SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBG* [2012] QCA 83
PARTIES:	**R** **v** **HBG** (applicant)
FILE NO/S:	CA No 210 of 2011 DC No 8 of 2011 DC No 11 of 2011 DC No 129 of 2011 DC No 180 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	5 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	29 February 2012
JUDGES:	Margaret McMurdo P and Margaret Wilson AJA and Daubney 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 to the extent of:** **(a) setting aside the orders made in Indictment No 129 of 2011 and instead order that a conviction be recorded and that the applicant be sentenced to imprisonment for four and a half months suspended forthwith with an operational period of two years;** **(b) setting aside the sentence imposed on Indictment No 180 of 2011 and instead order that a conviction be recorded and that the applicant be sentenced to imprisonment for nine months suspended forthwith with an operational period of two years;** **3. The sentence imposed at first instance is otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY

EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to offences committed over a nine month period – where offences committed before his 17th birthday were dealt with under the *Youth Justice Act* 1992 (Qld) and those offences committed after under the *Penalties and Sentences Act* 1992 (Qld) – whether the combined effect of the sentences under the *Youth Justice Act* 1992 (Qld) and the *Penalties and Sentences Act* 1992 (Qld) was manifestly excessive – whether time serviced in youth detention was adequately taken into account – whether conviction should have been recorded under *Penalties and Sentences Act* 1992 (Qld), s 143

Penalties and Sentences Act 1992 (Qld), s 143, s 147, s 148
Youth Justice Act 1992 (Qld), s 218, s 276C, Sch 1

R v DAZ [2012] QCA 31, discussed
R v HBF [1995] QCA 426, discussed
R v M [2001] QCA 11, discussed

COUNSEL: S J Hamlyn-Harris for the applicant (pro bono)
S P Vasta for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** This case raises some of the difficulties which can arise when a young offender is sentenced for some offences under the *Youth Justice Act* 1992 (Qld) and for other offences under the *Penalties and Sentences Act* 1992 (Qld). The applicant's offending was committed over a nine month period between June 2010 and April 2011. He turned 17 in December 2010 so that the offences committed before that date must be dealt with under the *Youth Justice Act* and those committed after had to be dealt with under the *Penalties and Sentences Act*.[1]

[2] The offences were contained in four indictments, three of which were *ex officio*. Indictment No 8 of 2011 charged one count of burglary by breaking, in the night, with violence, while armed, in company, with property damage (count 1); and one count of armed robbery in company (count 2). Both offences occurred on 3 July 2010. *Ex officio* Indictment No 11 of 2011 contained one count of break and enter premises and steal on 9 June 2010 (count 1); and one count of wilful damage on 7 July 2010 (count 2). The applicant was a youth when he committed these four offences. *Ex officio* Indictment No 129 of 2011 charged one count of entering premises with intent to commit an indictable offence on 4 March 2011. Indictment No 180 of 2011 contained one count of serious assault on 14 April 2011. The applicant was 17 when he committed these offences and, for the purposes of the criminal law in Queensland, an adult. He was also sentenced for two summary offences, assaulting a police officer and obstructing a police officer, both committed on 7 July 2010 whilst he was a youth.

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1 Queensland is unique in Australia in not dealing with 17 year old offenders under the youth justice system: see *R v Loveridge* [2011] QCA 32, [5]-[7].

[3] He pleaded guilty to the charges in Indictment No 11 of 2011 on 6 April 2011; to those in Indictments Nos 8 and 129 of 2011 on 3 May 2011; and to Indictment No 180 of 2011 and the summary offences on 20 June 2011. He was sentenced that day under the *Youth Justice Act* on each count in Indictment No 8 of 2011 to two and a half years detention with release after serving 50 per cent and with convictions recorded. One hundred and forty-one days of pre-sentence detention was ordered to be detention already served. In respect of Indictment No 11 of 2011 he was sentenced under the *Youth Justice Act* on count one to 12 months detention, and on count two to six months detention with no convictions recorded. On the sole count in Indictment No 129 of 2011 he was sentenced under the *Penalties and Sentences Act* to nine months imprisonment wholly suspended for three years without conviction. On Indictment No 180, he was sentenced under the *Penalties and Sentences Act* to 18 months imprisonment wholly suspended for three years with a conviction recorded. Pre-sentence detention of 141 days was ordered to be counted as detention already served. On the summary offences, the judge found the applicant guilty but did not further punish him.

[4] He has applied for leave to appeal against the sentences imposed on the indictable offences on the ground that they are manifestly excessive.

The applicant's criminal history

[5] The applicant's criminal history, which was all committed and imposed whilst a youth, was before the sentencing judge even though he was being sentenced for some offences as an adult. This arguably contravened s 148 *Youth Justice Act*, but as the judge was sitting as both the Childrens Court and the District Court, this was unavoidable. Indeed, under s 148(3), his Honour could take into account the sentences to which the applicant was subject under the *Youth Justice Act* to mitigate the sentence to be imposed on him as an adult.

[6] His criminal history commenced in the Maroochydore Children's Court on 31 May 2005 when he was 11 years old with a reprimand for stealing. The following year he was placed on a three month good behaviour bond without conviction for common assault and trespass. In April 2007 when he was 13, he was ordered to do 30 hours community service without conviction for entering premises with intent. In November 2007 whilst still 13, he was placed on six months probation without conviction for receiving stolen property. On 13 March 2008 aged 14, he was placed on 18 months probation without conviction for two counts of burglary; entering a dwelling with intent by break; stealing; and unlawful use of a motor vehicle with circumstances of aggravation. On 26 August 2008 still aged 14, he was placed on 12 months probation without conviction for three counts of trespass; wilful disturbance; obstructing a police officer; and assault occasioning bodily harm. Sixty-one days spent in pre-sentence detention was deemed as time already served under that sentence.

[7] On 17 March 2009 aged 15, he was placed on a 12 month good behaviour bond without conviction for wilful damage. On 25 May 2009 still aged 15, he appeared for the first time before the Childrens Court judge (the primary judge in this appeal) and was sentenced to a total of 200 hours community service both for stealing (committed when he was 14) and when resentenced for breaching the probation order imposed on 13 March 2008, all without convictions. On 30 June 2009 still aged 15, he was found guilty but not further punished for regulatory offences and placed on nine months probation without conviction for a traffic offence. On

18 August 2009 still aged 15, he was reprimanded without conviction for unlawful possession of weapons. On 15 December 2009 just after his 16th birthday, he was placed on six months probation without conviction for a wilful damage offence committed when he was 15. On 9 February 2010 aged 16, he was placed on a 12 month good behaviour bond for entering a dwelling with intent at night and unlawful use of a motor vehicle.

[8] On 7 April 2010 aged 16, he appeared before Judge O'Brien in the Childrens Court. His Honour sentenced him without conviction to 12 months detention with release after 70 per cent; 248 days of pre-sentence detention was deemed time already served for entering premises and committing an indictable offence; entering premises and committing indictable offence by break; two counts of unlawful use of motor vehicles; stealing; arson of a motor vehicle; breach of probation imposed on 26 August 2008; and breach of the probation imposed on 25 May 2009. Judge O'Brien noted that he was taking no further action in respect of the breaches of probation and those orders would continue in place after the applicant's release from detention. His Honour warned that he was giving the applicant one last chance to not have a conviction recorded but that was likely to change if he came back before the courts again.

[9] On 9 April 2010 still aged 16, the applicant was sentenced to a six month good behaviour bond without conviction for obstructing a police officer; consuming liquor as a minor and entering premises and committing an indictable offence, but these offences predated Judge O'Brien's orders.

[10] In accordance with Judge O'Brien's order, the applicant was released from detention under supervision on 13 April 2010, about two months before he committed the first of the present offences.

The facts of the present offending

[11] I will set out chronologically the details of the applicant's offending, contained in four agreed schedules of facts.[2]

Indictment No 11 of 2011

[12] Count 1 on Indictment No 11 of 2011 occurred in this way. On 9 June 2010, at about 7.44 pm, he and two co-offenders were at the Sunshine Plaza Shopping Centre at Maroochydore. They entered the Dreamy Donuts store through a side metal swing door. The applicant opened a drinks refrigerator and each of the three offenders stole two bottles of soft drink with a total value of $19.80. About eight minutes later, they were spotted by security officers, threw five bottles into bushes and ran back into the shopping centre. The next day police viewed CCTV footage and recognised the offenders. They located the applicant who agreed to accompany them to the police station. He admitted committing the offence. By way of explanation he said he was in love with his female co-offender. He refused to participate in an interview. He was issued with a notice to appear on 15 June 2010 (count 1). His female co-offender was also 16 and pleaded guilty in the Maroochydore Childrens Court on 14 September 2010. The other youth was not charged.

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2 Ex 5.

[13] The second count occurred at about 2.20 pm on Wednesday, 7 July 2010, when the applicant was in the dock in the Maroochydore Childrens Court in respect of the matters in Indictment No 8 of 2011. The magistrate was addressing him when the applicant yelled, "Fuck you all, you're sending me back." He walked past a police officer and struck the court wall with his right elbow causing a surface crack. The magistrate called him back into the dock and said, "Look what you've done." He replied, "I don't care, they're sending me back."

The summary offences

[14] When a police officer handcuffed him immediately following this incident, the applicant stood up and threatened the officer, making a fist with his right hand and saying, "Fuck you." He then raised his right fist and tried to strike the officer. Additional police were called to assist. They asked the applicant to leave the dock. He refused and had to be handcuffed and forcibly removed. He resisted violently for an extended period. He was placed in a padded cell where he continued to strike the cell walls.

[15] He refused to participate in a police interview and was issued with a notice to appear.

Indictment No 8 of 2011

[16] At about 11.30 pm on 3 July 2010, the 15 year old complainant, a 12 year old female friend and a 13 year old male friend were home alone at the complainant's house. The male friend answered a knock on the door and saw the applicant and his co-offender, C-G, each wearing a balaclava and carrying a knife. The applicant's knife had a black handle and a 14 cm blade. The male friend thought it was a joke and told the complainant. The complainant went to the front door and realised that it was no joke. The applicant and C-G tried to force their way into the house by kicking and smashing the front door. The complainant retreated and told his friends to lock themselves in his bedroom. The complainant tried to leave by another door to get help. The applicant and C-G entered the house by removing the flyscreen from a sliding glass window and climbing through it (count 1).

[17] C-G cornered the complainant on the back veranda and brought him back inside. The applicant forced his way into the complainant's bedroom and put his knife against the male friend's neck telling him to move away from the door. The male friend sat on the floor and the female friend said, "Please don't hurt us." The applicant asked them where the complainant was. They pretended he was not home. The applicant left the bedroom and returned with the complainant and C-G. The offenders ransacked the bedrooms. They then took the three young people to the lounge room. The applicant and C-G made themselves a sandwich and drank lemonade. The applicant said, "If you call the cops, we're going to kill all three of youse." The applicant and C-G fled, taking with them a laptop computer, an iPod, an iPhone, a mobile phone and two digital cameras (count 2).

[18] Police executed a search warrant at a Nambour premises where they found the applicant, one of the digital cameras and a mobile phone stolen from the complainant's home. The applicant accompanied police to the police station where he participated in an interview. He admitted committing the offences. He said the complainant owed C-G money and the applicant offered to help him collect it. They smoked marijuana beforehand and discussed whether they would physically

hurt the complainant or just scare him. They traded one digital camera, the laptop and the iPhone for marijuana and gave the iPod to a friend. C-G also made full admissions. Both the applicant and C-G were arrested, charged and released on bail.

Indictment No 129 of 2011

[19] On 3 March 2011, the applicant, who was 17 years and three months, was at his grandparents' home in Hervey Bay. Between 8.00 and 10.00 pm he drank a 10 pack of cans of premixed bourbon. He left to buy $10 worth of marijuana, returned home and smoked it. At about midnight, he went for a walk and met up with a male friend. As they passed the complainant's business, the applicant saw a radio-controlled toy car that he liked. He went to the back of the premises and turned off switches and ripped out cords in the electrical power box. He returned to the front and threw a rock through the glass window, repeating his actions until the glass shattered. He wrapped his shirt around his foot and kicked the glass from the frame, cutting his foot. He and his co-offender entered the premises, set off a security alarm and immediately ran away. Police responded, spoke with a security guard and conducted patrols of the area. They found the applicant hiding in a car park nearby. They arrested him and took him to the Hervey Bay police station. He participated in an interview, admitted his involvement but falsely implicated another person. Police conducted several searches of that person's residence before exonerating him. The applicant was charged and placed on bail.

Indictment No 180 of 2011

[20] At about 7.20 pm on 14 April 2011, the complainant, a 41 year old youth worker at the Brisbane Youth Detention Centre, was at work when he noticed a fight between two youths. Another youth worker was breaking up the fight while the complainant supervised the area. A youth picked up a pen from the floor and the complainant spoke to him about it. The applicant, who was then 17 years and four months, asked the complainant what he was doing. The applicant became quite agitated and ran around the room yelling and swearing. The complainant used his hand held radio to request additional assistance. The applicant shaped up saying, "Do you want a go?" The complainant responded, "You have had a good day, settle down, it's over, it's finished." The applicant lowered his fists and backed away. As the threat appeared over, the complainant turned back towards the original incident. The other youth worker saw the applicant run up behind the complainant and punch him to the head with his right fist. The punch connected to the right side of the complainant's face causing him to collapse to the ground unconscious. The other youth worker attempted to tackle the applicant who resisted and broke free. The worker finally managed to wrap his arms around the applicant and hold him on the ground. The worker saw the complainant's eyes had rolled back in his head and his body was shaking. Assistance arrived and the complainant received first aid. The applicant was restrained with handcuffs and taken to a secure unit within the detention centre. The complainant was taken to hospital and admitted overnight. He suffered a severe headache, pain to his jaw and eye socket, and bruising to his face. The applicant declined to be interviewed about this offence. He was issued with a notice to appear.

The pre-sentence reports

[21] Two pre-sentence reports were prepared by the same author under the *Youth Justice Act*. The first was dated 28 April 2011 and concerned the offences in Indictment No

11 of 2011. The second was dated 14 June 2011 and concerned the offences in Indictment No 8 of 2011.

[22] They noted the following. The applicant's biological parents have no meaningful contact with him and he is currently on a long term guardianship order with Department of Communities – Child Safety Services. The offending occurred in breach of community based orders. On 21 September 2010 after an appearance in the Childrens Court, he was granted bail with participation in the conditional bail program which required him to reside at the Teen Challenge Residential Rehabilitation Centre in Toowoomba. He complied until 26 November 2010 when he was excluded because of his behaviour. His bail was then varied to allow him to reside with his grandparents in Hervey Bay until he could return to Teen Challenge in Toowoomba. On 13 December 2010, he returned to Teen Challenge but was again excluded on 18 January 2011 because of behavioural issues. He returned to his grandparents where he resided until his arrest on 5 April 2011 for breaching his conditional bail program. On 6 April 2011 he pleaded guilty to the offences in Indictment No 11 of 2011. He was remanded in youth detention. By the time of his sentence in June, he had spent 141 days in pre-sentence custody.

[23] The following factors have contributed to his offending: dysfunctional family background; impulsivity and behaviour regulation; disengagement from structured activities; and substance misuse. As a young child he witnessed extreme domestic violence and illicit substance abuse by his parents and his mother's partners. His mother was diagnosed with drug induced schizophrenia. The author quoted a psychological report relating to the applicant: "[a] home environment where care is unresponsive, unpredictable, frightening and neglectful (heroin use and domestic violence) is clearly related in research as predictive of later personal and social dysfunction."

[24] The applicant was primarily in the care of his mother until his maternal grandmother was granted long term guardianship in 2004. His grandmother and step-grandfather have remained supportive but because of his behavioural difficulties they relinquished guardianship to the Department in 2010. He was then placed at the Integrated Family and Youth Services 24/7 Supported Accommodation House in Bli Bli which was his primary residence at the time he committed the offences in Indictment No 11 of 2011.

[25] He has had difficulties engaging in mainstream education and this is aligned with his anti-social behaviour. His offending reduced in periods when he was involved in structured activities such as the alternative schooling program. He began using alcohol at the age of 12 and other substances at the age of 13. This escalated in 2009 because of negative peer networks to misusing alcohol, marijuana, buprenorphine, methamphetamine and heroin. He was engaging in poly-substance abuse with his peers before committing count 1 in Indictment No 11 of 2011. When he committed count 2 in that indictment he was withdrawing from substances after being arrested and held in the watch house overnight.

[26] The applicant recognised that his behaviour was inappropriate and accepted responsibility for his actions but was relatively unmotivated to address his offending. He expressed his frustration at himself for not making better decisions but did not feel he could control his behaviour while under the influence of substances or in the presence of peers. He identified his time at Teen Challenge as

a positive learning experience but showed limited motivation to address his offending behaviour. He returned to his old ways. He has refused further interventions offered by the Department such as substance misuse counselling and psychological intervention. Although he recognised the impact of his offending on his victims, his primary focus remained upon its impact on him. His detention in custody had a significant impact on him as he was removed from his family and community. He is closely attached to his grandparents and he is concerned he has jeopardised his relationship with his grandmother.

[27] The report of 14 June 2011 noted that he decided to commit the offences in Indictment No 8 of 2011 after discovering one of the victims owed his co-offender money. He decided to act as debt collector as he was bigger than his friend and had an anti-social reputation that caused others to fear him. He clearly enjoyed his leadership status amongst his peers as a "tough guy". He experienced power and pride when discussing his offences and enjoyed his resulting notoriety. He had limited insight into his offending and had a lack of regard for the consequences, both for him and his victims.

[28] Both reports canvassed the various sentencing options under the *Youth Justice Act*, noting that he was willing to comply with community based orders. If sentenced to a period of detention, he would be expected to engage in educational programs, drug and alcohol counselling, employment related programs and recreational pursuits to further his opportunity for community integration upon release. He would be linked to a caseworker and given the opportunity to engage in therapeutic programs. On release, he would be subject to a supervised release order and would be supported in his re-integration.

The prosecutor's submissions at sentence

[29] The prosecutor made the following submissions at sentence. The most serious offence was the armed robbery in company which carried a maximum penalty of 10 years detention. The maximum penalty for the breaking and entering premises and stealing was five years detention; the wilful damage, two and a half years; the burglary by break in night with violence while armed in company with property damage, 10 years; entering premises with intent to commit an indictable offence, five years; and serious assault, seven years. In relation to the summary charges, the maximum penalty was three months detention.

[30] The applicant indicated an early plea of guilty to the armed robbery in company charge which occurred in the context of a home invasion. While none of the victims aged between 12 and 15 was physically injured, the applicant threatened to kill them all if they called the police. The offence involved some planning and preparation; was protracted; and involved the use of threats and a weapon against vulnerable complainants. Detention was the only appropriate penalty. Relying on *R v HBF*,[3] the prosecutor urged the judge to impose a sentence of three years detention to serve 50 per cent. Whilst acknowledging the applicant's unfortunate background, the prosecutor emphasised the applicant's repeated warnings and his behaviour whilst in custody, particularly the serious assault upon the youth worker. The prosecutor fairly conceded the applicant's prospects of rehabilitation whilst in custody were likely to be greater in youth detention than in an adult prison. With respect to the offences to be punished under the *Penalties and Sentences Act*, the prosecutor

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3 [1995] QCA 426.

submitted that orders of suspended imprisonment would be appropriate without further particulars.

Defence counsel's submissions at sentence

[31] Defence counsel conceded that a period of two years detention was appropriate to reflect the applicant's offending. *HBF* should be distinguished because that offender did not have the unfortunate background of the applicant, and HBF's offending was more serious as it involved a loaded gun held to the victim's head.

[32] The applicant cooperated with the authorities and made full and frank admissions as a result of which his co-offender in the offences in Indictment No 8 of 2011 was apprehended. Three of the indictments before the court were *ex officio*. The fourth, the first in time, proceeded by way of a full hand up committal proceeding and a very early plea was indicated. Fortunately, none of the applicant's victims was seriously injured.

[33] In respect of the offences committed as a youth, the applicant should be sentenced to an effective term of two years detention to serve 50 per cent. This would require him to serve a further nine and a half months before his release. Counsel made no submissions as to the sentences to be imposed for the offences committed as an adult but he emphasised the applicant's youthfulness. He asked the judge to discharge the applicant's current probation and community service orders.

The judge's sentencing remarks

[34] His Honour understandably considered the offending very serious. Indictment Nos 8 and 11 of 2011 occurred very soon after he was released from detention under the order of Judge O'Brien. The sentencing judge expressed his concern that whilst in custody the applicant committed a violent and cowardly attack on a youth worker. The applicant was a strongly built young man. He obviously inflicted a powerful punch on his victim who was admitted to hospital. Thankfully his injuries only amounted to bodily harm but the applicant's conduct showed a serious disregard for the law. By far the most serious offences were those committed on 3 July 2010 in Indictment No 8 of 2011. There were no victim impact statements before the court but the youthful victims were undoubtedly terrified. The applicant had pleaded guilty at an early stage and made frank admissions.

[35] The pre-sentence reports set out the applicant's appalling background but he was fortunate to have the support of his grandmother and step-grandfather whom he had surely disappointed. The judge warned him that he was now an adult and would be sentenced accordingly if he continued to offend.

[36] The judge set aside the existing probation and community service orders finding them breached but making no further orders.

[37] In relation to each count on Indictment No 8 of 2011, the judge sentenced the applicant to two and a half years detention. In relation to count 1 on Indictment No 11 of 2011, he sentenced the applicant to 12 months detention, and in relation to count 2 on that indictment, six months detention. On the single count in Indictment No 129 of 2011, he sentenced the applicant to nine months imprisonment wholly suspended for three years. On the serious assault in Indictment No 180 of 2011, he sentenced the applicant to 18 months imprisonment wholly suspended for three years. On each of the summary offences, the judge found the applicant guilty but did not punish him.

[38] The judge noted:

> "Convictions are recorded in relation to the burglary and the armed robbery in company, and a conviction is recorded in relation to the offence of serious assault, otherwise under the respective legislation, I exercise my discretion not to record convictions."

[39] Because of the applicant's dreadful background, plea of guilty and cooperation there were special circumstances warranting his release after serving 50 per cent of the two and a half year period of detention. His Honour declined to make a prison transfer order under s 276B *Youth Justice Act*. The judge noted that the effect of the sentences under the *Penalties and Sentences Act* was that these would hang over the applicant's head for three years and would still be in operation when he was released from detention. If he committed any further offences punishable by imprisonment, he could be ordered to serve those suspended sentences. The judge also declared 141 days as "time that [the applicant had] already served on the sentences … just imposed".

The applicant's submissions in this application

[40] The submissions of the applicant's counsel, Mr Hamlyn-Harris who appeared pro bono in this application for leave to appeal, are as follows. The overall effect of all the sentences (potentially up to four years in custody) is manifestly excessive having regard to all the relevant circumstances. The most serious offences were those contained in Indictment No 8 of 2011 (the home invasion) and Indictment No 180 of 2011 (the serious assault on the youth worker). Detention was warranted in respect of the offences contained in Indictment No 8 of 2011 because of their innate seriousness, the applicant's criminal history, and he offended in breach of supervised orders. But the seriousness of that offending was moderated by the fact that the victims were not subjected to any actual violence and were not physically harmed; there were no victim impact statements indicating psychological injury.

[41] The applicant's unsatisfactory attitude to his offending discussed in the pre-sentence report, was explicable by deep-seated self-esteem issues arising from his dreadful background. It did not mean he could not be rehabilitated after a period in detention. In sentencing the applicant for his offences as an adult, the judge was required to deal with him as a young person with no prior convictions: see s 148 *Youth Justice Act*.

[42] Mr Hamlyn-Harris referred to a large number of decisions of this Court concerning sentences imposed for home invasion offences on young adult offenders (*R v Bower-Miles & Smith*;[4] *R v Brelsford*;[5] *R v Fatnowna; ex parte Attorney-General*;[6] *R v Salmon; ex parte Attorney-General*;[7] *R v Denham; ex parte A-G (Qld)*;[8] *R v Sailor; ex parte A-G (Qld)*;[9] and *R v Cockfield*[10]) and one case concerning a youth (*R v M*[11]), to support his contention that a sentence of 18 months detention with an order for release after serving 50 per cent should be imposed on

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4 [1995] QCA 453.
5 [1995] QCA 594.
6 [1999] QCA 492.
7 [2002] QCA 262.
8 [2003] QCA 74.
9 [2003] QCA 227.
10 [2006] QCA 276.
11 [2001] QCA 11.

the offences in Indictment No 8 of 2011. For the offence of serious assault committed as an adult, Mr Hamlyn-Harris contended that a sentence of 12 to 18 months imprisonment wholly suspended for up to two years should be imposed.

Conclusion

[43] Both counsel agreed at the hearing of this application that the judge erred in ordering that no conviction be recorded in respect of the suspended sentence imposed on Indictment No 129 of 2011. That is because a conviction must be recorded under s 143 *Penalties and Sentences Act* when suspending a term of imprisonment, even if the suspension is immediate. The judge's statement about the recording of convictions, set out in [38] of these reasons, is not entirely clear as to its effect on Indictment No 129 of 2011. But the endorsement on the indictment of the sentence of nine months imprisonment fully suspended includes: "~~Conviction recorded~~". It therefore seems the judge ordered that there be no conviction recorded on this count. The application for leave to appeal must be granted and the appeal allowed to correct this error.

[44] But the applicant's principal contention is that, although detention was appropriate, the combined effect of the sentences under the *Youth Justice Act* and the *Penalties and Sentences Act* is manifestly excessive. It is logical to begin the analysis of that contention by determining whether the sentences of two and a half years detention with release after 50 per cent for the home invasion offences (Indictment No 8 of 2011) were manifestly excessive in light of the youth justice sentencing principle that the period of detention imposed should be "for the least time that is justified in the circumstances".[12]

[45] The applicant referred to a number of decisions as comparable. In my view, those dealing with adult offenders were not helpful as they concern a different sentencing regime under the *Penalties and Sentences Act*.

[46] The only decision to which the applicant referred concerning a youth was *R v M*. M pleaded guilty to many offences contained in two indictments. He was sentenced to an effective global term of three years detention to serve 70 per cent. Over a six month period, he committed 39 offences of dishonesty, principally breaking and entering of and stealing from commercial premises, churches, schools, child care centres, clubs and motor vehicles. The value of unrecovered or damaged property was almost $10,000. He was implicated in some offences because of fingerprints but mostly because of his admissions. The gravest offence was when M and two other hooded offenders broke and entered the home of an 81 year old woman who lived alone. M grabbed her in a bear hug and pushed her against a table. Another offender took her handbag and the third offender held the door open. The elderly complainant was not physically injured but had since become fearful for her security. Police later found M at a teller machine with some of the contents of the complainant's handbag. He declined to take part in an interview but pleaded guilty at an early stage.

M was 14 and 15 at that time of his offending some of which occurred whilst on bail for the home invasion. He offended after relocating to Queensland to live with his mother, having previously lived with his father in South Australia. He had not re-enrolled at school, was abusing alcohol and marijuana and was under the

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12 *Youth Justice Act*, Sch 1 – Charter of Youth Justice Principles, Principle 17.

influence of a negative peer group at the time. He had no prior convictions, but had an extensive criminal history including arson; breaking and entering a building and committing an offence; interfering with a motor vehicle and larceny. He had not previously had probation or supervision and was remorseful.

This Court agreed with the respondent's concession that the sentence was manifestly excessive; whilst detention was warranted, three years was not the shortest possible period. This Court substituted a sentence of 12 months detention to be served by way of an immediate release order; two years probation; and 200 hours community service without convictions.

[47] The prosecutor at sentence relied on *HBF* to support his contention that a three year detention order was appropriate. HBF was 15 when he committed a number of offences constituting a home invasion. He was in company with a group of older people who broke and entered the house of a 21 year old woman who lived alone. Others in the group used violence and threats. One offender pointed a loaded rifle at the unfortunate complainant's head. The group stole and damaged property and demanded drugs. There were no drugs; the offenders had burgled the wrong premises. The group stole the complainant's motor vehicle which HBF drove away. He initially denied but later admitted his involvement to police. Unsurprisingly, the complainant suffered psychological injury. HBF had "a most unenviable criminal record" including supervision orders for unlawfully using a motor vehicle and 12 months detention with convictions recorded for arson and attempted arson. He had committed many other property offences and was also subject to a 120 hour community service order. The pre-sentence report revealed no mitigating circumstances. He had a normal childhood and was a good student who had not taken the advantages offered by past community based orders and family support. The sentence was in line with that imposed on his young adult co-offenders. HBF's application for leave to appeal against sentence was refused.

[48] This Court's more recent decision in *R v DAZ*[13] provides further assistance in determining the sentencing range for home invasions committed by a youth. DAZ pleaded guilty to one indictment containing charges of entering premises and stealing, and entering premises and attempted stealing; another indictment containing charges of burglary while armed by breaking in the night with violence in company with property damage, and attempted robbery; and a third indictment containing charges of robbery in company with personal violence, and fraud. She was aged 15 and 16 when she offended and 17 at sentence. She had no criminal history. She was sentenced to an effective global term of 18 months detention with release after 50 per cent.

The charges in the first indictment were relatively minor. They concerned entering bars and stealing alcohol.

The charges in the second indictment concerned a serious home invasion. DAZ was in company with her 38 year old de facto partner, adult brother, younger sister and a 17 year old female. The women agreed to accompany the men to burgle the complainant's house. Each woman was armed with a kitchen knife from a block. The brother was armed with both a knife and a metal broom handle. The de facto was armed with a metal broom handle. The men's faces were covered by bandanas. The brother demanded drugs, money and beer. The complainant said there was nothing like that in the house. The brother threatened to break down the front door.

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13 [2012] QCA 31.

The applicant encouraged the men. The brother kicked at the door, forcing it open. The men and the applicant entered, all armed. The brother struck the complainant on the hand causing it to bleed. Another occupant who tried to help the complainant was struck three times with the pole. The men assaulted a third occupant with the metal poles before running from the house. One occupant eventually identified photos of two females as resembling the woman who entered the house. One of those photos was of the applicant. As a result, police located the offenders. The applicant made admissions to police.

The charges in the third indictment occurred in this way. The applicant grabbed the handbag of a 71 year old woman immediately after she withdrew $600 at an ATM. The handbag strap broke in the struggle and the complainant fell to the bitumen. Fortunately she was uninjured. The applicant ran off with the handbag to a waiting car being driven by her de facto. They used the complainant's Visa card to make six purchases totalling almost $4,000. The offences were recorded on CCTV footage. Police located the offenders with the complainant's handbag later that day.

The applicant had "an horrific background" with exposure to family violence, corporal punishment, neglect and instability. She had been subjected to alleged violence and sexual abuse from her paternal uncle from age six to 14 years resulting in a pregnancy termination at 11. Her mother suffered from bipolar disorder and misused alcohol and marijuana. The applicant had spent nine days in youth custody and 16 days in adult custody. A pre-sentence report emphasised that a combined detention and probation order would provide clear punishment as well as ensuring appropriate supervision and therapeutic support on release. After referring to *R v M*; *R v H*;[14] *R v F*;[15] *R v HBF*; and *R v WAN*,[16] this Court concluded that, despite the seriousness of the offences, 18 months detention was not the least appropriate period of detention. In light of her dreadful background and lack of criminal history, a 12 month detention order with immediate suspension by way of a conditional release order, and two years probation without convictions was substituted.

[49] This Court's *ex tempore* decision in *HBF* did not allude to the youth justice sentencing principle[17] that a child who is detained in custody should be detained for the least time that is justified in the circumstances. HBF's criminal history appeared to be worse than the applicant's in that HBF had prior convictions. HBF's offending involved a co-offender holding a loaded gun to the head of the young woman complainant with predictable long term detrimental psychological impact. It seemed even more serious than the reprehensible offending in the present case. The other factor in *HBF* which is not present in the applicant's case is that the court was concerned to maintain parity with HBF's youthful but adult co-offenders sentenced under the *Penalties and Sentences Act*. The offending in *M* and *DAZ* was more comparable to but still slightly worse than the applicant's offending, although they were not burdened with his unimpressive criminal history and his repeated failure to take advantage of the leniency and assistance offered to him by the courts and the Department. Even so, *M* and *DAZ* suggest that the least period of detention solely for the offences contained in Indictment No 8 of 2011 (the home invasion) was no more than two years.

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14 [2001] QCA 477.
15 [2001] QCA 2.
16 [2012] QCA 21.
17 *Youth Justice Act*, Sch 1, Principle 17.

[50] But that does not mean the sentence is manifestly excessive. It seems clear to me that the judge, with the urging of counsel, was keen to impose a sentence for the home invasion offences (the most serious of the offences for which the applicant was to be sentenced) which reflected the totality of his offending. As the prosecutor at sentence very fairly noted, the applicant's prospects of rehabilitation whilst in custody were likely to be greater in youth detention than in an adult prison.

[51] This brings me back to my opening observations about the difficulties which can arise when sentencing young offenders under both the *Youth Justice Act* and the *Penalties and Sentences Act*. At the commencement of the hearing of this application, the Court raised with counsel the effect of the applicant's combined sentences under both Acts. Our enquiry focussed on the following hypothetical series of events. If the applicant re-offends after his release from youth detention but during the operational period of the suspended sentences, he becomes liable to serve the suspended 18 months imprisonment under the *Penalties and Sentences Act*. Will the period of youth detention be credited as time served for the purpose of any period of imprisonment imposed under the suspended sentence orders?

[52] It is noteworthy that the endorsement on all indictments, including those dealing with the offences committed as an adult (Indictments Nos 129 and 180 of 2011), is: "Section 218 *Pre-sentence-Custody* Pre-sentence detention for a period of 141 days between 6 July 10 – 21 September 10 & 5 April 11 – 20 June 2011 counted as detention already served". This suggests that the sentencing judge intended the applicant's pre-sentence custody under the *Youth Justice Act* to be taken into account, not just in respect of his sentences under the *Youth Justice Act* but also his sentences under the *Penalties and Sentences Act*.

[53] Counsel agreed that the *Penalties and Sentences Act* makes no specific provision to take into account the time served in detention under the *Youth Justice Act* as time served under the sentence. This seems correct in light of the definitions of "period of imprisonment" and "term of imprisonment" in s 4, and Pt 9 (especially s 159A) *Penalties and Sentences Act*. Counsel pointed out that the detention served under the *Youth Justice Act* could be taken into account by a court sentencing the applicant under s 147 *Penalties and Sentences Act* for committing an offence during the operational period of the suspended sentences. Counsel also referred the Court to s 276C *Youth Justice Act* which may, depending on future circumstances, have some relevance. It provides for an unserved period of detention ordered under the *Youth Justice Act* to be served by an 18 year old as a term of imprisonment, apparently concurrently with other terms of imprisonment. After the hearing, counsel referred the Court to ss 140 to 148 *Youth Justice Act*. Of particular relevance is s 143 which provides that, in a proceeding arising out of a childhood sentence order taken before a court after the person becomes an adult because the person has committed another offence as an adult, the court may decide to deal with the childhood sentencing order as if it were a corresponding adult order.

[54] It seems that s 143 may be invoked to the benefit of the applicant if he is dealt with under the *Penalties and Sentences Act* for committing an offence during the operational period of the suspended sentences where the re-offending occurred during the youth detention period. But s 143 would not appear to assist him if he re-offended during the operational period of the suspended sentences under the *Penalties and Sentences Act* after the expiry of the youth detention order in July 2013. The operational period of the suspended sentence, however, does not expire for almost another year, on 21 June 2014.

[55] It is undesirable and unnecessary, especially in the absence of considered argument from the parties, to reach conclusions as to the possible effect of the applicant's sentences on hypothetical factual situations which, it is hoped, will never arise. This discussion makes clear however that, as the applicant contends, the combined effect of his sentences makes him potentially liable to four years in custody. Under the present orders, he will have served 15 months in youth detention when he is released on 30 April this year and then will be at risk, if he re-offends before 21 June 2014, of serving another 18 months imprisonment. It is by no means certain his period in youth detention would be taken into account in calculating whether he serves the full 18 months under s 147 *Penalties and Sentences Act*, especially if he re-offends after his youth detention order expires in July 2013.

[56] In sentencing the applicant in the District Court for the offences committed as an adult, the judge was required, subject to s 148(3) *Youth Justice Act*, to observe a legal fiction and treat him as a youthful first offender (apart from the offences committed as a youth on which the judge was sentencing him in the Childrens Court). This was so even though the applicant's full criminal history was before the judge in the Childrens Court sentencing proceeding. Despite the concerning anti-social aspects of the serious assault committed on the youth worker, and the need for general and personal deterrence in sentencing for that offence, it did not warrant 18 months imprisonment, even fully suspended, in light of the applicant's age and very early guilty plea. This is especially so where the sentence of two and a half years detention under the *Youth Justice Act* is only sustainable if it reflects all the applicant's offending. Taking into account his age, early plea and antecedents and the sentence imposed on the offences in Indictment No 8 of 2011 (the home invasion), a sentence of nine months imprisonment fully suspended is appropriate in the unusual and complex combination of circumstances in this case. These matters ought be kept in mind if this sentence is to be cited as comparable for similar offending. Such a sentence necessarily requires that a conviction is recorded. Despite the applicant's youth, this is entirely appropriate. The assault was on an authority figure performing his duties in a youth detention centre. In this case, a conviction should be recorded to make it clear that the community, acting through the court, denounces such conduct.

[57] Nor did the break and enter of the store with the intention of stealing the radio-controlled toy car warrant a nine month term of imprisonment, even if entirely suspended, for a 17 year old first offender who pleaded guilty at an early stage. Again, taking into account the sentence imposed on the offences in Indictment No 8 of 2011, a four and a half month concurrent term of imprisonment fully suspended is appropriate.

[58] As the two and a half year detention order on the home invasion offences could only be for the least period of detention justified in the circumstances if it also reflected the gravity of all the applicant's offending, the operational period of those suspended sentences should not extend beyond the period of the detention order which will cease at the end of July 2013. For that reason, I would order that the operational period on each count be two years.

[59] I propose the following orders:

1. Grant the application for leave to appeal.

2. Allow the appeal to the extent of:

(a) setting aside the orders made in Indictment No 129 of 2011 and instead order that a conviction be recorded and that the applicant be sentenced to imprisonment for four and a half months suspended forthwith with an operational period of two years;

(b) setting aside the sentence imposed on Indictment No 180 of 2011 and instead order that a conviction be recorded and that the applicant be sentenced to imprisonment for nine months suspended forthwith with an operational period of two years.

3. The sentence imposed at first instance is otherwise confirmed.

[60] **MARGARET WILSON AJA:** I agree with the orders proposed by the President, and with her Honour's reasons for judgment.

[61] **DAUBNEY J:** I respectfully agree with the reasons for judgment of the President and the orders proposed by her Honour.