SUPREME COURT OF QUEENSLAND

CITATION:	*R v SBU* [2011] QCA 203
PARTIES:	**R** **v** **SBU** (applicant/appellant)
FILE NO/S:	CA No 317 of 2010 SC No 616 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	13 July 2011
JUDGES:	Muir and Fraser JJA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal.** **2. Allow the appeal.** **3. Set aside the sentence and orders made by the sentencing judge on 15 December 2010 and instead order that:** **(a) The applicant be detained for a period of 12 years.** **(b) The applicant serve the unserved period of that detention as a period of imprisonment from 21 July 2011, pursuant to s 276B of the *Youth Justice Act* 1992 (Qld).**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of murder – where the applicant was 14 years of age at the time of the offence – where the applicant had struck the deceased in the head multiple times with a fence paling – where the attack on the deceased was sustained and marked by ferocity but was not premeditated – where the applicant was assessed as having extremely low cognitive functioning and immaturity – where the sentencing judge found the applicant to be older than his years – where the applicant was sentenced to detention for life – whether the sentence was manifestly excessive

CRIMINAL LAW – SENTENCE – SENTENCING OF JUVENILES – RELEVANT FACTORS – GENERAL PRINCIPLES – where detention for life was the maximum sentence which could be imposed on the applicant pursuant to the *Youth Justice Act* 1992 (Qld) – where the sentencing judge found that the applicant was a continuing danger to the community – where there was evidence that the applicant has prospects of rehabilitation – whether the sentencing judge erred in imposing the maximum sentence

CRIMINAL LAW – SENTENCE – SENTENCING OF JUVENILES – OTHER MATTERS – where the sentencing judge made an order pursuant to s 234 of the *Youth Justice Act* 1992 (Qld) allowing publication of the applicant's identifying particulars – whether the sentencing judge erred in making the order

Corrective Services Act 2006 (Qld), s 181(3)
Criminal Code 1899 (Qld), s 305(1)
Penalties and Sentences Act 1992 (Qld), s 9(1)
Youth Justice Act 1992 (Qld), s 150, s 150(1)(a), s 150(1)(b), s 150(1)(d), s 150(2)(a), s 150(2)(e), s 155, s 176(3), s 227, s 233, s 234, s 276B, sch 1

BP v R (2010) 201 A Crim R 379; [2010] NSWCCA 159, cited
R v Carroll [1995] QCA 399, distinguished
R v D [2000] 2 Qd R 659; [1999] QCA 231, distinguished
R v Dwyer [2008] QCA 117, considered
R v Gwilliams [1997] QCA 389, distinguished
R v Maygar; ex parte A-G (Qld); R v WT; ex parte A-G (Qld) [2007] QCA 310, considered
R v Rowlingson [2008] QCA 395, distinguished
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, applied

COUNSEL: J Hunter SC for the applicant/appellant
D C Boyle for the respondent

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

[1] **MUIR JA:** I agree with the reasons of Fraser JA and with the orders he proposes.

[2] **FRASER JA:** On 22 October 2010 the applicant and a co-offender, Weazel, were convicted of murder. The applicant was 14 years old when he committed that offence on 6 July 2008. He was two weeks short of his 15th birthday. Weazel, an adult, was sentenced to the mandatory term of life imprisonment. Sentencing of the applicant was adjourned to allow for the preparation of a pre-sentence report and other reports.

[3] On 15 December 2010 the applicant was sentenced to detention for life. The applicant had already served a lengthy period of time in custody before he was

sentenced, and the sentencing judge ordered that from 21 July 2011 (the day after the applicant's 18th birthday) the applicant serve the unserved period of the sentence as a period of imprisonment. The sentencing judge made a further order allowing publication of the applicant's identifying information, with the proviso that no such information be published until the end of the appeal period.

[4] The applicant has applied for leave to appeal on the grounds that the sentence is manifestly excessive and that the sentencing judge erred in ordering that the name of the applicant could be published. I will discuss those grounds of appeal after I have first summarised the circumstances of the offence and the applicant's personal circumstances.

Circumstances of the offence

[5] The applicant and Weazel were part of a group of people in Musgrave Park at South Brisbane on the afternoon of 6 July 2008. They had been consuming alcohol and inhaling paint fumes. A female member of the group urinated beside a nearby wall because the park toilets were locked. She returned to the group and told Weazel that the deceased, a 52 year old man, had been watching her going to the toilet. (It was not submitted that this was true.) Weazel confronted the deceased, pushed him, and pursued him to a nearby footpath, where they exchanged punches. The applicant ran to the footpath and also punched the deceased. The deceased punched back and pushed the applicant and Weazel. The deceased attempted to run away, but the applicant and Weazel cornered him on the footpath at an intersection of two roads and hit him in the face. The applicant removed a wooden paling from a nearby fence and struck the deceased's head several times with the paling whilst Weazel was punching the deceased. The sentencing judge referred to the applicant and Weazel "urging [each] other on" and to the applicant being a "particularly large man" whereas the deceased was "middle-aged and slightly built." The sentencing judge also accepted evidence that the applicant ignored the deceased's pleas for his life and the calls of the applicant's friends to desist in the attack.

[6] The deceased slumped to the footpath but the applicant continued the attack even though, as the sentencing judge found, the deceased was probably unconscious and certainly defenceless. There was expert medical evidence that the deceased suffered 21 separate head injuries. His skull was shattered and his brain was ruptured. He died immediately. The sentencing judge found that it might well be the case that the applicant struck the last of the blows after the deceased was already dead. The medical evidence was that the level of trauma was similar in nature to a car accident which causes rapid, if not instantaneous, death.

[7] The applicant ran away from the scene. The police found the applicant and Weazel in the early hours of the following morning. The applicant declined to be interviewed. Neither the applicant nor Weazel gave or called evidence at the trial. At the trial the applicant sought to shift primary responsibility for the offence to Weazel. The sentencing judge concluded that the applicant had shown no remorse. The sentencing judge observed that "the facts such as I have, concerning your personal circumstances, suggest that you were older than your years" and that the circumstances of the offence suggested that the applicant was "a danger to society."

The applicant's personal circumstances

[8] The sentencing judge referred to the applicant's personal circumstances in the following terms:

> "You were, at the time, two weeks short of 15 years of age. You had, since the age of 14, for about a year, perhaps a few months less, been living an independent life on the streets of Brisbane.
>
> You left your father's house in Cherbourg and came down to Brisbane where your mother and grandmother lived, but you seem to have lived independently of them, at least for most of the time.
>
> In your time in Brisbane, according to the reports, you commenced relationships with older girls and have fathered two children so that you are not, I think, a typical 14 or 15 year old."

[9] More detail about the applicant's personal circumstances was provided in reports by a psychologist and in a pre-sentence report. The applicant's parents separated when he was a very young child. During his childhood and early adolescence he moved between Maryborough and Cherbourg. He and his siblings were not afforded much supervision and seem to have been left to their own devices from an early age. Whilst the applicant was in Cherbourg he was often involved in fights with other members of the community. He contended, and this was said to be confirmed by departmental staff based at Cherbourg, that other members of the community initiated the fights. The applicant was very stressed in Cherbourg and started sniffing inhalants. He attended school to the beginning of year 10 but he was not a good student. The applicant was close to his elder brother, who was not a good role model: he often spent periods of time in youth detention. Because of the problems the applicant was having in Cherbourg, he decided to move to Brisbane to live with his grandmother. By this time the applicant was drinking alcohol, sniffing inhalants, and he occasionally smoked marijuana. He did not respond to his grandmother's attempts to have him attend school and to discourage his substance abuse. Not long after moving to Brisbane the applicant started a relationship with a woman who was about five years his senior and who was also involved in anti-social behaviours. They usually slept on the streets but sometimes they stayed with her relatives. By the time of the offence the applicant was using inhalants and drinking alcohol daily, sometimes several times a day, in the company of his peers.

[10] The applicant's intellectual and memory functioning were assessed as falling within the "Extremely Low Range". He was assessed to be functionally illiterate. The psychologist referred to the applicant as having "extremely low cognitive functioning and immaturity". During 2007 the applicant had committed and was convicted of offences of dishonesty, wilful damage, and obstructing police. He had not committed any previous offence of violence or been imprisoned for any offence. He had not received any rehabilitative treatment before he committed the offence.

[11] The pre-sentence report prepared by an officer of the Department of Communities concluded that the factors which contributed to the applicant's offence were:

> "
> - Disrupted childhood experiences such as instability, child protection issues, namely neglect, and disputes within his community, leading to [the applicant's] relocation to Brisbane
> - Disorganised and unstable lifestyle factors, including transience, absence of adult supervision, reliance on negative peer relationships and disengagement from structured, pro-social activities and education

- Chronic use of alcohol and inhalants, impacting significantly on his decision making ability".

The report also noted that further factors were investigated as possible contributing factors to the offence, but were discounted, namely "[p]ropensity to react violently/history of violent behaviour" (there was no such history) and "[a]cting with loyalty to assist co-accused".

[12] Under the heading "attitude to the offences and the victims of the offences", the report's author recorded that although the applicant pleaded not guilty to the offence, he indicated that he took responsibility for what he understood to be his part in the death of the deceased. The report's author also recorded the applicant's statements that immediately following the offence he was not aware that the deceased had died and was more concerned with escaping apprehension for assault. The applicant described feelings of shock once he became aware that the victim of his assault had died. The applicant was assessed as having experienced "feelings of shame and guilt for committing this offence" and as having articulated that the victim was "an innocent person, possibly just walking home, and did not provoke him whatsoever to engage in the assault." The applicant reported "that he continues to feel regret for the shame that he has brought on his family by committing this offence and in particular, feeling as though he has let down his grandmother."

[13] Under the heading "sentencing options", the report's author recorded that since being in custody the applicant had undertaken drug and alcohol counselling to address his substance misuse issues, he was a keen participant in educational and recreational programs in detention, and his long term goal was to be a productive member of society and a good father to his two children.

Summary of the parties' arguments

[14] The applicant's counsel submitted that the sentencing judge's observation that the circumstances of the offence suggested that the applicant was "a danger to society" did not justify the life sentence. This was not an appropriate case for a life sentence in light of the mitigating factors. Counsel emphasised that the applicant was very young at the time of the offence. It was submitted that the evidence did not support the sentencing judge's conclusion that "the facts such as I have, concerning your personal circumstances, suggest that you were older than your years". The applicant's counsel referred to the circumstances that: the applicant committed the offence spontaneously and without any premeditation; he had no previous convictions for offences of violence; and he was disadvantaged by his dysfunctional family life, his transient lifestyle, and the extremely low range of his intellectual functioning.

[15] The applicant's counsel submitted that a sentence of detention for life, being the most severe sentence which might be imposed, must be reserved for the worst category of the offence, and only where there were no subjective factors which justified mitigation of the sentence. The respondent's counsel did not contest that submission, but he contended that there was no error in the exercise of the sentencing discretion. The respondent's counsel acknowledged that the mitigating factors identified by the applicant's counsel were relevant, but he argued that the life sentence was nevertheless justified by matters to which the sentencing judge referred. The respondent's counsel emphasised: the ferocity of the applicant's

unprovoked and sustained violence in company against an innocent man; the applicant's callous conduct in fleeing the scene; and his lack of remorse.

Consideration

[16] The sentencing judge described the applicant's attack upon the deceased as "sustained" and "marked by ferocity." His Honour commented that it was "a matter of concern that one so young should initiate the armed attack on a smaller, outnumbered middle-age man", and it was "disturbing that a youth of your age should turn so readily to such a high level of violence." The sentencing judge remarked that the "need for deterrence is, of course, important if streets and parks are to be safe for the public to enjoy" and that the applicant's offence was "so serious as to call for quite condign punishment to mark the community's concern and its sense of outrage at what has happened."

[17] Those remarks were justified by the evidence. The senseless and violent murder of an innocent man, the bereavement and trauma suffered by those affected, particularly the deceased man's family and friends, and the impact on the community were important matters to be taken into account. A severe and deterrent sentence was appropriate.

[18] It does not necessarily follow, however, that it was appropriate to impose the maximum penalty of detention for life. The main question in this application is whether the sentencing judge erred in exercising the discretion to impose that maximum penalty instead of imposing a lengthy term of detention. Under the life sentence imposed by the sentencing judge, the applicant might remain in prison for the rest of his life, or he might be released on parole after he has served 15 years of the sentence.[1] Under a sentence for a fixed period of detention, the applicant would be released from detention after serving 70 per cent of the period of detention, unless there are special circumstances which justify earlier release after the applicant has served at least 50 per cent of the period.[2]

[19] Under s 305(1) of the *Criminal Code* 1899 (Qld) ("the Code"), a life sentence is mandatory for any person who commits an offence of murder, but the *Youth Justice Act* 1992 (Qld) ("*Youth Justice* Act") renders s 305(1) of the Code inapplicable to children and confers a discretion under which the age of a child is expressly made a mitigating factor. Section 155 of the *Youth Justice Act* provides that a court that sentences a child for an offence "must take a requirement under any other Act that an amount of money or term of imprisonment must be the only penalty for the offence as providing instead that the amount or term is the maximum penalty for the offence." Subsection 176(3) of the *Youth Justice Act* prescribes the period of detention that a court may order for a child who commits a "relevant offence" (a life offence or an offence of a type that would make an adult liable to imprisonment for 14 years or more) that is a "life offence" (an offence for which a person sentenced as an adult would be liable to life imprisonment) as:

> "(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

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1 *Youth Justice Act* 1992 (Qld), s 233; *Corrective Services Act* 2006 (Qld), s 181(3).

2 *Youth Justice Act* 1992 (Qld), s 227.

(ii) the court considers the offence to be a particularly heinous offence having regard to all the circumstances."

[20] Accordingly, for offences such as murder which carry a maximum penalty for an adult of life imprisonment, the equivalent maximum penalty for a child is 10 years detention or, in the case of "a particularly heinous offence" of violence against a person, life detention. Those are maximum sentences, not mandatory sentences. In *Veen v The Queen [No 2]*[3] the High Court held that the maximum penalty for an offence "is intended for cases falling within the worst category of cases for which that penalty is prescribed ... [t]hat does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category."

[21] If an offence is within the worst category of such offences the maximum penalty may be imposed unless there are subjective factors which should be taken into account by way of mitigation of the sentence. In *R v D*,[4] Davies JA, Thomas JA, and Wilson J, having held that a child's offence of murder was a particularly heinous offence, observed:

> "The sentencing judge then had a discretion to impose a penalty up to the maximum of life imprisonment. He was obliged to have regard to the sentencing principles in s. 109 of the *Juvenile Justice Act* [now the *Youth Justice Act*]. It was open to him to impose the maximum penalty only if the offence was within the worst category of offences of murder, although not necessarily the worst imaginable case. In *Twala* Badgery-Parker J. (with whom the other members of the N.S.W. Court of Criminal Appeal agreed) said:
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> > 'However, in order to characterize any case as being in the worst case category, it must be possible to point to particular features which are of very great heinousness and it must be possible to postulate the absence of facts mitigating the seriousness of the crime (as distinct from the subjective features mitigating the penalty to be imposed).'
>
> The same factors which led to the conclusion that this was a particularly heinous offence along with the absence of any objective mitigating factors lead us to the view that this offence was within the worst category of murders. Thus, it was open to the sentencing judge to impose the maximum penalty unless there were subjective features mitigating the penalty to be imposed." (citations omitted)

[22] As Keane JA pointed out in *R v Maygar; Ex-parte A-G (Qld); R v WT; Ex-parte A-G (Qld),*[5] "the considerations of leniency and child protection which inform the regime established by the *Juvenile Justice Act* must be observed by a sentencing judge." The applicable sentencing principles are prescribed in s 150 of the *Youth Justice Act*:

> "**150 Sentencing principles**
>
> (1) In sentencing a child for an offence, a court must have regard to—

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3 (1988) 164 CLR 465 at 478.

4 [2000] 2 Qd R 659 at 661 [10]-[11]. See also *R v Rowlingson* [2008] QCA 395 at [34]-[35] and *R v Handlen & Paddison* [2010] QCA 371 at [135].

5 [2007] QCA 310 at [57].

(a) subject to this Act, the general principles applying to the sentencing of all persons; and

(b) the youth justice principles; and

(c) the special considerations stated in subsection (2); and

(d) the nature and seriousness of the offence; and

(e) the child's previous offending history; and

(f) any information about the child, including a pre-sentence report, provided to assist the court in making a determination; and

(g) if the child is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the child's community that are relevant to sentencing the child, including, for example—

(i) the child's relationship to the child's community; or

(ii) any cultural considerations; or

(iii) any considerations relating to programs and services established for offenders in which the community justice group participates; and

(h) any impact of the offence on a victim, including harm mentioned in information relating to the victim given to the court under the *Victims of Crime Assistance Act 2009*, section 15; and

(i) a sentence imposed on the child that has not been completed; and

(j) a sentence that the child is liable to have imposed because of the revocation of any order under this Act for the breach of conditions by the child; and

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

(2) Special considerations are that—

(a) a child's age is a mitigating factor in determining whether or not to impose a penalty, and the nature of a penalty imposed; and

(b) a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community; and

(c) the rehabilitation of a child found guilty of an offence is greatly assisted by—

(i) the child's family; and

(ii) opportunities to engage in educational programs and employment; and

(d) a child who has no apparent family support, or opportunities to engage in educational programs and employment, should not receive a more severe sentence because of the lack of support or opportunity; and

(e) a detention order should be imposed only as a last resort and for the shortest appropriate period.

(3) In sentencing a child for an offence, a court may receive any information it considers appropriate to enable it to impose the proper sentence or make a proper order in connection with the sentence.

(4) If required by the court for subsection (1)(g), the representative must advise the court whether—

(a) any member of the community justice group that is responsible for the submission is related to the offender or the victim; or

(b) there are any circumstances that give rise to a conflict of interest between any member of the community justice group that is responsible for the submission and the child or victim."

[23] The general principles incorporated by s 150(1)(a) include those designed to give effect to the purposes of punishment, denunciation, and protection of the community specified in s 9(1) of the *Penalties and Sentences Act* 1992 (Qld). As the applicant's counsel properly conceded, the application of those general principles, and the specific reference to the nature and seriousness of the offence in s 150(1)(d), called for a lengthy sentence of imprisonment in the present case. Aspects of the "youth justice principles"[6] incorporated by s 150(1)(b) point in the same direction:

"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".

[24] On the other hand, the fact that the applicant was a child younger than 15 when he committed the offence is a factor which requires serious consideration. The "youth justice principles" also include:

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6 *Youth Justice Act* 1992 (Qld), sch 1.

> "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."

[25] The "special considerations" expressed in ss 150(2)(a) and (e) also specifically require a sentencing court to treat a child's age as a mitigating factor in determining the appropriate penalty and to impose the shortest appropriate period of detention for the offence.

[26] Counsel were unable to find any case in which a child as young as 14 or 15 was given a life sentence. Life sentences were imposed in *R v Rowlingson*[7] and *R v D*,[8] but in both cases the offender was substantially older: in *R v Rowlingson* the offender was 16 years and 10 months old and in *R v D* the offender was 16 and a half years old. In each case the circumstances of the offence were also worse than in this case and there was persuasive evidence that the offender represented a continuing danger to the community. In *R v Rowlingson* the offender planned the killing over time, disposed of the body of his victim, and was found accordingly to pose a "real and continuing danger to the community". In *R v D*, the offender brutally bashed a woman to death, attempted to conceal her body, showed no remorse, maintained his innocence after the trial, and the psychiatric evidence justified the finding that the offender was "presumably highly dangerous".

[27] The Court was also referred to *R v Gwilliams*[9] and *R v Carroll*,[10] in which the maximum penalty (which was then detention for 14 years) was imposed. The increase in the maximum penalty must be taken into account, but those decisions provide limited guidance because each offender was substantially older than the applicant. In *R v Carroll* the offender was 16 and a half or 17 years old.[11] In *R v Gwilliams* the offender was 16 years old and the Court also took into account that there was an element of premeditation in the offence.

[28] The significance of the applicant's young age as a mitigating factor might be diminished if he had a level of maturity beyond his years,[12] but although the applicant was "particularly large" and not typical of youths of his age, the evidence did not justify a finding that he was unusually mature. The only direct evidence on the point was to the opposite effect. The psychologist expressed the opinion that the applicant was of "extremely low cognitive functioning and immaturity".

[29] The respondent's counsel referred to *R v Dwyer*,[13] in which extreme and persistent violence was regarded as an indicator that an offender, who had a significant criminal history which included offences of violence, was dangerous. The extent of the present applicant's violence in the offence was material in the assessment whether the applicant represented a continuing danger to the community, but it was not the only relevant factor to be taken into account. It is also material that the

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7 [2008] QCA 395.
8 [2000] 2 Qd R 659.
9 [1997] QCA 389.
10 [1995] QCA 399.
11 The judgment describes that offender as being 17 years of age, but the stated date of birth and date of the offence suggests that he was 16 and a half years of age.
12 *R v D* [2000] 2 Qd R 659 at [13].
13 [2008] QCA 117 at [30].

applicant had no prior history of violence, that he lacked appropriate guidance and supervision by responsible adults for significant periods of his childhood, and although his offence was severe and prolonged, it was not premeditated. The last factor is a another feature which distinguishes this case from *R v Rowlingson*,[14] in which Keane JA observed that the offence considered in that case was not a spur of the moment error of judgment which might be explicable by the child's immaturity.

[30] In these circumstances, the violence of the applicant's offence did not itself demonstrate that the applicant was more mature than his age suggested.[15] Nor, in my respectful opinion, did the evidence as a whole warrant a finding that the applicant represented such a continuing danger to the community as to justify the imposition of the maximum sentence. The psychologist's report suggested that the applicant recognised and regretted his wrongdoing. The extent of the applicant's remorse was limited and had to be assessed in light of his conduct in fleeing from the scene and attempting to shift all of the blame to his co-offender at the trial, although his immaturity presumably played a part in that conduct. However it is clear that this is not a case like *R v Rowlingson*, in which the psychologist's reports provided no support for any confidence that the offender's deficits in terms of empathy might be overcome as he grew older. In my respectful opinion, the evidence does not justify a conclusion that there are no prospects for the applicant's rehabilitation as he matures and receives the benefit of responsible adult supervision and guidance of which he was previously deprived.

[31] The maximum penalty is reserved for the worst category of the offence and where there are no personal factors which should be taken into account in mitigation of the sentence. For the reasons I have given, this was not such a case. I respectfully conclude that the sentencing judge erred in imposing the maximum penalty.

[32] It is necessary to re-sentence the applicant afresh. None of the decisions which I have cited involved sufficiently comparable circumstances to shed much light on the proper sentence in this difficult and troubling case. That is true also of two further decisions which were cited by the applicant's counsel: *R v WS*[16] and *R v W; Ex parte A-G.*[17] As I have mentioned, the circumstances of the applicant's offence called for a lengthy period of incarceration. It is also necessary to take account of the mitigating factors, the most notable of which is the applicant's young age. Taking all of the circumstances into account, I consider that the appropriate sentence is 12 years detention.

[33] It was not submitted that there were any special circumstances which would justify an order for release under s 227 of the *Youth Justice Act* before the applicant has served 70 per cent of that period of detention. In my opinion such an order is not justified on the evidence. The applicant also did not challenge the sentencing judge's order under s 276B of the *Youth Justice Act* that the applicant should serve the unserved period of time as a period of imprisonment once he has turned 18. I consider that this order remains appropriate under the sentence I propose.

[34] Finally, it is necessary to consider the applicant's challenge to the sentencing judge's order permitting the publication of information which identifies the applicant. The *Youth Justice Act* provides:

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14 [2008] QCA 395 at [36].

15 See the similar conclusion in *BP v R* [2010] NSWCCA 159 at [6] per Hodgson JA and at [108] per Rothman J.

16 [2007] QCA 207.

17 [2000] 1 Qd R 460.

"**234 Court may allow publication of identifying information**

(1) This section applies if a court makes an order against a child under section 176(3)(b).

(2) The court may order that identifying information about the child may be published if the court considers it would be in the interests of justice to allow the publication, having regard to—

(a) the need to protect the community; and

(b) the safety or wellbeing of a person other than the child; and

(c) the impact of publication on the child's rehabilitation; and

(d) any other relevant matter.

(3) The order does not authorise publication of identifying information before the end of any appeal period or, if the child gives notice of appeal or of application for leave to appeal, before any appeal proceeding has ended.

(4) To remove any doubt, it is declared this section does not apply to a Childrens Court constituted by a Childrens Court magistrate.

(5) In this section—

appeal period means the 1 calendar month from the date of conviction or sentence mentioned in the Criminal Code, section 671."

[35] The sentencing judge found that there was no point in continuing suppression of identifying information about the applicant having regard to: his age at the time of sentence; the age he would be when he was eventually released from detention or imprisonment; the circumstances of the offence; and the community's interest in knowing what occurred within its boundaries and how offenders against peace and order were dealt with. The sentencing judge observed that if there was some particular reason why the applicant's name should not be published an order would not be made, but none having been advanced it was appropriate to make the order under s 234.

[36] Counsel for the applicant argued that in the absence of sufficient evidence to warrant the conclusion that the applicant was a danger to the community, and where the community had an interest in the rehabilitation of child offenders such as the applicant, that rehabilitation would be facilitated by the usual anonymity conferred by the *Youth Justice Act*. He submitted that where there was no convincing evidence of a continuing risk to the public, the interests of justice did not require an order under s 234. The respondent submitted that it was open to the sentencing judge to conclude, particularly from the nature of the offence, that the order was warranted in the interests of protection of the community.

[37] In *R v Rowlingson*[18] Keane JA referred to some of the considerations relevant to the exercise of the discretion under s 234 in that case: members of the relevant

[18] [2008] QCA 395 at [47]-[50].

community were already familiar with the circumstances of the case and the offender's identity; the offender committed a particularly heinous crime; he was a dangerous man, and there was therefore a legitimate reason in terms of the protection of the community why the facts should be made public.

[38] The features to which the sentencing judge referred have less force in the context of the sentence I propose and there is a consideration, the applicant's rehabilitation, which weighs against the order. The seriousness of the applicant's offence is a relevant consideration, but the community also has an interest in the applicant's rehabilitation, which would likely be prejudiced by allowing the publication of his identifying information. It has not been demonstrated that there is good reason for departing from the general legislative prohibition upon the publication of the identifying details of child offenders.

Proposed orders

[39] I consider that the appropriate orders are:

1. Grant the application for leave to appeal.
2. Allow the appeal.
3. Set aside the sentence and orders made by the sentencing judge on 15 December 2010 and instead order that:
   (a) The applicant be detained for a period of 12 years.
   (b) The applicant serve the unserved period of that detention as a period of imprisonment from 21 July 2011, pursuant to s 276B of the *Youth Justice Act* 1992 (Qld).

[40] **McMURDO J:** I agree with Fraser JA.