IN THE COURT OF APPEAL [1998] QCA 252

SUPREME COURT OF QUEENSLAND

C.A. No. 192 of 1998.
C.A. No. 228 of 1998.

Brisbane

[R v. C & M]

THE QUEEN

v.

C and
M

(Applicants)

Pincus J.A.
Mackenzie J.
Helman J.

Judgment of the Court

Judgment delivered 1 September 1998

APPLICATIONS FOR LEAVE TO APPEAL AGAINST SENTENCE REFUSED

CATCHWORDS: **CRIMINAL LAW - sentence - juvenile offenders - attempted arson and wilful damage - 3 offenders all 15 years of age - 1 offender still at school - appellants are the 2 offenders who had left school - 3 months detention with immediate release ordered - whether detention order was contrary to s. 165 *Juvenile Justice Act* - whether a justifiable sense of grievance caused by sentence of community service imposed on co-offender still at school - whether rate at which compensation was ordered to be paid was excessive *Juvenile Justice Act* 1992 ss. 109, 165, 175, 176, 177, 192.**

Counsel: Mr P Leask for the applicant C.
Mrs D Richards for the applicant M.
Mr T Winn for the respondent.

Solicitors: Legal Aid Queensland for the applicant C.
Legal Aid Queensland for the applicant M.
Director of Public Prosecutions (Queensland) for the respondent.

Hearing date: 3 August 1998.

REASONS FOR JUDGMENT - THE COURT

Judgment delivered 1 September 1998

These applicants apply for leave to appeal against their sentences, imposed for offences of attempted arson and wilful damage. The applicant M committed two, and the applicant C three, offences of attempted arson; each committed one offence of wilful damage. All the offences were committed in November 1997 when each offender was 15 years of age. The primary judge made the same order in relation to each of these applicants: that no convictions be recorded, that each be detained for a period of three months, that each be immediately released upon participating in such a programme as is mentioned in s. 177(2) of the *Juvenile Justice Act* 1992 ("the Act") and that each pay compensation, on a basis which is discussed below. Counsel for each of the applicants made similar submissions, except with respect to the order for compensation. Each counsel contended that the making of a detention order was contrary to s. 165 of the Act and was, apart from that, too heavy a punishment; each also submitted that the sentence imposed on these offenders was such as to give rise to a justifiable sense of grievance, by comparison with that imposed on a co-offender, one K. Lastly, counsel for M argued that the rate at which compensation was ordered to be paid was excessive having regard to s. 192(5) of the Act.

The first offence was committed at the Albany Creek State Primary School. M, C and K piled up plastic boxes against the door of the girls' toilet block there and set the boxes on fire, damaging the door and a wall. Then on the following weekend, C and K poured a mixture of chemicals over part of a bridge at Albany Creek and set fire to it, causing some charring. On the same weekend all three offenders again attacked the Albany Creek State School. They poured a mixture of chemicals on a door of a classroom block, setting it alight

and causing damage to the door and surrounding wall; then they poured chemicals on and scorched a door in a games area. It has to be said in favour of these applicants that it appeared to be unlikely that the methods they used would cause a great amount of damage; however, it must surely have appeared to them possible that extensive damage could occur.

The sentencing judge had before him pre-sentence reports. That relating to M said that he appeared to be depressed after these matters first came before the court and that M's family had never had trouble with him previously. M's mother said that her son was certain that he would never offend again and that he was sorry for his actions. C's report also said that the offender had never been a problem to his family previously and that his offences took the family by surprise.

The first question is whether it was open to the learned primary judge to make a detention order; the argument to the contrary is based on the language of s. 165 of the Act, which reads as follows:

> "A court may make a detention order against a child only if the court, after -
> (a) considering all other available sentences; and
> (b) taking into account the desirability of not holding a child in detention;
> is satisfied that no other sentence is appropriate in the circumstances of the case".

Because, if committed by an adult, the offence of attempted arson created by s. 462 of the *Criminal Code* makes the offender liable to imprisonment for 14 years, it is a "serious offence" within the meaning of s. 8 of the Act. Therefore each of these offenders was liable under s. 121(2) of the Act to be detained for a period of not more than seven years and such an order is a "detention order": see the definition of "detention order" in s. 5. On the face of it, then, one would think s. 165 to be applicable to the present case. The reason for questioning that conclusion is that the detention order made, which was one requiring

detention for three months, was accompanied by an order for immediate release under s. 176, which is contained in subdivision 2 of division 7 of Part 5 of the Act. Section 175 of the Act states that the purpose of that subdivision -

> ". . . is to provide for a final option instead of the detention of a child by allowing a court to immediately release the child into a structured program with strict conditions". (emphasis added)

This seems, perhaps, to imply that an order made under subdivision 2 is not a detention order. On the other hand, subdivision 2, to which we have just referred, is part of a division headed "Detention order" and an immediate release order may only be made if the court has made a detention order: see s. 176(1); we note that s. 177(3) also refers to an order under subdivision 2 as a "detention order".

The better view is that the expression "detention order" in s. 165, quoted above, includes an order under subdivision 2 of the division dealing with detention orders - i.e. it includes an order that the offender be detained, accompanied by an immediate release order under s. 176(1) of the Act. This view of the matter is in accordance with the discussion in the reasons given in this Court in L (No. 117 of 1995, 26 April 1995).

It is our opinion, also, that the order made was a "detention order" within the meaning of s. 109(2)(e) of the Act which requires that a detention order be imposed on a child "only as a last resort and for the shortest appropriate period".

The more difficult question is whether the detention orders made were permitted by s. 165, relied on by the applicants and s. 109(2)(e) which we have just mentioned. Each of these provisions is intended, in cases to which it applies, strongly to constrain courts choosing

a sentencing option. But the question whether detention is a possible choice must always be a matter of degree, dependent upon the circumstances of the individual case. Neither of the applicants had any previous convictions and the judge was conscious of that, as well as of the favourable aspects of the reports referred to above. The reason his Honour decided to make the order he did in each of these cases - a detention order accompanied by an order for immediate release - was, it appears, that he thought such attacks on State schools have become too common; there was also particular mention of the deliberate nature of the offences of attempted arson and wilful damage, committed about a week after the initial offences of attempted arson.

Some reference was made to the decision of this Court in McG, (No. 194 of 1996,); there were three orders made by the Court, on 20 September 1996, 11 October 1996, and 24 October 1997. If one has reference only to the last, the impression might be gained that, for a similar offence of arson of a much more serious character, committed by a 16 year old, a probation order was thought appropriate. On 29 April 1996 McG was sentenced to detention. After he had served 23 weeks detention, this Court on 20 September 1996 varied the sentence so that it was to be suspended after six months followed by release on probation. When it was pointed out that this was not a permissible course, the order for detention was set aside, but that did not occur until 11 October 1996, by which time McG had spent over six months in detention. It does not appear to us that the case is of any assistance, for present purposes.

Although views might differ as to whether detention orders should have been made, in view of the inhibiting provisions discussed above, it does not appear to us that the punishments ordered were impermissible. Nor could they be held to be manifestly excessive. Paying particular regard, as we think one must, to the pressing need for deterrence, in relation

to arson attacks on schools, we would reject the submissions advanced for the applicants, based on s. 165 of the Act. Further, it does not appear to us that the sentence imposed upon the co-offender, one K, would justify this Court setting aside the detention orders. K's case was marginally less heinous than that of these applicants, in that he was a schoolboy and somewhat younger than the applicants. He was ordered to perform 100 hours community service and we do not regard the discrepancy between that punishment and the sentences imposed on the applicants as being such as to give the applicants a justifiable sense of grievance.

The only other point argued was that counsel for M contended that the order for compensation made against him was too severe. The judge ordered M to pay half the damage, amounting to $1,195, at the rate of $50 per week. It was pointed out on behalf of M that the court could make such an order only if "satisfied that the child has the capacity to pay the amount"; see s. 192(5). On the figures placed before the judge, it would have been difficult for M to pay. He had a part-time job only and it appears to us that (unless his parents were willing to accept a lesser sum for his board than had been agreed) he would have to find some other paying work, in addition, to meet the compensation payments. In the circumstances, of the case we do not see why the judge was obliged to regard that as beyond the applicant's capacity. If the judge's expectation turns out to be falsified by events, the order made can be varied by the proper officer of the court, under s. 230 of the Act.

In our opinion both applications should be refused.