SUPREME COURT OF QUEENSLAND

CITATION:	*R v SCR* [2017] QCA 60
PARTIES:	**R** **v** **SCR** (applicant)
FILE NO/S:	CA No 238 of 2016 DC No 15 of 2016 DC No 16 of 2016 DC No 22 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Townsville – Date of Sentence: 5 August 2016
DELIVERED ON:	Orders delivered ex tempore 15 March 2017 Reasons delivered 11 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	15 March 2017
JUDGES:	Fraser and Morrison JJA and Mullins J Judgment of the Court
ORDERS:	**Delivered ex tempore on 15 March 2017:** **1. Application for leave to appeal against sentence is allowed.** **2. Sentence imposed in the Children's Court on 5 August 2016 is varied by setting aside the order that the applicant is required to serve 70% of the sentence of detention and instead ordering the applicant is to be released from detention on a supervised release order after serving 60% of the period of detention.** **3. Otherwise the other orders of the Children's Court are confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the child applicant plead guilty to a substantial number of offences and was sentenced to serve concurrent terms of detention for three years and six months – where s 272(2) *Youth Justice Act* allows for release after the young offender serves 70 per cent of the detention term – where, in special circumstances that term may be reduced to

between 50 and 70 per cent – where the applicant had a prejudicial upbringing and is institutionalised due to a history of petty crime – where the applicant assisted and cooperated with authorities – where the respondent concedes that an error was made by the sentencing judge when the sentencing judge failed to consider those matters as special circumstances – whether the special circumstances should result in an earlier release date – whether the sentence is manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 189
Youth Justice Act 1992 (Qld), s 227(2)

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, cited
R v J [1995] QCA 516, cited
R v R, unreported, McPherson JA Thomas and Moynihan JJ, CA No 188 of 1995, 25 August 1995, cited

COUNSEL: P F Richards for the applicant (pro bono)
V A Loury QC for the respondent

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

[1] **THE COURT:** Over a 13 month period between 7 January 2015 and 16 February 2016, Mr SCR committed a substantial number of offences, all of which were the subject of guilty pleas and sentences on 5 August 2016. He was aged between 14 and 15 years at the time of offences, and 16 at the time of sentence.

[2] He was sentenced to various (concurrent) terms of detention, the most severe of which was three years and six months. The learned sentencing judge also ordered that he serve 70 per cent of the period of detention before being released on a supervised release order.

[3] Mr SCR sought leave to appeal against the sentences imposed on the basis that they were manifestly excessive when viewed as a whole, principally because the learned sentencing judge required him to serve 70 per cent of the detention, under s 227(2) of the *Youth Justice Act* 1992 (Qld).

[4] On 15 March 2017 this Court set aside the sentences imposed but only as to the requirement to serve 70 per cent, substituting that he be released on a supervised release order after serving 60 per cent of the period of detention. What follow are our reasons for joining in those orders.

General nature of the offences

[5] Some idea of the nature and extent of the offences committed over the 13 month period can be gained by reference to the two indictments and the summary charges which were dealt with on the one day.

[6] Indictment No 15 of 2016 contained 30 counts which can be summarised as follows:

(a) two counts of entering premises with intent to commit an indictable offence;

(b) seven counts of burglary and stealing;

(c) seven counts of unlawfully using a motor vehicle;

(d) two counts of burglary by breaking in the night;

(e) two counts of attempted unlawful use of a motor vehicle;

(f) one count of dangerous operation of a motor vehicle, involving excessive speed;

(g) one count of common assault;

(h) one count of attempted burglary;

(i) one count of entering premises and stealing by breaking;

(j) four counts of wilful damage; and

(k) two counts of serious assault.

[7] Indictment No 16 of 2016 contained 13 counts, summarised as follows:

(a) two counts of wilful damage;

(b) one count of breaking and entering premises, and wilful damage;

(c) three counts of common assault;

(d) six counts of serious assault against a public officer; and

(e) one count of serious assault, by spitting on a public officer.

[8] Eleven summary offences were also dealt with at the same time as the two indictments. The offences covered in those were:

(a) one count of trespass;

(b) one count of driving without a licence and having never held a licence;

(c) one count of driving an unregistered motor vehicle;

(d) one count of driving an uninsured motor vehicle;

(e) one count of wilful damage of police property;

(f) three counts of unregulated high risk activities; and

(g) three counts of failing to stop a motor vehicle.

[9] In addition to those revealed mentioned above, a further 65 offences were taken into account pursuant to s 189 of the *Penalties and Sentences Act* 1992 (Qld). The s 189 schedule identified various offences: throwing rocks, concrete projectiles, parts of an air conditioning vent and duct, round discs of concrete, counterweights and cables from inside fans, metal straps, ventilation grills, the metal end of a fire hose, aluminium strips like spears and pieces of steel plate. Some of these items hit various staff members causing injuries ranging from pain, bruising and contusions, wounds and grazes. In addition, quite a deal of property damage was caused, including ventilation louvres, air conditioning vents and air ducts, extraction fans, an extraction hood, ventilation grills, communication circuits for duress alarms, fluorescent lights and reflectors, and the hot water system. Those offences were committed between 7 January 2015 and 3 August 2015.

[10] There were 516 days of pre-sentence custody, which were taken into account in setting the date upon which Mr SCR was to be released. His current release date is 18 August 2017, at which time he will be then subject to supervised release until 6 September 2018.

General nature of the offences

[11] Over a two month period, Mr SCR broke into more than 22 homes and stole items of property, including many cars. One of those cars was driven by him, while being chased by police, at speeds of up to 180 kilometres per hour in a 60 kilometre per hour speed zone.

[12] Mr SCR was returned to a detention centre where he was held in custody until his sentence. Whilst there, he committed further offences which included wilfully damaging property in the centre and assaulting 20 youth detention centre workers. The general circumstances of those offences were that:

(a) on 10 March 2015, Mr SCR and another detainee climbed onto the roof of the detention centre where a length of metal railing was used to damage property;[1]

(b) on 5 July 2015, Mr SCR became aggressive, abusing a staff member and arming himself with a rock;[2]

(c) on 3 August 2015, Mr SCR and two others climbed onto the roof of the detention centre and assaulted a staff member by throwing a concrete projectile; metal louvres were kicked out and used as projectiles; and he broke into a plant room and tried to use a fire hose to hose staff; and

(d) on 4 September 2015 Mr SCR was aggressive, climbed onto a storage box and smashed a television.

[13] Subsequently in late 2015, there were two more days when Mr SCR became involved in offences involving either wilful damage or serious assault on public officers. On 20 November 2015, he and two others climbed onto the roof of the administration building at the detention centre and broke multiple antennas, antenna mounts and transmitters, causing $8,768.45 worth of damage. Then, on 27 and 28 December, Mr SCR and another detainee climbed onto the roof of part of the detention centre and engaged in extensive damage to the exterior of the roof and the fittings, causing in excess of $50,000 damage. In addition, Mr SCR broke into the upper plant room causing extensive damage to louvres, air conditioning filters, light fittings, the ceiling and hatch panels. At one point they took several fire extinguishers and discharged them on the roof and over staff. Items were thrown at the staff including a bolt, a base plate, metal objects, fibre board, fluorescent light tubes, pieces of plasterboard and roofing plaster. The assaults of staff members included causing injuries from spraying fire extinguisher powder over one staff member, causing a laceration to the head of another, causing bruising and swelling to another, causing a laceration to the forearm of another, a deep laceration to the finger of another and spitting on yet another staff member.

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1 The s 189 schedule listed other offences: windows and lights were smashed, a fire extinguisher was sprayed at the staff and then thrown into the ground, the roof vent and guttering were damaged and objects were thrown at and hit staff members.

2 The s 189 schedule identified other offences: damaging the camera of the CCTV inside the cell, breaking parts of the smoke detector and damaging a second smoke detector in another room.

[14] On 16 February 2016, Mr SCR committed a serious assault on a youth detention worker. He had become angry and aggressive when told that books and paper items would be removed from his cell because he was repeatedly using paper to obstruct the CCTV camera in his cell. Mr SCR repeatedly kicked the water dispenser in the living area, causing detention workers to restrain him. In the course of fighting back, Mr SCR spat in the direction of one particular detention worker. The spit landed on that workers lips, and entered his mouth. It was this offence which attracted the sentence of three years and six months detention.

[15] The offences involving breaking and entering and unlawful use of motor vehicles can largely be grouped together. Between 7 January 2015 and 8 March 2015, Mr SCR and some co-offenders committed a series of property offences between Port Douglas and Townsville, targeting houses in order to steal keys and vehicles. Mr SCR was 14 during this period. All of these offences occurred during his release under a supervised release order.[3] This section of the offending commenced six days after Mr SCR had been released under a supervised release order.

[16] The nature of the offending conduct for each count in this category is similar. Mr SCR and others would break into a house and if vehicle keys could be found, the vehicle would be stolen. As often as not, the vehicle would be found abandoned later. Entry to the houses was mostly gained in the early hours of the morning while the occupants were asleep. Entry would be gained through unlocked doors and windows or by cutting through flyscreens. On occasions other items were stolen, such as keys to other residences, a laptop computer, phones, discount cards, cash, a handbag and jewellery. On some occasions the vehicle that was stolen was used in committing other offences, and in some cases, the vehicles were damaged in collisions. In total, about 17 vehicles of one sort or another were stolen in this way.

[17] Of them, three were damaged, one extensively. On a number of occasions, the owners or occupiers of properties pursued Mr SCR and his co-offenders, sometimes on foot and other times in vehicles. On more than one occasion police were involved in pursuing the vehicles, and deploying a tyre deflation device in order to bring them to a halt.

[18] One of the incidents where Mr SCR and his co-offenders stole a vehicle, involved a Holden utility. Soon after it was stolen, police attempted unsuccessfully to intercept it on two occasions. The vehicle was fitted with an in-car video which was connected to a GPS, and the footage recorded by it revealed some of what occurred. The vehicle was used on a road outside a party, where a serious of "burnouts" were performed. The vehicle then accelerated to 180 kilometres per hour in a 60 kilometre per hour speed limit zone, travelling at high speed past a 24 hour ambulance station. The vehicle was also recorded weaving through traffic and sliding around corners on the back streets of Townsville. Mr SCR was driving during this incident. He said he could recall that police were trying to intercept him (he thought around six to eight times), but he just sped away.[4]

Mr SCR's antecedents

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[3] On 15 October 2014, Mr SCR had been sentenced to 15 months detention with an order for release after 50 per cent of that period had been served. The offences consisted of 20 property offences. He was released on a supervised release order on 1 January 2015, and the expiry date of that order was 18 August 2015.

[4] AB 85.

[19] A pre-sentence report was provided to the learned sentencing judge.[5] Under the heading "Factors Contributing to Offending", the report listed the following:

(a) ongoing childhood trauma;

(b) institutionalisation/entrenched pro-criminal attitude;

(c) negative peer influence; and

(d) substance misuse.

[20] The report referred to Mr SCR's significant trauma in his early life due to exposure to domestic violence and rejection from family members. It said that his behaviour had deteriorated significantly upon the death of his grandfather in 2011. In 2012, his mother, unable to cope with Mr SCR's complex behaviours, entered into an Intervention with Parental Agreement (IPA) with Child Safety. That resulted in a one year short-term custody child protection order by the Cairns Childrens Court. As a result, Mr SCR was removed from family members and his community, and placed at a Child Safety approved residential home in Cairns. That residential home was for young people with assessed complex to extreme behaviours.

[21] It recorded that Mr SCR admitted he had responded aggressively towards the detention officers, but maintained he had been treated badly by the staff, thereby causing his reaction. The author of the report considered that Mr SCR's exposure to cumulative trauma as a child increased the likelihood of cognitive distortions, hypervigilance and the misinterpretation of the detention officer's directions as a personal affront.

[22] Mr SCR had spent the majority of his teenage years, between the ages of 12 and 16, incarcerated at the Cleveland Youth Detention Centre, and more recently at the Brisbane Youth Detention Centre. The longest period of time he had spent in the community in the past four years was 67 days between 1 January 2015 and 9 March 2015. Not surprisingly, the report advanced the view that Mr SCR's long period of detention would have contributed to his difficulties in making the transition back to the community.

[23] The report also offered the view that Mr SCR's affiliation with negative peers may have contributed to his attitude and his pro-criminal behaviour. Throughout the period of his offending in the community, Mr SCR had spent his time as he chose, freely associating with anti-social peers and engaging in anti-social behaviour. On his own report, he was smoking cannabis daily, using methamphetamine and drinking alcohol. The author's assessment was that substance misuse exacerbated Mr SCR's level of impulsivity.

[24] The report looked at Mr SCR's attitude to the offences and victims. He showed no remorse for his actions towards the detention staff. As to the offences committed in the community, he was able to identify that he felt sorry for the victims, but "had little insight into the impact that his offending behaviour may have had on the people he offended against".[6] He struggled to show empathy for the victims of his offences or acknowledge the dangers to the community by his driving stolen cars. The report went on to offer the view that "the difficulties he experiences can be

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5 AB 132.

6 AB 135.

linked to his age, maturity level, cumulative trauma he has experienced, the limited pro-social behaviours he has been exposed to and his level of institutionalisation".[7]

[25] Mr SCR's criminal record is remarkably long for one so young. The bulk of the offences consist of property type offences, namely unlawful use of motor vehicles, entering premises to commit indictable offences, wilful damage, burglary, stealing, assault, and possession of tainted property. In addition there are several offences involving common assault,[8] and more recently, serious assaults on police officers.[9] Between 2011 and 2014, he had appeared in court and been sentenced on 10 different occasions, on about 146 different offences.

[26] The punishment imposed by way of sentences across that span had increased over time, from probation and good behaviour bonds in 2011-2012, to detention periods in 2012, increasing to 12 months detention in 2013 and 15 months detention in 2014.

[27] Counsel for Mr SCR advanced some matters to the learned sentencing judge in relation to his background. He frankly described him as a "young man who essentially has had no prospects in life of ever doing anything with his life", which he attributed, by reference to the pre-sentencing report, to the dysfunctional childhood involving his family environment and domestic violence.[10] He had only been educated to Grade 7 and with the exception of 67 days, had spent the majority of his teenage years, between the ages of 12 and 16, in detention. Counsel agreed that it would be almost inevitable that Mr SCR will end up in an adult prison, attributing that to the fact that he had "missed out on all the opportunities that a young indigenous lad might otherwise have expected and certainly been entitled to".[11]

[28] In the course of discussing with the learned sentencing judge the approach that might be taken, counsel for Mr SCR accepted that "detention is an inevitability".[12] He added that, based on instructions, that Mr SCR "has been attending all of his schooling whilst in detention … [and] is now essentially studying in Grade 11".[13]

Approach of the learned sentencing judge

[29] The learned sentencing judge referred to sentencing remarks made in October 2014 when Mr SCR had been sentenced for previous offences. He adopted, as applicable to this occasion, what was said then:

> "A lot of people have suffered a lot of anxiety because of what you've done.
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> …
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> You've shown a blatant disrespect for other people's property. You don't seem to care about other people's property. You seem to think you can take other people's property, and you seem to think you can

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7 AB 135.
8 In 2012, AB 122.
9 In 2013, AB 128-129.
10 AB 60.
11 AB 62.
12 AB 63.
13 AB 63 line 14.

> damage other people's property as and when you feel like it. And that sort of thing just cannot be tolerated."[14]

[30] His Honour summarised the history of offending, referring to the fact that between 2011 and 2014, Mr SCR had appeared in court on 10 occasions, on 146 charges. At the time of this sentencing, there were an additional 118 offences, 65 of which were to be taken into account when sentencing the indictable offences.

[31] Factors referred to by his Honour included the following:

(a) Mr SCR's age; 14-15 years old at the time, and 16 years at the date of sentence;

(b) he had been in detention for 516 days, and that period would be taken into account in deciding the release date;

(c) the aggravating factors identified by the Prosecutor, including that the offending commenced only days after his release on a supervised release order, the significant number of property offences over a two month period, the entry into people's homes and theft of their vehicles causing them inconvenience, the dangerous driving whilst unlicensed, the complete disregard for authority of the detention workers, the damage to a significant amount of property (in excess of $50,000), and assaults on the youth detention workers;

(d) the fact that he had been a persistent offender, committing significant offences, and with a significant criminal history;

(e) the plea of guilty;

(f) the pre-sentence report including details of his upbringing and background provided by counsel;

(g) the fact that he was completing his education whilst in detention and undergoing some training courses;

(h) that he had no regard whatever for other people and the property of other people, and had shown no remorse; and

(i) that he had displayed little insight into the impact of his offending, and little, if any, empathy for the victims.[15]

[32] Having identified the need for general deterrence and community protection, the learned sentencing judge then said this as to the period of time that would have to be served before release:

> "In my view, whilst detention should only be imposed as a last resort, it is my view that detention is the only suitable sentencing option for your offending, and I'm not satisfied that any sufficient special circumstances exist, such as, would warrant a reduction of the time to be spent in detention from 70 per cent to 50 per cent. You have, in the past, been released on supervised release after 50 per cent and have continued to offend."[16]

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14 AB 68.
15 AB 68.
16 AB 69.

[33] Finally, the learned sentencing judge took into account the totality of the offending when imposing the sentences.

Discussion

[34] Before this Court, counsel for Mr SCR, commendably appearing pro-bono, urged a number of matters. It is necessary to refer to only one. That is that the sentencing discretion miscarried because of the failure to be satisfied that there were special circumstances, within the meaning of s 227(2) of the *Youth Justice Act* 1992 (Qld), and therefore to reduce the period of time to be served in detention to less than the default level of 70 per cent

[35] Section 227(2) of the *Youth Justice Act* provides:

> "(1) Unless a court makes an order under subsection (2), a child sentencedto serve a period of detention must be released from detention after serving 70% of the period of detention.
>
> (2) A court may order a child to be released from detention after serving 50% or more, and less than 70%, of a period of detention if it considers that there are special circumstances, for example to ensure parity of sentence with that imposed on a person involved in the same or related offence."

[36] Unfortunately, as the Crown acknowledged, no submission was made to the sentencing judge about the kinds of circumstances that could amount to special circumstances for the purposes of s 227(2). The Crown conceded that the learned sentencing judge erred by not taking into account certain matters as special circumstances that enlivened the discretion under that subsection to reduce the pre-release period of detention. The conceded error is of a kind described in *House v The King*[17] as justifying appellate correction.

[37] The subject of "special circumstances" received attention on several occasions during the sentencing hearing. The first occurred when the Prosecutor was referring to Mr SCR's criminal history, and the fact that in 2013 he received "a sentence of 12 months detention with release after 50 per cent, which is the release imposed for special circumstances".[18] The second was at the end of the Prosecutor's submissions when the percentage of time to be served was discussed. The Prosecutor referred to the fact that he had been released after 50 per cent on two prior occasions, and in each case he had breached the supervised release orders and continued to offend.[19] The learned sentencing judge then inquired as to whether the Prosecutor was contending that 70 per cent should be served. The answer was:

> "Yes, 70 per cent of the default position unless there are special circumstances and, in my submission, there are no special circumstances having regard to the breach of those orders and the nature of the offences and so he should serve 70 per cent of the sentence before release."[20]

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17 (1936) 55 CLR 499; [1936] HCA 40.
18 AB 48 line 32.
19 AB 59.
20 AB 60 lines 1-4.

[38] The third occurred when Mr SCR's counsel was addressing the question of sentence. In the course of submissions by Mr SCR's counsel he said:

> "I accept, your Honour, it would be difficult to persuade your Honour that the default position of 70 per cent should not be served." [21]

He went on to say that the real issue was what the overall head sentence should be.

[39] The fourth was in the learned judge's sentencing remarks when he indicated that he was not satisfied that there were "any sufficient special circumstances" that would warrant a reduction of less than 70 per cent.

[40] On the application before this Court the factors which the Crown said were relevant as special circumstances were:

(a) the fact that Mr SCR has been institutionalised as a very young age, warranting his release at something less than 70 per cent; and

(b) Mr SCR's cooperation with law enforcement, in that he made admissions to many of the offences committed whilst in the community, and nominated his co-offenders; balanced against that is the fact that there was no cooperation in relation to the offences which occurred in the detention centre.[22]

[41] With respect, we consider that the Crown's concession is properly and fairly made, at least as to the second factor. For the purposes of the resolution of the application it is only necessary to refer to that factor.

[42] Reference was made by the Prosecutor to the admissions made by Mr SCR to police, as to his being the driver of vehicles on most of the occasions where houses were broken into and vehicles stolen.[23] However, the true nature of those admissions and cooperation is, as reflected in the Crown's outline on this application, that he not only admitted his own conduct, but nominated his co-offenders. As the agreed schedule of facts stated, Mr SCR "made admissions to the offences and nominated co-offenders", then naming four identified co-offenders.[24] Further, on a number of occasions it seems apparent from the agreed schedule of facts that the police could not have identified Mr SCR as the driver, absent his admissions to that very fact. The agreed schedule of facts identifies about 17 occasions where that was the case.[25]

[43] Here the crime might have been known, in the sense that someone knew their car had been stolen, and police found it, but the police did not know who the offender was until Mr SCR's admission came. Likewise, police did not know the names of the co-offenders until the admission was made. That form of cooperation would otherwise attract special leniency,[26] and in my view constitutes "special circumstances" for the purposes of s 227(2) of the *Youth Justice Act*.[27]

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21 AB 65 line 14.
22 Respondent's outline, paragraphs 10.6 and 10.7.
23 AB 55 lines 33-35, and AB 56 lines 4-5.
24 AB 88.
25 Counts 5, 6, 7, 10, 11, 16 and 19; and on 10 of the s 189 offences.
26 *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46, per Hayne J at [116].
27 *R v R* (CA 188 of 1995, 25 August 1995) per Thomas J at page 9, McPherson JA and Moynihan J concurring.

[44] Whilst that would warrant some reduction from the 70 per cent default position, it would not warrant a reduction below 60 per cent because of the countervailing factors, such as:

(a) the offences were very substantial in number, escalating over time, and committed in breach of a supervised release order; they involved serious assaults against detention officers, and a complete defiance of the detention system;

(b) there was no remorse shown, and little insight into the impact of the offending;

(c) Mr SCR demonstrated little, if any, empathy for his victims, and did not acknowledge the dangers to others in the manner of his driving;

(d) his criminal history was very significant, in length, number and type of offence; it involved repeated offending soon after release, and in breach of supervised release orders; and

(e) whilst the offending was related to age, maturity level, cumulative trauma over the years, limited pro-social behaviours and institutionalisation, the community was entitled to be protected against him.

[45] We are of the view that the special circumstances, in this particular case, warrant the reduction of the time to be served from 70 per cent to 60 per cent. That is the position adopted by the Crown and counsel for Mr SCR.

[46] The head sentences were not challenged as being manifestly excessive. However the Crown addressed that issue in its outline. The authorities referred to, *R v R*[28] *and R v J*,[29] offer some support for the sentences imposed.

[47] In *R v R* a similarly aged offender who committed 104 offences of a generally similar nature, but with greater loss ($302,728), and whose offences included seven occasions of escaping from custody, was sentenced to six years detention with 50 percent to be served. He pleaded guilty and cooperated with police. That sentence was not found to be manifestly excessive.

[48] *R v R* was referred to by this Court in *R v J*, where a similarly aged offender committed about 33 offences, largely of a similar nature to the current case. Some were committed while on probation. He had a poor criminal and family history, and was a heroin addict. He pleaded guilty and cooperated with police. The sentence of four years without earlier release was reduced to three with 50 per cent to be served, largely on considerations relating to not harming the chances of rehabilitation.

[49] For the reasons above we joined in the orders made on 15 March 2017.

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28 CA 188 of 1995, 25 August 1995.
29 [1995] QCA 516.