SUPREME COURT OF QUEENSLAND

CITATION:	*R v Patrick (a pseudonym); R v Patrick (a pseudonym); Ex parte Attorney-General (Qld)* [2020] QCA 51
PARTIES:	**In CA No 227 of 2019:** **R** **v** **PATRICK (a pseudonym)** **(applicant)** **In CA No 230 of 2019:** **R** **v** **PATRICK (a pseudonym)** **(respondent)** **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** **(appellant)**
FILE NO/S:	CA No 227 of 2019 CA No 230 of 2019 DC No 42 of 2019 DC No 45 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	Childrens Court at Ipswich – Date of Sentence: 9 August 2019 (Lynch QC DCJ)
DELIVERED ON:	24 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2019
JUDGES:	Sofronoff P and Fraser JA and Boddice J
ORDERS:	**1. The application for leave to appeal is refused.** **2. The appeal by the Attorney-General is allowed.** **3. Sentence for count 2 on indictment CCJ-00003169/19(7) be set aside.** **4. In lieu thereof, the offender be detained for a period of five years and that he be released after serving 50 per cent of the period of detention.** **5. A conviction be recorded.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL –

APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where a child offender pleaded guilty on the first indictment to burglary and robbery – where a child offender pleaded guilty on the second indictment to unlawful use of a motor vehicle and malicious act with intent, namely doing grievous bodily harm with intent to prevent their lawful arrest – where the child committed the offences of the second indictment while on bail for the first indictment – where the child was driving a stolen vehicle – where the child caused grievous bodily harm to a police officer by swerving to avoid a tyre deflation device installed to intercept the stolen vehicle – where the child was sentenced for the malicious act with intent to three years' detention with a conviction recorded, with lesser concurrent sentences for the other three counts with no conviction recorded for the lesser counts – where the learned sentencing judge identified the child offender's early plea of guilty, remorse, lack of criminal history, efforts at rehabilitation in detention, exposure to domestic violence and drug use, and youth as factors in mitigation – whether the learned sentencing judge erred in recording the conviction for the malicious act with intent – whether the learned sentencing judge erred in not affording appropriate weight to the fact that the grievous bodily harm was done to a police officer and the permanence and severity of the harm inflicted upon the officer as factors in aggravation – whether the sentence of detention was manifestly inadequate – whether the sentence regarding the conviction was manifestly excessive

Criminal Code (Qld), s 317
Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld), s 3, s 6
Penalties and Sentences Act 1992 (Qld), s 4
Youth Justice Act 1992 (Qld), s 2, s 3, s 149, s 150, s 173, s 176, s 184, s 207, s 227

COUNSEL: R A East for the applicant/respondent
C W Heaton QC for the respondent/appellant

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

[1] **SOFRONOFF P:** Patrick (a pseudonym) pleaded guilty to four counts on two indictments. In summary, they were as follows:

(a) That he entered the dwelling house of Xu Yi-Chong and stole a quantity of electrical items;

(b) That he robbed Kian Meng Lee;

(c) That he unlawfully used a motor vehicle without the consent of its owner, Bruce Stewart Snell; and

(d) That, with intent to prevent lawful arrest, he did grievous bodily harm to Peter Douglas McAulay.

[2] Patrick was aged 15 when he committed the first two offences and was 16 when he committed the third and fourth offences. He was 17 when he came to be sentenced. He pleaded guilty to all offences and Lynch QC DCJ imposed the following sentences:

(a) Burglary and stealing: three months detention with no conviction recorded;

(b) Robbery: three months detention with no conviction recorded;

(c) Unlawful use of a motor vehicle: six months detention with no conviction recorded; and

(d) Doing grievous bodily harm with intent to prevent arrest: three years detention to be released after serving 50 per cent of that sentence with a conviction recorded.

[3] Patrick seeks leave to appeal against the sentence for doing grievous bodily harm on the ground that the recording of a conviction made the sentence manifestly excessive. The Attorney-General appeals against the same sentence on the ground that it is manifestly inadequate.

[4] The objective circumstances of these offences were as follows. In May 2018, Xu Yi-Chong asked a friend, Kian Meng Lee, to attend her home in Sunnybank Hills to attend to a task while Ms Xu was at work. When Mr Lee entered the house he heard footsteps upstairs. He went outside and saw that a security screen on the back entrance was damaged. A short time later, he saw Patrick come out. He was holding a laptop that belonged to Ms Xu which he had stolen. Mr Lee held out an arm to stop him. Patrick pushed past Mr Lee, who gave chase. As Mr Lee was closing in on him, Patrick pushed back and Mr Lee fell and scratched his left hand. Patrick ran into a neighbouring house where police later found and arrested him together with a co-offender. Patrick participated in a record of interview and made full admissions. Patrick was required to appear in the Magistrates' Court two days later but he failed to appear. A warrant was issued for his arrest and, in due course, when he appeared on 11 July 2018 he was granted bail on his own undertaking.

[5] Between the evening of Sunday 23 September 2018 and the morning of Monday 24 September 2018 an unknown person stole a sedan belonging to Mr Bruce Snell. In the early morning of the following Thursday two police officers patrolling in the East Ipswich area spotted the stolen car and tried to stop it. They activated the police lights on their car but the driver of the stolen car, who was Patrick, continued to drive. In accordance with police requirements, the pursuing officers stopped their chase and notified Police Communications that the stolen car had turned east onto Brisbane Road. At that time, Senior Constable Gillespie and his colleague, Constable Peter McAulay, were driving on Brisbane Road in a marked police van. They reported that they were in the vicinity and that they would respond. Senior Constable Gillespie stopped his vehicle about 30 metres from the intersection of Brisbane Road and Hamilton Road. Constable McAulay took a tyre deflation device from the rear of the police van. This was a chain fitted with sharp points, called a "stinger", which was designed to be placed across a road in order to induce an oncoming driver to stop before the car's tyres were shredded by the chain.

Constable McAulay saw the stolen car approaching and he deployed the stingers across the road.

[6] Patrick stopped the car some distance away from Constable McAulay. Later tests showed that Constable McAulay was visible to Patrick from a distance of 87 metres. The stingers were visible from a distance of 27 metres. Patrick accelerated the car from a standing start and, as tests showed, accelerated to a speed of 76 kph over 6.5 seconds before swerving to the left and hitting Constable McAulay. When the front bumper of the car struck him, it was travelling between 49 kph and 56 kph. Patrick did not swerve to avoid Constable McAulay nor did he brake heavily, although later investigations showed that the brakes had been applied for about one second before impact. Constable McAulay was carried some distance on the car's hood before falling to the roadway. He then slid along the road for about four metres. His head hit a kerb before he came to rest in a gutter.

[7] Patrick kept driving. The safety system built into the car caused it to slow to a very restricted speed and he continued to drive until he crashed into a tree at a cross-street. He and his accomplice then got out and ran away. Police found them about a kilometre away and arrested them. At first Patrick denied his involvement in the offence and blamed his passenger who, he said, had been the driver. Then he refused to be interviewed and was remanded in custody.

[8] Constable McAulay suffered serious and permanent disabling injuries. He had been knocked unconscious and was admitted to an intensive care unit where, for a long time, he lay in a coma. His spine was fractured in more than one place. His right leg was also fractured in a number of places and his knee was dislocated. His right arm was fractured and an artery in his left arm was severed. His jaw was fractured and he lost several teeth and other teeth were cracked. His natural bite became misaligned. The right side of his face was fractured, involving his eye socket, cheek and upper jaw. His nose and sinuses were injured so as to affect his breathing. A large portion of his skull had to be removed and could not be replaced for eight months, which has caused him great pain.

[9] He continues to suffer from problems associated with these shocking injuries. His short term memory has been affected. He loses situational awareness. His language has been affected. Eating has been painful. There has been a painful process of dental therapy. His hearing has been affected. Many operations had to be performed over a lengthy period of time in order to treat these serious injuries. After he was able to rise from his bed he had to rely on walking aids for mobility, which was slow, painful and limited. His ability to walk normally has been permanently affected. His pain, discomfort and his treatment will continue for a long time. His mental health has been affected. There has been a great deal of expense.

[10] Before this, Constable McAulay had been an active and energetic man who engaged in many physical activities, such as mountain biking, camping, skydiving and skiing. A career with the Queensland Police Service was consistent with his character and personality. He had also worked with the Australian Defence Force. His life as he had lived it, and as he had expected to go on living it, was destroyed and he must now rebuild it as best he can.

[11] Constable McAulay suffered these injuries in the execution of his duties as a police constable.

[12] Patrick was born in June 2002. His mother and father separated when he was two years old. In a later relationship with another man his mother bore two more children. From 2008, when Patrick was six years old, until 2016, when he was 14, several child safety notifications were submitted which arose from domestic violence that was inflicted upon Patrick and his mother by her then live-in partner. This man frequently inflicted verbal and physical abuse upon her and he required Patrick to watch his abuse of his mother. Patrick felt a responsibility to protect his younger siblings from this brutality. He played loud music to mask the noise of arguments and he would take his siblings for long walks. Patrick's mother reported that towards the end of her relationship with this man, which it seems was in about 2016, Patrick's behaviour changed. According to the pre-sentence report, he "became disrespectful towards the family, disregarded rules and boundaries and [was] prone to aggressive outbursts". He disengaged from education. He himself reported to the author of the report that he disliked school and disliked his frequent involvement in fights at school. He did not like people telling him what to do. He came to prefer to spend time with friends outside school. He preferred to be independent and self-sufficient and did not want to rely on others for support or to follow rules imposed upon him. When he was 12 a friend introduced him to cannabis. The feeling of relaxation was enjoyable. It must have relieved the stress he was suffering as a result of what the adults in his home were doing. When he was 15 someone introduced him to methamphetamines. The feeling of euphoria and relief caused him to use the drug on a daily basis. He began to commit offences to get the money to buy the drug.

[13] According to the pre-sentence report, Patrick's exposure to the violence in his home altered his emotional and social reasoning and caused him to develop wrongheaded rationalisations for social relationships. He had developed a sense of independence from others in order to survive but his association with peers introduced him to criminally-minded ideas and his drug addiction led to his committing offences.

[14] In his home, the place in which a child is entitled to feel secure, Patrick's mother and her partner instead exposed him to violence. Instead of being able to rely upon his parental guardians for safety and comfort, he and his younger siblings felt endangered by them. The normal rules of society were not there and the rules that actually applied were perverse. Such an environment can place an immature boy entering adolescence into a situation in which his judgment about how to cope is prone to be damaged and he can form distorted judgements about how to live. And so it proved in this case.

[15] After his remand in custody, Patrick wrote a letter to a friend who was also incarcerated. That letter was intercepted and then tendered at the sentence hearing. Relevantly, Patrick wrote:

> "I stuffed up that night when I left you … at home … I should've stayed home or at least left my frank with you because I think that's half the reason what happend [*sic*]. I was off my head … You would've seen the news? It wasn't like they made it out to be. The dumb mort was still on the road. I went to go around the spikes and

> he still stands there trying to be superman or something haha. Anyway's other than that I'm just kicking back in here …"

[16] Some time later, Patrick wrote another letter. This one was addressed to Constable McAuley and read as follows:

> "Dear Constable Peter Mcually [*sic*]
>
> I just want to say sorry to you and your family for the accident that has happend [*sic*].
>
> I didn't mean to hurt you in any sort of way. I honestly didn't see you and can honestly say that it wasn't intentionally [*sic*]. I'm truely [*sic*] sorry words can't express how sorry I am to you and your family if I could go back in time and change it I would.
>
> I'm trying to turn my life around and I hope you can forgive me for what happend [*sic*] that day. I wish you a good and full recovery."

[17] The pre-sentence report said that Patrick expressed insight into his offending. He expressed "sadness" when he heard about the extent of Constable McAuley's injuries. He acknowledged that his offending was the product of his own selfish search for instant gratification without heeding the consequences that others may suffer. He acknowledged that he had initially sought to place the blame for his actions upon the police officers involved but has since realised that they were his own responsibility. He has been suffering from sleep disturbances and flashbacks.

[18] Six reports from instructors at the Youth Detention Centre were tendered at the sentence hearing. These were unanimously commendatory. One example will suffice because they all say the same kinds of things:

> "[Patrick] is a hardworking, determined and motivated student. He is working hard to achieve his learning goals and obtain certificates in a number of classes. [Patrick] is a pleasure to teach."

[19] Patrick informed the author of the pre-sentence report that he has identified positive consequences of his detention, including having time to reflect upon his behaviour and the opportunities he now has to engage in education and to improve his mental and physical health.

[20] At the sentence hearing, the Crown submitted that the appropriate sentence was one of five years' detention and that a conviction should be recorded. Patrick's counsel put forward various forms of orders for his Honour's consideration, each of which would have resulted in Patrick's release from detention immediately on conditional release or on probation.

[21] It is convenient to consider the Attorney-General's appeal first.

[22] The substance of the Attorney-General's submission is that the sentence of three years detention with release after serving 50 per cent of the term is manifestly inadequate because the sentence fails to reflect the seriousness of the offences, the consequences for Constable McAulay and the need for community protection.

[23] This case is governed by the *Youth Justice Act* 1992 (Qld). Section 150 of the Act sets out the principles to which a Court must have regard when sentencing a child. Among the relevant factors are these:

(a) the nature and seriousness of the offence;

(b) any impact of the offence on the victim;

(c) the fitting proportion between the sentence and the offence.

[24] Because the Act is concerned with punishments imposed upon children, section 150(2) states that a non-custodial order is better than detention in promoting a child's ability to re-integrate into the community and that rehabilitation is greatly assisted by a child's family and by opportunities to engage in educational programs and employment. The section says that a child's lack of opportunity for education or employment, and lack of apparent family support, should not result in a more severe sentence.

[25] Section 150 also requires the application of the Youth Justice Principles set out in Schedule 1 of the Act. Those principles include the following:

> "1 The community should be protected from offences.
>
> …
>
> 8 A child who commits an offence should be –
>
> (a) held accountable and encouraged to accept responsibility for the offending behaviour; and
>
> (b) dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways."
>
> …
>
> 16 A child should be dealt with under this Act in a way that allows the child to be reintegrated into the community.
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> 17 A child should be detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least time that is justified in the circumstances."

[26] That Patrick is not constitutionally prone to malicious and dangerous acts can be accepted. His positive response to his detention, as evidenced by his instructors' opinions, shows that is so. Patrick had no criminal history before facing these charges.

[27] Those are important considerations, as the learned sentencing judge fully appreciated. The *Youth Justice Act* 1992 (Qld) requires that full weight is given to them when deciding upon a just sentence.

[28] The Act also requires other things to be taken into account. In the sentencing process these are called "aggravating factors" and that is a useful expression because it signifies the tendency of such factors to promote a more severe punishment. However, sometimes such factors really reflect the relevance, in the sentencing process, of the interests of the community and the interests of those who have been directly affected by the offence. So it is in this case.

[29] Two of these interests have to be considered in this case. The first of these is the interest of the community in being protected against the commission of offences. That is expressly required by one of the Youth Justice Principles. In this particular case the community interest has two aspects. The first is the assumed propensity of punishments to deter other people from committing similar offences. A sentence is believed to have that deterrent effect if it is sufficiently severe to frighten potential offenders. A sentencing judge is obliged to take into account that purpose, when appropriate, when deciding upon a sentence.

[30] The second aspect is the interest that the community has in the maintenance of an effective police force and the protection of police officers from harm. The establishment of a state sanctioned body of police serves a number of important and obvious purposes. One of these purposes is to ensure that the community need not rely upon self-help or upon vigilantism to protect itself against criminal acts. The community does not need to take such measures because some among us have volunteered to undertake this difficult and hazardous duty as members of the Queensland Police Service. There is, therefore, a public interest in ensuring that, so far as laws can do so, police officers are protected against harm in the execution of their duties and that offenders are punished when they harm police. Section 317(1) of the *Criminal Code* (Qld) is such a law. Relevantly, it provides:

> "Any person who, with intent … to resist or prevent the lawful arrest… of any person … in any way … does grievous bodily harm … to any person … is guilty of a crime, and is liable to imprisonment for life."

[31] Whether the doing of grievous bodily harm is accompanied by an intent to do such harm or an intent to maim, disfigure or disable or an intent to transmit a serious disease or, as in this case, an intent to prevent lawful arrest, the punishment is the same: life imprisonment. This offence can be contrasted with the offence created by section 320(1), doing grievous bodily harm *without* any malicious intent, which carries a maximum punishment of 14 years.

[32] At the sentence hearing, Patrick's counsel submitted that it was relevant for the judge to take into account that "the Crown chose the offence that is on the indictment with the specific intention alleged, rather than *one of the more serious ones available within section 317*" (emphasis added). It does not appear that that submission was accepted and rightly so. It was misconceived because, in terms of the seriousness of the offence, the section draws no distinction between any of the specified kinds of intent that motivate the doing of grievous bodily harm – although the circumstances of a particular case will affect the culpability.

[33] The two prominent facts that aggravate the gravity of the offending in this case are, first, that grievous bodily harm was done to a police officer in order to evade arrest and, second, that the grievous bodily harm that was actually inflicted upon Constable McAulay was permanent and was so severe. The other objective facts are in this case also matters in aggravation of sentence. The car that Patrick drove into Constable McAulay was a stolen car and he was then on bail for burglary and robbery. After injuring his victim, Patrick left him on the roadway and fled, later falsely denying responsibility. However, the first two facts to which I have referred are the crucial ones.

[34] I would accept the Attorney-General's submission that the seriousness of the facts that the victim was a police officer and that the offence was committed to stop him doing his duty were not given due recognition so that the discretion miscarried.

[35] Section 176(3) of the *Youth Justice Act* 1992 (Qld) provides:

> "(3) For a relevant offence that is a life offence, the court may order that the child be detained for –
>
> (a) a period not more than 10 years; or
>
> (b) a period up to and including the maximum of life, if –
>
> (i) the offence involves the commission of violence against a person; and
>
> (ii) the court considers the offence to be a particularly heinous offence having regard to all the circumstances."

[36] No submissions were made below or on appeal that section 176(3)(b) was applicable to this offending and so this appeal should be decided upon the footing that section 173(3)(a) rendered Patrick liable to a maximum period of detention of 10 years.

[37] I would conclude that a sentence of detention for three years, being approximately one third of the maximum penalty, with a release after serving 18 months, and a recorded conviction, is inadequate to reflect the seriousness of the offence.

[38] I would, therefore, set aside the sentence that was imposed.

[39] The Attorney-General has submitted that a sentence of five years' detention should be imposed with no order for an early release and with a conviction recorded.

[40] In his own application for leave to appeal against sentence, Patrick has submitted that a conviction should not have been recorded but otherwise did not challenge the correctness of the sentence imposed. Having regard to the success of the Attorney-General's appeal, the application for leave to appeal should be dismissed. However, the applicant's submissions about whether a conviction should have been recorded should be taken into account in considering the appropriate sentence that should now be imposed.

[41] The difficult issue that has been presented by this case lies in the need to resolve the conflict between the objective circumstances of the offending, which are so grave, and Patrick's youth and personal circumstances, which, while incapable of negating the gravity of the offending, raise mitigating considerations.

[42] Confusion of thought can be avoided if the purposes to be achieved by this particular sentence are kept clearly in mind. When a Court must determine upon a sentence it must decide by reference to some purpose or purposes. To "refuse to define an aim for the punishment imposed is to make Pilate's choice, and to give way to the emotions of others" or, indeed, to a judge's own emotions.[1] Punishment

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[1] Norval Morris, *Sentencing Convicted Criminals* (1953) 27 ALJ 186, at 189.

under the law is a problem in the application of legal principles.[2] It is true that a sentence serves to satisfy the legitimate emotional needs of the community, but it can only do so justly when the judge engages in the dispassionate application of legal rules and principles in order to serve those needs. It is therefore necessary to be rigorous in the application of the provisions of the Act that sentencing judges are bound to apply.

[43] The purposes to be achieved when sentencing a boy of 15 or 16 are not the same as the purposes to be achieved when sentencing a grown man for the same offence. Section 2(d) of the *Youth Justice Act* 1992 (Qld) declares that it is an objective of the Act to ensure that courts deal with children who have committed offences by dealing with them in accordance with the principles established under the Act. Section 3(2) states that the principles set out in Schedule 1 "underlie" the operation of the Act. Four of those principles are particularly important in this case.

[44] In the present appeal, rightly, neither party has suggested that a just sentence could be one that did not involve detention. The only questions are for how long that detention should be and what associated orders should be made. The expression in Principle 17 that detention should be for the "least time that is justified under the circumstances" directs attention to the factors in the case that justify detention. The main factors in this case that point toward a long, rather than a short, period of detention have already been noticed, namely the objective gravity of the offending, which is the subject of section 150(1)(d), and the effects of the offending upon Constable McAulay, referred to in section 150(1)(h). To these can be added the effect of detention both as a personal deterrent and as a general deterrent against future offending.

[45] In dealing with the objective circumstances of the offending, it is crucial in this case to bear in mind that it was no part of the prosecution case that Patrick intended to drive the car into Constable McAulay or that he intended to injure him. In almost all cases involving adult offenders, when the consequences have been as grave as they are in this case, a lack of intention to cause harm is often of only minor significance for sentencing purposes. When sentencing adult offenders, the plainly foreseeable consequences of offending are often treated as equivalent to intended consequences whether the offender foresaw them or not. However, when dealing with child offenders that simple equivalence is not available. Immaturity in thinking that hampers a child's judgment, as well as a child's lack of experience, means that children often commit offences without being conscious of the potential consequences. For this reason, the moral blameworthiness of a child for the consequences of offending cannot always be the same as that of an adult.

[46] The *Youth Justice Act* 1992 (Qld) embodies this as a fundamental premise and requires judges to sentence accordingly. Principles 8(b) and 16, which require a sentencing judge to deal with a child in a way that gives an "opportunity to develop in responsible, beneficial and socially acceptable ways" and in a way that "allows the child to be reintegrated into the community", command a sentencing judge to do what can be done to increase the prospects of diverting the child from the potentially damaging effects of punishment towards education, the learning of self-discipline, the nurturing of an appreciation and an acceptance of social standards and, in due course, successful reintegration with the community.

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2 *Ibid*.

[47] In this respect, if the aims of the Act are to be understood, it is critical to appreciate that although those aims are to some degree informed by the community's natural tenderness towards children, that is a minor aspect and, for present purposes, it can be put to one side. The *real* reason for these legislative requirements lies in the Australian community's belief that, until a child has matured into an autonomous adult, whatever a child's current circumstances might be, and whatever offence a child has committed, every child holds within itself the potential for an honourable and productive life. The alternative view, that the child's character is irredeemable, or that painful punishment of children will "reform" them, is not to be adopted unless and until it is conclusively shown to be justified in an individual case. The Act builds upon this assumption by regulating the punishment of children so as to increase the prospect that the child will not reoffend, not by fear of the pain of punishment, but because successful reintegration of the child into the community has removed the risk of re-offending.

[48] The statutory requirements with which this Court must comply in resentencing direct attention towards any evidence about Patrick's prospects for reintegration. That evidence has already been referred to. Since he has been subject to consistent adult guidance, he has developed and thrived. It can be accepted that the opinions of the instructors at the Brisbane Youth Detention Centre, given in writing, were the result of their earnest consideration and based upon direct observation by professionals who have experience in dealing with young offenders. They should be given great weight.

[49] The learned sentencing judge found that Patrick's contrition was genuine. That finding has not been challenged. The letter that Patrick wrote to his friend in detention is disturbing. However, Lynch QC DCJ concluded that this was bravado calculated to show a friend that he was undismayed by his arrest. I would respectfully agree with his Honour's conclusion that this letter holds little significance for evaluating Patrick's future prospect of reintegrating with the community. Patrick now has ambitions for his adult life and has been introduced to the means to achieve them. He has shown adequate promise upon which to base optimism about his future growth into worthwhile manhood.

[50] The *Youth Justice Act* 1992 (Qld) places these matters upon an equal footing with the gravity of the offending and its consequences.

[51] The combination of factors that the Act requires the Court to take into account mean that, subject to what follows about supervised release, a period of detention of five years should be ordered and a conviction should be recorded.

[52] Section 184(1) provides that, among any other relevant circumstances, when considering whether to record a conviction, a Court should have regard to the nature of the offence, the child's age and previous convictions as well as the "impact" that the recording of a conviction will have on the child's chances of rehabilitation or finding or retaining employment.

[53] The nature of the offence, including the objective circumstances that have been described, place this particular offending in the category of very serious offences for which a child might be held responsible. In that context, the absence of previous convictions means little.

[54] Part of Patrick's rehabilitation must involve, as Principle 8(a) requires, him accepting responsibility for what he has done and what harm he has caused.

Acceptance of responsibility is much more than an offender's verbal acknowledgment of personal fault. It must involve an actual appreciation and acknowledgement of the community's revulsion at the crime and its consequences. That revulsion is partly manifested by the public record that is a conviction. It is true, as counsel for Patrick urged, that the recording of a conviction may affect Patrick's future employment prospects but in a case like the present, that does not outweigh the justification for recording, as a conviction, the community's denunciation of the offending act, notwithstanding that it was committed by a child in the circumstances in which Patrick found himself.

[55] It was submitted that the recording of a conviction will have a permanent effect upon Patrick because the provisions of the *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld) will not apply. That Act provides that in certain cases, after a lapse of a defined time, the fact of a conviction shall not be disclosed.[3]

[56] The Act provides that a conviction as a child does not have to be disclosed after the lapse of five years.[4] However, the protection that the Act gives in this way does not apply to a person who has been sentenced "to a term of imprisonment … of more than 30 months".[5] The scope of this exclusion depends upon the meaning of the expression "term of imprisonment".

[57] The expression "term of imprisonment" is defined in the Act expressly by reference to section 4 of the *Penalties and Sentences Act* 1992 (Qld)[6] which contains an inclusive definition that refers to the "duration of imprisonment imposed for a single offence". The word "imprisonment" is not defined.

[58] Section 149 of the *Youth Justice Act* 1992 (Qld) provides that a child who is to be sentenced must be sentenced under Part 7 of that Act and that this provision applies despite any other law. This is consistent with section 2(b) which establishes the Act as a code for dealing with child offenders. Part 7 of the Act concerns sentencing. Division 10 of Part 7 deals with "Detention orders" and empowers a court to "make a detention order against a child".[7] The Act contains no provisions authorising "imprisonment" of a child. However, section 217 deals with the case when, at a time when a Court "makes a detention order against a person as a child", that person is then serving, or has been sentenced, "to serve a term of imprisonment as an adult". The provision also deals with the case of a person sentenced to "a term of imprisonment" while serving "a period of detention as a child".[8] These provisions, and in particular section 217, demonstrate is that there is a legislative distinction between "detention" and "imprisonment". The difference pervades the distinct legislative incidents of each form of incarceration in each of the two statutes.

[59] Consequently, the exclusion in section 3(2) of the *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld) does not apply to a detention order. It follows that after the expiry of five years, Patrick's conviction cannot be disclosed except in accordance with the provisions of the latter Act. The duration of the effect of the

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3 *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld), s 6.

4 See *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld), s 3 for the definition of "rehabilitation period".

5 *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld), s 3(2)(b).

6 *Penalties and Sentences Act* 1992 (Qld), s 4.

7 *Youth Justice Act* 1992 (Qld), s 207.

8 see also *Youth Justice Act* 1992 (Qld), s 135(3).

conviction will therefore be limited and its permanence cannot constitute a reason not to record a conviction.

[60] Section 227 of the *Youth Justice Act* 1992 (Qld) provides that a child who has been sentenced to serve a period of detention must be released after serving 70 per cent of the period of detention. Section 227(2) empowers a sentencing court to order a child to be released from detention after having served between 50 per cent and 70 per cent of the period of detention if the court considers that there are "special circumstances". The Chief Executive orders such a release subject to the conditions in a "supervised release order".[9] Those conditions must require the child to abstain from violation of the law, attend programs as directed, comply with the Chief Executive's reasonable directions and impose other supervisory constraints. The Chief Executive may also impose other appropriate conditions. Such a release does not signify the end of the child's sentence.[10] A breach of any condition of release may result in a revocation of the release order.[11] Lynch QC DCJ was of the opinion that there were special circumstances to justify early release and his Honour made an order to take effect after Patrick had served 50 per cent of his sentence. In reaching that view, his Honour had regard to Patrick's early pleas of guilty, his acceptance of responsibility, his lack of criminal history, his expressions of remorse and his efforts at rehabilitation. To these might be added the perverse circumstances in which Patrick found himself, alone and without adult guidance, and that constituted the underlying impetus for Patrick's criminal behaviour generally, but including the most serious offence.

[61] These are special circumstances which, in view of the requirement of Principle 8(b) that a child offender is dealt with in a way that will give him the opportunity to develop in a responsible, beneficial and socially acceptable way, justify an order for conditional release after Patrick has served 50 per cent of the period of detention.

[62] It is ordered:

1. The application for leave to appeal is refused.
2. The appeal by the Attorney-General is allowed.
3. Sentence for count 2 on indictment CCJ-00003169/19(7) be set aside.
4. In lieu thereof, the offender be detained for a period of five years and that he be released after serving 50 per cent of the period of detention.
5. A conviction be recorded.

[63] **FRASER JA:** I agree with the reasons for judgment of Sofronoff P and the orders proposed by his Honour.

[64] **BODDICE J:** I agree with Sofronoff P.

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9 *Youth Justice Act* 1992 (Qld), s 228.
10 *Youth Justice Act* 1992 (Qld), s 230.
11 *Youth Justice Act* 1992 (Qld), Part 7, Division 12A.