SUPREME COURT OF QUEENSLAND

CITATION:	*R v B* [2003] QCA 24
PARTIES:	**R** v **B** (applicant/appellant)
FILE NO/S:	CA No 408 of 2002 DC No 261 of 2002 DC No 262 of 2002 DC No 322 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED EX TEMPORE ON:	7 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2003
JUDGES:	Davies and Williams JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed** **3. Set aside sentence imposed and in lieu order the applicant undergo probation for a period of 12 months from today (Friday 7 February 2003) with the condition that the applicant undergo such counselling and other programmes as may be directed by the Director of Family Services, including a residential programme, if that is thought desirable** **4. Set aside the order recording convictions in each case**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - CIRCUMSTANCES OF OFFENDER - where applicant a juvenile - where applicant pleaded guilty to a range of offences - where applicant had previous criminal history - whether conviction ought to have been recorded
COUNSEL:	K M McGinness for applicant/appellant D L Meredith for respondent
SOLICITORS:	Legal Aid Queensland for applicant/appellant Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: The applicant pleaded guilty in the District Court on 15 August 2002 to 11 offences committed between 13 December 2001 and 25 March 2002. However, as Mrs McGinness, for the applicant pointed out, the majority of the offences were committed between 30 December and 2 January.

The offences in all were, one of attempted unlawful use of a motor vehicle, two of wilful damage, one of burglary, one of assault occasioning bodily harm, two of stealing, one of attempted entry of premises, one of entry of premises and stealing, one of entry of premises with intent, one of attempted robbery whilst pretending to be armed and one of stealing from the person. She was 13 years of age when she committed these offences having been born on 24 January 1988.

On 8 November 2002 the applicant was sentenced to an effective term of six months detention immediately suspended with an order that she be immediately released from detention conditioned that she participate in a programme for a period of three months. Convictions were recorded in respect of the offences of attempted unlawful use of a motor vehicle, assault occasioning bodily harm and attempted armed robbery. She seeks leave to appeal against those sentences.

The applicant had been before the Court on four previous occasions. On 25 October 2000 it was for unlawful use of a motor vehicle. Then she was reprimanded and no conviction was recorded. On 4 June 2001 she was again before a court for unauthorised dealing with shop goods. She was then given a good behaviour bond for six months and no conviction was

recorded. Then on 12 December 2001, the day before she committed one of the wilful damage offences, the offence of burglary and the offence of occasioning bodily harm, she was before a court upon offences of wilful damage to property for which she was given community service of 20 hours. Again, no conviction was recorded. It thus appears that all of the offences the subject of the application were committed in breach of her community service order and they commenced, significantly, immediately after her court appearance. She was again before a court on 22 May 2002 for unauthorised dealing with shop goods on 16 May 2002. Again, she was given a good behaviour bond of six months and no conviction was recorded. And finally, she was before a court on 24 July 2002 for one offence of breaking and entering with intent and one of stealing for which she was given probation of 12 months and community service of 60 hours. Again, no conviction was recorded. These last two offences were committed after the offences the subject of the present application.

One of the offences of wilful damage, the offence of burglary and the offence of assault occasioning bodily harm all occurred on one occasion. The applicant and two friends commenced throwing rocks on the complainant's roof. When the complainant chastised the applicant the applicant threw a rock through the complainant's front window narrowly missing the complainant's one year old daughter. The applicant opened the front door and forced her way inside where she hit the complainant with a steel pole several times to the head and body. The applicant's mother arrived and took her home.

In an interview the applicant told police that the complainant had called her a black nigger whilst she was walking past the complainant's house. She then obtained part of a fan stand from her house and went back and hit the complainant with it. The complainant suffered bruising and swelling to the forehead, left eye and cheek.

The other more serious offence was the attempted robbery while pretending to be armed. The applicant entered a food store with a grey toy pistol and demanded that the complainant hand over money. The complainant told the applicant to get out of the store. The applicant tried to open the till but soon after left the store.

Unsurprisingly, the applicant comes from a dysfunctional family. She also has an addiction to paint sniffing. Some, if not all of the offences were committed whilst she was so addicted. Again perhaps unsurprisingly given her family background, the applicant presents as an angry child inclined to seek revenge on those whom she thinks have hurt her or a member of her family. She is apparently especially protective of her mother.

Although the applicant's previous criminal history was not substantial it does appear to have been persistent. She, after the sentence was imposed, continued her probation imposed on the earlier occasion until about two weeks ago and it was only then that she commenced serving the sentence the subject of the present application. We were informed by Mrs McGinness that she has responded well to probation. The

applicant herself seems to think that detention might help her overcome her petrol sniffing addiction which indicates, it seems to me, a strong motivation to do so. Mr Meredith also pointed out that the psychologist who examined her and the Family Services Officer who saw her both seem to think that either detention or an immediate release order might well be an appropriate sentence.

It seems to me however that having regard to the age of the child, the good prospects of rehabilitation having regard to her strong motivation to do so, the fact that she has not had time to respond sufficiently to a probation order and the extent to which she has responded so far has now been demonstrated to be good, it seems to me that, I cannot be satisfied, I should say, that a non-custodial sentence such as probation was not within the learned sentencing judge's discretion. Such a sentence having been open to the learned sentencing judge, it seems to me that that was a sentence which should have been imposed.

In the circumstances of this case then, although there are some benefits in imposing an immediate release order with the intensive supervision which that involves I think that the imposition of a detention order on such a young person is likely to tell against her in the future and as I have already said I can't be satisfied that a probation order was not open in the circumstances.

Accordingly, I would grant the application, allow the appeal, set aside the sentence imposed and, in lieu, order that the applicant undergo probation for a period of 12 months from today with the special condition that the applicant undergo such counselling and other programs as may be directed by the Director of Family Services including a residential program if that is thought desirable.

No doubt most of the offences committed were quite serious offences. However, it is unusual to record convictions in respect of a child as young as this and I do not think that either her previous criminal conduct or the offences in this case justify that course here. I would therefore also set aside the order recording convictions in each case.

WILLIAMS JA: I agree.

CULLINANE J: I agree also.

DAVIES JA: The orders are as I have indicated.
