SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBE* [2011] QCA 378
PARTIES:	**R** **v** **HBE (a child)** (applicant)
FILE NO/S:	CA No 295 of 2011 DC No 1 of 2011 DC No 21 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Townsville
DELIVERED ON:	20 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2011
JUDGES:	Margaret McMurdo P, White JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal against sentence allowed.** **3. The sentence for the offence of arson varied by substituting detention for a period of 69 days in lieu of detention for six months.** **4. Set aside the sentence for the two offences of burglary and in lieu order the applicant to serve 100 hours of community service and the child must report to the chief executive of the Department of Communities within two business days of the making of this order.** **5. Set aside the order recording convictions for all offences and order that convictions not be recorded.** **6. The sentence of probation for the other offences is confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant was 13 years nine months old when he and other children were playing with cigarette lighters in a vacant building which

caught fire and was destroyed – where applicant pleaded guilty to arson and receiving tainted property – where sentencing delayed while pre-sentence report was prepared and a youth justice conference convened – where applicant committed offence of burglary and steal, burglary and three offences of unlawfully using a motor vehicle whilst on bail for the first offences – where applicant did not attend the youth justice conference – whether sentence of detention of six months for the arson and four months for the burglaries were manifestly excessive – whether detention the only appropriate sentence in the circumstances of the case – whether convictions should have been recorded

Youth Justice Act 1992 (Qld), s 150, s 151, s 161, s 183, s 184, s 208

R v A (1995) 80 A Crim R 255; [1995] QCA 208, considered
R v C [2001] QCA 552, considered
R v P [1996] QCA 317, considered

COUNSEL: D C Shepherd for the applicant
D A Holliday for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Mullins J's reasons for granting this application for leave to appeal against sentence and allowing the appeal. I agree with the orders proposed by Mullins J.

[2] **WHITE JA:** I have read the reasons for judgment of Mullins J and agree with those reasons and the orders which her Honour proposes.

[3] This young offender, as her Honour has observed, is strongly in need of structured guidance about how to resist peer pressure to engage in anti-social behaviour, and how to see himself as a worthwhile member of his community. Although the case worker referred in her report to programmes in detention which would include educational, therapeutic and recreational goals, the unfortunate reality is that the applicant would likely come under the influence of other offending juveniles. His personality, at present, is such that those influences would not be beneficial to him.

[4] I should like to acknowledge the assistance which I have received from the careful, thorough and respectful report prepared by the case worker at the Townsville Youth Justice Service Centre in respect of this applicant for the assistance of the Children's Court.

[5] **MULLINS J:** The applicant was 13 years nine months old when he committed the offences of arson and receiving tainted property on 8 September 2009. He pleaded guilty to those offences on 17 January 2011 in the Children's Court. He then committed further offences between 24 and 31 May 2011 whilst on bail for the first offences. He pleaded guilty to those further offences of three counts of unlawfully

using a motor vehicle, one count of burglary and steal and one count of burglary, in the night, when an ex officio indictment was presented against him on 25 August 2011.

[6] The applicant was sentenced for all offences on 1 September 2011. He was sentenced to six months' detention for the arson and four months' detention for each of the burglary offences on the second indictment. These sentences were concurrent. For the receiving tainted property and the three counts of unlawfully using a motor vehicle, he was sentenced to two years' probation. He applies for leave to appeal against the sentences on the ground that they are manifestly excessive in all the circumstances. On 8 November 2011 an order was made in the Supreme Court releasing the applicant to bail. The period of detention that he has served is 69 days between 1 September and 8 November 2011. In addition he had served an aggregate period of 14 days on remand for the first offences.

The circumstances of the first offences

[7] The applicant's parents had separated when the applicant was around three years old. The applicant resided with his mother mainly at Palm Island until 2005 when his mother moved to Townsville. The applicant's mother had difficulty controlling the applicant due to her health problems and the applicant's mixing with peers who had a negative influence on him. Shortly prior to the first offences, the applicant had moved to Palm Island to live with his father and his father's partner. He was associating with other young people who roamed the streets at night and engaged in anti-social behaviour. In the early hours of 8 September 2009, others in the applicant's group of acquaintances had broken into the Palm Island service station and taken away goods including cigarette lighters, food and drink. Although the applicant did not go inside the service station, he was seen walking away carrying bags and, shortly after, was in possession of some cigarette lighters. That is the conduct that resulted in the count of receiving tainted property.

[8] The applicant and others in the group made their way to a building that was owned by the Palm Island Council, which had been relocated to Main Street, and was intended to be renovated and reopened as a cultural centre. The sum of $127,000 had been spent on the relocation of the building and it was valued at $117,281.

[9] Some of the group went inside the building which was empty and were playing with the cigarette lighters. The applicant had been observed inside the building twisting the tops off cigarette lighters to create a gas stream and then setting them on fire. When the building caught on fire, there was only the applicant, his co-offender X in relation to the arson and a girl inside the building. Children were seen running away from the building. The building could not be saved. It was uninsured.

[10] The applicant was interviewed by police and blamed the girl for lighting the cupboard in the building and said that he had tried to "hunt it out". The girl admitted to playing with lighters and burning them, but denied setting fire to the building. The prosecution entered a *nolle prosequi* in relation to the charge of arson against the girl. X pleaded guilty to entering premises and stealing (in relation to the service station) and arson.

The circumstances of the second offences

[11] The first unlawful use of a motor vehicle offence (count 1) was committed on the evening of 24 May 2011. The complainant's Toyota Yaris vehicle was parked and

secured on her front lawn. The next morning it was gone. It was located later the same day in another part of Townsville.

[12] The burglary (count 2) and the second unlawful use of a motor vehicle (count 3) were committed when the side door of the complainant's garage was forced open and two sets of keys and the complainant's Ford Territory vehicle were stolen. The vehicle was located subsequently. The applicant's fingerprint was located on a vehicle next to where the Ford Territory vehicle had been parked. The insurer of the vehicle indemnified the owner for damage to the vehicle of $8,942.34.

[13] The second burglary (count 4) and the third unlawful use of a motor vehicle (count 5) were committed when the Ford Focus vehicle was taken from the complainant's garage in the early hours of 31 May 2011. The complainant had left the keys in the car and the doors were unlocked. The vehicle was involved in a traffic accident at 8 pm on 31 May 2011, but the occupants of the vehicle left the scene before the arrival of the police. A fingerprint of the applicant was located on the bonnet of the car in front of the driver's side. The vehicle was uneconomic to repair and the insurer paid out the owner on the basis of its market value of $24,000, but the insurer kept the benefit of the vehicle's salvage value of $2,500. The applicant's counsel informed the sentencing judge of the applicant's instructions that in relation to the vehicle that was the subject of counts 4 and 5, his involvement was in assisting to push the car, and he was never the driver of, or a passenger in, the car.

[14] The applicant declined to be interviewed by the police in relation to the second offences.

The applicant's antecedents

[15] The applicant had no prior criminal history when he committed the offences on 8 September 2009. At the time he was sentenced, he had a single entry that related to an offence of shoplifting and an offence of assaulting or obstructing a police officer for which he was dealt with in the Children's Court in May 2010. No convictions were recorded and he was reprimanded.

The pre-sentence report

[16] On 17 January 2011 the sentencing judge ordered that a pre-sentence report in relation to the applicant be prepared pursuant to s 151(1) of the *Youth Justice Act* 1992 (the Act). A caseworker with the Department of Communities interviewed the applicant on 21 February 2011, interviewed the applicant's mother on two occasions in January and March 2011 and used information supplied from the records and files held by the Department and the Office of the Director of Public Prosecutions for the purpose of preparing the report which is dated 13 April 2011. The caseworker was unsuccessful in locating the applicant's father and his partner for the purpose of interviews.

[17] The caseworker identified the factors that contributed to the applicant's committing the first offences as negative peer association, parental health problems and difficulties in providing appropriate boundaries, and defiance of parental boundaries. These factors were expanded upon in the caseworker's conclusion about the first offences:

> "It appears that [the applicant] demonstrated little forethought for the consequences of his actions immediately prior to the building

> catching fire and was caught up in the group mentality of playing with lighters. It is the author's assessment and [the applicant's] mother confirmed that [the applicant] is easily influenced by his offending peers and he gains a sense of exhilaration and a sense of belonging from engaging in such behaviours with his peers. [The applicant's] offending behaviour is therefore characterised by his association and influence of his peers.
>
> In summary, [the applicant's] parents' difficulties in providing adequate boundaries and supervision to [the applicant] at times and the resultant freedom [the applicant] has experienced has coincided in a rise in his display of anti-social behaviours and engagement in criminal activities. Further whilst [the applicant] is away from the family home, his engagement with and influence by offending peers in anti-social activities have contributed to the offending behaviour before the court."

[18] As a result of the applicant's responses to the caseworker about the first offences, the caseworker recorded:

> "In questioning [the applicant] in relation to his offences he deflects most of the blame for the Arson charge to his alleged co-offenders. He acknowledged his guilt to the offences due to his participation in using stolen lighters in fire play with his co-offenders but indicated that he feels he is not to blame as he was not the person that actually lit the fire that caused the building to burn down. It was evident to the author during questioning that the offence was not premeditated and further information suggests that [the applicant] made some attempt to stop the fire from progressing. It appears that [the applicant] decamped from the scene when the fire got out of control due to the fear of being implicated for his involvement in the offence.
>
> [The applicant] indicated he understood the seriousness of the offences and the consequences of his offending behaviour on potential victims. [The applicant] showed significant remorse for his involvement in the Arson offence once the author explained to him the cultural and historical significance of the building that was destroyed as a result of the offence. [The applicant] reported that he was not previously aware of the heritage of the building and its worth to the Palm Island community and he acknowledged that knowing this information makes the offence more serious and that he feels 'bad' for his involvement. [The applicant] indicated that if he were in the same circumstances again he would not have entered the building."

[19] The pre-sentence report canvassed each of the sentencing options under the Act and the likely effect of each sentencing option, if imposed on the applicant. In relation to a detention order, the caseworker stated:

> "Being ordered to serve a period of Detention would provide a clear punishment for [the applicant] and a strong message that such offending is unacceptable. It would however, deny [the applicant] the opportunity to build personal resilience, strengthen his community based support network, and make positive steps towards a life free of offending.

[20] Sentencing submissions were heard by the sentencing judge on 20 April 2011 for both the applicant and X, when the judge raised the possible benefit of a conference before sentence pursuant to s 161 of the Act. The sentencing judge ordered both the applicant and X to a youth justice conference before sentence.

The sentencing

[21] X participated in the youth justice conference and was taken to have shown remorse for his offending. X had turned 14 years old a couple of days prior to the commission of the offences. In relation to the entering premises and stealing, X was sentenced to 100 hours community service to be completed within 12 months. In relation to the arson, he was sentenced to probation for a period of two years. No convictions were recorded against X.

[22] Because the applicant failed to attend an initial appointment with a Fight Fire Fascination facilitator as part of the youth justice conference, the youth justice conference for the applicant was terminated by the Youth Justice Conferencing Service.

[23] The prosecutor who appeared before the sentencing judge submitted in relation to the applicant that "all sentencing options are still open in relation to this child, your Honour, however in my submission the preferred sentence should be detention … ." The prosecutor then submitted that detention in the order of between eight and 12 months was called for with a concurrent probation order. Counsel who appeared for the applicant before the sentencing judge did not make a submission against detention, but submitted that the sentencing judge would sentence at the lower end of the range suggested by the prosecutor. The applicant's counsel on the sentencing conveyed his instructions from the applicant that the applicant knew he had to attend the youth justice conference, but was waiting for someone else to contact him about it. The sentencing judge did not accept that explanation.

[24] In sentencing the applicant, the sentencing judge differentiated his circumstances from that of X, because the applicant failed to attend the youth justice conference and committed five further serious offences whilst on bail. The sentencing judge observed that the making of restitution orders against the applicant was totally impractical. The sentencing judge surmised that the commission by the applicant of the second offences whilst on bail gave an indication of why the applicant did not participate in the conferencing. The sentencing judge noted that detention is a last resort under the Act, but expressed the opinion that detention was "the only appropriate remedy" in the applicant's case. Because of the number of offences and the way in which the second offences were committed while the applicant was on bail, the sentencing judge considered it appropriate that convictions be recorded in respect the offences on both indictments.

Comparable authorities

[25] Reference was made on this application to comparable authorities that were put before the sentencing judge.

[26] In *R v A* [1995] QCA 208, the offender A was 16 years old when he committed arson and breaking and entering with intent. A was of Samoan descent and had no prior criminal history. A's sentence was reduced on appeal from 18 months' detention with an order for release after serving one-half of that term for each

offence to three years' probation. A had found difficulty in adjusting to western culture and had problems reading and writing English. On leaving school he sought acceptance by a peer group where offending was not unusual. A's employer manufactured packaging and the week before committing the offences A told co-workers that he intended to burn the factory down. A and his co-offenders broke into the factory, spread paint thinners about, lit the fire, and all then fled. There was no person in the factory. The fire brigade extinguished the fire, but about $73,000 damage was done. A admitted to co-workers the next day that he lit the fire and made admissions when interviewed by the police. By the time he was sentenced, he no longer associated with the peer group, had apologised to his family and the Samoan community and appeared to have good prospects for rehabilitation. Although there was some mitigating features that applied to A which do not apply to the applicant, A was older than the applicant and procured co-offenders to join in the offending. A also intended to burn the factory, whereas the applicant's arson was not intentional, but as a result of recklessness.

[27] The majority in *R v P* [1996] QCA 317 considered that a sentence of six months' detention for each of two counts of arson arising out of one incident committed by the offender P when he was 14 years old was within the discretion of the sentencing judge, even though there were features favouring a non-custodial penalty including the applicant's youth, his lack of prior criminal convictions, that the incident was out of character, his apparent remorse, his disrupted home life, the good prospects of rehabilitation and that P may have acted under the influence of an older youth with a criminal history. The arsons were committed in respect of two classrooms in school buildings which resulted in damage costing $122,801. The need to deter the commission of arson at schools was held by the majority to distinguish the case from *R v A*. The dissentient, Dowsett J, considered that the sentencing judge attached too much significance to prevalence of school offences and too little weight to the antecedents of the applicant. The focus of *R v P* was the need for general deterrence in relation to arson of school buildings.

[28] The offender in *R v C* [2001] QCA 552 was 14 years old when he committed his first offence of arson. He was a resident of Boystown and was annoyed with another resident, when he lit a tea towel on a hot plate and placed it underneath a lounge in one of the Boystown cottages. He had ascertained that no person was in the building. He left the building, but felt guilty and returned and tried to remove the tea towel, but the lounge burst into flames and he ran back to his own cottage. When the fire was detected, he tried to assist in putting the flames out. The damage to the cottage was about $500,000. Some two months later, whilst on bail for the first offence, C and two co-offenders stole fuel canisters from the trailer of a parked vehicle and used the petrol to set fire to a rubbish bin, a tree, and a car. C was remanded in custody for 38 days following the second lot of offences. He pleaded guilty to all charges. He was sentenced to two years' detention for each arson offence. Pending the appeal, he was granted conditional bail after he had served an aggregate period of 75 days in detention. C's appeal was successful on the basis that a combination of an immediate release order for some offences and a probation order on others would take account of his youth, his lack of previous criminal offences, his background and diagnosis of Klinefelter's syndrome, his guilty pleas, his positive response to the conditional bail program and the community conference, and the likely negative effects of detention on him, whilst also taking into account the seriousness of the offences and the repetition of an offence of arson whilst on bail for the first offence of arson. The commission of arson offences on two

separate occasions made *R v C* a more serious example of arson offending than the applicant's offence.

Was detention the only appropriate sentence?

[29] There was no issue about the application of the sentencing principles set out in s 150 of the Act and the application of the youth justice principles that underlie the operation of the Act. The main focus of the hearing in this court was whether detention was the only sentence appropriate for the applicant in the circumstances of the case: s 208 of the Act. This provision reflects principle 17 of the youth justice principles that a child should be detained in custody as a sentence for an offence only as a last resort and for the least time that is justified in the circumstances.

[30] Counsel for the respondent conceded that the sentence imposed on the applicant was high, but pointed out that sentencing judge was faced with the prosecution submitting for detention, and no real assistance being provided by counsel who appeared for the applicant on the sentencing as to why that sentence was not appropriate.

[31] Ultimately, the fact that the applicant's counsel did not submit against detention at the sentencing does not preclude the applicant making the submission that detention should not have been imposed because it was not the only appropriate sentence in the circumstances.

[32] The failure of the applicant to take the opportunity to attend the youth justice conference assumed significance in the sentencing. That failure may have been an indication of lack of remorse that deprived the applicant of that mitigating feature, but could not be characterised as an aggravating feature of the commission of the arson.

[33] The pre-sentence report showed that the applicant had not had the benefit of any long term and meaningful intervention and assistance in his life. Consistent with the suggestions made in the pre-sentence report, the applicant needed an opportunity to gain the skills to avoid offending, such as learning to resist the influence of the peer group of co-offenders.

[34] Because of the number of offences for which the applicant was being sentenced, the sentencing judge had the option of combining non-custodial sentencing options that would give the applicant the opportunity to develop in responsible, beneficial and socially acceptable ways, as contemplated by principle 8 of the youth justice principles, and avoid the potential negative effect of detention for the applicant identified in the pre-sentence report.

[35] Although the destruction of the building by fire was a relevant factor in the sentencing for the arson, it was also relevant that it was the result of recklessness and lack of foresight as to the consequences of playing with the cigarette lighters, which can be attributed to the immaturity of the applicant. No person's life was endangered as a result of the fire. Even if the remorse that the applicant did express when interviewed for the pre-sentence report was effectively lost by the applicant's failure to participate in the youth justice conference, the other mitigating factors of his age and antecedents at the time he committed the first offences and guilty pleas mean that, consistent with the comparable authorities, detention was not the only appropriate sentence for the arson.

[36] The two burglaries did not involve entry into the living areas of the homes, but were confined to the garages where vehicles were parked. The second offences were a series of offences committed over a relatively short period of about seven days. Although an aggravating feature that the second offences were committed whilst the applicant was on bail for the first offences, the applicant had not had the benefit of structured intervention for his behaviour prior to the commission of the second offences. Again, when account is also taken of his early guilty pleas and his personal circumstances, detention was not the only appropriate sentence for the burglaries.

[37] On the basis that the sentencing judge erred in imposing detention when sentencing the applicant, the applicant has succeeded in showing that the sentences were manifestly excessive.

[38] How the sentences should be structured now is determined by the fact that recognition must be given to the period of 69 days that has been served in detention by the applicant before he was granted bail. That should therefore remain the sentence for the arson, because it has been served. The constructive programs that are necessary to assist the applicant in reintegrating into the community with skills and strategies to avoid future offending can be delivered through community based orders for the other offences.

[39] Counsel for the respondent did not dispute the proposed orders sought by the applicant's counsel, if the appeal were allowed. The probation order for two years should be maintained, but in addition the applicant should serve 100 hours of community service for the burglaries in lieu of the detention for four months. During the preparation of the pre-sentence report the applicant had indicated a willingness to comply with a community service order and the applicant has confirmed that willingness to his representatives for this appeal.

[40] The issue of recording a conviction appears to have been determined by the sentencing judge in reliance on the commission of the second offences. The commission of the first offences which was the first criminal offending of the applicant would not in the normal course have attracted the recording of a conviction pursuant to s 183 and s 184 of the Act and that should be the position. In view of the starting point in exercising the discretion under s 183(3) of the Act that a conviction should not be recorded against a child offender and that the applicant still had experienced no remedial influences in his life by the time of the commission of the second offences, and in order to facilitate his rehabilitation, the discretion should also be exercised not to record convictions for the second offences.

Orders

[41] The following orders should be made:

1. Application for leave to appeal against sentence granted.
2. Appeal against sentence allowed.
3. The sentence for the offence of arson varied by substituting detention for a period of 69 days in lieu of detention for six months.
4. Set aside the sentence for the two offences of burglary and in lieu order the applicant to serve 100 hours of community service and the child must report to the chief executive of the Department of Communities within two business days of the making of this order.

5. Set aside the order recording convictions for all offences and order that convictions not be recorded.
6. The sentence of probation for the other offences is confirmed.