SUPREME COURT OF QUEENSLAND

CITATION:	*R v RBB* [2019] QCA 277
PARTIES:	**R** **v** **RBB** (applicant)
FILE NO/S:	CA No 205 of 2019 DC No 10 of 2019 DC No 11 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Ipswich – Date of Sentence: 8 August 2019 (Lynch QC DCJ)
DELIVERED ON:	Date of Orders: 25 November 2019 Date of Publication of Reasons: 3 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2019
JUDGES:	Morrison and McMurdo JJA and Mullins AJA
ORDERS:	**Date of Orders: 25 November 2019** **1. Grant the application for leave to appeal.** **2. Allow the appeal.** **3. Set aside the orders made on 8 August 2019 to the extent only that they order that the applicant be released after serving 50 per cent of the periods of detention imposed and in lieu thereof order that the periods of detention be suspended immediately and the applicant be placed on a conditional release order, that is attachment 'C' to the Pre-Sentence Report dated 7 June 2019, for a period of 3 months.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING OF JUVENILES – CUSTODIAL ORDERS – GENERALLY – where the applicant pleaded guilty to one count of attempted robbery in company, one count of grievous bodily harm and one count of robbery in company with personal violence – where the applicant was sentenced to four months' detention for the attempted robbery and nine months' detention for each of the other offences – where the sentences were concurrent and the applicant was to be released after serving 50 per cent of the sentence – where the pre-sentence report tendered on the sentencing hearing proposed a structured

program for the applicant under a conditional release order – whether the sentencing judge erred by failing to consider in detail the option of a conditional release order before imposing a detention order

Youth Justice Act 1992 (Qld), s 208, s 219

R v SCU [2017] QCA 198, followed

COUNSEL: T G Zwoerner for the applicant
J A Geary for the respondent

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

[1] **MORRISON JA:** I have read the draft reasons prepared by Mullins AJA. They reflect my own reasons for joining in the orders made on 25 November 2019.

[2] **McMURDO JA:** I agree with the reasons of Mullins AJA.

[3] **MULLINS AJA:** The applicant applied for leave to appeal against the sentences imposed on him in the Childrens Court on 8 August 2019. The applicant had pleaded guilty to one count of attempted robbery in company, one count of grievous bodily harm and one count of robbery in company with personal violence. He was sentenced to four months' detention for the attempted robbery and nine months' detention for each of the other offences. The sentences were concurrent and the learned sentencing judge ordered the applicant be released after serving 50 per cent of the sentence. The applicant had spent 66 days in pre-sentence detention which counted as part of the period of detention. No convictions were recorded. The applicant was released on appeal bail on 21 August 2019.

[4] The grounds on which the applicant sought to appeal were that the sentence was manifestly excessive and the sentencing judge erred in the application of s 208 of the *Youth Justice Act* 1992 (Qld) (the Act) by failing to consider properly the suitability of a conditional release order. The applicant was not seeking to disturb the respective periods of detention imposed for each of the offences, but was seeking to substitute a conditional release order pursuant to s 220 of the Act.

[5] The reasons which follow are my reasons for joining in the orders the court made on 25 November 2019 granting leave to appeal, allowing the appeal, deleting the order that the applicant be released from custody after serving 50 per cent of the detention order and in lieu ordering that the periods of detention be suspended immediately and the applicant be placed on the conditional release order proposed in the pre-sentence report that was tendered on the sentencing hearing for a period of three months.

Circumstances of the offending

[6] The first incident occurred when the applicant was on a train with a male and a female co-accused on 27 May 2018. They approached the 17 year old complainant. The male co-accused asked the complainant about his phone and stated "Before we leave, you're going to give me that phone". The female co-accused loudly asked

the appellant, "Didn't you lose a phone like that?". The complainant moved towards the conductor's room and the male co-accused raised his fist towards the complainant and demanded the phone. The train conductor opened the door to the carriage and the complainant went over to him. The applicant yelled out to the conductor to the effect the complainant had stolen his phone. The male co-accused then said to the complainant "I'm going to bash you if you don't give me your phone". The male co-accused grabbed the complainant's jumper and pulled it over his head, before the complainant escaped into the conductor's room. The applicant and his co-accused left the train. The applicant was not arrested for this offence until 10 June 2018. When interviewed by the police, the applicant gave a self-serving account of the incident.

[7] The second incident occurred the day following the first incident. The 17 year old complainant was known to the applicant. The complainant was walking his bicycle from the train station when he was approached by the applicant and two other males, one of whom asked the complainant for money. When the complainant refused to give him money, that person punched the complainant in the jaw. The complainant fell to the ground and was kicked and punched by the same person. Whilst the complainant was on the ground, the applicant took his phone and bicycle, the person who punched the complainant took $40 out of the complainant's wallet which had fallen from his pocket and the other person took the complainant's shoes. The complainant suffered a fracture to his jaw which required surgery including the placement of plates and screws. After being charged and released from custody, the applicant on 29 May 2018 sent threatening social media messages to the complainant who had identified the applicant. The applicant was charged with using a carriage service to menace, harass or cause offence and was sentenced on 4 December 2018 to a period of six months' probation for that offending (together with other offending dealt with on the same day).

The applicant's antecedents

[8] The applicant was 16 years and six months old at the time of offending and 17 years and eight months old at the time of sentence. His juvenile history commenced with offending committed in January 2017 and was predominately dishonesty offending such as stealing and burglary and also street offending. He received sentences of probation and community service orders which he breached on occasions by reoffending. The subject offending breached a probation order of six months and a graffiti removal order that had been imposed in the Childrens Court on 16 March 2018. On 4 December 2018 the applicant was re-sentenced in the Childrens Court for the original offences and a fresh probation order of six months was imposed. At that time he moved to the regional centre where his father was living, in order to reside with him. The applicant was sentenced in the Childrens Court on 8 January 2019 for unlawful use of a motor vehicle, stealing and fraud (dishonestly make off without paying) for which he was given probation for nine months and community service of 50 hours. He was then dealt with in the Childrens Court on 23 April 2019 for wilful damage by graffiti, enter premises and committing indictable offence, possessing dangerous drugs and unregulated high-risk activities for which he was sentenced to nine months' probation and a graffiti removal order of 20 hours. There were no violent offences committed by the applicant either prior, or subsequent, to the subject offending.

[9] A pre-sentence report dated 7 June 2019 was prepared for the applicant for which the case worker conducted interviews with the applicant and his father. The report identified five factors as contributing to the applicant's offending behaviour which were summarised as: poor parental/guardian supervision at time of offending; no engagement in education at the time of offending; no engagement in pro-social activities; negative peer association; and substance misuse.

[10] The applicant's parents had separated in 2008 and the applicant was living with his mother when in 2014 she was diagnosed with cancer from which she passed away later that year. The applicant and his father struggled with their grief and loss which made it difficult to re-establish a positive relationship. The applicant chose to live with a previous neighbour whilst his father returned to live in a different regional area. In 2016 the applicant disengaged from school after completing year 9 at which time the applicant was involved in a social group, most of whom were not attending school. His was misusing substances and participating in crime as a source of income and this resulted in a disassociation from positive adult relationships. At the time of offending, the applicant's primary activities were based upon pro-criminal and anti-social behaviours. The applicant self-disclosed chronic drug use during this period. The report noted that:

> "[The applicant] is able to reflect and provide insight regarding his offending behaviour. He is able to identify that his actions were an attempt to impress his girlfriend and peers. [The applicant] also stated that these offences were opportunistic, selfish and aided by chronic ice smoking and glue sniffing.
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> [The applicant] demonstrates a high level of remorse, advising that he recognises the seriousness of his offending and feels ashamed of his behaviour at the time. [The applicant] stated that he recognises there would be lasting consequences for the victims and that his participation in these offences was 'stupid'. [The applicant] is not proud of his offending behaviour and does not tell other persons of his offences."

[11] The pre-sentence report attached the remand in custody report that set out the periods during which the applicant was held on remand. The most extensive periods were 54 days between 11 October and 4 December 2018 and eight days between 9 April and 17 April 2019. The applicant had failed to appear before the Childrens Court on 25 September 2018 for offences including the subject offences and a warrant was issued. When the applicant was before the court on 11 October 2018 bail on a number of offences including the subject offences was refused. When bail was granted on 4 December 2018, the applicant was required to live with his father. On 8 April 2019, the applicant was remanded in custody in relation to other offences and on 9 April 2019 the applicant was remanded in custody for the subject offences. He was granted bail again, when he pleaded guilty to the subject offences on 17 April 2019.

[12] At the time the report was prepared, the applicant was residing with his father who was assisting him in complying with his bail conditions. He was therefore unable to associate with his peer group from the time of the subject offending. The pre-sentence report addressed all the suitable sentence options that were available, including a conditional release order for a maximum period of three months. The

conditional release order program proposed for the applicant comprised three components: vocational training, community supports and services and interventions to address offending. It was proposed that the applicant be provided with assistance and support to engage in vocational training programs, Youth Justice Service programs and employment interests and that his ongoing attendances at such programs would form the basis of his release program, provide structure to the applicant's daily livelihood and may lead to future employment. It was also proposed that he would be introduced to positive pro-social activities provided by Youth Justice Service or sources through local community agencies, according to availability. The applicant would also be directed to attend programs and interventions during the period of the conditional release order that were considered relevant in addressing the assessed causal factors contributing to his offending, including counselling to address grief and loss and substance misuse. The applicant would be required to participate in fortnightly reviews of the conditional release order activities. The conditions of the conditional release order and the consequences of failing to comply had been explained to the applicant and he indicated willingness to comply with such an order.

The sentencing remarks

[13] After summarising the offending, the sentencing judge noted the second incident "should be seen as a very serious one, resulting as it did in significant injury to the Complainant, who had done nothing wrong and was simply going about his business". The sentencing judge observed:

> "What your conduct demonstrates in respect of the two instances is that you were prepared to engage yourself with others in the assault of innocent young persons, who were vulnerable by reason of being outnumbered, in order to take their property."

[14] The primary judge accepted that it was true that the applicant did not engage in any of the physical violence that was inflicted on either occasion, but noted that, for the first incident, the applicant's physical role included his physical presence and participation by attempting to complain that the complainant had stolen the applicant's phone and that his conduct was an encouragement to the others. Similarly on the second occasion, it was noted that the applicant's presence encouraged the physical violence that was inflicted by the others on the complainant and that the applicant had taken advantage of that by taking the complainant's mobile telephone and his bicycle.

[15] The sentencing judge dealt at length with each of the entries in the applicant's juvenile history. The sentencing judge noted that some of the offences for which the applicant was sentenced on 4 December 2018 and the offences for which he was dealt with on 8 January and 23 April 2019 were committed whilst he was on bail for some or all of the subject offences. The sentencing judge summarised the pre-sentence report, referring to the fact that the applicant's upbringing had been significantly impacted by the death of his mother. The sentencing judge noted the submission of the prosecution that a period of detention was within the appropriate sentencing range, but the court should release the applicant on a conditional release order, and noted the submission made on the applicant's behalf that in view of the period of 66 days spent in pre-sentence detention, a community service order was appropriate together with probation in respect of one or other of the offences.

[16] The sentencing judge recognised that he was required to have regard to the principles set out in s 150 of the Act, including that the court must have regard to the general principles applying to the sentencing of all persons, as well as the youth justice principles set out in schedule 1 to the Act. The sentencing judge quoted the youth justice principles numbered 1 to 5. The sentencing judge referred to the requirement of s 162 of the Act requiring the court to consider a restorative justice process or a referral for such a process and then noted:

> "In addition, the Act requires that if a detention order is considered, then a conditional release order must also be considered in preference to that order for actual detention."

[17] After the sentencing judge identified the serious aspects of the applicant's offending, his Honour then stated:

> "Whilst it has to be accepted that your conduct should be viewed less seriously because you did not yourself inflict actual violence on the victims on either occasion, nevertheless you were prepared to take advantage of the violence that was inflicted, particularly on the second occasion, and your conduct on each occasion was a clear approval by encouraging the infliction of violence on the victim."

[18] The sentencing judge referred to the applicant's conduct of committing offences that extended over a significant period before and after the subject offences and that the applicant had not learnt much after his periods in custody, because he continued to commit offences whilst on bail and after having relocated to live with his father. The sentencing judge acknowledged that it did seem the applicant had not been committing any offences since April 2019 and had more recently started completing the community service he had been ordered to do. The sentencing judge explained expressly that he was satisfied in the circumstances that the offences were too serious, when looked at in the light of the applicant's record, and no referral should be made for a restorative justice process. The sentencing judge then explained in his conclusion that a period of actual detention was necessary:

> "I have had regard in particular to the submissions made by your counsel that you have entered early pleas of guilty, that there is now evidence of your genuine remorse, that you have a lack of history of violence, that your role in these offences did not involve you personally inflicting any violence and that you have now spent 66 days in custody in assessing what should be ultimately the penalty to be imposed. In the circumstances, I have come to the view, sadly, that a period of detention should be imposed, coming as it does, as a last resort. I do intend to take those matters referred to by your counsel into account in your favour. I have considered whether the making of a conditional release order is appropriate but I am satisfied in the end that a period of actual detention is necessary, having regard to the seriousness of the offences and your role in the offences, notwithstanding that you did not inflict any actual violence.
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> …
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> I make it plain that I have considered in coming to that decision your prospects of rehabilitation and the need to impose a penalty which takes account of the need to foster your rehabilitation. It seems to

> me that that can be facilitated under the order that I have stated by reason of the supervision that takes place upon your release. But weighing all of the required features, I have come to the view that detention is the only appropriate penalty."

Did the sentencing judge give real consideration to a conditional release order?

[19] In support of ground 2, the applicant relied on Sofronoff P's observation in *R v SCU* [2017] QCA 198 at [81] as to what consideration a sentencing judge must give under the Act to a conditional release order, before imposing a sentence of detention:

> "It is incumbent upon a judge, who is considering imposing a sentence of detention, to give consideration, based on the materials before the court, as to whether a conditional release order would be adequate to serve all of the purposes of punishment. This would have to involve a consideration of the facts and opinions contained in relevant reports of the nature and content of the "structured program" in which the child would be released and the nature and possible effectiveness of the conditions that could be imposed to prevent reoffending."

[20] The applicant submitted that the sentencing judge did not outline why he determined the structured program available under the conditional release order for the applicant was not appropriate to address the causes of the applicant's offending. Although the sentencing judge expressly stated in the sentencing remarks that he had considered the making of a conditional release order, but was satisfied that a period of actual detention was necessary, there was a failure to consider whether the proposed structured release program may have a positive impact on the prospect of the applicant's rehabilitation and explain why in all the circumstances further actual detention was necessary.

[21] The respondent conceded the sentencing judge did not expressly identify why the structured program available under the conditional release order was not appropriate, but relied on the concern expressed by the sentencing judge during the course of sentencing submissions that the maximum period for a conditional release order of three months was not sufficient to reflect the seriousness of the offending and the appellant had previously continued to offend whilst subject to a conditional bail program and community based orders.

[22] Apart from the guidance found at [81] of *SCU*, Sofronoff P (with whom Morrison and McMurdo JJA agreed) in *SCU* dealt with the structure of the Act, its purposes and how that is reflected in a requirement for a sentencing judge to be satisfied positively that none of the sentencing options that do not involve detention would be likely to serve their intended purpose of prevention of reoffending before imposing the final alternative of detention: *SCU* at [53]-[57]. Sofronoff P explained at [84]:

> "The injunction in the Act that detention is to be regarded as a sentence of last resort, to be imposed only when the court is positively satisfied that there is no other possible alternative, is, therefore, not merely a platitude or a bromide. It is an emphatic parliamentary order enacted with express deliberation."

Sofronoff P noted at [85] that s 208 of the Act prescribes a process of reasoning for the purpose of a sentencing judge making a detention order after considering all other available sentences, taking into account the desirability of not holding a child in detention, and being satisfied that no sentence other than detention is appropriate in the circumstances of the case. Sofronoff P then concluded at [86]:

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

[23] Observations expressed by a sentencing judge during sentencing submissions do not necessarily reflect a concluded view by the sentencing judge. The reasons for imposing a particular sentence are generally to be found in the sentencing remarks.

[24] Even though the sentencing judge's sentencing remarks were lengthy and detailed in setting out the circumstances of the offending and the applicant's history of offending and circumstances, there was a failure in the sentencing remarks to engage with the recommendation of the pre-sentence report in favour of a conditional release order and the benefits that such an intensive program may have in preventing further offending by the applicant before imposing detention orders. The sentencing judge overlooked the obligation on the sentencing judge described in *SCU* at [81] which has its genesis in s 208 and s 219 of the Act. The applicant therefore succeeded on his ground of appeal that the sentencing judge erred in the application of s 208 of the Act which required the applicant to be resentenced.

Resentencing

[25] Although the applicant had been the subject of probation orders and other community based orders in the past which had not prevented his reoffending, he did experience detention when he was held on remand for a total period of 66 days prior to the sentencing for the subject offences. He had not, however, been sentenced previously to any period of detention and therefore had not had the opportunity of the intensive supervision available under a conditional release order where the program is tailored for the particular offender.

[26] The applicant had relocated to live with his father only in December 2018. Even though that was not itself sufficient to curtail the offending that he committed up until April 2019, the pre-sentencing report showed some signs of optimism for the applicant after he commenced engaging again with the Youth Justice Service and undertaking community service. The proposed program under the conditional release order is directed at the factors that were identified as the causes of the applicant's offending. Because of the applicant's age, the sentencing for the subject offences was his last opportunity to benefit from the provisions of the Act. It is therefore appropriate to exercise the discretion to give effect to the option provided for in s 219 of the Act in all the circumstances applicable to the applicant before imposing a detention order that involves actual custody.