SUPREME COURT OF QUEENSLAND

CITATION:	*R v BBX* [2011] QCA 8
PARTIES:	**R** **v** **BBX** (applicant)
FILE NO/S:	CA No 165 of 2010 DC No 18 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Townsville
DELIVERED ON:	11 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2011
JUDGES:	Chief Justice and Fraser and White JJA 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 – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant child pleaded guilty in the Childrens Court to an offence of wilful damage – where the applicant had a relevant criminal history involving a number of property offences – where the first entry in the applicant's criminal history resulted in a youth justice conference and no further action was taken – where the applicant argued the first entry on the applicant's criminal history was inadmissible by s 166(11) of the *Youth Justice Act* 1992 (Qld) – whether the primary judge erred in considering the first entry on the applicant's criminal history CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – POWERS OF APPELLATE COURT – TO ADMIT NEW EVIDENCE – where the applicant sought to introduce evidence that the first entry in the applicant's criminal history related to a youth justice conference – where new evidence may be admitted if it shows the sentence was manifestly excessive – where the new evidence could only establish manifest excess if it demonstrated the first entry to be inadmissible by s 166(11) of the *Youth Justice Act* 1992 (Qld) – whether the new evidence should be admitted

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – WORDS TO BE GIVEN LITERAL AND GRAMMATICAL MEANING – where s 166(11) of the *Youth Justice Act* 1992 (Qld) provides that a decision to take no further action following a youth justice conference does not form part of a child's criminal history – where the applicant contended that s 166(11) rendered an entire entry on the applicant's criminal history inadmissible – whether the applicant's construction was consistent with the literal and contextual meaning of the words of s 166(11)

Youth Justice Act 1992 (Qld), s 161, s 163, s 165, s 166, s 166(11)

R v GT [2005] QCA 478, considered
R v Maniadis [1997] 1 Qd R 593, [1996] QCA 242, considered

COUNSEL: J P Benjamin for the applicant
M B Lehane for the respondent

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

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree that the application should be refused, for those reasons.

[2] **FRASER JA:** On 16 June 2010 the applicant pleaded guilty in the Childrens Court at Townsville to an offence of wilful damage. The applicant was 15 years old when she committed that offence. In the early hours of 1 November 2009 she and two friends went into the loading dock of a supermarket in Garbutt. The applicant used her cigarette lighter to set fire to some bales of cardboard. She watched as the bales burned and until fire engines arrived and extinguished the fire. The fire was close to some wooden pallets and the supermarket building so that there was some risk (the prosecutor described it as a small likelihood) that a much more serious fire might have resulted. When the applicant was questioned by police she admitted what she had done and said that she had not realised it was dangerous until afterwards.

[3] The first entry on the applicant's criminal history recorded that in the Townsville Childrens Court on 20 August 2008 the applicant was dealt with for 15 offences which she had committed between March and June 2008, when she was 14 years old. Those matters included four wilful damage (graffiti) offences and three stealing offences. The document stated that no conviction was recorded and "no further action taken". A second entry on the applicant's criminal history referred to a trespass offence in October 2009 and an offence of entering premises and committing an indictable offence in September 2009. On 27 January 2010 the Townsville Childrens Court ordered that no conviction be recorded for those offences and the applicant was not further punished.

[4] The sentencing judge took into account the applicant's criminal history and ordered her to perform community service for 50 hours and made a probation order under

which the applicant was released under the supervision of the Chief Executive for a period of 18 months. No conviction was recorded.

[5] The applicant has applied for leave to appeal against sentence. The ground of appeal stated in her application is that the sentence is manifestly excessive. In light of the applicant's criminal history the sentence could not be regarded as excessive. At the hearing of the application the applicant's counsel acknowledged as much. The applicant applied for and was given leave to amend her application by adding the ground that the primary judge erred in considering the first entry on the applicant's criminal history. The contention for the applicant is that this evidence was rendered inadmissible by s 166(11) of the *Youth Justice Act* 1992 (Qld).

[6] That provision is in Pt 7, Div 2 of the Act, concerning court referred conferences before sentencing. The first section in that division, s 161, provides:

> "(1) This section applies if a finding of guilt for an offence is made against a child before a court.
>
> (2) The court must consider referring the offence to a coordinator for a conference.
>
> (3) The court may refer the offence to the coordinator, if the court considers—
>
> (a) referral to a conference—
>
> (i) would allow the offence to be appropriately dealt with without the court making a sentence order (an ***indefinite referral***); or
>
> (ii) would help the court to make an appropriate sentence order (a ***conference before sentence***); and
>
> (b) a convenor will be available for the conference.
>
> (4) In considering whether to refer the offence to a conference, the court may consider whether the child has made any other conference agreement for any offence, without considering the terms of any agreement.
>
> (5) On making the referral, the court may—
>
> (a) give directions it considers appropriate to the child, the coordinator, convenor of the conference and anyone else who may participate in the conference; and
>
> (b) adjourn the proceeding for the offence."

[7] In relation to an "indefinite referral" under s 161(3)(a)(i), s 163 provides:

> "(1) This section applies if a conference agreement is made on referral by a court that considered the offence may be appropriately dealt with by a conference without the court making a sentence order.

(2) A coordinator must give notice to the court's proper officer that the agreement was made.

(3) A notice under subsection (2)—

(a) brings the court proceeding for the offence to an end; and

(b) the child is then not liable to be further prosecuted for the offence.

(4) On the day the notice is received by the court, the child is taken to have been found guilty by the court of the offence without a conviction being recorded."

[8] In relation to a "conference before sentence" under s 161(3)(a)(ii), s 165 provides:

"(1) This section applies if a conference agreement is made on referral by a court because the court considered referral to a conference would help the court in making an appropriate sentence order for the offence.

(2) In making a sentence order for the offence, the court must consider—

(a) the child's participation in the conference; and

(b) the agreement; and

(c) anything done by the child under the agreement; and

(d) a coordinator's report under section 35(7).

(3) For the purpose of the sentence, the court must give a copy of the conference agreement and any report provided under section 35(7) to the parties to the proceeding.

(4) The court may—

(a) include all or any of the terms of the agreement in, or as part of, the sentence order, including, for example, within a community based order; and

(b) impose requirements on the child to ensure the child complies with the terms so included.

. . ."

(Subsequent subsections provide for the case in which a child contravenes the terms of an agreement included in the sentence order.)

[9] Section 166 provides:

"(1) This section applies if a court may make a sentence order for a child in the circumstances mentioned in section 165(1).

(2) The court may decide to take no further action, if the child agrees to carry out the agreement made by the child in the conference.

. . .

> (11) A decision by the court under subsection (2) to take no further action does not form part of the child's criminal history."

[10] Regrettably, the evidence before the sentencing judge did not make it clear that the offences in the first entry in the applicant's criminal history had been referred to a coordinator for a conference under s 161. The respondent did not oppose the applicant's tender of new evidence in this Court, an affidavit exhibiting a "verdict and judgment record" dated 22 December 2010. That record reveals that the offences in the first entry on the applicant's criminal history had been referred to a conference. The record is endorsed:

> "NO ACTION TAKEN - Conviction not applicable
> YTH JUSTICE CONFERENCING COMPLETE - NO FURTHER ACTION TAKEN".

The record also notes that the applicant pleaded guilty to each of the 15 offences on 21 January 2009, although that date is difficult to reconcile with the stated "Verdict/Result" date of 20 August 2008 (which accords with the applicant's criminal history tendered at the sentence hearing).

[11] This new evidence may be admitted if it shows that the sentence was manifestly excessive.[1] Because of the applicant's youth and because her counsel at the sentence hearing seems to have been unaware of the relevant facts the Court should exercise its discretion to admit the new evidence if it does show that the sentence was manifestly excessive. The new evidence might have that effect only if it demonstrates that the first entry on the applicant's criminal history was rendered inadmissible by s 166(11).

[12] Section 166(11) came into operation on 29 March 2010,[2] after the applicant had committed the wilful damage offence on 1 November 2009. The proceedings were commenced by indictment presented on 11 June 2010 and she pleaded guilty and was sentenced on 16 June 2010. The respondent's counsel submitted that s 166(11) applied in those proceedings, because that provision is procedural in nature.[3] I accept that s 166(11) might apply in such circumstances. The question in this application concerns the effect of that provision. The applicant's counsel submitted that the effect of s 166(11) was that the child's criminal history did not include any of the August 2008 offences. He argued that the sentencing judge should not have taken those previous offences into account in sentencing the applicant. The respondent's counsel endorsed that submission. Nevertheless, it remains necessary for the Court to determine the proper construction of the provision.

[13] Section 166(11) literally applies only in relation to a "conference before sentence" under s 161(3)(a)(ii) and not in relation to an "indefinite referral" under s 161(3)(a)(i): see s 166(1) and s 165(1). It is not easy to understand why the legislation makes that distinction in this context, but if those provisions are given their literal meaning the new evidence, which sheds no light upon the nature of the conference in this case, does not establish that the sentencing judge was not permitted to take the previous offences into account.

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1 See *R v Maniadis* [1997] 1 Qd R 593 at 597.

2 Act No 34 of 2009 s 8 and s 23, Subordinate Legislation 2010 No 37.

3 See *R v GT* [2005] QCA 478 at [31].

[14] There is a more fundamental reason why I do not accept the applicant's argument. In construing s 166(11) it is necessary to take into account another provision, s 154. That section is in Pt 7, Div 1 of the Act, which is headed "Sentencing generally". It provides that a finding of guilt against a child for an offence, whether or not a conviction has been recorded, is part of the criminal history of the child to which regard may be had by a court that subsequently sentences the child for any offence as a child. Section 154(1) is inconsistent with the applicant's construction of s 166(11) but it is readily reconcilable with the literal meaning of that provision. Section 166(11) in terms excludes from the child's criminal history only the court's decision to take no further action. It does not exclude from the child's criminal history the finding of guilt of an offence which s 161(1) requires before the offence may be referred to a coordinator for a conference.[4] More importantly, s 166(11) does not provide that a court that subsequently sentences a child for an offence as a child may not have regard to a finding of guilt for a previous offence committed by the child.

[15] The respondent's counsel argued that it would defeat the purpose of s 166(11) to construe it as not precluding reference to a finding of guilt of an earlier offence by the child. The Court was not referred to any extrinsic evidence of the legislative purpose. I have examined the second reading speech[5] and the explanatory notes[6] but that material sheds no real light upon the present question. However, in the second reading debate, the Minister said:[7]

> "… While youth justice conference agreements are not recorded on a young person's criminal history, this does not prevent the police or the courts from considering whether the young person has made any other previous conference agreements when deciding on an appropriate response. This information is recorded by both police and the Department of Communities and can be considered by the court."

[16] That is consistent with the construction I prefer.

[17] In the end the Court must construe the text of the provision in its statutory context. The applicant's construction is not what the text provides and it conflicts with s 154. It would also produce the surprising result that the Childrens Court would be obliged to sentence a recidivist youth on the false basis that the youth had not committed earlier offences. The Court was not referred to any evidence that this reflected the legislative purpose.

[18] The applicant's construction of s 166(11) should be rejected. Section 166(11) should be given its literal meaning. Accordingly, s 166(11) did not preclude the sentencing judge from taking into account the applicant's previous offending recorded on her criminal history.

[19] I would refuse the application for leave to appeal.

[20] **WHITE JA:** I have read the reasons for judgment of Fraser JA and agree with his Honour for the reasons that he gives that the application for leave to appeal against sentence should be refused.

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4 Section 161(1) conflicts with s 163(4) in this regard, but both provisions require a finding of guilt.

5 Parliamentary Debates (Hansard), 19 May 2009, p 305 et seq.

6 Explanatory Notes, Juvenile Justice and Other Acts Amendment Bill 2009 (Qld).

7 Parliamentary Debates (Hansard), 2 September 2009, p 2055.