[1997] QCA 80

COURT OF APPEAL

FITZGERALD P
DAVIES JA
FRYBERG J

CA No 25 of 1997

THE QUEEN

v

A **Applicant**

BRISBANE

DATE 06/02/97

JUDGMENT

THE PRESIDENT: This is an application for leave to appeal against a sentence imposed in the Children's Court on 23 January this year. The applicant pleaded guilty to one count of grievous bodily harm on 11 December last year and his sentencing was adjourned so that a pre-sentence report could be obtained. The offence had been committed about 10 months earlier on 13 February last year.

The applicant was sentenced to six months detention with an order for release after serving 50 per cent of that time. No conviction was recorded. The applicant is 15 years of age born on 7 July 1981. He was 14 years of age when he committed the offence and has no prior or subsequent criminal history. The offence, the subject in which the applicant was involved, concerned an attack by the applicant and two others, JC and KG upon a single student of approximately the same age 13, who attended the same school as the applicant.

I mention JC and KG in that way because that is the basis upon which this case has proceeded although it must be said that they have not been found guilty of any offence and that they are proceeding to trial in the District Court. The victim of the attack was walking in the school grounds when he was assaulted without warning. He fell over and was unable to see his attackers. According to the applicant's version of events which formed the factual basis of this sentence, he and the other two intended to assault a debtor of a friend. The debtor was unknown to them and a bystander erroneously identified their victim as the debtor.

The victim did not know any of those who assaulted him. On the version of the facts given by the applicant, JC pushed the victim and KG kicked and punched him. Towards the end of the incident the applicant "jumped in" and punched the victim once but did not kick him. It seems that the punch was to the head and was probably in the nature of a jab. The applicant retreated when the complainant victim called for help.

The applicant and his co-offenders on the basis upon which this Court is proceeding, were later identified by witnesses to the attack and after being approached by the Deputy Principal of the school which he and the victim attended, the applicant provided her with a handwritten statement in which he acknowledged his guilt. He subsequently confirmed what he said in the statement in an interview with the police.

Regrettably what might otherwise have been a comparatively minor although unacceptable incident had severe consequences for the victim who suffered a smashed kneecap and was hospitalised for two days. By July last year the victim had regained 75 per cent of the strength in his leg and might regain full use of his leg although it is possible perhaps likely that there will be a five per cent disability. The injury has had a detrimental impact on the victim's sporting prowess. He was a champion swimmer but his times have been drastically reduced and he now runs with a limp. Further it requires little imagination to accept that a 14 year old interested in sporting activity would be significantly disadvantaged psychologically by the consequences which the victim has sustained. The sentencing Judge described the assault as gratuitous and sudden and ferocious and he did not accept that the applicant

disassociated himself in any meaningful way from the attack until it was over. He described the victim's life as seriously disrupted and referred to the need to set "proper standards", to quote him, against school assaults.

He also rejected a suggestion in the pre-sentence report that ethnic tensions at the school had some bearing on the attack. However, he described the pre-sentence report on the whole as favourable to the applicant, perhaps something of an understatement and referred to the applicant's youth, good family background and satisfactory school performance as mitigating circumstances. He also accepted that the applicant was remorseful and indeed there is significant evidence that the remorse was immediate, sincere and deep.

The respondent supports the sentence imposed. While it is conceded that the interests of a juvenile offender are a prominent consideration it was submitted that they are not the overwhelming consideration and cannot outweigh the community's interest in deterrents. Further there was a need to have regard to the consequences of the applicant's offence on his victim and it was submitted that the short period of detention ordered was within an appropriate sentencing range. However, that is not as has been said on numerous occasions the appropriate first question to be asked when the person to be sentenced is a juvenile.

The applicant has submitted that a non-custodial sentence in particular a community based order is appropriate and relies upon a number of matters, his youth, his lack of previous convictions, the fact that he was liable as a party only under section 8 of the code in the sense that he did not himself inflict the grievous bodily harm which is the subject of the charge; his early plea of guilty which was indicated at the committal hearing; his remorse to which reference has been made; the favourable pre-sentence report; his good home life and his history of previous and subsequent good behaviour.

In substance it was submitted that the sentencing Judge placed too much weight on deterrents and gave insufficient regard to the mitigating circumstances including the applicant's prospects of rehabilitation which will be diminished by his detention. It is necessary to say just a little more of the background of the offence in order to explain how a person, a young boy of good character and good behaviour became involved in such a cowardly attack.

In seems that earlier in the year the applicant had joined a group at his school apparently out of a need to be accepted and the group which was one of a number of groups at his school involved in racial or cultural rivalry had had an adverse influence on him. However there is nothing to indicate that the applicant had any foreknowledge of the type of assaults which his co-offenders intended and inflicted or that he had reason to anticipate the injuries which resulted.

Also in his favour he has offered to give evidence against his co-offenders at their trial. There are two final matters. One is that there are passages in the sentencing Judge's remarks and cases referred to by His Honour which seem to me to be at best of doubtful validity for present purposes. Secondly, there are the provisions of the *Juvenile Justice Act* 1992 and the attitude consistently adopted by this Court most recently in *P* Court of Appeal 477 of 1996 earlier this morning which emphasise the principle that a juvenile who has not previously offended is only to be sentenced to detention as a last resort.

In my opinion the circumstances of this case including in particular the consequence to the victim are not such that this boy should be detained because substantially for the reasons urged on this behalf. I would grant the application, allow the appeal, set aside the sentence imposed below and order instead that he perform 120 hours community service. I note in conclusion that this sentence is effectively in addition to a period of approximately two weeks which he has already spent in the Sir Leslie Wilson Detention Centre.

DAVIES JA: I agree.

FRYBERG J: With one caveat I also agree in the order that is proposed and with the President's reasons. I would not see anything inappropriate in the reference by the learned trial Judge to *The Queen v. Amituanai* and the relevance of that case to consequences. Also I am particularly moved by the willingness of the applicant to give evidence which I think is a very substantial discounting factor to be taken into account.

THE PRESIDENT: I omitted to say that a conviction should not be recorded, a matter which was discussed in argument and a preliminary view had been indicated by the Bench and accepted by both parties, an approach easily understood since the Judge below had

ordered that a conviction not be recorded.

In summary therefore the order of the Court is application granted, appeal allowed, sentence imposed below set aside. In lieu order that the applicant carry out a period of 120 hours community service and further order that no conviction be recorded.