SUPREME COURT OF QUEENSLAND

CITATION:	*R v JAB* [2020] QCA 124
PARTIES:	**R** **v** **JAB** (applicant)
FILE NO/S:	CA No 299 of 2019 DC No 33 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Townsville – Date of Sentence: 6 August 2019 (Clare SC DCJ)
DELIVERED ON:	9 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2020
JUDGES:	Sofronoff P and Boddice and Ryan JJ
ORDERS:	**1. The application for leave to appeal against sentence is granted.** **2. The appeal against sentence is allowed.** **3. The sentence imposed in respect of Count 1 is set aside, to the extent that no conviction is recorded, but otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant pleaded guilty to one count of attempted armed robbery (Count 1) and one count of unlawfully using a motor vehicle (Count 2) – where the applicant was ordered to be detained for six months for Count 1, with that period of detention being suspended immediately – where a conviction was recorded on Count 1 – where the applicant was ordered to be released under the supervision of the chief executive for a period of two years and disqualified from holding or obtaining a driver licence for six months for Count 2 – where a conviction was not recorded on Count 2 – where the applicant seeks leave to appeal the sentence for Count 1 on the ground that the sentencing Judge erred in failing to invite submissions from the applicant's counsel as to whether a conviction ought to be recorded – where the prosecutor made submissions in relation to the issue of recording a conviction but defence counsel did not – where the prosecutor expressly

acknowledged the consequences the recording of a conviction may have on the applicant's future employment opportunities – whether the recording of the conviction breached the principles of natural justice – whether the sentencing discretion miscarried

Youth Justice Act 1992 (Qld), s 176(2), s 183, s 184, s 220, s 221

R v Cunningham [2005] QCA 321, cited
R v Dodd [2010] QCA 31, cited
Re Hamilton; Re Forrest [1981] AC 1038; [1981] 2 All ER 711, cited
R v Kitson [2008] QCA 86, cited
R v Moodie [1999] QCA 125, cited
R v Robertson (2017) 268 A Crim R 240; [2017] QCA 164, distinguished
R v SCU [2017] QCA 198, applied

COUNSEL: N A Bennett for the applicant
A Walklate for the respondent

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

[1] **THE COURT:** On 28 June 2019, the applicant pleaded guilty to two offences in the Childrens Court of Queensland at Townsville. The first offence was attempted armed robbery. The second offence was unlawfully using a motor vehicle. Both were committed on 27 October 2018.

[2] On 6 August 2019, the applicant was ordered to be detained for six months on the offence of attempted armed robbery, with that period of detention being suspended immediately and the applicant being released pursuant to section 221 of the *Youth Justice Act* 1992 ("the Act") on the condition he participate in a program as directed by the chief executive for three months. A conviction was recorded for that count.

[3] On the same date, the applicant was ordered to be released under the supervision of the chief executive for a period of two years pursuant to section 193 of the Act and disqualified from holding or obtaining a driver licence for six months in respect of the count of unlawfully using a motor vehicle. A conviction was not recorded for that count.

[4] The applicant seeks leave to appeal the sentence for the count of attempted armed robbery. He relies on two grounds, should leave be granted:

(1) The learned sentencing Judge erred in failing to invite submissions from the applicant's counsel as to whether a conviction ought to be recorded.

(2) The recording of a conviction rendered the sentence manifestly excessive.

Background

[5] The applicant was born on 1 February 2002. He was aged 16 years at the time of the offences and 17 years at sentence. The applicant had a relevant criminal history. It included multiple property and other offences when he was aged 15 years.

[6] The applicant had previously been placed on probation and ordered to perform community service. He had been dealt with for a breach of the probation order.

[7] On each of his previous appearances, no conviction had been recorded.

Offences

[8] The attempted armed robbery offence occurred after the applicant failed to pay for a taxi ride provided by the complainant, a 31 year old taxi driver. The applicant repeatedly punched the complainant to his face, causing pain to the mouth and nose. As a consequence, the complainant lost control of the taxi, which rolled onto a fence causing damage to the fence and the taxi. At that point, the applicant ordered the complainant out of the taxi, directing that he leave his bag or the applicant would "pull the gun out".

[9] The offence of unlawfully using a motor vehicle involved the applicant driving away in the taxi. The applicant was apprehended by police soon after these events. A police vehicle and the taxi were damaged during the applicant's apprehension.

Sentence hearing

[10] At the sentence hearing, the prosecutor submitted that, having regard to the applicant's previous history of entering houses, stealing property, unlawfully using motor vehicles and past breaches of Court orders, the applicant demonstrated a lack of insight into his offending and disregard for past Court orders. It was submitted it would be beneficial for the applicant to be further supervised, given that a pre-sentence report identified anger and alcohol use as risk factors.

[11] The prosecutor submitted that, having regard to the serious nature of the offending and the applicant's past criminal history, and even allowing for the early pleas of guilty, albeit in the face of a strong Crown case, the applicant should be sentenced to a detention order for the attempted armed robbery, but that order could be mitigated by a conditional release order pursuant to sections 220 and 221 of the Act. It was submitted probation ought to be imposed for the count of unlawfully using a motor vehicle as it would provide further supervision beyond the period of the conditional release order.

[12] In respect of the recording of a conviction, the prosecutor submitted:

> "… your Honour has to have regard to section 184 and the factors set out in that section, including the nature of the offence, his age and prior convictions, the impact it would have on his rehabilitation and finding or retaining employment. In my submission, this is a serious example of violence showing escalation in offending, and the defendant is now 17 and a-half with a lengthy criminal history. This may be, hopefully, one of the last times he appears before the [Childrens] Court. However, it is accepted that there may be some impact on him obtaining employment if a conviction were recorded."

[13] Defence counsel submitted that the offences had been committed against a background of significant loss and ongoing health issues in the applicant's family circle. His brother had committed suicide and his father was being treated for a significant medical condition. Whilst there had been non-compliance with his conditional bail program, with the result that the applicant had been returned to the detention centre on occasions, the applicant had the support of his family and detention had been a harsh world.

[14] Defence counsel accepted that, even though detention was a sentence of last resort, "he's knocking on that door". Defence counsel submitted that a conditional release order would give a concentrated attention to rehabilitative therapies that might complement a subsequent probation order. Defence counsel made no submission in relation to the recording of convictions.

Sentencing remarks

[15] The sentencing Judge observed that the applicant had used trickery and violence in a premeditated attempted robbery of a taxi driver. He had caused injury to the taxi driver's face and significant property damage, leaving other people to bear the costs of repairs to vehicles and a fence. The sentencing Judge further noted that the applicant had pretended to be armed with a gun.

[16] The sentencing Judge noted that shortly prior to these offences the applicant's probation had been revoked for noncompliance. The applicant had spent 16 months on probation for similar conduct involving similar cars and breaking into places. Violence was a new development and escalation in his conduct.

[17] The sentencing Judge recorded that the applicant came from a very large Cook Islander family. There was a history of anger issues, bullying and aggression, that things were made worse in the lead up to these offences by reason of the tragic death of his brother and the ill health of his father and that, as a consequence, the applicant had stopped going to school and had been drinking a lot.

[18] The sentencing Judge observed that the applicant was almost 17 years of age at the time of the offences and came under the protective umbrella of the Act. Detention was, therefore, a matter of last resort.

[19] After noting that the applicant had already suffered some consequences, spending in total 46 days in detention, in part because he continued to breach bail, and that his case was not an appropriate case for the restorative justice program, the sentencing Judge found that the applicant's level of violence was serious enough to warrant an order for detention but one to be served by conditional release in conjunction with a probation order.

[20] The sentencing Judge then stated:

> "Finally, there's the recording of a conviction having regard to those matters in section 183 of the [*Youth Justice Act*]. I'll take into account all of those things but specifically having regard to the age at 16 and eight months, the past history, and the serious nature of the attempted robbery and the level of violence involved, it seems to me that it is appropriate for a conviction to be recorded in respect of the attempted armed robbery but not the unlawful use. So a conviction is recorded for count 1. No conviction is recorded for count 2."

Applicant's submissions

[21] The applicant submits that, whilst the prosecutor referred to relevant factors in respect of the recording of a conviction, the prosecutor did not positively submit for the recording of a conviction and the sentencing Judge did not engage with either the prosecutor or defence counsel in respect of whether a conviction ought to be recorded.

[22] Against that background, the recording of a conviction against a juvenile defendant without first inviting submissions on that issue constituted a denial of natural justice. It was an order which was both unusual in the circumstances and not genuinely in the contemplation of either party.

[23] The applicant submits that the recording of a conviction in respect of Count 1 rendered the sentence for that offence manifestly excessive. The recording of a conviction is presumed to have an adverse impact on a juvenile's rehabilitation. The Youth Justice Principles underlying the operation of the Act require that a juvenile be dealt with in a way that gives that child the opportunity to develop in responsible, beneficial and socially acceptable ways. The recording of a conviction impacts on a child's chances of rehabilitation and of finding or retaining employment.

[24] In circumstances where the applicant had no prior criminal history of violence and there were factors suggestive of positive prospects of rehabilitation, the recording of a conviction evidenced a misapplication of sentencing principles. The prosecution, at sentence, had not submitted for the recording of a conviction and had accepted that the recording of a conviction may have an impact on the applicant's future employment prospects.

Respondent's submissions

[25] The respondent submits that the failure of the sentencing Judge to seek specific submissions in relation to the recording of a conviction did not constitute a denial of natural justice. The exercise of the discretion to record a conviction is not an unusual order. It is one plainly within the contemplation of both parties. It had been the subject of submissions by the prosecutor. The fact that defence counsel chose not to make submissions in respect of that matter did not render the recording of a conviction an unusual order.

[26] The respondent submits the recording of a conviction in respect of Count 1 did not render the sentence manifestly excessive. The sentencing Judge plainly had reference to the relevant factors in the exercise of the discretion. There was no evidence that the recording of a conviction would impact on the applicant's rehabilitation generally or on finding or retaining employment. The applicant had a significant past criminal history, including noncompliance with previous Court orders. The offence of attempted armed robbery was planned, violent and committed against a vulnerable complainant. The recording of a conviction for the offence of attempted armed robbery fell within a proper exercise of the sentencing discretion.

Consideration

[27] A principle of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against that person.[1]

[28] This principle has been adopted by this Court to set aside sentences imposed without first inviting submissions as to matters such as licence disqualification,[2] a later than legislatively provided for parole release date,[3] the declaration of a serious violent offence,[4] or the recording of a conviction where reasons were not given and submissions were not invited before the recording of that conviction.[5]

[29] That principle does not oblige a sentencing Judge to set out each and every alternative available in sentencing a defendant. As Atkinson J observed in *R v Robertson*:[6]

> "Counsel who appear before judges on sentences are expected to know the provisions of Queensland's sentencing law and to make relevant submissions.
>
> Unless the judge is considering imposing a sentence which may be considered unusual or an additional penalty which is unusual, there is no obligation upon a sentencing judge to advise counsel of the sentence that may be imposed and to seek specific submissions on that." (footnotes omitted).

[30] Whether a sentencing Judge's sentence may be considered unusual or involving an additional penalty will depend upon the circumstances of a particular case. A sentence would not normally be considered unusual or an additional penalty if its content can properly be said to have fallen within the contemplation of the parties, having regard to the issues in dispute at sentence and the submissions made by the parties at that sentence hearing.

[31] As Atkinson J said in *R v Robertson* in the passage above, unless a judge is considering imposing a sentence which may be considered "unusual or an additional penalty which is unusual", there is no obligation upon the judge to advise counsel of that possible outcome. The reason why that is so is twofold.

[32] First, as her Honour said, judges make decisions upon the basis that counsel who appear before them know the law that bears directly upon the case at hand. Judges are entitled to act upon the footing that, if a particular order ought to reasonably be within the parties' contemplation having regard to the circumstances of a case, then the silence of counsel upon that issue can be taken by the judge to be the result of a professional judgment that there was nothing useful for counsel to say about it. Second, judges do not expect, and do not want, counsel to make submissions about orders that are evidently not going to be made and counsel should not waste time making them.

[33] It follows that if a judge is thinking about making an order that, despite appearances, might be made, then the judge is obliged to give the parties a fair

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1 *Re Hamilton*; *Re Forrest* [1981] AC 1038 at 1045.
2 *R v Cunningham* [2005] QCA 321 at 5.
3 *R v Kitson* [2008] QCA 86 at [21].
4 *R v Moodie* [1999] QCA 125 at 5.
5 *R v Dodd* [2010] QCA 31 at [13].
6 (2017) 268 A Crim R 240 at [55] – [56].

opportunity to be heard upon that issue. Otherwise, in accordance with expected practice, the judge's silence, despite having that course in mind, would mislead counsel into believing that no submissions were necessary.

[34] That being so, the word "unusual", as used in *Robertson*, should not be misunderstood to be a term of art or as stating a "test" that can be applied. The word was merely an apt adjective to describe an order which the aggrieved party could not reasonably have been expected to have in mind before it was made.

[35] In short, the real issue is whether a judge's omission to give the parties notice that a particular order might be made has resulted in a failure to afford the parties a reasonable opportunity to be heard.

[36] In the present case, the prosecutor did make submissions in relation to the issue of a recording of a conviction. Significantly, those submissions did not positively contend for the recording of a conviction. They expressly acknowledged that the recording of a conviction may impact upon the applicant's future employment opportunities, a specific factor to be considered in the recording of a conviction against a juvenile.

[37] Against that background, and in circumstances where the sentencing Judge did not indicate in the course of the sentencing hearing that consideration was being given to the recording of a conviction, it is unsurprising that defence counsel made no submissions in relation to the recording of a conviction.

[38] This is particularly so having regard to the unusual feature of sentencing of juveniles, namely, that a conviction is not to be recorded against a child who is found guilty of an offence, other than in accordance with section 183 of the Act. That section gives the Court a discretion whether to record a conviction if the Court makes an order under sections 175(1)(c) to (g) or section 176 or section 176A.

[39] Importantly, section 184 of the Act provides that, in considering whether or not to record a conviction:

> "(1) … a court must have regard to all the circumstances of the case, including–
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> (a) the nature of the offence; and
>
> (b) the child's age and any previous convictions; and
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> (c) the impact the recording of a conviction will have on the child's chances of–
>
> (i) rehabilitation generally; or
>
> (ii) finding or retaining employment."

[40] The sentence imposed for the count of attempted armed robbery was imposed under section 176(2) of the Act. The discretion to record a conviction was, therefore, enlivened but enlivened in the context where a Court must have regard to all of the circumstances of the case including, relevantly, the impact of recording a conviction will have on the child's chances of finding or retaining employment.

[41] In circumstances where the prosecutor has specifically accepted that the recording of a conviction would impact on the child's chances of finding or retaining employment, the recording of a conviction against a juvenile without first inviting submissions from counsel was in the nature of an unusual order.

[42] In the circumstances of this proceeding, the recording of a conviction did breach a principle of natural justice. The consequence of this conclusion is that the sentencing discretion miscarried and it is necessary to re-exercise that sentencing discretion.

[43] This conclusion renders it unnecessary to consider the remaining ground of appeal.

[44] In re-exercising the sentencing discretion, there is no basis to interfere with the conditional release order. Such an order, having regard to the serious nature of the applicant's offence of attempted armed robbery, in the context of his previous noncompliance with Court orders, represented a sound exercise of the sentencing discretion, even allowing for the mitigating factors in his favour.

[45] We would, however, exercise our discretion to not record a conviction for this count.

[46] The starting premise under the Act is that no conviction be recorded.[7] The Act mandates matters that must be taken into account by a sentencing Judge in exercising the discretion whether or not to record a conviction. They include not only the nature of the offence and the child's age and previous convictions, the impact the recording of a conviction will have on a child's chances of rehabilitation generally, or in finding or retaining employment, is specifically to be considered by the sentencing Judge.

[47] In the present case, whilst the offence was serious and occurred in the context of a past history of noncompliance with Court orders, the pre-sentence report specifically identified tragic and distressing family circumstances as being relevant considerations in this particular offending by the applicant.

[48] Further, that expert acknowledged that the applicant had displayed a "sound level of victim empathy regarding the impact his offending behaviours had on the victim of the offences"; that at no point had the applicant sought to minimise his involvement in the offences; that the applicant specifically acknowledged his behaviour was not socially acceptable; and that there had been positive changes to the applicant's attitudes.

[49] Each of those matters are supportive of a conclusion that the applicant has reasonable prospects of rehabilitation, notwithstanding his poor performance previously on Court orders, including noncompliance with bail conditions for these offences.

[50] Whilst no evidence was led at the sentence hearing as to the applicant's employment prospects, the prosecution specifically accepted that "there may be some impact on him obtaining employment if a conviction were recorded". That acceptance is significant in circumstances where the applicant has not previously had a conviction recorded in respect of any appearance in Court.

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7 *R v SCU* [2017] QCA 198 at [94].

[51] Balancing all of those factors, an exercise of the sentencing discretion favours a conclusion that no conviction be recorded for this count.

Orders

[52] We order:

(1) The application for leave to appeal against sentence is granted.

(2) The appeal against sentence is allowed.

(3) The sentence imposed in respect of Count 1 is set aside, to the extent that no conviction is recorded, but otherwise confirmed.