SUPREME COURT OF QUEENSLAND

CITATION:	*R v RAO & BCR & BCS; Ex parte Attorney-General (Qld)* [2014] QCA 7
PARTIES:	**R** **v** **RAO** (first respondent) **BCR** (second respondent) **BCS** (third respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 193 of 2013 CA No 194 of 2013 CA No 195 of 2013 DC No 17 of 2013 DC No 18 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	Childrens Court at Southport
DELIVERED ON:	11 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	5 December 2013
JUDGES:	Holmes, Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Each appeal against sentence is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the 16 year old first respondent entered a stolen vehicle – where the first respondent acted as a lookout for the other respondents' robberies – where the first respondent evaded police by driving dangerously – where the 15 year old second respondent entered a stolen vehicle – where the second respondent armed with a small axe robbed a woman – where the second respondent put petrol into the vehicle at a service station but did not pay – where the 16 year old third respondent broke in to a school tuck shop and stole food items – where the third respondent

entered a stolen vehicle – where the second and third respondents concealed their faces and armed with knives and batons robbed a woman and her 12 year old daughter – where the second and third respondents concealed their faces and armed with knives confronted two women – where the respondents were cannabis users – where the respondents had no criminal history prior to this offending – where the respondents pleaded guilty – where the first respondent was sentenced under the *Youth Justice Act* 1992 (Queensland) ("*YJA*") to probation for 18 months and must comply with s 193 of the *YJA* – where the first respondent was disqualified from driving for six months – where the second and third respondents were sentenced under the *YJA* to probation for two years and must comply with s 193 of the and were sentenced to 40 hours community service – where no convictions were recorded – where the appellant contends that the sentence was manifestly inadequate – where the appellant contends that the sentence is plainly unreasonable because the trial judge failed to impose a period of detention for the very serious offences – where the appellant contends the sentence is plainly unreasonable because the trial judge failed to record convictions – where the appellant contends that the circumstances of serious offending makes it unreasonable not to find that detention was appropriate – where the appellant contends that the trial judge failed to have any or sufficient regard to the nature of the offences and how it outweighed the fact that it was the first respondent's first appearance – whether the sentences imposed were manifestly inadequate

Criminal Code 1899 (Qld), s 669A
Youth Justice Act 1992 (Qld), s 150, s 183, s 184

Dinsdale v The Queen (1999) 202 CLR 321; [2000] HCA 54, cited
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
R v A [1998] QCA 354, cited
R v B [1997] QCA 188, cited
R v E; ex parte A-G (Qld) (2002) 134 A Crim R 486; [2002] QCA 417, cited
R v F & P [1997] QCA 98, cited
R v H [2000] QCA 196, cited
R v H (unreported, Court of Appeal, 31 August 1998, CA No 224 of 1998), cited
R v TX [2011] 2 Qd R 247; [2011] QCA 68, considered
R v WAN [2012] QCA 21, distinguished

COUNSEL: A W Moynihan QC for the appellant
J J Allen for the first respondent
J P Benjamin for the second respondent
S L Crofton for the third respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondents

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

[2] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[3] **GOTTERSON JA:** On 24 July 2013 at the Childrens Court at Southport, the respondents, RAO, BCS and BCR, were each sentenced on pleas of guilty to a range of offences for which they were convicted on 16 (RAO), 10 (BCS) and 21 (BCR) May 2013. The respondents were co-offenders in respect of a number of the offences.

[4] RAO who was 16 years old when he offended, was convicted on three counts of armed robbery in company, one count of unlawful use of a motor vehicle and one count of dangerous operation of a motor vehicle, all committed on 15 October 2012.

[5] BCS who was 16 years old when he offended, was convicted on one count of entering premises and stealing committed on 21 September 2011, and three counts of armed robbery in company and one count of unlawful use of a motor vehicle committed on 15 October 2012.

[6] BCR who was 15 years old when he offended, was convicted on one count of armed robbery and one count of taking petrol without paying, both committed on 14 October 2012, three counts of armed robbery committed on 15 October 2012, one count of receiving a stolen mobile phone between 12 and 14 October 2012 and one count of using a motor vehicle to facilitate the commission of an indictable offence between 13 and 16 October 2012.

[7] None of the respondents had a criminal history prior to this offending.

[8] RAO was sentenced to 18 months' probation and was disqualified from holding a driver's licence for six months. No conviction was recorded. BCS and BCR were both sentenced to two years' probation and 40 hours of community service. Again, no convictions were recorded.

Circumstances of the offending

[9] The offending by BCS in September 2011 involved a break in by him and others at a tuck shop at the Surfers Paradise State School. Ice-cream and drinks were stolen. RAO and BCR did not participate in this offending.

[10] The offending on 14 and 15 October 2012 took place at a number of street locations at the Gold Coast. It involved the use of a motor vehicle that had been stolen by others. At about 3 pm on 14 October, BCR with two others (neither of them being the respondents) were the occupants of the vehicle. BCR got out of it armed with a small axe and robbed a 36 year old woman as she was walking home. He took her bag.

[11] RAO and BCS got into the vehicle at about 7.30 pm that evening. At 10.51 pm BCR put petrol into the vehicle at a service station but did not pay for it.

[12] At about 11.45 pm, BCR who was wearing a balaclava and was armed with a knife, and BCS who had his face covered by a shirt and was armed with a baton, confronted a 47 year old woman and her 12 year old daughter. They took the woman's handbag containing money and personal items including two iPads, and then ran off towards the vehicle.

[13] An hour later, BCR and BCS, both armed with knives, got out of the vehicle and confronted two young women aged 19 and 20 respectively. They demanded that the women give them their handbags and an iPhone.

[14] RAO acted as a look out for the robberies. He was driving the vehicle when police encountered the respondents at 2 am on 15 October. He drove dangerously, on the wrong side of the road and at excessive speed, before evading the pursuing police.

[15] About one month later, police executed a search warrant at BCR's residence. They found a stolen iPhone which BCR said he had bought from friends for $200.

[16] All the respondents were cannabis users. The offending appears to have been motivated by a desire to obtain money in order to acquire cannabis.

Sentencing submissions and remarks

[17] After outlining the circumstances of the offending and the personal circumstances of each respondent, the prosecutor concluded his submissions with the following summary:

> "Your Honour has various sentencing options available, including a period of detention, possibly detention and probation orders. Taking into account the circumstances of the offending, the principles of the Youth Justice Act and the need for supervision highlighted in the pre-sentence reports of each child, your Honour could also impose a significant period of probation. [The armed robbery in company counts] attract – or would attract – could attract maximum periods of up to three years' probation. They are considered serious offences under the Youth Justice Act.
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> Similarly, enter premises, the single count indictment involving Master BCS, is also considered a serious offence under the Youth Justice Act. Given the serious nature of the offending, your Honour also has a discretion, pursuant to section 183, subsection (3), of the Youth Justice Act to order that convictions be recorded. Your Honour, I would seek an order for the forfeiture of the baton and the two knives pursuant to section 701 of the Police Powers and Responsibilities Act. …"[1]

[18] In the course of the sentencing remarks, the learned sentencing judge described the offences as "very serious", noting that armed robbery is one of the most serious offences in the *Criminal Code* (Qld).[2]

[19] Her Honour described the respondents as using "a great deal of menace" with their faces covered and wielding "fearsome weapons".[3] She referred to the offences as

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1 AB43; Tr1-8 LL21-35.
2 AB54 LL3-4.
3 *Ibid* LL12-14.

"calculated" and not something done "on the spur of the moment with some momentary bad judgment".[4] She viewed their conduct as "cowardly, shameful behaviour".[5]

[20] Account was also taken of the impact of the offences on the victims. The learned sentencing judge noted that their sense of security had been shattered and that they were frightened when they went out.[6]

[21] Her Honour rated the offending of BCS and BCR as more serious than that of RAO on the footing that he played a lesser role in the robberies. That relativity justified the "sterner" sentence that she was to impose on those two.[7]

[22] In mitigation, her Honour noted the respondents' pleas of guilty and lack of criminal history. She referred to the facts that they had ceased associating with one another since the offending and that they had stopped using drugs. She regarded those positive developments as signalling that they had "real prospects of leading a crime-free life in the future" and that she should sentence on that basis.[8]

[23] The learned sentencing judge also noted that the respondents fell to be sentenced under the *Youth Justice Act* 1992 ("YJA") with the consequence that they were to be treated more leniently than they would be were they adults. Her Honour observed that adults are treated "very differently". She ventured that had an adult committed these robberies, then a sentence of five years imprisonment might be imposed.[9] Her Honour was mindful that, consistently with the observations of Jerrard JA in *R v E; ex parte Attorney-General*[10] in sentencing children under the YJA the court is to focus more on rehabilitation than punishment.[11]

[24] Her Honour then dealt with each of the respondents in turn. She noted that BCR had spent three days in custody in relation to the offences and 10 months on bail with a curfew and restrictions on association with others. His goal was to finish school at TAFE. He had a new circle of friends and two part-time jobs. BCS had spent two days in custody in relation to the offences. He was living at home with his mother and finishing off Grade 10. He had sound job prospects with his father thereafter. RAO was in Grade 11, living in Gatton and working part-time in a restaurant. He was planning to study hospitality at school.

Ground of appeal

[25] By notices of appeal filed on 9 August 2013, the Attorney-General of Queensland appealed pursuant to s 669A(1) of the *Code* against each sentence. In each case, the sole ground of appeal is that the sentence is manifestly inadequate.

[26] It is well settled that in order to trigger the jurisdiction to re-sentence conferred on this Court by s 669A(1), the Attorney-General must demonstrate that the sentence under appeal is affected by legal error. In *Lacey v Attorney-General* (*Qld*),[12] the

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4 *Ibid* LL23-25.
5 *Ibid* L23.
6 *Ibid* LL16-19.
7 AB55 LL10-12.
8 AB54 LL35-40.
9 AB54 LL42-48.
10 [2002] QCA 417; (2002) 134 A Crim R 486 at [37].
11 AB55 LL1-2.
12 [2011] HCA 10; (2011) 242 CLR 573.

majority so held.[13] In that case, their Honours referred[14] with apparent approval to the reference by McMurdo P in the decision then under appeal[15] to the principles enunciated in *House v The King*[16] as being those to be applied in determining whether a sentencing decision was affected by error for the purposes of the section.

[27] Counsel for the appellant accepted that an error of the types described in *House* had to be demonstrated.[17] The error sought to be invoked by the appellant here was based upon what is often called the second category of error described in *House*, namely, that the result reached in exercise of the discretion is "unreasonable or plainly unjust", notwithstanding that specific error in the decision making process cannot be identified. The appellant submits that the sentences under appeal are unreasonable or plainly unjust because they are manifestly inadequate.[18]

The appellant's contentions

[28] In brief, the appellant contends that the sentences are manifestly inadequate, and thus "plainly unreasonable" because the learned sentencing judge:

> "(a) failed to impose a period of detention for this series of offences; and/or
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> (b) failed to record convictions."[19]

[29] The appellant did not take issue with any of the observations made by her Honour in the sentencing remarks concerning the approach to be taken or the respondents' conduct. The appellant also acknowledged that s 150(2)(e) of the YJA requires that, in sentencing a child offender, a detention order should be imposed only as a last resort and, then, only for the shortest appropriate period. However, as the appellant's submissions also remind, the sentencing principles in s 150(1)(d) and (k) do require the sentencing court to have regard for the nature and seriousness of the offending and a fitting proportion between the sentence and the offending.

[30] For this appeal, the appellant referred to some six decisions of this Court as illustrations of a range of outcomes from detention to community-based orders for what was said by the appellant, to be comparable offending. The variation in outcomes in those cases, it was submitted, is attributable to the nature and extent of the offending, the criminal history of the offenders and whether actual violence was used.[20] None of these decisions had been drawn to the attention of the learned sentencing judge.

[31] Essentially, the appellant's submission is this. Having regard to the following circumstances, her Honour acted unreasonably in failing to conclude that a period of detention was appropriate for each respondent. These circumstances are: that armed robbery is one of the most serious offences in the *Code*; that the respondents used a stolen vehicle to commit a series of premeditated armed robberies; that they took knives for the purpose of the robberies; that they wore disguises; that they chose female victims including a woman and her 12 year old daughter; that the victims

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13 French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [62].
14 *Ibid* at [41].
15 [2009] QCA 274; (2009) A Crim R 399 at [263].
16 (1936) 55 CLR 499 at 504-505.
17 Written outline of submissions paragraph 13.
18 See *Dinsdale v The Queen* [2000] HCA 54; (1999) 202 CLR 321 per Gleeson CJ and Hayne J at [5]-[6].
19 Written outline of submissions paragraph 14.
20 Written outline of submissions paragraph 16.

were terrified; and that the respondents were prepared to drive dangerously to avoid apprehension.

[32] Further, in both written and oral submissions, the appellant articulated a separate and specific argument that the exercise of the discretion not to record a conviction in each instance was flawed by errors of principle. It is convenient to consider this argument first.

Exercise of discretion not to record a conviction

[33] As the prosecutor noted in submissions on sentence, having regard to the serious nature of the offending, s 183(3) YJA conferred on the court a discretion whether or not to record convictions. Section 184(1) requires the discretion to be exercised having regard to all the circumstances of the case including those listed in that subsection. The prosecutor did not submit that the circumstances required that a conviction be recorded for any of the three respondents.

[34] In *R v TX*,[21] Lyons J observed[22] that it is now well established that the *prima facie* position under ss 183 and 184 is that a conviction is not to be recorded against a child. In this appeal, the appellant does not challenge that exposition of the approach to be taken.

[35] In the course of her sentencing remarks, the learned sentencing judge said:

> "Given that this is your first appearance, as with your co-accused, I have been persuaded that I ought not record a conviction today. You each get one chance of escaping without a criminal record, but if you re-offend, it will be an entirely different matter."[23]

[36] The appellant's specific challenge to the exercise of the s 183(3) discretion is put at two levels. One is based upon these remarks. It is said that they demonstrate that her Honour acted upon an erroneous principle, namely, that every first-time offender gets what might be called "a free turn", that is to say, that no matter how egregious the first-time offending might be, a conviction is never recorded against a first-time offender. In my view, this aspect of the challenge completely misreads her Honour's remarks. It is, I think, quite plain that she was doing no more than making the observation that by reason of a decision that she had already made not to record convictions, each respondent would have the benefit of not having a criminal record. Of itself, that observation is factual and unremarkable.

[37] The other aspect of this challenge maintains that her Honour failed to have "any or any sufficient regard" to the nature of the offences and how that circumstance outweighed a combination of the circumstances of first-offending by each respondent and of the impacts that a conviction would have on each of the respondents' rehabilitation and prospects of finding and retaining employment, they each being a circumstance listed in s 184(1).[24]

[38] Her Honour did have regard to each of these circumstances. In substance, the challenge is one to the balance of them undertaken by her Honour. To make headway with such a challenge, the appellant would need to demonstrate not merely

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21 [2011] QCA 68; [2011] 2 Qd. R. 247.

22 At [33], Muir JA and Wilson AJA concurring.

23 AB57 LL10-13.

24 Written outline of argument paragraph 18.

an imbalance between them but an imbalance of a degree that each decision not to record a conviction was unreasonable or unjust. The appellant did not advance a serious argument to that effect. In any event, such an argument would have needed to address the *prima facie* position against recording a conviction. In light of these considerations, I am unpersuaded that the exercise of this discretion was defective in principle.

Manifestly inadequate ground of appeal

[39] In two[25] of the six decisions referred to by the appellant, the sentence under review in this Court was one of probation. Detention was not ordered at the primary or appellate level. The other four decisions involved appeals against sentences requiring actual detention of youth offenders. In three[26] of them, the sentences of detention were set aside and substituted with non-custodial orders (in almost all instances, probation orders for a period of two years or less), usually with no conviction recorded. The nature of offending involved in them included robbery with personal violence.

[40] At the hearing of the appeal, counsel for the appellant referred only to the sixth of the decisions, *R v WAN*.[27] In that case, a sentence of three years detention on a count of burglary with wilful damage was substituted with a sentence of two years' detention with release after serving fifty percent. A sentence of two years' detention on a separate count of robbery in company with personal violence was undisturbed on appeal.

[41] The offender in *WAN* was sentenced on three separate indictments relating to three separate incidents which occurred at intervals of about four months. The robbery in company with personal violence was committed by the offender when he was almost 16 years old. He and others set upon a young couple at night at Southbank Parklands, circling them. Both were then brutally attacked. There were kicks to the head of the male complainant while he was on the ground. Some of their possessions were stolen. The burglary which occurred when the offender was 16 years old, involved a gang-style attack on a house at Kingston occupied by young Indian nationals. They were subjected first to racial taunts and physical threats. Then the offenders entered their house and ransacked it for 20 minutes using knives. They terrorised the occupants and damaged or stole many of their possessions. The offending on the third indictment involved grievous bodily harm to a school boy.

[42] In my view, these decisions do not provide a firm foundation for asserting that the offending by the respondents necessitated a sentence of detention. In only one of those decisions was a sentence of detention sanctioned on appeal. The circumstances of the offending in that case were considerably worse. It occurred at separate times and involved robbery with vicious personal violence and burglary coupled with intimidation and extensive wilful damage to property. It is true that two of the respondents were armed when they committed the robberies; however, no actual violence was inflicted on any of the victims.

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25 *R v H* [2000] QCA 196; *R v H* CA No 224 of 1998, unreported, 31 August 1998.

26 *R v A* [1998] QCA 354; *R v F & P* [1997] QCA 98; *R v B* [1997] QCA 188.

27 [2012] QCA 21.

[43] The respondents' offending deserved the condemnatory epithets attributed to it by the learned sentencing judge. For BCR and BCS, it would have been open to her Honour to have reflected the seriousness of their offending somewhat more severely. She could have recorded convictions. She could have imposed a period of detention subject to immediate release under conditional release orders as had been canvassed as an option in their pre-sentence reports. However, the fact that she did not choose those options is a manifestation of leniency in sentencing. It is not a demonstration that the sentences of probation for substantial periods without conviction that she did impose are manifestly inadequate.

[44] I consider the orders of probation for the respective periods together with the decisions not to record convictions to be neither unreasonable nor unjust. They are not manifestly inadequate.

Disposition

[45] For these reasons, I am of the view that the ground of appeal has not been made out. Consequently, the appeal cannot succeed.

Order

[46] I would propose the following order in each appeal:

1. Appeal dismissed.