then drove off and later used the person's credit card to purchase tobacco.

[8] On the morning of 19 August 2018, the applicant became involved in an altercation at a shopping centre carpark. The applicant was still driving the stolen car. At one point the applicant brandished a long knife towards the man, and said words to the effect of "I'll fucking kill you". The man then left the carpark but was followed by the applicant in the car which he had stolen. The applicant rammed the stolen car into the rear of the man's car before he could get away.

[9] Later that morning, as a couple was driving along the Bruce Highway, they noticed that there was a car nudging the rear of their vehicle and then ramming it. As that car passed, they saw the applicant, as a passenger, holding a chainsaw. This was the chainsaw which police later found at the applicant's residence.

[10] On that same morning, the applicant filled the car with fuel at a service station and drove off without paying the amount owed, which was about $75.

[11] It was on the same morning again that the applicant committed the offence of attempted armed robbery.

The applicant's personal and criminal history

[12] The applicant developed a substance dependency at a young age. Two years before these offences were committed, his parents separated in circumstances which resulted in a domestic violence order being made against his father. After a short time living with his mother, he moved in with his father and his behaviour continued to decline. He was then exposed to his father's chronic illicit substance misuse. The applicant became a user of prescription medication, methylamphetamine, ecstasy and other drugs. In early 2018, he sought assistance as a voluntary inpatient at a residential facility in Sydney. He successfully completed that program but relapsed and again became a daily drug taker. He said that, during the period of this offending, he was under the influence of prescription medication and methylamphetamine, which reduced his capacity to control his behaviour.

[13] He had a significant history of offending prior to the subject offences. Notably, in September 2017, he was dealt with for two offences of robbery in company with related summary offences of unauthorised dealing with shop goods and the possession of a knife in a public place. There were also offences of burglary and attempted arson, the complainant for those offences being the applicant's mother. He attempted to break into her house and set it alight by igniting the curtains. This occurred in the context of the breakdown in the relationship between his parents, at

a stage when he had become aligned with his father. It appears that, at that time, the father had gone to prison and the applicant did these things out of protest against being returned to his mother's residence. For those two offences, he was placed on probation for a period of three years. For the offences of robbery in company, there was an order for 15 months' detention, which was suspended after the making of a conditional release order. For the summary offences, the applicant was not further punished.

[14] Subsequently, but prior to the subject offences, he committed offences of the unlawful use of motor vehicles, stealing, wilful damage, assaulting or obstructing police, and burglary. In the Childrens Court in June 2018, a magistrate sentenced him to 6 months' detention, making a conditional release order.

[15] No conviction was recorded for any of these offences.

The sentencing reasons

[16] At the conclusion of the sentencing hearing, on 11 December last year, the judge commenced his sentencing reasons by setting out the applicant's prior history of offending and then detailing the facts of the subject offences. His Honour acknowledged the very troubled history of the applicant's youth, saying that it was necessary to have regard to the applicant's personal history of descent into drug use and a destabilised lifestyle, in the context of the applicant's alignment with his father and the exposure in that way to the abuse of illicit drugs. His Honour noted that the applicant had the continuing support of his mother and grandmother.

[17] The judge remarked that there were "indications of perhaps some growing insight into your offending and the impact it has on others." His Honour noted the applicant's self-motivated and voluntary engagement with a program of rehabilitation, in early 2018. However, his Honour said that, although all of that had to be recognised, "the problem is that there is nothing new in it", the judge then referring to similar submissions which had been made to the Childrens Court in June and August 2018.

[18] The applicant had been in detention from 21 August 2018, and the judge noted that, during that period the applicant had engaged in some educative programs and had "linked with the mental health, alcohol and other drug service[s]".

[19] In sentencing for the subject offences, his Honour said:

> "In dealing with you under the *Youth Justice Act 1992*, it is necessary to have regard to the principles set out in section 150 including, but not limited to, the youth justice principles and the special considerations set out in section 152(2). However, it is necessary to note that the youth justice principles include recognition of the protection of society from offending, as a relevant consideration. And those aspects which favour an approach of having particular regard to the prospects of achieving that protection through rehabilitation, must be viewed in the context that your prospects of reversion to drug abuse and reoffending upon release must be regarded as remaining at a high level.
>
> Therefore, there is a particular need for reflection of personal deterrence. That is, in getting a message through to you as to the consequences of further offending. Accordingly, your circumstances

> have now moved past the point at which substantial weight may be given to the special consideration as to preference for a non-custodial order over detention. But the special considerations that a detention order should be imposed only as a last resort and for the shortest appropriate period, remain apposite."

[20] With one exception, there were various periods of detention which were imposed for the various offences, ranging from one month to 10 months for the offence of attempted armed robbery. The exception was for an offence of a public nuisance (again committed on 19 August 2018) for which the applicant was "convicted and not further punished." In that last respect, it is common ground that this was not an option which was open to his Honour under the *Youth Justice Act* 1992 (Qld) ("the Act"). The options were those set out in s 175, of which one was that the child be reprimanded for an offence under s 175(1)(a). But in that event, a conviction could not be recorded for that offence: s 183(2).

[21] The judge then turned to the orders which were to be made for the breaches of the orders for conditional release and probation which had been made in June 2018. For the former, it was ordered that the applicant serve six months' detention and, on the latter, he was re-sentenced for each offence to six months' detention, those terms to be served concurrently with each other, but cumulatively upon the ten month sentence for the attempted armed robbery offence. Consequently, the total period of detention was 16 months. Pursuant to s 227(2) of the Act, it was ordered that he be released from detention after serving 50 per cent of that period. As I have said, with an allowance for periods of pre-sentence detention, his period of supervised release was to commence on 8 April and to expire on 8 December this year. He was to remain under further supervision, under the probation order which had been imposed in 2017, until September next year.

The recording of convictions

[22] The prosecutor submitted to the sentencing judge that convictions ought to be recorded, because the applicant was a 17 year old already with a serious and relevant criminal history. If convictions were not to be recorded on all offences, the prosecutor submitted that a conviction should be recorded on the attempted armed robbery offence. The prosecutor told the sentencing judge that the applicant had had convictions recorded in respect of some traffic offences that had occurred in June 2018. That was a mistake: no convictions had been recorded prior to these orders.

[23] The applicant's counsel submitted that convictions ought not to be recorded, emphasising the mitigating circumstances of the applicant's personal history and his attempts at rehabilitation. He pointed out that the applicant had written a letter of apology to the complainant in the attempted robbery offence, and had told the sentencing judge that the applicant was willing to participate in a restorative justice process. The sentencing judge had a pre-sentence report which referred to that option, saying:

> "A restorative justice process can be facilitated and it would ensure [the applicant] is held accountable for his actions in a safe and supportive environment. It would also afford him the opportunity to accept responsibility and make amends for his offending to the victim. [The applicant] has indicated he would be willing to attend a restorative justice process."

[24] The judge explained his reasoning for ordering convictions, for each offence, in these terms:

> "Notwithstanding the recognised prima facie position that, pursuant to section 184 of the *Youth Justice Act 1992*, convictions are not recorded, and the potential impact that such recordings would have upon your future chances of rehabilitation, generally and finding or retaining employment, it is otherwise necessary to balance the nature of the offending that is involved and your advancing age and repetitive offending behaviours and, most significantly, the presently poor prospects of your rehabilitation, particularly in the context of your repeated breaching of Court orders. In these circumstances *and where the point has now been reached where periods of detention are necessary* and with the guidance to be obtained from *R v Cunningham* [2014] 2 Qd R 285, this leads to the conclusion that it is appropriate to direct the recording of convictions for all of the offending which has been dealt with by the Court today."
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> [Emphasis added.]

[25] I have emphasised those words because they are the basis for the applicant's principal submission, namely that the judge erred in exercising this discretion because he considered that convictions had to be recorded because periods of detention had to be imposed. Before returning to that submission, I will discuss the other arguments.

Applicant's submissions

[26] For the applicant it is submitted that the judge erred by failing to distinguish between the offences when considering whether convictions ought to be recorded, by instead taking an "all or nothing" approach. This was impermissible, it is said, because s 184 of the Act requires a consideration of the seriousness of the offence, and also because the more serious is an offence, the greater is the impact of recording a conviction. As Sofronoff P said in *R v SCU*,[1] a decision to record a conviction for a serious offence (such as arson in that case) must be an explanation for a decision, at the same time, to record convictions for less serious offences.

[27] It is argued that, because the judge had been told, contrary to the fact, that convictions had been recorded for previous offences, his Honour exercised this discretion upon a false premise.

[28] There was a further argument, not the subject of a ground of appeal, but which was made at the hearing, upon the basis of this Court's recent judgment in *R v PBD*.[2] In that case, as in the present one, the sentencing judge was required to consider whether to make an order under s 162(2) of the Act, which provides that "[i]f 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".

[29] In this case, there was that statement in the pre-sentence report, which I have set out above, which was drawn to the attention of the judge by the applicant's counsel.

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1 [2017] QCA 198 at [101].
2 [2019] QCA 59.

However, there was no reference to this matter in the judge's sentencing reasons. In my respectful view, it is a fair inference that his Honour did not consider the matter, and thereby erred in the exercise of the sentencing discretion.

[30] I return to the applicant's principal ground. I have set out above at [24] the part of the sentencing reasons in which his Honour explained his decision to record convictions. It is sufficiently clear that his Honour regarded it as relevant to the decision that periods of detention were necessary. For the applicant, it is submitted that this was the same error which Sofronoff P found was made by the primary judge in *R v SCU*, where the President said:[3]

> "Second, his Honour's reference to this case as one "where detention having been warranted" is a reference to a matter which is not, without explanation, relevant to the exercise of discretion. The question whether or not to record a conviction will arise in cases in which detention is not ordered and also in cases in which detention is ordered. Many circumstances leading to a detention order will also justify the recording of a conviction. However, the fact alone that detention is part of the punishment cannot do so. Indeed, in an appropriate case the fact that detention has been ordered may result in a conclusion that a conviction should not also be recorded as a blight upon a child's future. It was erroneous to use the fact of detention having been ordered as a justification for recording a conviction."

[31] For the respondent, it is submitted that, in this case, the relevant statement by the judge was an observation that the offending by the applicant had escalated to an increased level of seriousness in the context of his criminal history, rather than a statement which treated the imposition of detention as synonymous with the requirement for the recording of a conviction. I am unable to accept that argument, when the critical statement is seen in the context of the judge's reasons. In the preceding sentence, his Honour identified considerations which were favourable and unfavourable to the applicant, the latter including "the nature of the offending that is involved" and the applicant's "repetitive offending behaviours". The judge then added to those circumstances the fact that "the point has now been reached where periods of detention are necessary". It thereby appears that the judge considered that this was a distinct reason to record convictions. If so, that was an error in the exercise of the discretion.

[32] There is a further part of the reasons on this subject which is of concern, although it is not specifically raised by the applicant's argument. The judge thought that it was most significant that the applicant had "presently poor prospects of … rehabilitation", whilst at the same time acknowledging that his "future chances of rehabilitation" could be affected by the recording of convictions. In effect, the judge said that the applicant was unlikely to improve in the short term, but that he had chances of rehabilitation in the longer term. In my respectful view, it was not to the point that the applicant's rehabilitation might take some time. What mattered was the impact of the recording of the conviction on his chances of rehabilitation generally, or of finding or retaining employment.

Re-sentencing the applicant

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3 [2017] QCA 198 at [98].

[33] I am persuaded by the applicant's principal argument, as well as by his recent argument about s 162 of the Act, to conclude that the applicant should be re-sentenced, for all matters, by this Court.

[34] After the hearing, this Court received written submissions from the parties as to the discretion to be exercised under s 162 of the Act. For the applicant, it is submitted that a restorative justice process would serve the interests of both the applicant and the community. It is said that it would promote the applicant's rehabilitation for him to be given an opportunity to express his remorse, in person, to the complainant for the attempted robbery offence. That course is not opposed by counsel for the respondent.

[35] Section 162 requires two matters to be considered, namely whether to make a court diversion referral and whether to make a pre-sentence referral. Under the former, a court refers the offence to the chief executive for a restorative justice process instead of sentencing the child. By s 164, the making of the referral brings the court proceeding for the offence to an end, and the child is not liable to be further prosecuted, unless the chief executive returns the referral under s 32(1) or advises that the child failed to comply with a restorative justice agreement made as a consequence of the referral. The referral may be returned by the chief executive, under s 32(1)(a), if the chief executive is unable to contact the child after reasonable inquiries. A court diversion referral is not relevant in this case, where the applicant has already served the period of actual detention which was imposed by the primary judge. I should add that there would not have been a strong basis for that course at the time at which the applicant was sentenced, having regard to the applicant's previous offending and the serious nature of some of the subject offences.

[36] The other question under s 162 is whether an offence should be referred to the chief executive, in order to help the court make an appropriate sentence order. It appears that the applicant is still willing to engage in that process for the offence of attempted armed robbery. There is no submission that any of the other offences should be referred under s 162(2). The purpose of referring that offence would be to help the court (this Court) to make an appropriate order on that offence.

[37] It is common ground that this Court does have the power to refer the offence under s 162(2), and that this Court must consider whether it should do so. In my opinion, no order should be made under s 162(2), for the reason that, by the time this appeal was heard, the applicant had served the period of actual detention of eight months for all of these matters, and almost all of the 10 months imposed for this offence had expired. In practical terms, a referral under s 162(2) was, by then, of possible relevance only to the question of whether a conviction should be recorded for that offence. As I have concluded that a conviction should not be recorded for that offence as well as the other offences, I would not make an order under s 162(2).

[38] The primary position, under s 183 and s 184 of the Act is that a conviction is not to be recorded against a child offender.[4] Some of the offences here were serious, which was a relevant but not the sole consideration. In *R v JO*,[5] Holmes JA said:

> "Some offences committed by children are, of course, inherently so serious that a conviction must be recorded … But it does not follow that every offence which can, in general terms, be described as serious requires the recording of a conviction."

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4 *R v LAL* [2019] 2 Qd R 115 at 131 [65]; [2018] QCA 179 at [65] and the cases there cited.

5 [2008] QCA 260 at [14].

[39] By s 184(1)(b), the child's age and any previous convictions are to be considered. Neither of those considerations is favourable to the applicant, although they do not strongly indicate a reason to record convictions.

[40] By s 184(1)(c), the impact of recording a conviction on the applicant's chances of rehabilitation generally, or finding or retaining employment, must be considered. It must be said that, with reference to his conduct in recent years, the applicant may have some way to go in order to be rehabilitated. But clearly also, his prospects of finding or retaining employment, which of course would affect his prospects of rehabilitation, are likely to be prejudiced by the recording of convictions for these offences.

[41] Overall then, the relevant considerations do not favour this case being outside the usual position, where convictions are not recorded.

[42] No submission was made by the applicant that, in resentencing, this Court should affect the orders made by the primary judge, save for the recording of convictions and for an order under s 162. And there is no basis for disagreeing with the other orders which were made.

Orders

[43] I would order as follows:

1. Grant leave to appeal.
2. Allow the appeal.
3. For the offence of committing a public nuisance, set aside the order that a conviction be recorded and order that the applicant be reprimanded for that offence.
4. For the other offences for which an order was made that a conviction be recorded, set aside that order in each case.

[44] **DOUGLAS J:** I agree with McMurdo JA.