SUPREME COURT OF QUEENSLAND

CITATION:	*R v O* [2003] QCA 472
PARTIES:	**R** **v** **O** (applicant)
FILE NO/S:	CA No 296 of 2003 CC No 1 of 2003 CC No 139 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Townsville
DELIVERED EX TEMPORE ON:	29 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2003
JUDGES:	McMurdo P, Williams JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE - JUVENILE OFFENDERS – OTHER MATTERS – where applicant pleaded guilty to numerous property offences and one count of assault occasioning bodily harm – where, in respect of offences committed by the applicant while on bail, she was sentenced to 12 months detention with a 3 month immediate release order – where, in respect of the remaining offences, applicant sentenced to 2 years probation with conditions and ordered to serve 200 hours of community service – whether recording of convictions and the sentences imposed manifestly excessive *Juvenile Justice Act* 1992 (Qld), s 176, s 4, s 109, s 165, s 150, s 208 *R v B* [2003] QCA 24; CA No 408 of 2002, 7 February 2003, distinguished *R v B* [1995] QCA 231; CA No 551 of 1994, 9 June 1995, distinguished *R v C & M* [2001] Qd R 636, followed
COUNSEL:	K M McGinness for the applicant K A Holliday for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant child, aged 16 at the time of sentence and 15½ at the time of the offences, pleaded guilty in the Childrens Court of Queensland at Townsville on the 27th of May 2003 to multiple offences. The first indictment charged four counts of burglary committed between 3 and 14 July 2002. The second indictment charged seven counts of burglary and stealing, 10 counts of receiving and one count of stealing. These offences occurred between June and 31 August 2002, when the applicant was detained in custody. The third indictment, brought without committal proceedings, charged one count of burglary by breaking in company, one count of stealing, nine counts of burglary and stealing and one count of assault occasioning bodily harm. These offences occurred between June and August 2002. A large number of the offences were committed whilst the applicant was on bail. The applicant was sentenced in August 2003, after a presentence report was prepared. In respect of the offences committed by her on bail, she was sentenced to 12 months' detention with a three-month immediate release order under s 176, *Juvenile Justice Act* 1992 (Qld), as it then applied.

In respect of the remaining offences, she was sentenced to two years' probation, with a series of additional conditions tailored to her needs, and 200 hours' community service. Convictions were recorded in respect of all offences. Ms McGinness, who appears for the applicant, contends that the sentence of detention with an immediate release order, imposed for the offences committed whilst on bail, is manifestly excessive, as is the recording of convictions on all offences.

She contends that a lengthy period of probation and/or community service was open in respect of all offences and, in the circumstances, that penalty should have been imposed, rather than detention by way of an immediate release order and that no convictions should have been recorded.

The applicant had some criminal history. She was cautioned in respect of a number of property offences on the 22nd of May 2002 and again on the 23rd of May 2002, and reprimanded on the 12th of June 2002 in respect of the offence of entering or being in premises and committing an indictable offence and break. She was placed on a 12-month probation order on 26 June 2002, at the beginning of the time period when she committed the offences presently for this Court's consideration. She was placed in detention on 31 August 2002, having breached her bail, but was released again on the 30th of October 2002, when she was placed on a conditional bail program.

The report prepared by the Department of Families addressing the question of bail, relied on at the sentencing proceedings, indicated that since the applicant was placed on the conditional bail program, her behaviour had improved and she was maturing and becoming more responsible. She has developed a number of skills, including budgeting, cooking and health and personal hygiene and has learnt how to link into community support agencies, including the Townsville Aboriginal Health Service Women's Centre, Centrelink and Youth Housing. These skills were particularly important because the applicant was

pregnant at that time. She has since given birth to a little boy. During the bail program she also took part in a sewing program, making clothes for children in East Timor, until her doctor ordered that she stop. It seems that she made remarkable progress whilst on bail and refrained from illegal substance abuse, including paint sniffing, and was strongly motivated by the birth of her child to keep out of trouble. She did not reoffend, after being released from custody on the 31st of October 2002, prior to her sentence.

The applicant's offending behaviour was extremely serious. It resulted in over $34,000 of property remaining unrecovered or damaged. She had no prospect of making restitution. The burglary offences related to private homes, which the applicant broke and entered with other youths, and included assorted acts of vandalism, some of which were personally perpetrated by the applicant. The offence of assault occasioning bodily harm was also concerning. The complainant was a worker in a Townsville store. When the applicant went to leave the store another employer asked to look under her jumper, believing she had some store property concealed. The applicant became angry and then confronted the complainant, who was not involved in the confrontation with the applicant. She pushed the complainant in the chest and struck her in the face with a clenched fist. The complainant suffered a split lip, sore jaw and neck. The applicant spent 61 days on remand for these offences.

After the presentence report was presented to the Court in June 2003, the applicant agreed to take part in community conferencing with her victims before being sentenced. Unfortunately, it seems that this community conferencing, which was in its infancy in the Townsville area, was far from successful. The large number of complainants, who were understandably distressed, apparently frightened the applicant, who then behaved inappropriately towards them. Two victims were so disgusted with her attitude that they left the conference. Unfortunately the applicant did not show the maturity or remorse which would have assisted in mitigating the serious aspects of her offending.

Some sort of agreement was reached between the limited number of complainants who attended the conference, in that the participants agreed that the applicant would perform 200 hours' community service, preferably working in the human services field, and that she undertake to be of good behaviour for a period decided by the Court, but preferably the maximum period. On questioning the officer from the Department of Families, his Honour extracted information that suggested the victims had not been informed of all relevant facts, including the applicant's previous history and that some of the offences had been committed whilst on bail.

A number of tendered victim impact statements graphically demonstrated the traumatic effects of the applicant's offending on the lives of the victims.

The presentence report noted the applicant's severely deprived and dysfunctional family background and observed that three factors contributed to her commission of these offences: first, her relationship with her anti-social partner, C, and his family; second, a compulsion to steal and, third, volatile substance abuse. She has made progress in addressing these factors. Much of her offending has been to please her boyfriend and his family by providing them with the proceeds of the offences and elements of domestic violence were present in her relationship with C. Both he and his family are known offenders. To manage and monitor the influence of C, the child protection team had sought a child protection order on her baby. It seems that at sentence she was still having contact with the family, although C had recently been placed in custody. Nevertheless, the report noted that the applicant had been motivated to develop her independence and to ensure the safety of her child. She demonstrated an ability to budget and plan for the birth of her child and seemed to have addressed her compulsion to steal. She has not abused substances since she realised she was pregnant. She accepted the blame and her responsibility for the commission of these offences, which the report noted was an improvement on her original attitude, namely that it was funny to break into people's houses. She said that having met someone whose home was burgled she now realised the impact on home owners of such offences. The author of the report considered that probation was a realistic sentencing option especially when coupled with conditions of the kind later imposed by his Honour. A community service order could be served in an agency where the

applicant could take her baby son. If a detention order were imposed it would be served at the Brisbane Youth Detention Centre where the applicant would have access to programs designed to develop her personal, employment and social skills and it may be possible for her to take her infant into the centre. A period in detention would, however, be detrimental to the good progress she had made notwithstanding the gravity of her offending. The report noted that:

> "Alternatively, a sentence to detention may be suspended in favour of an immediate release order (IRO) for up to three months…
>
> Such an order is highly intensive and structured and would provide [the applicant] with an opportunity to remain in the community and to provide a positive contribution. However given the short time frame, i.e. Three months, it may not offer the long-term support that a sentence to probation could offer."

Mrs McGinness, in her very thorough argument, has referred us to a number of cases. *R v R & K* [2000] QCA 490; CA Nos 198 and 199 of 2002, 28 November 2000; *R v H* [2000] QCA 196; CA No 51 of 2000, 25 May 2000; *R v B* [1995] QCA 231; CA No 551 of 1994, 9 June 1995 and *R v B* [2003] QCA 24; CA No 408 of 2002, 7 February 2003.

In all but the matter of *B*, the children involved, who had convictions recorded set aside by this Court, were much younger than this applicant and that was a significant reason in this Court's determination. In *B*, the learned sentencing Judge erred in not exercising his discretion to determine whether or not to record a conviction. In exercising that discretion for the first time this Court determined that a

conviction should not be imposed there. It should also be noted that in *B* the applicant attended the police station with his mother and admitted his liability for his offending before being contacted by police.

The applicant has particularly emphasised the case of *R v B*. But that case too can properly be distinguished by B's age at the time, 13 compared to 15½ here. Additionally, B was sentenced for 11 offences whereas this offender has been sentenced for 34 offences. B's offences were committed over three days just after being placed on probation. Here, the offences occurred over a three-month period. Whilst this offender had only been placed on probation at the beginning of the three-month period of offending, she continued to offend for that extended period and committed many of the offences whilst on bail. For these reasons this case is quite different to that of B.

None of the cases to which we have been referred demonstrate that the learned primary Judge erred here in determining that a conviction should be recorded because the offences were committed whilst on probation and many of them whilst on bail. It is also relevant that the applicant was 15 and a half at the time of the spate of her serious offending. In these circumstances it cannot be said that the learned primary Judge erred in exercising his discretion to record convictions even though another Judge may not necessarily have reached the same conclusion.

The applicant also relies on the provisions contained in ss 4, 109 and 165 of the *Juvenile Justice Act* 1992 (Qld) as they were at the time of the sentence. Those provisions are now contained in Schedule 1 para 17 and ss 150(2)(b) and 208 of the Act in its present form. They emphasise the juvenile justice sentencing principle that a Court should only make detention orders against a child as a last resort. Detention includes detention by way of an immediate release order and it is clear that a penalty involving detention by way of an immediate release order can only be imposed after considering all other available sentences and taking into account the desirability of not holding a child in detention and that no other sentence is appropriate in the circumstances of the case, (see *R v F & P* CA No 114 of 1997, 2 May 1997 and *R v C & M* [2001] QdR 636), a principle also followed in *R v B*, cited earlier. The fact remains that the purpose of a conditional release order is to provide a final option to detaining a child where detention is the only appropriate sentence: see s 219 of the current Act and s 175 of the Act at the time of sentence.

The presentence report recognised that an immediate release order was a final option to a detention order and that one of its benefits was that it was highly intensive and structured; something which could only benefit the applicant with her unfortunate history. The author of the report was merely concerned that such an order could only remain in place for three months, whilst this applicant needed long-term supervision and assistance. The combination of orders imposed

here by the Judge meant that the immediate release order, coupled with a probation order for two years, gave the applicant the benefit and control of the extended period of supervision. It was an appropriate sentence. Importantly, his Honour did not impose the immediate release order without turning his mind as to whether detention was the only appropriate penalty in the circumstances. He decided that it was. In doing so he complied with the spirit of the principles of juvenile justice set out in the Act and did so only after considering all the alternative sentencing options. I am not persuaded that he erred in any way. He was entitled to conclude a detention order to be served by an immediate release order was the most lenient penalty he could impose, taking into account the extent of the offending, the seriousness of the offences, the age of the offender and the fact that the offences were committed whilst she was on probation and many of them whilst she was on bail. Although the combination of penalties was a significant punishment for a 16 year old single mother with the applicant's background and a lighter overall penalty perhaps could have been imposed, I am not persuaded that the total sentence was manifestly excessive or that the learned sentencing Judge erred in any way in determining that detention by way of an immediate release order was the only appropriate penalty, when coupled also with the probation and community service in respect of the offences not committed whilst she was on bail.

It follows that I would refuse the application for leave to appeal against sentence.

WILLIAMS JA: Whilst I agree with all that's been said by the President, it is desirable that I add some brief reasons of my own for arriving at that conclusion.

As has already been noted, the applicant was dealt with in the Children's Court on the 12th of June 2002 for an offence of entering premises and committing an indictable offence, committed on the 31st of May 2002. She next appeared in the Townsville Children's Court on the 26th of June 2002 and was dealt with for offences of attempting to enter a dwelling house, and receiving property, offences committed on the 14th of June 2002.

It is not clear when the applicant was apprehended with respect to those offences dealt with in the Court on the 26th of June 2002, but in my view it is of great significance that one of the offences with which the Court is now concerned was committed on the 24th of June 2002, and that offence involved entering a dwelling house and stealing a large quantity of jewellery. In all, property valued at over $17,000 was taken on that occasion. Some $9,910 in value of the property has been recovered, leaving $8,305 outstanding. Then on the 28th of June, some two days after she was dealt with in the Court, another offence was committed of entering a dwelling house, and again removing a substantial quantity of property. The material indicates that $3,300 worth of property taken on that occasion is still outstanding.

Those are two of the offences with which the Court is now concerned. In all, between 3 June 2002 and 30 August 2002, 33 offences of dishonesty were committed, and one offence of assault occasioning bodily harm. The break-up is 19 counts of burglary and stealing, one count of burglary by breaking in company with property damage, one count of burglary by breaking in company, 10 of receiving, and two of stealing. In all, property valued at $34,000 remains outstanding, and a compensation order was sought in that sum. That was nowhere near the total amount of property taken by the applicant in the commission of the 33 offences of dishonesty.

Given all of that, in my view, the learned sentencing Judge was quite justified in concluding that a probation order was entirely inappropriate, and that the only way of dealing with the applicant was by the imposition of a detention order coupled with an immediate release order. The sentencing remarks, in my view, addressed all the relevant considerations required to be taken into account by the Juvenile Justice legislation.

In my view, it was also appropriate, given the vast amount of money involved, the serious nature of the offences, and the regular offending, to impose convictions with respect to the charges. In my view, the decision of this Court in *R v B* [2003] QCA 24 can be readily distinguished. There the offender was much younger, and the offences were committed over a much shorter period of time. I agree that, in the circumstances, the application should be refused.

MACKENZIE J: I agree with what has been said by the President and by Justice Williams. The learned sentencing Judge had to fashion a sentence that had due regard to the principles of juvenile justice. In my view, it was open to him to conclude that a detention order in respect of the offences committed while on bail, with immediate release, and the intensive treatment of the offender that would ensue from that was an option that was clearly open to him. He could, in other words, decide that that was the only course reasonably open.

The overall sentence was clearly designed to get the best possible chance of rehabilitation to the applicant, having regard to her most unfortunate antecedents. I therefore agree with the orders proposed.

THE PRESIDENT: The appeal - application for leave to appeal against sentence is refused.
