SUPREME COURT OF QUEENSLAND

CITATION:	*R v MKL* [2016] QCA 249
PARTIES:	**R** **v** **MKL** (applicant)
FILE NO/S:	CA No 81 of 2016 DC No 1 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Charleville – Date of Sentence: 8 March 2016
DELIVERED ON:	7 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	21 June 2016
JUDGES:	Fraser and Morrison JJA and Peter Lyons J Separate reasons for judgment of each member of the Court, Fraser and Morrison JJA concurring as to the orders made, Peter Lyons J dissenting
ORDERS:	**1. The application for leave to appeal is allowed.** **2. The appeal is allowed.** **3. The orders made on 8 March 2016 are set aside to the extent that they ordered that the applicant perform 30 hours of community service.** **4. Otherwise the sentence imposed on 8 March 2016 is confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to two years' probation and 30 hours of community service for the offence of breaking and entering premises and stealing – where the applicant was 13 and a half years old at the time of the offence – where the applicant broke into the offices of a community service organisation and stole $2 in coins, a set of headphones, and a set of keys – where the applicant had a prior criminal history of break and enter and trespass and injuring animals – where the applicant spent 61 days in custody before being released on bail in relation to other charges as well as for the present offence – where the learned trial judge did not take the presentence custody into account when sentencing for this offence, on the basis that it could be

taken into account in the subsequent charges – where the applicant contends that the learned trial judge erred by not taking into account the presentence custody, as if the applicant were acquitted of the subsequent charges the presentence custody would never be taken into account and therefore the sentence was manifestly excessive – whether the sentence was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 159A
Youth Justice Act 1992 (Qld), s 150, s 218

Geale v Tasmania (2009) 18 Tas R 338; (2009) 195 A Crim R 252; [2009] TASSC 28, cited
R v Fabre [2008] QCA 386, considered
R v H [2002] QCA 265, considered
R v Hutton, unreported, 31 August 1998, considered
R v HY [2005] QCA 163, considered
R v J [2002] QCA 227, considered
R v Lappan [2015] QCA 180, cited
R v Maksoud [2016] QCA 115, cited
R v Simon, unreported, 15 July 1997, considered

COUNSEL: K Prskalo for the applicant
S J Farnden for the respondent

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

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

[2] **MORRISON JA:** In June 2015 MKL was 13 and a-half years old. He broke into the offices of Centacare Charleville, and stole $2 in coins, a set of headphones and a set of keys. He was quickly apprehended and charged with one count of breaking and entering and stealing.

[3] He spent 61 days in custody before being released on bail. That custody was in relation to other charges as well as the present one.[1]

[4] On 8 March 2016 he pleaded guilty and was sentenced to two years' probation and 30 hours of community service.

[5] MKL seeks leave to appeal against that sentence as being manifestly excessive. The only aspect challenged is the length of the period of probation. His counsel contended that 12 months' probation was the appropriate sentence.

MKL's antecedents

[6] MKL's offending commenced when he was nearly 13. The prosecutor added some particulars of the conduct, without objection. The history revealed:

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1 These were charges of rape and indecent dealing.

(a) trespass and injuring animals in November 2014; no conviction recorded but sentenced to three months' probation, later extended to six months; this involved catching and forcefully punching two sheep, and letting them be mauled by a dog; one sheep died and the other required treatment; and

(b) break and enter, and attempted break and enter, in about March 2015, when he was just 13; these were committed in breach of the probation order; no conviction recorded but previous probation order extended to six months, and 40 hours community service; he attempted to break into a day care centre by ripping off flyscreens; several days later he broke into a council building by smashing a window, and stole some soft-drink cans.

[7] Youth Justice Services provided information about MKL's performance under the bail conditions, probation and community service. His attendance for the community service and probation was mostly good with several failures to report. His compliance with his conditional bail programme was excellent. He had engaged in education programmes, supervised structural activities and sessions designed to let him better understand legal obligations, relationships, problem solving, decision making, developing coping strategies and the like.

[8] The Youth Justice Services records showed inadequate supervision, early disengagement from school, negative peer influence and lack of impulse control and consequential thinking. There was also a record of extensive substance abuse in his family home, and he was the victim of physical abuse, neglect and sexual abuse.

[9] At sentence he was living with his grandmother, and was doing distance education in grade 9.

Submissions at sentence

[10] MKL's counsel contended that there should be no conviction, and a period of probation. A period of 30 hours community service was not opposed.

The learned sentencing judge's approach

[11] The learned sentencing judge took into account the following:

(a) MKL's youth, being 14 years old;

(b) the guilty plea;

(c) the offending conduct, and the fact that it was committed whilst on probation and community service orders;

(d) the "growing criminal history";

(e) MKL's problem with anti-social behaviour, instanced by the injury of the animals, and breaking into the offices of community service providers; and

(f) MKL's personal circumstances, including the family history of abuse and neglect.

[12] The approach taken is epitomised in this passage:

> "So make sure that you get all you can out of probation, because I'm going to give you another opportunity. … Not because I don't think the offences were serious, but because you're only 14 and my experience

> in life shows that some people who do stupid things at the age of 14 learn not to do stupid things when they get older. With the help of the Probation Service and Youth Justice and Lifeline, hopefully, your grandmother, who's stepped into the breach to look after you at a time she should have her feet up being able to relax a bit, with the help of all of those people, hopefully you'll be able to get a reasonable education and then go out and get long-term employment."[2]

and

> "And 30 hours of community service, okay? Now, they're designed to try to help you, not really as a punishment. The 30 hours is a bit of a punishment, but hopefully you will learn something from going to that. It's not a great deal. You've got six months to do it, but you make sure you put your head down, comply as you have in the past – it's good that you have – and make sure that you don't come back before me or any other Judge again. You see if you can turn your life around and be a source of pride to your grandmother, so when she talks about you she talks about that [MKL], he's a good boy. He's finished his schooling, he's got a job."[3]

[13] In my view, it is plain that his Honour was designing the probation orders in particular to give MKL appropriate supervision to get him through his education to at least grade 11.

Submission on the application for leave

[14] Counsel for MKL contended that two years was too long in the circumstances, and that 12 months was appropriate. No challenge was mounted to the community service component.

[15] The relevant factor upon which greatest reliance was placed was that there had been 61 days pre-sentence custody which had not been properly taken into account. It was said that the learned sentencing judge erred when that factor was put to one side on the basis that it could be taken into account when the other charges faced by MKL were eventually dealt with. If MKL was acquitted it would never be taken into account. Therefore it should have been taken into account.

[16] Reference was made to comparable cases such as *R v HY*,[4] *R v H*,[5] *R v Hutton*,[6] *R v Simon*,[7] and *R v J*.[8]

Discussion

[17] The period of pre-sentence custody was not referred to in the sentencing remarks. The reason for that is probably revealed in the course of argument, where this exchange took place in relation to the pre-sentence custody:[9]

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2 AB 19.
3 AB 20.
4 [2005] QCA 163.
5 [2002] QCA 265.
6 Unreported, 31 August 1998.
7 Unreported, 15 July 1997.
8 [2002] QCA 227.
9 AB 11 lines 13-20.

> "HIS HONOUR: So there's 61 days. Anyway, I'm not sure how we'll take that into account, probably from – deal with him in the way I think I'm going to, that can be taken into account at a later date.
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> MS SOLDI: Thank you, your Honour.
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> HIS HONOUR: The reason I say that is that it's not time related solely to this offence, is it? It's related to this offence and the rape offence."

[18] That comment was the basis of the contention that the learned sentencing judge had put the pre-sentence custody aside on the basis that it could or would be taken into account in the subsequent charges.

[19] There is no provision under the *Youth Justice Act* 1992 (Qld) that requires pre-sentence custody to be taken into account when the sentence does not involve detention. The contrary is the case where the sentence is to a period of detention. In that case s 218 provides:

> "(1) If a child is sentenced to a period of detention for an offence, any period of time for which the child was held in custody pending the proceeding for the offence must be counted as part of the period of detention that is served in a detention centre or corrective services facility.
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> *Note—*
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> In determining, under section 227, when to release the child from detention under a supervised release order under section 228, the chief executive counts the period of time for which the child was held in custody pending the proceeding for the offence.
>
> (2) A period of time for which a child is also held in custody on sentence for another offence is not to be counted for the purposes of subsection (1)."

[20] Thus the *Youth Justice Act* requires pre-sentence custody to be taken into account in the case of detention orders, by making it mandatory that it be counted as part of the period of detention. There is no discretion involved in that instance. However, where the custody was not solely in respect of the present charge the position is different. Section 218(2) puts such a child in the same position as an adult under s 159A of the *Penalties and Sentences Act* 1992 (Qld), which provides:

> "(1) If an offender is sentenced to a term of imprisonment for an offence, any time that the offender was held in custody in relation to proceedings for the offence **and for no other reason** must be taken to be imprisonment already served under the sentence, unless the sentencing court otherwise orders."[10]

[21] In my view, that the *Youth Justice Act* does not specify that pre-sentence custody is to be taken into account for non-detention orders, but mandates it in respect of detention

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10 Emphasis added.

orders, supports the conclusion that pre-sentence custody is not **required** to be taken into account when the only sentencing orders are for probation and community service.

[22] However, there is no reason in logic or principle why such pre-sentence custody in the case of sentences under the *Youth Justice Act* should be treated any differently from un-declarable pre-sentence custody in sentences under the *Penalties and Sentences Act*. As will appear, in that situation the sentencing court still retains a discretion to take it into account.

[23] In the present case the learned sentencing judge was not required by the *Youth Justice Act* to take the pre-sentence custody into account. Further, the time in custody could not be treated as detention served under the sentence (under s 218 of the *Youth Justice Act*) as no detention was ordered.

[24] Where pre-sentence custody cannot be formally declared the sentencing court still retains a discretion to take it into account. In *R v Fabre*[11] this Court referred to the case where pre-sentence custody cannot be declared because it relates to more than the offences for which the offender is sentenced. The Court recognised that even when the time in custody is not declarable a sentencing court retains a discretion to take the period of pre-sentence custody into account in arriving at the appropriate sentence.[12]

[25] The Court then dealt with the fact that the sentencing judge in *Fabre* had decided that it was likely that the offender would be convicted of the other offences in the future and the pre-sentence custody could be taken into account then, and therefore it was appropriate to leave it out of account on the current sentencing. That approach was rejected, the Court holding the following were the applicable principles:[13]

(a) although it is not mandatory, it is generally desirable to take into account periods of pre-sentence custody which are not declarable under s 159A of the *Penalties and Sentences Act* 1992 (Qld) at the first opportunity;[14]

(b) that general approach should continue to be followed in Queensland because: (i) if the offender is subsequently acquitted of the other charges an application for re-opening of the sentence will not be necessary; and (ii) if credit for the pre-sentence custody has been given at the first opportunity and the offender is subsequently convicted of the other charges which also justified the offender being held in custody, it ordinarily should be simpler for the subsequent sentencing court to impose cumulative terms of imprisonment where that is warranted;[15] and

(c) the manner in which the discretion is to be exercised depends upon the particular facts of each case.[16]

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11 [2008] QCA 386.
12 *Fabre* at [11] per Fraser JA, Keane and Muir JJA concurring.
13 *Fabre* at [14]-[16].
14 *Fabre* at [14].
15 *Fabre* at [15].
16 *Fabre* at [16].

[26] The decision in *Fabre* has been followed in this State, and elsewhere.[17]

[27] In my view, the learned sentencing judge erred in failing to take the pre-sentence custody into account. That his Honour did not do so is evident from the sentencing remarks themselves. If regard is had to what was said during submissions it seems the reason was that his Honour thought it would be taken into account later when the other charges were dealt with.

[28] The approach taken by the learned sentencing judge in this case was the same as that taken by the sentencing judge in *Fabre*. In *Fabre* this Court held that the approach was erroneous because: (i) the grounds assigned for declining to take into account any part of the substantial period of pre-sentence custody were irrelevant; and (ii) reliance upon a view that the applicant would probably be convicted of the other alleged offences, in respect of which his counsel had signalled his intention to plead not guilty, was inconsistent with the presumption of innocence to which the applicant was entitled.

[29] The error here was one of principle, and infected the sentence that was imposed. It follows that the application for leave to appeal should be granted, the appeal should be allowed, and MKL should be sentenced afresh unless this Court concludes "in the separate and independent exercise of its discretion" that no different sentence should be passed.[18]

Re-sentencing

[30] To correct the error requires this Court to take the 61 days of pre-sentence custody into account. However, just how such pre-sentence custody is to be taken into account is a matter of discretion, and does not require mathematical precision.

[31] In my view, the most appropriate way to take into account the pre-sentence custody of 61 days is by removing the requirement to perform any community service. Whilst the matter is not perfectly clear it seems reasonable to infer that no community service was, in fact, performed. Once MKL filed the application for leave to appeal the community service order was suspended: s 115(1) *Youth Justice Act*.

The comparable cases

[32] *HY* involved a 16 year old sentenced to 18 months' probation on a conviction for receiving, on his guilty plea. At the time he was already subject to the remaining three months of an existing 12 months' probation order. That had the effect that he would serve a total of 27 months' probation. The offender had a more serious criminal history than MKL, a "disturbing criminal history for one so young".

[33] No complaint was made as to the extension of the probation order, simply the length of the extension. The Court held that totality considerations meant that the total period was beyond the bounds of sentencing discretion, and 18 months was appropriate. It ordered that six months' probation should be served following the 12 months, thus achieving 18 months.

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17 *R v Lappan* [2015] QCA 180, at [19]; *R v Maksoud* [2016] QCA 115, at [40]-[42]; *Geale v Tasmania* [2009] TASSC 28, at [18], [60]-[63].

18 *Maksoud* at [42], citing *Kentwell v The Queen* [2014] HCA 37; (2014) 252 CLR 601 per French CJ, Hayne, Bell and Keane JJ at [35], [42]; *R v Illin* [2014] QCA 285 per Fraser JA at [21].

[34] MKL's counsel accepted that *HY* involved totality considerations which were not relevant here. That and the different circumstances of the offender make *HY* of little utility in the present case.

[35] *H* involved a 15 year old (16 at sentence) who was sentenced to 18 months' probation and 25 hours' community service on a conviction for stealing, after a trial. The offender had a somewhat troubled past but was in full-time employment as a trainee cook. The Court held that probation was appropriate because the offender was in need of supervision. It held that the combination of 18 months' probation and the community service was excessive, because the additional component of community service "might impede rather than improve his prospects of rehabilitation". The component of community service was removed.

[36] The reason for the amendment to the sentence in *H* does not mean that it can be treated as suggesting that 18 months' was appropriate for the more serious offence in that case. What can be drawn from that case are the (not surprising) propositions that probation is warranted where an offender needs supervision, and rehabilitation is to be supported, not impeded. Otherwise I consider it of little assistance here.

[37] *Simon* involved a 15 year old boy, sentenced to 12 months' detention imposed on a guilty plea to a charge of breaking and entering and stealing. He had a prior history of wilful damage, breaking and stealing, and stealing. At the time of the application to this Court the offender had served about two and a-half months. The Court held that the detention was excessive and that, but for insufficient evidence from the Department of Families, Youth and Community Care as to the applicable conditions, immediate release might have been ordered. Instead 12 months' probation was substituted. The total sentence was then 12 months' probation to follow the two and a-half months' custody. The report makes it clear that the need for supervision was paramount in that conclusion.

[38] *Simon* has two distinguishing features, first that the offences were not committed while the offender was subject to other orders such as parole or community service, and secondly that the Court was considering the appropriateness of a custodial sentence in the face of Departmental recommendations for a non-custodial regime. Nonetheless *Simon* provides some assistance here.

[39] *Hutton* involved a 16 year old boy (15 at the time of the offence) sentenced to three years' probation on a plea of guilty to a charge of robbery with personal violence. He had significant behavioural and substance abuse problems and was living on the streets. As well he had attention deficit disorder, poor impulse control, excess motor activity and a low frustration threshold. The offending conduct was an attack by three men on an older woman, punches to her head and shoulders and other injuries. The Department of Families, Youth and Community Care recommended a community based sentence, based on demonstrated rehabilitation.

[40] The only aspect of the sentence that was challenged was the recording of a conviction, but counsel for the offender also offered to submit to a community service order as part of the sentence. It was also pointed out that one of the co-offenders was sentenced only to two years' probation. The Court took the view that no conviction should be recorded, but that the sentence should be 75 hours of community service and two years' probation. That would "punish him for his actions, enable him to make a positive contribution to society and would draw a

proper distinction between the sentence he will have received and that given to [the co-offender]".[19]

[41] It can be seen that there are two points of distinction in relation to *Hutton*. First, parity considerations affected the outcome; and secondly, the opportunity, invited by the offender, to blend the two components of the sentence resulted in a much longer period of community service than in the present case. For those reasons I do not consider *Hutton* to be of much assistance.

[42] *J* involved a 14 year old boy who pleaded guilty to a charge of entering a dwelling with intent to commit an indictable offence. He was 15 when sentenced to two years' probation and 100 hours community service. No conviction was recorded. That was described as "a reasonably lengthy period of probation with a significant amount of community service".[20] The offender had no relevant criminal history, family support and was a competent student at school. The offending conduct was "unusual", consisting of his being inebriated, entering a unit next door to where he was at a party, and then inviting a fight when he was asked to leave.

[43] The Court held that in the circumstances the two years' probation was adequate and removed the order for community service (none of which had been performed at the time that the Court dealt with it).

[44] In my view, the circumstances of the offence and the offender in *J* are sufficiently different so as to make it of little assistance.

[45] Having reviewed the various factors applicable to MKL, including the provisions of s 150 of the *Youth Justice Act*, his personal history, youth, the nature of the offending, the prospects of rehabilitation, and the need for deterrence to protect both MKL and the community, it is my view that the most appropriate sentence, taking into account the pre-sentence custody, was one for probation for the two year period originally ordered.[21] Like the learned sentencing judge I am of the view that MKL must be subject to supervision. His chances of rehabilitation, and the protection of the community, will be best served by probation that maximises the prospect of furthering his education whilst under the care and protection of his grandmother. That accords with the principles in s 150(2)(c) of the *Youth Justice Act*.

[46] I do not consider that the comparable cases show that a two year period of probation would, in MKL's particular circumstances, be other than appropriate.

Conclusion

[47] For the reasons expressed above, I would grant the application for leave to appeal, allow the appeal and re-sentence MKL to two years' probation on the terms originally set by the learned sentencing judge.

[48] I propose the following orders:

1. The application for leave to appeal is allowed.

2. The appeal is allowed.

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19 *Hutton* at page 6.

20 *J* at page 3.

21 I note that at the original sentencing hearing MKL agreed to the imposition of such a period of probation.

3. The orders made on 8 March 2016 are set aside to the extent that they ordered that the applicant perform 30 hours of community service.

4. Otherwise the sentence imposed on 8 March 2016 is confirmed.

[49] **PETER LYONS J:** I have had the advantage of reading the reasons for judgment of Morrison JA. These reasons should be read with his Honour's reasons, which record background matters.

[50] The applicant pleaded guilty to one count of breaking and entering Centacare premises in June 2015, and stealing money, headphones and a set of keys. At the time of the offence, the applicant was 13 and a half years old.

[51] On 13 January 2015, the applicant had been placed on probation for a period of three months for an offence of trespass, and an offence of injuring animals, both offences committed on 9 November 2014[22]. On the same date he was reprimanded, without a conviction being recorded, for an offence of wilful damage committed on 1 December 2014.

[52] On 14 April 2015 he was sentenced to 40 hours' community service for an attempted break and enter offence committed about the end of February 2015; and for a break and enter offence committed on 4 March 2015. The existing probation order was extended by a period of six months.

[53] On 25 August 2015 the probation order imposed on 14 April 2015 was extended for a period of six months, commencing on 13 October 2015. That was subsequent to the offending the subject of these proceedings.

[54] The offences the subject of these proceedings were committed during the period of the probation ordered extended on 14 April 2015, and prior to the completion of the community service order then imposed[23].

[55] The applicant had been remanded in custody for a period of 61 days (from 26 June 2015 to 26 August 2015), both for the offence the subject of these proceedings, and for another offence[24].

[56] The applicant was sentenced by a District Court Judge sitting as the Childrens Court on 8 March 2016. No conviction was recorded, and the applicant was placed on probation for a period of two years, and ordered to perform 30 hours of community service[25]. By this time he had been continuously on probation for a period of almost 14 months.

Time in custody

[57] Section 218 of the *Youth Justice Act* 1992 (Qld) provides as follows:

> "**218 Period of custody on remand to be treated as detention on sentence**
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> (1) If a child is sentenced to a period of detention for an offence, any period of time for which the child was held in custody pending the proceeding for the offence must

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22 The applicant's criminal history is at AR 22.
23 AR 24.
24 AR 27.
25 AR 2.

> be counted as part of the period of detention that is served in a detention centre or corrective services facility.
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> *Note—*
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> In determining, under section 227, when to release the child from detention under a supervised release order under section 228, the chief executive counts the period of time for which the child was held in custody pending the proceeding for the offence.
>
> (2) A period of time for which a child is also held in custody on sentence for another offence is not to be counted for the purposes of subsection (1).
>
> (3) Any period of custody of less than 1 day is not to be counted under subsection (1)."

[58] As Morrison JA has recorded, the learned sentencing judge did not take into account the time spent in custody, on the basis that it could be dealt with at a later date.

[59] Under s 175 of the *Youth Justice Act*, when a child is found guilty of an offence, amongst the orders that might be made by way of sentence is an order that the child be detained for a period determined in accordance with that section. Under s 218(1) when such an order is made, any period of time for which the child was held in custody pending the proceeding for the offence must be counted as part of the period of detention. As the note to the subsection indicates, effect is given to this provision when a child is released under ss 227 and 228. The provisions of the *Youth Justice Act* do not call for the making of a declaration of the kind prescribed by s 159A of the *Penalties and Sentences Act* 1992 (Qld). Nor does s 218(1) of the *Youth Justice Act* apply only when an offender is held in custody "for no other reason" than the offence or offences the subject of the sentence.

[60] Section 218(2) applies to a period of time for which a child "is also held in custody *on sentence* for another offence" (emphasis added). It thus excludes from the operation of s 218(1) (i.e., from the mandatory counting of a period of custody, when a detention order is made), a period served under a sentence for some other offence. Its provisions are in this respect different from those of s 159A(1) of the *Penalties and Sentences Act*.

[61] In my view, therefore, s 218 says nothing of relevance in relation to time spent by a child in pre-sentence custody, when no order is made for the child's detention under s 175 of the *Youth Justice Act*.

[62] It seems to me unlikely in the extreme that the provisions of s 218 of the *Youth Justice Act* were intended to deal exhaustively with the consideration to be given to a period of pre-sentence custody. For example, I find it difficult to envisage in a case where, if a child is held in pre-sentence custody only for the offence for which the child is being sentenced, and no detention order is to be made, the time in pre-sentence custody should not be taken into account in determining the sentence. It was therefore a matter for the Court's discretion as to the significance it attributes to a period of pre-sentence custody, when it does not impose an order for the child's detention. I agree with Morrison JA that where no detention order is to be made, but the child has been held in custody for the offence for which the child is being

sentenced and for some other offence, the principles stated in *R v Fabre*[26] are applicable.

[63] I agree with Morrison JA that the sentencing discretion miscarried in the present case.

Re-sentencing

[64] Another order that may be made under s 175 of the *Youth Justice Act*, when a judge is sentencing a child for an offence like the present one, is an order that the child be placed on probation for a period not longer than two years. Requirements of such an order appear in s 193 of that Act, though the Court may, under that provision, impose additional requirements.

[65] If a child breaches a requirement of a probation order, a warrant may issue for the child's arrest under s 238; and other orders may be made, including under s 245 of the *Youth Justices Act*. A probation order is penal in character.

[66] Although an objective of the *Youth Justice Act* is to establish a code for dealing with children who have committed offences[27], the Act provides that a Court, when sentencing a child for an offence, must have regard (subject to the provisions of the *Youth Justice Act*) to the general principles applying to the sentencing of all persons[28]. One of those general principles, a product of the fact that a sentence is the exercise of a judicial discretion, is that there should be consistency of approach in sentencing[29]. As Gleeson CJ said in *Wong v The Queen*[30]

> "Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency."

[67] The consistency which is sought involves "the treatment of like cases alike, and different cases differently"[31]. It would seem to follow that where there are broad similarities between cases, the basis for different outcomes should be apparent in the differences between those cases.

[68] The case which was principally relied upon by the applicant was *R v Simon*[32]. The applicant in that case had pleaded guilty to breaking and entering with intent, and to stealing a laptop computer, a pair of tracksuit pants, and a pair of sunglasses. He was sentenced to a period of 12 months' detention. He was 15 years of age at the time of sentence. He had a prior criminal history involving offences of wilful damage, stealing, and breaking, entering and stealing, for which he had been given community service or community service and probation orders in the past. The offences were committed approximately 12 months before the application to this Court was heard, suggesting that the applicant was 14 or 15 years of age at the time of the offending. He had spent two and a half months in custody at the time of the appeal. McPherson JA, with whom the other members of the Court agreed, indicated that, with better information about the circumstances in which the applicant would

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26 [2008] QCA 386.
27 See s 2(b).
28 See s 150(1)(a).
29 See *Markarian v The Queen* (2005) 228 CLR 357 at [27].
30 (2001) 207 CLR 584 at [6]; cited with approval in *Hili v The Queen* (2010) 242 CLR 520 at [47].
31 See *Hili* at [49].
32 Unreported; CA 183 of 1997; 15 July 1997.

then be, he would have been minded to accede to a submission that it was appropriate to order the immediate release of the applicant. However the Court indicated that it was prepared to make an order for the applicant's release on probation for a period of 12 months.

[69] Apart from the fact that the applicant Simon was a little older than the present applicant, the circumstances of that case seem to me to be remarkably similar to the circumstances of the present case. Moreover, the present case involved a single offence, whereas the sentence imposed in *Simon* was for offending on three different occasions. The reasons are silent as to whether any of those three offences was committed while the applicant was subject to probation, or to a community service order, though the absence of reference to this matter would suggest that none of them was. While, as with adult offenders[33], it is a requirement of both a probation order and a community service order imposed under the *Youth Justice Act*[34] that the child not violate the law during the currency of the order, it seems to me that, by virtue of the child's age, the fact that the offending occurred in the currency of such orders is less significant than it generally would be for an adult offender.

[70] On the other hand, the present applicant had complied with his conditional bail programme, for the period from 25 August 2015 until the date of his sentence. Apart from the present offence, he appears to have complied satisfactorily with the community service order and probation order made on 14 April 2015. The sentencing report provided to the Childrens Court would seem to indicate that there is an explanation for his offending in his personal circumstances[35].

[71] When one weighs up the relevant considerations, I find it difficult to find a basis to require the present applicant to be subject to a probation order for a longer period than the applicant Simon.

[72] I propose to comment only briefly on the other authorities to which we were referred. The applicant in *R v H*[36] was 15 years of age at the time of his offending. Although he had not previously offended, the only sentence imposed was a period of 18 months' probation. Once the period which the present applicant has spent in custody is taken into account, this case does not provide support for a period of two years' probation for the present applicant.

[73] It seems to me that, since the offending in *R v Hutton*[37] involved violence inflicted by the applicant in company with others to a 50 year old woman, it is difficult to derive much assistance from it. I would, however, note that that applicant was 15 years of age at the time of the offending; had committed some previous offences; and was sentenced to two years' probation and 75 hours of community service. There was no suggestion of time in custody. His personal circumstances are likely to have provided a more significant explanation for his offending, than in the present case.

[74] The applicant in *R v HY*[38] was 16 years of age at the time of his offending. The offence was committed in the currency of a probation order. That applicant had a criminal history from the age of 13, described as a "disturbing criminal history for

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33 See ss 93 and 103 of the *Penalties and Sentences Act*.
34 See ss 193 and 196.
35 See AR pp 23-26; see also AR 13.
36 [2002] QCA 265.
37 Unreported; CA 224 of 1998; 31 August 1998.
38 [2005] QCA 163.

one so young". The applicant's offending demonstrated his need for the supervision and guidance provided by a probation order. He, too, was subject to a community service order at the time of his offending. The only sentence imposed was 18 months' probation. The criticism of that order, resulting in its variation, was based on the totality principle, having the consequence that that applicant would then face a period of 27 months subject to the order. The Court, on appeal, made orders to reduce the total effective period to 18 months. Again, taking into account the time which the present applicant has spent in custody, and the lengthy period for which he had been subject to a probation order prior to the present sentence, this case indicates that a period of two years' probation for the present applicant is excessive.

[75] The applicant in *R v J*[39] pleaded guilty to entering a dwelling house at night with intent to commit an indictable offence. He was 14 years of age when the offence was committed. The offending involved alcohol, and included a threat of violence to the complainant. Although the applicant had not previously been before the Court, he had earlier received a warning with respect to a reasonably similar incident. On appeal, the sentence was varied to a period of two years' probation. Bearing in mind the time the present applicant has spent in custody, his age, the period he has already spent on probation, and his conduct generally during this period and while on bail, this decision provides little support for an order that he serve two years on probation.

[76] I agree with Morrison JA that an important consideration focused in the present case is the applicant's rehabilitation. Nevertheless, probation is a form of punishment, and as the decision in *R v HY* demonstrates, the period for which a child is subject to a probation order is some measure of the extent of the punishment. The Court considered that the applicant in that case would benefit from probation. There is no reason to think that that was not also true of the applicant in *Simon*. Such a consideration can not provide justification for the maximum period of probation which may be imposed. I also bear in mind the applicant's conduct recorded in the Youth Justice Service Centre, particularly since his release in August 2015. Bearing in mind the period he spent in custody, and the similarities between this case and *Simon*, it seems to me appropriate to replace the orders of the sentencing judge with an order that the applicant be released subject to a probation order for a period of 12 months.

Conclusion

[77] In my respectful opinion, in light of the cases to which we have been referred, a period of probation longer than 12 months would not reflect the consistent application of sentencing principles. It would result in inexplicable differences between the sentence imposed in this case, and others imposed by this Court, particularly in *Simon* and in *HY*. The application for leave to appeal against sentence should be granted, and the sentence imposed on the applicant should be replaced with a sentence that he be subject to a probation order for a period of 12 months from the date of the sentence in the Childrens Court.

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39 [2002] QCA 227.