SUPREME COURT OF QUEENSLAND

CITATION:	*R v MDD* [2019] QCA 197
PARTIES:	**R** **v** **MDD** (applicant)
FILE NO/S:	CA No 74 of 2019 DC No 3 of 2019 DC No 5 of 2019 DC No 9 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Rockhampton – Date of Sentence: 26 February 2019 (Burnett DCJ)
DELIVERED ON:	Date of Orders: 29 April 2019 Date of Publication of Reasons: 27 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2019
JUDGES:	Sofronoff P and Mullins and Davis JJ
ORDERS:	**Date of Orders: 29 April 2019** **1. Leave to appeal granted.** **2. Appeal allowed.** **3. Set aside the orders made in the Childrens Court on 26 February 2019.** **4. The applicant be released under the supervision of the Chief Executive for a period of 6 months, and comply with the requirements set out in s 193(1) of the *Youth Justice Act* 1992, and report to the Chief Executive by 4 pm 1 May 2019, and abstain from consumption of alcohol or illicit drugs.** **5. No conviction recorded for any of these offences.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty in the Childrens Court to 21 counts and charges including armed robbery in company with personal violence, burglary and stealing and common assault – where the applicant was sentenced to 17 months detention on each count, served

concurrently, to be released after serving 60 per cent, with time on remand declared as time served – where the applicant was in detention prior to sentence, in part serving other sentences, and in part on remand for the present offending – where the period of detention served in respect of other sentences is a relevant consideration going to the total impact of the sentence to be imposed – where the learned sentencing judge found the period of detention served in respect of other sentences was 81 days – where the applicant had served 146 days in detention in respect of other sentences – whether the sentencing discretion miscarried – whether the sentence imposed is manifestly excessive

CRIMINAL LAW – SENTENCE – SENTENCING OF JUVENILES – CUSTODIAL ORDERS – where the applicant pleaded guilty in the Childrens Court to 21 counts and charges including armed robbery in company with personal violence, burglary and stealing and common assault – where the applicant was sentenced to 17 months detention on each count, served concurrently, to be released after serving 60 per cent, with time on remand declared as time served – where s 208 of the *Youth Justice Act* requires the learned sentencing judge to only make an order for detention if satisfied that no other sentence is appropriate – where the learned sentencing judge received a pre-sentence report identifying a restorative justice order or a conditional release order as viable alternatives to detention – where the learned sentencing judge did not provide reasons as to why either order was not preferred to detention – whether the learned sentencing judge was required to express the reasons for imposing detention, rather than other sentencing options, in the sentencing remarks – whether the sentencing process miscarried

Youth Justice Act 1992 (Qld), s 163, s 208, s 218

R v SCU [2017] QCA 198, applied

COUNSEL: N Edridge for the applicant (pro bono)
C N Marco for the respondent

SOLICITORS: Hans Legal for the applicant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The reasons of Davis J reflect the basis for my joining in the orders made on 29 April 2019.

[2] **MULLINS J:** I agree with Davis J.

[3] **DAVIS J:** The applicant sought leave to appeal against sentences imposed upon him.

[4] On 5 February 2019 the applicant pleaded guilty in the Childrens Court sitting in Rockhampton to a total of 20 charges contained in two indictments. On 26 February 2019 he pleaded guilty to a summary charge.

[5] The offences were:

First indictment covering dates from 9 May 2018 to 16 May 2018

(i) Three charges of unlawfully using a motor vehicle;[1]

(ii) Two counts of burglary and stealing;[2]

(iii) One count of entering premises and wilful damage;[3]

(iv) One count of armed robbery in company with personal violence;[4]

(v) One count of stealing;[5]

Second indictment covering dates from 8 May 2018 to 30 May 2018

(i) Five counts of burglary and stealing;[6]

(ii) Three counts of unlawfully using a motor vehicle;[7]

(iii) Two counts of common assault;[8]

(iv) One count of unlawfully entering a vehicle with intent to commit an indictable offence in the night time;[9]

(v) One count of stealing.[10]

[6] The summary offence was that on 27 May 2018 in Rockhampton the applicant drove a motor vehicle whilst unlicenced.[11]

[7] The first indictment charged another child jointly with the applicant and he and that other were both sentenced on 26 February 2019.

[8] In relation to each of the charges on the two indictments, the sentence was 17 months detention, all to be served concurrently. No convictions were recorded and it was ordered that the applicant be released after serving 60 per cent of the period of detention. It was further ordered that time served on remand for the offences would count as time served.[12]

[9] In relation to the summary offence, the applicant was sentenced to detention for one month to be served concurrently with the sentences imposed on the indictments. No

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1 *Criminal Code* s 408A(1)(a).
2 *Criminal Code* s 419(4).
3 *Criminal Code* s 421(2).
4 *Criminal Code* s 409, 411(1), (2).
5 *Criminal Code* s 391 and s 398.
6 *Criminal Code* s 419(4).
7 *Criminal Code* s 408A(1)(a).
8 *Criminal Code* s 335.
9 *Criminal Code* s 427(1)(2)(a).
10 *Criminal Code* s 391 and s 398.
11 *Transport Operations (Road Use Management) Act* 1995 s 78(1).
12 *Youth Justice Act* 1992 s 218.

conviction was recorded. Again, it was ordered that time spent on remand would count as time served.

[10] On 29 April 2019 I joined in the following orders:

(1) Leave to appeal granted;

(2) Appeal allowed;

(3) Set aside the orders made in the Childrens Court on 26 February 2019;

(4) The applicant be released under the supervision of the Chief Executive for a period of six months and that he complies with the requirements set out in s 193(1)(b) of the *Youth Justice Act* 1992 and that he report to the Chief Executive by 4.00 pm on 1 May 2019 and abstain from consumption of alcohol or illicit drugs;

(5) No conviction be recorded for any of the offences.

[11] These are my reasons for joining in those orders:

The offending

The first indictment

[12] Some time between 9 May 2018 and 12 May 2018, another boy entered a yard in Gracemere and stole a car. The applicant was not involved with the stealing of the car but he drove in it.[13]

[13] In either the late hours of 13 May 2018 or the early hours of 14 May 2018, the applicant and the boy who had stolen the car, broke into the home of an elderly lady and stole a car key.[14] Using the key, the pair drove off in the car.[15]

[14] On 14 May 2018, the applicant was again in company with the boy involved in the earlier offending. While the applicant stood as "look out" the other boy threw a rock through the front window of a supermarket. They fled and later returned. While the applicant again stood as "look out", the other boy entered the premises through the shattered window but ultimately nothing was stolen.[16]

[15] In either the late hours of 14 May 2018 or the early hours of 15 May 2018, the applicant and the boy involved in the earlier offending entered the home of an elderly woman and stole her handbag.[17] Also stolen were car keys which were used to steal the woman's car.[18]

[16] In the early hours of 15 May 2018 the applicant was again in the company of the boy involved in the earlier offending. They approached a taxi cab but the driver would only accept them for travel if they paid him $50.00 immediately. They did so. At the end of the journey, both boys assaulted the taxi driver. The applicant threatened to hit him in the head with a socket wrench while the other boy

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13 Unlawful use of a motor vehicle *Criminal Code* s 408A(1)(a).
14 Burglary and stealing *Criminal Code* s 419(4).
15 Unlawful use of a motor vehicle *Criminal Code* s 408A(1)(a).
16 Entering premises and wilful damage *Criminal Code* s 421(3).
17 Burglary and stealing *Criminal Code* s 419(4).
18 Unlawful use of a motor vehicle *Criminal Code* s 408A(1)(a).

threatened him with a knife. Ultimately, the pair of them made off with about $100.00.[19]

[17] In the morning of 16 May 2018 the applicant and the boy involved in the earlier offending drove a car to a BP service station, pumped petrol into the car to the value of $57.54 and then drove off without making payment.[20]

The second indictment

[18] On or about 8 May 2018 the applicant and other youths entered the home of a young woman and stole the key to her Mitsubishi Mirage motor vehicle.[21] They then used the key to drive off in the car.[22]

[19] On the evening of 17 May 2018 the applicant was confronted by police and fled. He entered the backyard of a residence and there saw a 19 year old woman. He asked her for help to hide and when she refused, he grabbed her by the left shoulder and pulled her inside the house.[23] A girl aged 15 was in the house and the applicant pushed her.[24] He then fled.

[20] In either the late hours of 20 May 2018 or the early hours of 21 May 2018, the applicant entered the house of a 64 year old woman and stole a mobile telephone and approximately $300.00 cash.[25]

[21] On or about 27 May 2018 the applicant and a co-offender entered the home of a 25 year old woman and stole her car key and a mobile telephone.[26] Then, using the car key, they drove off in her red Toyota car.[27]

[22] Sometime between midnight on 27 May 2018 and 7.00 am on 28 May 2018, the applicant and a co-offender entered a house and stole an Xbox gaming console and a quantity of Xbox games.[28]

[23] In the early hours of the morning of 28 May 2018, the applicant entered an unlocked Holden Barina and began searching the car. The owner, a 63 year old woman, saw the applicant in the car and went to confront him. He then fled.[29]

[24] On 29 May 2018 the applicant and a co-offender entered the house of a 25 year old woman and stole some car keys.[30] They then drove away in the woman's car.[31]

[25] In the early hours of the morning of 29 May 2018, the applicant drove a car into a Caltex service station. He pumped petrol into the car to the value of $34.85 and drove off without paying.[32]

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19 Armed robbery in company with personal violence *Criminal Code* s 409, s 411(1)(2).
20 Stealing *Criminal Code* s 398.
21 Burglary and stealing *Criminal Code* s 419(4).
22 Unlawful use of a motor vehicle *Criminal Code* s 408A(1).
23 Common assault *Criminal Code* s 335(1).
24 Common assault *Criminal Code* s 335(1).
25 Burglary and stealing *Criminal Code* s 419(4).
26 Burglary and stealing *Criminal Code* s 419(4).
27 Unlawful use of a motor vehicle *Criminal Code* s 408A(1).
28 Burglary and stealing *Criminal Code* s 419(4).
29 Unlawful entry of vehicle with intent to commit indictable offence at night *Criminal Code* s 427(1)(2)(a).
30 Burglary and stealing *Criminal Code* s 419(4).
31 Unlawful use of a motor vehicle *Criminal Code* s 408A(1).
32 Stealing *Criminal Code* s 398(1).

The summary offence

[26] Between about 4.30 am on 27 May 2018 and 10.00 am on 29 May 2018, the applicant drove a stolen vehicle in the Rockhampton and Gracemere areas. The applicant is below the legal age to hold a driver's licence and was therefore driving whilst unlicenced.[33]

Criminal history

[27] The applicant's criminal history commences when he appeared in the Beenleigh Childrens Court on 24 October 2016. He was then 13 years of age.[34] A period of probation of 12 months was ordered in relation to various offences of entering premises and stealing.

[28] The applicant was sentenced again on 13 April 2018 to detention of 12 months but with a supervised release order.[35]

[29] On 27 April 2018, the applicant was sentenced to a further period of detention of 12 months to be served concurrently with the period of detention imposed on 13 April 2018.

[30] On the current offending, the applicant was taken into custody on 30 May 2018.

[31] On 31 May 2018 the applicant appeared before the Rockhampton Childrens Court and was ordered to serve the outstanding period of the detention order imposed on 13 April 2018.

[32] On 27 July 2018 the applicant was re-sentenced for the breach of the probation order and sentenced to detention but ordered to be released from custody on the original charges after serving seven days.

[33] The applicant has not been in the community since 31 May 2018. The applicant was on remand for the charges the subject of the present application, however some of that time was time spent serving other sentences.

[34] The periods of remand for the offences the subject of the current application are:

30 May 2018 to 24 August 2018:	86 days
7 September 2018 to 27 February 2019:	173 days
	Total: 259 days

[35] Of that period, the following was time served on other sentences:

31 May 2018 to 4 August 2018:	65 days
7 September 2018 to 27 November 2018:	81 days
	Total: 146 days

[36] Time served then, only in relation to the charges the subject of the present application, is:

Total time served:	259 days

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33 *Traffic Operations (Road Use Management) Act* 1995 s 78(1).
34 Date of Birth 12 August 2003.
35 *Youth Justice Act* 1992 s 220.

Less time served on other sentences: 146 days

Time served only on remand in relation to the current offences: 113 days

[37] The effect of the sentences imposed in February 2018 was that the applicant would be released on a supervised release order in September 2019. By that point, the applicant would have been in custody for about 15 months.

The grounds of appeal

[38] The notice of appeal was amended to allege two grounds of appeal, namely:

> "(a) The sentencing Judge made errors of law and fact which caused the discretion to miscarry and led to a manifestly excessive sentence;
>
> (b) In any case, each sentence is manifestly excessive."

[39] The alleged "errors of law and fact" are as follows:

> "(a) The sentencing Judge failed to have regard to a relevant sentencing option, namely release on a conditional release order, before imposing actual detention;
>
> (b) The sentencing Judge failed to have regard to a relevant sentencing option, namely referral to a restorative justice process;
>
> (c) The learned sentencing Judge made errors of fact and law regarding the applicant's cooperation and remorse;
>
> (d) The learned sentencing Judge made an error of fact regarding the length of pre-sentence custody which could not be taken into account by the Chief Executive as time served under the sentence;
>
> (e) The learned sentencing Judge made an error of law by fixing a head sentence on the most serious offence to reflect the overall criminality of the offending, but then applying that increased penalty to every count on indictment."

Consideration

[40] Section 218 of the *Youth Justice Act* 1992 provides as follows:

> "**218 Period of custody on remand to be treated as detention on sentence**
>
> (1) If a child is sentenced to a period of detention for an offence, any period of time for which the child was held in custody pending the proceeding for the offence must be counted as part of the period of detention that is served in a detention centre or corrective services facility.
>
> *Note—*
>
> In determining, under section 227, when to release the child from detention under a supervised release order

> under section 228, the chief executive counts the period of time for which the child was held in custody pending the proceeding for the offence.
>
> (2) A period of time for which a child is also held in custody on sentence for another offence is not to be counted for the purposes of subsection (1).
>
> (3) Any period of custody of less than 1 day is not to be counted under subsection (1)."

[41] Here, the period the applicant was held on remand in relation to the offences the subject of the present application was 113 days.

[42] The total period the applicant had been held was 259 days and there were therefore 146 days attributed to other sentences.

[43] That 146 days was relevant to the consideration of the total impact of the sentences to be imposed.

[44] The learned sentencing Judge appreciated this but erred in finding that the period of time not attributable to the current sentences was 81 days, rather than 146.

[45] His Honour, labouring under that error, set a notional sentence of 20 months and then deducted the roughly three months custody which he believed could not be attributed to the current offending.

[46] His Honour was not obliged to construct the sentence in the way he did, and was not obliged to reduce the sentence by an extra 65 days being the difference between the 146 days served and the 81 days his Honour believed had been served.

[47] However, because the exercise of discretion was based on an error as to the number of days served not attributable under s 218 to the sentences being imposed, the sentencing process miscarried.

[48] In sentencing, the applicant and his co-offender, the learned sentencing Judge said this:

> "I note that it was observed[36] that as one of the consequences you have experienced, apart from the usual, which are expected, namely the dislike of custody. You did actually identify, as a positive matter, the education opportunities afforded to you at the Cleveland Youth Detention Centre. Generally speaking, the principles applicable when sentencing youth, are those informed by section 150 of the Youth Justice Act, which in particular, call for consideration of the youth justice principles, together with obvious recognition of age, and plainly, in the context of this style of offending, consideration of non-custodial order being better. That is, a non-custodial order being better than detention in promoting a child's ability to reintegrate into the community. Detention of course, if it has to be imposed, should be imposed only as a last resort and for the shortest appropriate period.
>
> So far as the relevant youth justice principles are concerned, of course, the first principle, provided for is that the community should

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[36] In reference to a pre-sentence report.

> be protected from offences, and if possible, a child should be treated in a way that diverts the child from the Courts and the criminal justice system, although that is not possible in this case. It is plain by reference to the cases that have been put up before me, that detention is an appropriate sentence, despite the fact that it is desirable that other sentences be considered, and it can be seen from an examination of the criminal histories of both of you, that other Courts, on previous occasions, have looked to other sentences and other forms of sentences, which were directed more to rehabilitation than punishment, not that this sentence today is directed to punishment, but obviously punishment becomes a feature.
>
> In respect of many property offences, it can be seen that it is not necessary to impose a period of detention, but unfortunately, when people present time and time again for the same sort of offence, it does, as the Crown submits, call not only for a sentence that expresses general deterrence and community denunciation, but also, in your particular case, some element of specific deterrence, in order to remind you that no society can survive if people are permitted to conduct themselves in this way. In a civilised society, people have to learn to behave in a civilised way, and understand that there will always be consequences for antisocial behaviours.
>
> As I said, you have each been afforded many opportunities to achieve that, and a lot of assistance has been provided. Sadly, in your instances, it seems for whatever reasons, those best expressed in the reports, you have not taken advantage of those opportunities. That is of course, not to say that we throw the book away, and we forget about rehabilitation. Ultimately, the sentencing regimes provided for in the Youth Justice Act is directed to your rehabilitation.
>
> It is not the community's advantage to have such young people as yourselves subjected to lengthy periods of detention. Of course, it is to everybody's advantage to have you reintegrate into society, hopefully with more skills, with some assistance in your education, and so forth, so that you can progress, and we can put the folly of your youth behind you, but as I say, your offending to date, in respect of each of you, is now reaching a point where Courts will start looking very closely at whether or not this is indeed a true marker of where you will be for the rest of your lives, whether you were going to be recidivists – I am turning not just to this Court, but perhaps to Courts in years to come, as adults, or whether indeed you are genuine in your expressions that you have turned the corner and you are looking to do other things with your lives, but as I have said, that is only part of the sentencing process."

[49] The Y*outh Justice Act* establishes, amongst other things, a sentencing regime for children who offend. Many features of the regime established by the *Youth Justice Act* are very different from the sentencing regime established for adult offenders under the *Penalties and Sentences Act* 1992.

[50] The *Youth Justice Act* provides that the court may impose a restorative justice order.[37] Before a restorative justice order is made, various pre-conditions must be fulfilled. These are prescribed by s 163:

> "**163 Power of court to make restorative justice process referral**
>
> (1) The court may, by notice given to the chief executive, refer an offence to the chief executive for a restorative justice process if—
>
> (a) the court considers the child is informed of, and understands, the process; and
>
> (b) the child indicates willingness to comply with the referral; and
>
> (c) the court is satisfied that the child is a suitable person to participate in a restorative justice process; and
>
> (d) having regard to the deciding factors for referring the offence, the court considers the referral would—
>
> (i) allow the offence to be appropriately dealt with without making a sentence order (a ***court diversion referral***); or
>
> (ii) help the court make an appropriate community based order or detention order (a ***presentence referral***); and
>
> (e) having regard to a submission by the chief executive about the appropriateness of the offence for a referral, the court considers the referral is appropriate in the circumstances.
>
> (2) In this section—
>
> ***deciding factors***, for referring an offence, means—
>
> (a) the nature of the offence; and
>
> (b) the harm suffered by anyone because of the offence; and
>
> (c) whether the interests of the community and the child would be served by having the offence dealt with under a restorative justice process."

[51] During the sentencing of the applicant, the Childrens Court received a pre-sentence report. The author of that report mentioned the option of referring the applicant to a restorative justice process and explained that the conditions of a restorative justice order had been explained to the applicant who had expressed a willingness to comply.

[52] Subdivision 2 of Division 10 of Part 7 of the *Youth Justice Act* provides for conditional release orders. Under that system, a court may make a detention order but then release the child conditionally on terms that the child participate in a conditional release program.

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[37] *Youth Justice Act* 1992 ss 101-165; 192A-192D.

[53] The author of the pre-sentence report opined that there were suitable community service activities available, and that these had been explained to the applicant who had expressed a willingness to comply. She further opined that the applicant had been assessed as suitable for a conditional release order and that there was an appropriate conditional release program available. She said that the proposed conditions of conditional release had been explained to the applicant who had expressed a willingness to comply. A conditional release order proposal which explained the proposed program, was attached to the report.

[54] Section 208 of the *Youth Justice Act* provides as follows:

> "**208 Detention must be only appropriate sentence**
>
> A court may make a detention order against a child only if the court, after—
>
> (a) considering all other available sentences; and
>
> (b) taking into account the desirability of not holding a child in detention;
>
> is satisfied that no other sentence is appropriate in the circumstances of the case."

[55] In *R v SCU*[38], Sofronoff P, with whom Morrison and McMurdo JJA agreed, analysed the *Youth Justice Act* and observed:

> "[53] The effect of the provisions of the *Youth Justice Act* that I have referred to is that the Act is emphatic about the requirement that a court give consideration to all statutory factors relevant to a particular case, as well as the facts of the case itself in the ordinary way, before deciding upon an appropriate sentence to be imposed upon a child. At the forefront of the strictures imposed by the Act is the obligation of a court to consider all other options that are reasonably available before imposing a sentence of detention. Even at that point, a court must consider whether a conditional release order can properly be put to one side in favour of actual immediate detention of a child."

[56] Specifically in relation to s 208, his Honour observed:

> "[85] Section 208 prescribes a process of reasoning for this purpose. It states:
>
> 'A court may make a detention order against a child only if the court, after—
>
> (a) considering all other available sentences; and
>
> (b) taking into account the desirability of not holding a child in detention;
>
> is satisfied that no other sentence is appropriate in the circumstances of the case.'

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38 [2017] QCA 198.

> [86] A sentencing judge is obliged, therefore, to comply with s 208 and to explain that compliance in the sentencing remarks."

[57] The learned sentencing Judge, faced with a pre-sentence report identifying the making of a restorative justice order, or the making of a conditional release order, as viable alternatives to detention, has not explained why one or other of those orders was not preferred to detention but then concluded that detention was necessary because the applicant had offended before. It by no means follows that the appropriate order is one of detention simply because a child has been subject to non-custodial orders previously and has reoffended.

[58] Even if ultimately detention is ordered, as s 208 obliges the sentencing court to consider all other options, the reasons for imposing detention (rather than taking other options) must be expressed in the sentencing remarks. The sentencing remarks here do not explain why the options of the making of a restorative justice order or a conditional release order were rejected in the face of a pre-sentence report which assessed the applicant as suitable for both. For these reasons, the sentencing process miscarried.

[59] It is unnecessary to consider the other complaints raised on the applicant's behalf. It was necessary though to resentence the applicant.

Resentencing

[60] The applicant was born at Duaringa about 60 kilometres from Woorabinda and is indigenous. He has had a deprived upbringing.

[61] At the time the orders were made by this court, he had been in custody for about 11 months. He was then still short of his sixteenth birthday.

[62] While the applicant had previously been the subject of non-custodial orders, the pre-sentence report was encouraging. There was no basis to reject the author's opinion that the applicant was now a suitable candidate for probation, a restorative justice order, or a conditional release order.

[63] It therefore followed that detention was not the only appropriate sentence[39] and it therefore followed that a detention order should not be made. The appropriate course is to make a probation order in the terms that were made.

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[39] *Youth Justice Act* 1992 s 208.