SUPREME COURT OF QUEENSLAND

CITATION:	*R v DAZ* [2012] QCA 31
PARTIES:	**R** **v** **DAZ** (applicant)
FILE NO/S:	CA No 3 of 2012 DC No 30 of 2011 DC No 56 of 2011 DC No 58 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Cairns
DELIVERED ON:	2 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2012
JUDGES:	Margaret McMurdo P and White JA and Atkinson 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 orders imposed below and instead order the following.** **4. Upon the applicant's willingness to comply with this order being communicated to the Deputy Registrar (Appeals) by her lawyer, on each count on Indictment No 56 of 2011 and on count 1 on Indictment No 58 of 2011, the applicant be sentenced to 12 months detention with an order that the sentence of detention be suspended immediately and the applicant be released from detention immediately subject to a conditional release order in the terms set out in s 221 of the *Youth Justice Act 1992* (Qld).** **5. On each remaining count the applicant be placed on probation for a period of two years subject to the requirements of s 193 of the *Youth Justice Act* 1992 (Qld).** **6. Convictions are not recorded.**

7. The Court order sheet attached to indictment 30/11 is amended by deleting "6 months" and substituting "3 months".

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to entering premises and stealing; entering premises and attempted stealing; burglary, while armed, by breaking, in the night, with violence, in company, with property damage; attempted robbery, while armed, in company; robbery, in company, with personal violence; and fraud – where applicant was sentenced to 18 months detention for each of the burglary, the attempted armed robbery, and the robbery with personal violence; and three months detention for each of the entering premises and stealing, entering premises and attempted stealing, and fraud – where the applicant was therefore required to serve 50 per cent of an 18 month sentence under the *Youth Justice* Act 1992 (Qld), s 227(2) – where no conviction was recorded – where the applicant contended that the learned sentencing judge erred in failing to make a conditional release order pursuant to the *Youth Justice* Act 1992 (Qld), s 220 – where the applicant contended that the learned sentencing judge had given insufficient consideration to other factors including the applicant's co-operation – where the applicant had refrained from the commission of further serious offences for 11 months – where the applicant came from "an horrific background" – whether the sentence was manifestly excessive in the circumstances

Criminal Code 1899 (Qld), s 419
Juvenile Justice Act 1992 (Qld)
Penalties and Sentences Act 1992 (Qld), s 189
Youth Justice Act 1992 (Qld), s 150, s 175, s 176, s 220, s 227(2)

R v F [2001] QCA 2, considered
R v H [2001] QCA 477, considered
R v HBF [1995] QCA 426, considered
R v M [2001] QCA 11, considered
R v Maygar; ex parte Attorney-General (Qld); R v WT; ex parte Attorney-General (Qld) [2007] QCA 310, considered
R v Tuki [2004] QCA 482, cited
R v WAN [2012] QCA 21, considered

COUNSEL: J P Benjamin for the applicant
S P Vasta 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 White JA's reasons for granting the application for leave to appeal against sentence and allowing the appeal. I agree with the orders proposed by White JA.

[2] **WHITE JA:** The applicant pleaded guilty in the Childrens Court at Cairns on 21 October 2011 to a number of offences on three indictments. Sentence was adjourned to allow a pre-sentence report to be obtained. On 13 December 2011 the applicant was sentenced to various periods of detention, the highest being 18 months of which she was to serve 50 per cent pursuant to s 227(2) of the *Youth Justice Act* 1992.

[3] The following table sets out the charges and the sentences imposed:

Indictment No.	Date of Offence	Charge	Sentence
30/2011	21.08.10	• Entering premises and stealing (alcohol) • Entering premises and attempted stealing (alcohol)	3 months detention 3 months detention
56/2011	05.01.11	• Burglary while armed by breaking in the night with violence in company with property damage • Attempted robbery while armed in company	18 months detention 18 months detention
58/2011	11.01.11	• Robbery in company with personal violence • Fraud	18 months detention 3 months detention

All sentences were to be served concurrently. Convictions were not recorded.

[4] The applicant was born in 1994 and was aged between 15 and 16 when the offences were committed and 17 at sentence. She had no previous criminal history. She had one subsequent criminal entry for breaching a condition of her bail on 7 October 2011 (associating with a co-accused who was her de facto partner). She was fined $200 and no conviction recorded.

Grounds of appeal

[5] The applicant contends that the sentence is manifestly excessive. At the hearing of her application for leave to appeal against sentence her counsel, Mr J P Benjamin, was given leave to add further grounds, namely:

- The learned sentencing judge erred in failing to make a conditional release order pursuant to s 220 of the *Youth Justice Act* 1992.
- The learned sentencing judge gave insufficient consideration to the applicant's co-operation with the administration of justice.
- The learned sentencing judge gave insufficient consideration to the fact that the applicant had refrained from the commission of further serious offences for 11 months.

Circumstances of offending

[6] The sentence hearing proceeded on agreed schedules of facts.

(i) Indictment No 30 of 2011

[7] The applicant had been seen around residential licensed premises in Cairns over the course of the afternoon of 21 August 2010. She stole approximately eight bottles of alcohol from the bar area with a value of $308. This was revealed when a member of staff checked CCTV footage. As police were leaving from checking that theft the applicant returned to the premises and police arrested her. She was aggressive and appeared to be intoxicated. Although initially taken to the watch house, due to her level of intoxication, she was transported to her mother's house and left in her care. She was granted bail.

(ii) Indictment No 56 of 2011

[8] The charges on this indictment involved a home invasion. On the evening of 4 January 2011 the applicant was in company with her much older de facto partner (aged 38), her older adult brother and younger sister (aged 15) and another female (aged 17) at a house in Cairns. The brother and the de facto discussed robbing the complainant's house. They told the three females that they were doing this but did not identify whose house. The females agreed to go with them but did not discuss what their roles would be. Prior to leaving, each female armed herself with a knife from a block in the kitchen which were put in the 17 year old female's backpack. The brother armed himself with a knife and a metal broom handle. The de facto armed himself with a metal broom handle. They walked to the complainant's house.

[9] As they approached the de facto told the 17 year old female and the younger sister to keep a lookout while he, the brother and the applicant went into the house. The applicant armed herself with one of the knives from the backpack and she, her de facto and brother walked to the front door of the complainant's house after midnight on 5 January 2011. The occupants of the house - the complainant, her partner, the complainant's two adult daughters and her grandchildren aged between 10 and 12 - were in the house asleep. The complainant was woken by voices and called out, "Who's that?" There was conversation between the complainant and the brother during which he demanded drugs, money and beer. The complainant responded that there was nothing, whereupon the brother became aggressive and demanded to be let in to obtain drugs. Some of the offenders began knocking on the complainant's bedroom window. She called out, "Fucking hell, there are children in bed, leave or I'll call the police"[1]. The brother threatened to break down the door. The complainant went to the front door, drew back a curtain and observed the three standing outside the door. The men had their faces covered with bandanas. The applicant offered encouragement to the men to open the door. After further shouting the brother began kicking at the door, forcing it open, causing property damage. He entered the lounge room holding a knife in one hand and a metal broom handle in the other. The de facto entered carrying a metal broom handle. The applicant entered with a knife.

[10] The brother approached the complainant and began swinging the metal pole at her demanding she give him her money and drugs. He struck the complainant on the hand causing it to bleed. Another occupant stepped in and tried to block this attack and was struck three times with the pole. Those facts constituted count 1 on that indictment.

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1 AR 92.

[11] The applicant went into one of the bedrooms where a male occupant had been hiding. Her de facto and brother followed, demanded money and began assaulting him with the metal poles. They left the bedroom and ran through the lounge back out through the front door. The assaulted man ran after them. As he closed the door the applicant's foot was caught causing her pain. Those facts constituted the second count on the indictment.

[12] The occupants of the house were not able to identify any of the offenders. On 7 January 2011 one of the occupants was able to identify two females, one of whom was the applicant, from a police photo board, as resembling the female who had entered the house. Further information enabled police to locate the offenders on 12 January 2011. All except the brother took part in a police interview.

(iii) Indictment No 58 of 2011

[13] On the morning of 11 January 2011 the complainant, a 71 year old woman, drove to a bank in a shopping centre in Cairns and withdrew $600 at an ATM. She put the money in her handbag which contained a visa card and other identifying material including her passport. As she walked towards her car the applicant demanded, "Give it to me!"[2] The complainant turned and observed the applicant standing about 30 centimetres away. The applicant grabbed the complainant's handbag and pulled at it twice causing the strap to break. The complainant attempted to hold on to her bag but when the strap broke she lost her balance and fell to the bitumen of the car park. She did not sustain any injuries as a result of the fall. The applicant ran off with the handbag to a waiting car being driven by her de facto. Those facts constituted count 1 on that indictment.

[14] The same day the applicant and her de facto used the complainant's Visa card to make six separate purchases amounting to $3,851.91. On each purchase, either the de facto or the applicant signed the merchant receipt purporting to be the complainant. That offending constituted count 2 (fraud) on that indictment. The offences were detected by CCTV footage from each of the stores. The same day police located the offenders and the vehicle. Inside the vehicle some items were located which had been in the complainant's handbag.

[15] After a period on remand the applicant was released on a conditional bail program.

The sentence proceedings

[16] On 13 December the Childrens Court judge sentenced the 17 year old, who was 18 and sentenced as an adult, and the younger sister in the same sentence proceeding as the applicant. His Honour had earlier sentenced the older brother. His Honour had the benefit of a pre-sentence report under the hand of Barbie Sevesi, a caseworker with the Cairns Youth Justice Service, dated 1 December 2011; a letter under the hand of Melissa Bann, youth co-ordinator from the West Cairns Indigenous Youth Empowerment Program (Nintiringanyi Cultural Training Centre Inc), dated 8 December 2011; a letter under the hand of Tula Junna from the Cairns office of Vocational Partnerships Group Inc. dated 12 December 2011[3]; a psychological assessment under the hand of Megan Colahan dated 29 November 2011[4] and a letter to the sentencing judge from the applicant dated 13 December 2011.[5]

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2 AR 102.
3 AR 136.
4 AR 125-33.
5 AR 137-9.

[17] The applicant had spent nine days in a juvenile facility in pre-sentence custody and 16 days in an adult women's prison after she became 17 – 25 days in total before being released on a conditional bail program.

[18] Although the applicant's ethnicity is described as Maori she participated in an Indigenous Youth Empowerment Program. The report from Ms Bann described its work:

> "The West Cairns Indigenous Youth Empowerment Program targets indigenous youth from West Cairns that are 'at risk' of having adverse contact with the criminal justice system. In all of our programs, we utilise the services of positive indigenous youth role models to engage and motivate 'at risk' indigenous youth."

Ms Bann noted that the applicant had been participating in the conditional bail program:

> "In recent months [the applicant's] attendance has improved significantly and she has developed a very positive attitude to the program and a determination to achieve career and personal goals. She has become very co-operative, respectful of authority and is a good role model to the other clients in the group. [The applicant] attended over 72 hours in program time. She also completed a business course with Vocational Training Program and participated in a Customer Contact Course with RediTeach. [The applicant] has also participated in our Aggression Replacement Training program, learning skills in how to control anger."

She continued:

> "[The applicant] is committed to keeping out of trouble. She has stated repeatedly that she does not wish to return to detention.
>
> During the time [the applicant] has been involved in our programs, I found her to be lovely young women [sic] with a friendly personality. She has good manners and a respect for authority. She genuinely wishes to make positive changes in her life.
>
> I have seen the positive impact that our youth mentors have had on [the applicant] during her time in the program. I believe if she continues to participate in our programs, she will achieve great success in her life. We would like to have the opportunity to help her make further positive changes in her life and accomplish her personal and career goals."[6]

[19] The report from Vocational Partnerships Group Inc, utilised by the Cairns Youth Justice Service, noted that the applicant had enrolled and commenced a Certificate I in Business (BSB10107) and that:

> "[The applicant] has demonstrated an eagerness to complete a Full Qualification and has been working on her personal skills within a small training group environment. [The applicant] has completed three modules and has communicated commitment to the [sic] completing the final three to receive full completion of Certificate I Business."[7]

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6 AR 134.

7 AR 136.

The writer noted that the applicant had committed to attending a Senior First Aid Certificate course in mid-January 2012.

[20] The applicant's history, described by the sentencing judge as "an horrific background"[8], is set out in the pre-sentence report and further elaborated in the psychological report of Ms Colahan. The applicant has three older siblings and one younger sibling.[9] Her parents are of Maori descent from New Zealand who moved to Australia about 24 years prior to sentence. Departmental records indicated that the applicant's upbringing was marked by exposure to family violence, corporal punishment, neglect and instability. As a consequence, the children resided with their father's brother and his partner in Brisbane until 2009. The applicant alleged violence and sexual abuse from her paternal uncle from about six to 14 years of age including becoming pregnant when she was 11 and having a termination arranged by her aunt as well as physical beatings. She was, as she related, preparing a police statement regarding the abuse. Her two eldest brothers, 26 and 19 years old, were incarcerated in Lotus Glen Correctional Facility. Her eldest brother has a serious criminal history and has spent long periods in prison. He had stolen food and money in the past to support the family. He had frequently hit the applicant and her sister. The next brother allegedly raped the applicant when she was eight years old. The third brother has a regular job, lives with the mother and helps care for her and has never been to prison. In 2009, the applicant moved to live with extended family in Melbourne but towards the end of that year relocated to Cairns. The children had had limited contact with their parents due to both parents suffering from mental illness and alcoholism. The applicant's father passed away in June 2009 from alcohol related complications. Her mother was diagnosed with bi-polar disorder and engaged in alcohol and marijuana misuse. The applicant resided with her mother and siblings during 2010 but moved due to family violence including by the mother's de facto partner.

[21] The pre-sentence report noted that the applicant had been exposed to violence throughout her upbringing and knew limited strategies to deal with emotions. She had been exposed to her parents, older siblings and extended family members engaging in substance abuse from a young age and, as a consequence, had consumed alcohol and marijuana. Ms Sevesi observed that the conditional bail program had afforded the applicant an opportunity to receive support and assistance which she had not previously experienced. Through this support the applicant obtained accommodation, increased her self-esteem and engaged in pro-social programs and activities.

[22] Ms Sevesi assessed the applicant's exposure to family and domestic violence, alcohol misuse and poor impulse control as possibly contributing to the applicant's offending behaviour. Considerable interview time had been dedicated to victim empathy. The applicant was able to identify that it was

> "…wrong to offend and who the direct victims were. [The applicant] articulated feelings of remorse for her actions, voicing an understanding of the direct impact upon the victims, such as their feelings of safety, [and] cost to replace items or repair damage to property as a result of her offending."[10]

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8 AR 69.

9 It is suggested (at AR 110) that the applicant has four older siblings however the identity of any fourth older sibling is unclear.

10 AR 111.

[23] Before turning to the sentencing options set out in that report it is convenient to refer to the psychological report prepared by Ms Megan Colahan at the request of Ms Sevesi.

[24] There were two interviews. The second, as reported by Ms Colahan, was far from satisfactory. The applicant became uncooperative and hostile. She told Ms Colahan that she had been sexually active from about the age of 14 with numerous partners. She had started a sexual relationship with her de facto partner on her sixteenth birthday. She related a history of marijuana use from the age of 14. She had been introduced to it by an older brother who supplied her. She denied current use and had ceased after her release from remand detention. She had used speed since she was 15, although had not for some months. She was a prolific smoker of tobacco but disavowed a liking for alcohol.

[25] The applicant told Ms Colahan that on the night of the home invasion offences her brother had given her pills which made her feel high. She did not recall very much of what had occurred in the house or that night. She described "impulsively" following an old lady from the ATM and stealing her bag and going on a shopping spree. The applicant told Ms Colahan that she felt "shame" about her involvement in the criminal offences.[11] She told Ms Colahan that she hoped to complete her business studies course and apply for a job in the mining industry. Ms Colahan concluded:

> "Overall [the applicant] presents with significant emotional and social problems. Her presentation during the assessment and her prejudicial history are consistent with her having a significant personality disorder and she is presenting with some symptoms consistent with a psychotic disorder.
>
> With regards to her personality, [the applicant] presents as chaotic and disorganised, she is sensation seeking and impulsive, has a significant history of substance abuse and she tends to associate with individuals who exhibit similar behaviours and also engage in criminal behaviour. [The applicant] has a range of social factors that also place her at high risk. She has very few supportive adults in her life, her accommodation is unstable, she is unemployed and has no employment history and she is in a relationship with a man who has a history of criminal behaviour and substance misuse and is 22 years her senior.
>
> Her suspicious and paranoid behaviour throughout the assessment along with visual and auditory hallucinations are consistent with a possible psychotic disorder. In my opinion [the applicant] is at significantly high risk of developing a serious mental health disorder and she would benefit from further psychiatric assessment.
>
> Given the significant mental health, social and personality risk factors, [the applicant] is very vulnerable and is at risk of re-offending and engaging in other criminal activities. She displays limited remorse or responsibility for her actions. She is reluctant to engage in therapy or counselling and her behaviour during this assessment indicates that she would find it very difficult to engage in therapy."[12]

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11 AR 130.

12 AR 132-133.

[26] Ms Sevesi set out for the sentencing court the available sentencing options under the *Youth Justice Act*. These were Youth Justice Conferencing, a probation order, a community service order, combined probation and community service orders, a conditional release order and, finally, a detention order or a combined detention and probation order. It is unnecessary to say anything about the Youth Justice Conferencing option because of the seriousness of the offending. A probation order would address substance use, counselling, victim empathy, changing habits and reaching targets and giving the applicant personal support to engage in educational and cultural activities. A community service order would not offer the same level of personal support nor the therapeutic focus of a probation order. A conditional release order is a detention order but suspended on appropriate conditions. Ms Sevesi described the conditional release order as providing:

> "… an intensive program of supervision and case management. The activities proposed for the program are structured, skills orientated and therapeutic based within a community setting.
>
> A Conditional Release Order comprises three essential components that are listed below:
>
> 1. Educational, vocational and work requirements allowing [the applicant] to make reparation to the community and to continue to engage in structured educational activities
>
> 2. Re-integrative – focussing on identifying positive activities for [the applicant] within the community
>
> 3. Therapeutic interventions to address [the applicant's] offending behaviour."[13]

A proposed program was attached.

[27] When discussing a detention order Ms Sevesi mentioned that the applicant had already spent nine days in juvenile custody and 16 days remanded in adult custody in relation to these offences. She respectfully suggested that the sentencing court may wish to take a number of factors into account if considering a period of detention:

> "● [The applicant] is a 17 year old female and serving a period of detention may distance her from community connections
>
> ● [The applicant] does not have a supervised order history in Queensland
>
> ● [The applicant] has articulated a willingness to participate in community based programs
>
> ● Sentencing options canvassed in this report would hold [the applicant] accountable for her actions and encourage her to take responsibility for her offending behaviour, whilst still engaging her in appropriate interventions within the community
>
> ● The principles of the Act outline that detention is to be considered as a last resort."[14]

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13 AR 114.

14 AR 115.

If a detention order were considered the only suitable sentencing option, detention centre staff would work with the applicant to implement a full-time program of educational, therapeutic and recreational activities.

[28] Finally, the pre-sentence report referred to the option of a combined detention and probation order, that is, the option of combining a detention order for a maximum of six months and a probation order for a maximum of one year. The writer again emphasised that the applicant had already spent 25 days remanded in custody and a combined detention and probation order would provide clear punishment as well as ensuring appropriate supervision and therapeutic support on release.

[29] In her letter to the court the applicant described her background and her long history of sexual abuse at the hands of her relatives. She expressed her desire to make something of her life and admitted that she had caused grief and heartache to a lot of people whilst in bad company and under the influence of drugs and alcohol. She truly regretted and was sorry for the pain she had caused. She sought a future in which she might help other young girls in a similar situation.[15] However, the sentencing judge observed that the applicant was self-interested and had no insight into the effect of her behaviour on others. He noted that at an early age she had become involved with "a criminal and a thug", 22 years older, who was the prime offender in the two serious offences. Although his Honour noted the applicant's co-operation with police in admitting the offences, particularly the home invasion, he described it as "up and down."[16] His Honour did acknowledge that the applicant had gained some benefit from attending the Nintiringanyi Cultural Training Centre. His Honour, however, made an adverse comment about the applicant's breach of her bail conditions as not making an effort.[17] He described the applicant as being "quite flippant at times" in her dealings with Ms Colahan in as much as she was not fully co-operative. He made reference to the passage in Ms Colahan's report set out above at [24]. His Honour observed that the applicant continued to be at high risk adding:

> "… although I accept that you have at least kept out of any criminal trouble whilst you have had these matters hanging over your head."[18]

[30] The older brother was sentenced to five years imprisonment for his part in the home invasion. The younger sister had a conditional release order imposed. The maximum penalty for the burglary offence for an adult is life imprisonment[19]; under the *Youth Justice Act* it is 10 years[20]; and for entering premises and fraud under the *Youth Justice Act* the maximum penalty is five years.[21]

Submissions on application

[31] The applicant contends that there are two errors in the way in which the sentencing judge approached his task. The first is that his Honour had too high a starting point in mind after determining that the offending was so serious that detention was required. His Honour observed that he would have imposed a higher penalty had it

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15 AR 137-139.
16 AR 69.
17 AR 70.
18 AR 71.
19 *Criminal Code*, s 419.
20 s 176.
21 s 175.

not been for the applicant's "unfortunate background"; he took into account her pleas of guilty and her progress under the training program whilst she was on bail and imposed detention for 18 months. The contention is that the starting point ought to have been 18 months with significant allowances given for the applicant's background; and that she was without any criminal history prior to the theft of the alcohol in August 2010 and the escalating criminal conduct in January 2011. Further, the sentencing judge ought to have had regard to the strong influence of her much older partner and older brother, both of whom had significant criminal histories.

[32] The second asserted error was the failure by the sentencing judge to explain why he did not impose an order for detention with release immediately on a conditional release order.

[33] In *R v M*[22], which had been referred to below, the offender pleaded guilty to one count of burglary with actual violence in company, one count of serious assault and one count of stealing and on a second indictment pleaded guilty to a further 11 counts of breaking and entering premises and stealing, one count of receiving, seven counts of entering premises with intent, one count of unlawful damage and one count of stealing. An additional 14 counts of break and enter premises and steal and three counts of entering premises with intent and one count of stealing were taken into account on a schedule pursuant to s 189 of the *Penalties and Sentences Act* 1992. The offender was a 15 year old indigenous juvenile with an extensive criminal history for driving under the influence, arson and breaking and entering offences. Over a seven month period he had committed 39 offences of breaking, entering and stealing. The total value of the property stolen or damaged was just under $10,000; none was recovered. Some offences were detected because of the location of the offender's finger prints but most were from his admissions to police.

[34] Towards the end of this offending cycle, the offender with two hooded co-offenders broke into an 81 year old woman's home. She was weak and tired from a stomach infection and was home alone watching television when she heard a noise at her front door. When she opened her door one of the offenders grabbed her in a bear hug and pushed her against the table, another offender took her handbag and a third held the door open. The offender was located with a co-offender near an ATM in possession of some property from the complainant's bag. He did not participate in a record of interview but pleaded guilty at an early stage. The elderly complainant was not physically injured but became very fearful. By the time he came to be sentenced that offender had become the father of a child and was said to have expressed remorse and to be showing signs of maturing. He was said to be largely co-operative with the authorities. He was sentenced to three years detention to serve 70 per cent.

[35] The President, with whom Williams JA and Mackenzie J agreed, observed that the offender's involvement in the serious offences and his prior history permitted the conclusion that a sentence of detention was the only available sentencing option. However, it was not for the shortest appropriate period as mandated and was thus manifestly excessive. The offender had spent two and a half months in custody. The applicant's age, early pleas of guilty and rehabilitative prospects were mitigating factors; the objects and principles of the *Juvenile Justice Act* 1992 could

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22 [2001] QCA 11.

be best served by releasing him on an immediate release order and requiring him to serve a substantial period of probation and to perform community service. An aggravating feature was that after the offender had committed the offences upon the elderly complainant he committed three further property offences whilst on bail. However, he had not had the benefit of probation or supervision in the past. That offender was re-sentenced to 12 months detention to be served by way of an immediate release order on the burglary with violence in company count. On all remaining counts he was placed on probation for two years and ordered to perform 200 hours community service. No convictions were recorded.

[36] The offender in *M*, whilst younger than the present applicant, was a person known to police with a significant criminal history. It was not apparent from the sentencing remarks whether his prospects of rehabilitation were stronger than for this applicant but, at the very least, they were comparable. This applicant made admissions which implicated her in the very serious home invasion which might not otherwise have led to a successful prosecution. A further difference was the influence of this applicant's de facto partner and drug taking.

[37] Mr Benjamin also referred to *R v H.*[23] That offender was a 15 year old girl who pleaded guilty to robbery in company with violence committed when she was 14. With a number of young people she set upon a man affected by alcohol, sleeping on the ground. The offender stole a necklace from him and kicked him in the face. He was threatened with serious injury should he not give the number of his credit card. The offender had a very significant criminal history which commenced when she was about 12 and a half years. Over that period she had been subjected to numerous intervention type orders including probation and detention orders with immediate release in respect of which the relevant department had worked intensively with her. She had significant substance abuse. She had no expressed respect for the judicial system or the part that the administration of criminal justice played in keeping a community safe. She liked to impress her friends with the nature of her offending behaviour and had no proposal for rehabilitation. She was sentenced to two years detention to serve 70 per cent. Ambrose J, with whom the President and McPherson JA agreed, concluded that it was for the benefit of the child to have a significant period of time

> "off the streets under supervision and control, where she will stand a chance with counselling and steps being taken to motivate her to achieve rehabilitation".[24]

Clearly that offender was in a quite different category to the present applicant. She had had many previous orders to assist her in rehabilitation and had shown no inclination to take advantage of them and had a very lengthy prior criminal history.

[38] The offender in *R v F*[25] was sentenced to 15 months detention after pleas of guilty to a number of offences, the most serious of which was robbery in company with personal violence. This involved an altercation between two groups in a street at the Gold Coast. The complainant's wallet containing some money was taken after she had been punched in the face by the offender. The other offences involved unlawful use of a motor vehicle, stealing, obstructing police and other street type offences. She made admissions to police. The offender was aged 15 at sentence, 14

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23 [2001] QCA 477.

24 At p 9.

25 [2001] QCA 2.

when offending. It is not apparent in the brief sentencing remarks of McPherson JA whether this offender had a previous criminal history. The sentence was not disturbed.

[39] In *R v HBF*[26] the offender pleaded guilty on ex officio indictment to a number of counts associated with a home invasion, the most serious of which was armed robbery in company with personal violence. He was sentenced to three years detention for the armed robbery. He was aged between 15 and 16 when the offences were committed. He was in the company of a number of others, one of whom was significantly older, the others closer to him in age. They broke into a house occupied by a 21 year old woman. One of the offenders had a rifle which was loaded and pointed at the complainant's head. Property was stolen and damage was done. It appears that the offenders erroneously thought someone else lived in that house. They stole the complainant's car which the offender, the subject of the application for leave to appeal, drove away. He had what was described as "a most unenviable criminal record" involving numerous offences of unlawful use of a motor vehicle, breaking and entering, stealing and arson. He had already been given detention for earlier offences. There was nothing in his background to suggest any mitigating circumstances. He had a normal childhood and had no medical or psychiatric conditions. Negative peer group influence was not predominant as he had committed a number of offences alone. That sentence was not altered on appeal.

[40] Judgment was handed down in *R v WAN*[27] on 24 February 2012 after this application was heard. There is no particular point of principle raised in the judgment which requires further submissions from counsel but it may be observed that that offender, who was sentenced under the *Youth Justice Act*, pleaded guilty to the commission of a number of offences on three indictments. The first contained two counts of robbery in company with personal violence, the second, one count of grievous bodily harm committed about three months later and the third indictment contained a count of threatening violence at night, burglary and wilful damage and stealing some four months after the second indictment offending. For the first offending conduct the offender was in a group of young males and females attempting to provoke a couple at Southbank Parklands at night into a fight. The offender kicked and punched the male complainant. The female offenders attacked the female complainant and stole her handbag. The offender admitted kicking the male complainant hard in the head before and after he was dragged to the ground. He was sentenced to two years detention in respect of the first robbery with violence.

[41] The second offending conduct was an attack on a complainant who had been at school with the offender and his co-offenders. The group attacked and punched him with the offender, kicking him in the ribs. That complainant's front teeth were broken and he suffered other injuries. The offender was sentenced to 18 months detention for the grievous bodily harm. The third offending conduct arose as part of a group involved in a home invasion in which the offenders ransacked the complainant's home, leaving behind broken windows, television sets, doors and having stolen a significant amount of property. He was sentenced to three years detention for the burglary and wilful damage.

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26 [1995] QCA 426.

27 [2012] QCA 21.

[42] That offender had no previous contact with the relevant department, had significant family support and stable accommodation. He had been participating on a conditional bail program but because of his non-compliance this ceased. He was regarded as a suitable candidate for a conditional release program. The offender was almost 15 when he participated in the last of the offending. He had an alcohol problem and until he began associating with his co-offenders had been a good student. There were issues of parity with co-offenders which is not present here. The President, with whom Fraser JA and I agreed, concluded that a global sentence of two years detention with release after 50 per cent, coupled with a lengthy probation order was appropriate to reflect all the offending.

[43] A review of those sentences would suggest that, serious though the present offences were, to describe the starting point as potentially much higher than 18 months but for the unfortunate circumstances of the applicant's background was misconceived. The acts of personal violence were greater in *M, H, HBF* and *WAN*. Eighteen months was the appropriate starting point.

[44] The maximum penalty for the most serious of the offences, the burglary offence, which for an adult would attract a maximum penalty of life imprisonment, attracts 10 years under the *Youth Justice Act*. Mr S Vasta, for the respondent, submitted that the brother was sentenced as an adult to five years imprisonment which, on a parity basis, justified the 18 months imposed upon the applicant. He was described as having a bad criminal history, was older, and had committed the offence whilst on parole. In response Mr Benjamin referred to *R v Maygar; ex parte Attorney-General (Qld); R v WT; ex parte Attorney-General (Qld)*[28] on the issue of proportionality where some offenders are dealt with as adults and others as juveniles. It had been argued in that case that one of the offenders, having been sentenced as an adult, might have a justifiable sense of grievance that his period of mandatory custody should exceed his co-offender, who was a juvenile, by many years. Keane JA, with whom Williams JA and Mullins J agreed, commented that the different periods of imprisonment were simply the consequence of the application of different sentencing regimes - one falling to be sentenced under the law relating to adults and the other to laws relating to children. His Honour noted:

> "In the sentencing of child offenders, the considerations of leniency and child protection which inform the regime established by the *Juvenile Justice Act* must be observed by a sentencing judge. It may be thought that the drawing of a line in this regard between [the adult] and [the juvenile] by reason of the small difference in their ages is arbitrary; but a line has to be drawn somewhere for these purposes. More importantly, the drawing of this line is not a matter of judicial discretion: the line has been drawn by the legislature whose function it is to determine when a person should be dealt with as an adult by the criminal justice system."[29]

Those observations apply equally to the regime for juvenile sentencing established under the *Youth Justice Act*.

[45] There can be no minimising the seriousness with which the collection of offences involved in the home invasion must be regarded. Taking a knife into the house could have led to a very bad outcome. Following these offences the attack on the

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28 [2007] QCA 310.

29 At [57]. See also *R v Tuki* [2004] QCA 482 per Mackenzie J, with whom Jerrard JA agreed at [7].

woman to steal her handbag and money was correctly described by the sentencing judge as the action of "a thug, a bully ...." In both offences the applicant was plainly under the influence of her much older de facto partner, a man with a significant criminal history. Her older brother was also a participant in the home invasion. His Honour makes no or little reference to the influence which the de facto must have played in the applicant participating in these offences. Notwithstanding her very disadvantaged background, the applicant had not offended previously and was not, apparently, known to the authorities. Of great significance as indicating prospects for rehabilitation, the applicant had remained offence free for the 11 months that she was on the conditional bail order. His Honour makes little of this quite impressive effort. The positive response the applicant had made to the programs offered to her were evidenced in the reports from Ms Bann and Ms Junno. His Honour appears to have been influenced, perhaps unduly, by the negative flavour of Ms Colahan's psychological report, without appreciating the fact of co-operation in the conditional bail program and the lack of offending which countered her less than favourable predictions. The applicant had already spent 25 days in detention when she came to be sentenced.

[46] While his Honour referred to s 150 of the *Youth Justice Act* which contains the sentencing principles to be applied when sentencing a juvenile, and made particular mention of s 150(2)(e): "… a detention order should be imposed only as a last resort and for the shortest appropriate period"[30], his Honour did not give the above matters in mitigation appropriate weight resulting in a sentence which was manifestly excessive.

[47] The second ground of appeal that his Honour's sentencing discretion miscarried because he failed to explain or explain adequately why he did not impose a conditional release order cannot be sustained. It is apparent that his Honour considered the home invasion robbery and the ATM offences as so grave that nothing other than a lengthy period of actual detention should be imposed. His Honour did not accept thereby that a conditional release order was the most appropriate penalty.

[48] The applicant, through her counsel, has agreed to accept the conditions of any probation. In light of her very difficult family situation a probation order combined with a conditional release order is appropriate.

[49] It is noted that the Court order sheet attached to indictment 30 of 2011 incorrectly describes the sentence imposed as six months detention on each count.[31] His Honour imposed a sentence of three months detention on each count on that indictment.[32]

[50] The orders which I would propose are:

1. Grant the application for leave to appeal.
2. Allow the appeal.
3. Set aside the orders imposed below and instead order the following.
4. Upon the applicant's willingness to comply with this order being communicated to the Deputy Registrar (Appeals) by her lawyer, on each count on Indictment No 56 of 2011 and on count 1 on Indictment No 58 of

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30 Reflected in Charter of Youth Justice Principles no 17.

31 AR 5.

32 AR 72.

2011, the applicant be sentenced to 12 months detention with an order that the sentence of detention be suspended immediately and the applicant be released from detention immediately subject to a conditional release order in the terms set out in s 221 of the *Youth Justice Act* 1992 (Qld).

5. On each remaining count the applicant be placed on probation for a period of two years subject to the requirements of s 193 of the *Youth Justice Act* 1992 (Qld).
6. Convictions are not recorded.
7. The Court order sheet attached to indictment 30/11 is amended by deleting "6 months" and substituting "3 months".

[51] **ATKINSON J:** I agree with the orders proposed by White JA for the reasons given by her Honour.