

SUPREME COURT OF QUEENSLAND

CITATION: *R v WAN* [2012] QCA 21

PARTIES: **R**
v
WAN
(applicant/appellant)

FILE NO/S: CA No 191 of 2011
DC No 22 of 2011

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Childrens Court at Southport

DELIVERED ON: 24 February 2012

DELIVERED AT: Brisbane

HEARING DATE: 3 February 2012

JUDGES: Margaret McMurdo P and Fraser and White JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Application for leave to appeal against sentence granted.**
2. Appeal against sentence allowed to the extent of setting aside the sentence imposed on count 2 in indictment 34/10 and substituting a sentence of two years detention with release after 50 per cent.
3. Order 4 in the court order sheet attached to indictments 748/09, 34/10 and 124/10 is amended by deleting "748/09" and substituting "124/10".

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant pleaded guilty to two counts of robbery in company with personal violence, burglary and wilful damage, stealing, doing grievous bodily harm and threatening violence at night – where the appellant was a child under the *Youth Justice Act 1992 (Qld)* – where appellant sentenced to three years detention to serve 50 per cent on burglary and wilful damage – where maximum penalty was five years detention under s 176 *Youth Justice Act 1992 (Qld)* – whether sentence was manifestly excessive

Youth Justice Act 1992 (Qld), s 3, s 176, sch 1

COUNSEL: D Shepherd for the applicant/appellant
S P Vasta for the respondent

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

- [1] **MARGARET McMURDO P:** The applicant pleaded guilty on 1 March 2011 to six offences committed on three separate occasions and charged in three indictments. He was a child under the *Youth Justice Act 1992 (Qld)* at the time of the commission of the offences and at sentence. The first indictment (748/09) contained two counts of robbery in company with personal violence both committed on 15 December 2008. The second indictment (124/2010) contained one count of grievous bodily harm committed on 2 March 2009. The third indictment (34/2010) contained threatening violence at night (count 1), burglary and wilful damage (count 2) and stealing (count 3) all committed on 5 July 2009. On 3 March 2011, the court ordered that a pre-sentence report be prepared in respect of the applicant. The court heard submissions as to the sentence on 3 June 2011. On 16 June 2011 the applicant was sentenced to two years detention to serve 50 per cent on count 1 and three years probation on count 2 on the first indictment; 18 months detention to serve 50 per cent on the count of grievous bodily harm on the second indictment; and two years probation on counts 1 and 3 and three years detention to serve 50 per cent on count 2 on the third indictment. He has applied for leave to appeal against those sentences on the ground that they are manifestly excessive.
- [2] His counsel made clear that his application concerns only the sentences imposed for count 1 on the first indictment of two years detention and count 2 on the third indictment of three years detention. He contends the sentences failed to adequately take into account the applicant's youth and lack of previous convictions; give adequate weight to the requirement that any period of detention should be for the shortest possible period; and to have adequate regard to the sentences imposed on co-offenders. He submits that the sentences on count 1 on the first indictment and count 2 on the third indictment should be set aside and sentences of 18 months detention with release after 50 per cent should be substituted.

The offending in the first indictment (748/2009)

- [3] The complainants, a couple aged 21 and 22, were enjoying their first date at Southbank Parklands on 15 December 2008. At about 10.20 pm they walked along the boardwalk and sat on a retaining wall near the pier 3 ferry terminal waiting for the 10.50 pm ferry. Ten minutes later a group of about six young males approached them from behind, threatened the male complainant and tried to provoke him into fighting. The complainants tried to walk away but were surrounded by at least 12 young people, including at least four females. Those involved included LMcK, N, ZMcK, W, D-W and McL. The male complainant was pushed by one male and kicked in the head by the applicant who was standing on the ledge behind him. The complainants continued their attempts to leave but were encircled by the group who repeatedly asked the male complainant to fight. The males surrounded the male complainant whilst the females assaulted the female complainant. A male on the ledge behind again kicked the male complainant in the back of the head. His

assailants then punched him to the left side of the face with a closed fist and pushed him. He tried to reach for and protect the female complainant but the offenders pulled him backwards, punching him in the face and upper body and knocking him to the ground. They continued to punch and kick him in the head. He felt pain to his face, head and upper body, curled into the foetal position, and protected his face and head with his arms and hands. He felt someone search his pockets and remove his mobile phone and wallet and rip a silver chain from his neck.

- [4] Meanwhile the female complainant was pushed in the chest by an aggressive female who wanted to fight and who demanded to know whether she had money or cigarettes. Her assailants dragged her by the hair to the ground where they repeatedly punched and kicked her in the head. She tasted blood and felt dizzy and disoriented. Her bag and watch were stolen.
- [5] The incident was recorded on CCTV. Police viewed the footage later that night and detained some suspects, including the applicant, early the next morning. He was charged and released on a bail undertaking.
- [6] The male complainant suffered a swollen lip, a graze or bruising to his forehead and a lump to the right side of his head. The female complainant suffered a black eye, bruising to the head and upper left arm, and bruising and scratches to her back, knees and lower legs. She also suffered abrasions over her lower back consistent with fingernail trauma. No victim impact statements were tendered.¹
- [7] On 4 January 2009 the applicant participated in a recorded interview with police in the presence of his mother. He admitted that he and the others assaulted the complainants. He stood on a retaining wall and kicked the male complainant hard in the head. He also kicked the male complainant four or five times after he was dragged to the ground. He was in possession of the male complainant's mobile phone after the assault.
- [8] N was sentenced to two years probation and 80 hours community service without conviction; ZMcK was sentenced to 12 months detention to be served by way of a three month conditional release order and 18 months probation without conviction; McK-F, W and McL were sentenced to 18 months probation and 60 hours community service without conviction.

The offending in the second indictment (124/2010)

- [9] The complainant was a student at a high school. He knew the offenders because he had previously skipped school with them. The applicant's co-offenders, F and M, were also students at the school. The co-offender S and the applicant were former students at the school and friends with F and M. There was some tension between the complainant and the offenders who accused him of telling the principal that they stole money. As a result, the complainant had been avoiding them. On Monday, 2 March 2009, he was walking to a service station across from the school when he saw the offenders. When the offenders saw him they decided to bash him because he had implicated them in the stealing.
- [10] One of the group punched him. S, F and the applicant quickly became involved, each throwing multiple forceful punches, predominantly to his face and head.

¹ Victim impact statements were tendered on the sentence of a co-offender which indicated they suffered a significant psychological reaction to the offending: see *R v SJT* (Unreported, District Court, Brisbane, Reid DCJ, 14 March 2011).

A group of female students tried to stop the assault. The complainant fell to the ground. The applicant kicked him in the ribs. One female student pulled the applicant away. Another offender wielding a long wooden pole with a metal tip forcefully hit the complainant in the shin. M and F became involved by powerfully kicking the complainant's torso and legs whilst he was on the ground. Some female students managed to stop the assault and physically removed many of the offenders. M produced a pocket knife but a female student persuaded him to leave. S, W, F and M were all principal offenders. W punched and kicked the complainant. The offenders boasted and laughed about the assault.

- [11] The complainant's two front teeth were broken and the nerves exposed; he had a split lip and a cut to his right shin. In his victim impact statement he explained how concerning the loss of his two front teeth was to him as a teenage boy. He no longer smiled. They would cost \$15,000 to fix with ongoing maintenance costs. He was in considerable pain after the attack and could not eat until he underwent dental treatment. His mother wanted to move house because of the attack. He no longer went out much alone.
- [12] The applicant participated in an interview with police on 22 March 2009, again in the presence of his mother. He said the fight was over \$60 that the complainant owed F. He admitted only being present during the fight.
- [13] At the time of the applicant's sentencing, S was sentenced to three years probation and 100 hours community service without convictions; and LMCK was sentenced for this and other offences to two years detention with release after 12 months and three years probation with convictions on the more serious counts.

The offending in the third indictment (34/2010)

- [14] The complainants were a group of young Indian nationals with student or spousal visas. Between 6.30 and 7.30 pm on 5 July 2009 they heard a group of people at the front of their Kingston premises. The group was using a paling removed from the complainants' front fence to smash a glass window. Some members of the group yelled "You bastards, you bastards, we're going to get you." The complainants contacted their landlord and reported the incident to police. On their way home from the police station, they saw a group of young people on the road near their house. They suspected they were involved in the earlier incident.
- [15] Between 10.00 and 10.45 pm that night, the complainants again heard noises outside. When they investigated they saw a group of 10 to 12 young men in the front yard and on the footpath. One was holding a baseball bat which he pointed at an Indian man yelling "You fucking bitch, come down here I'm going to fucking kill you." Others were also armed with poles and bats and yelled abuse. The occupants were fearful and locked themselves in a bedroom. Some of the offenders yelled "Come out here, you bloody Indians, and we will kill you" and "You motherfuckers, we will kill you." The complainants physically held the bedroom door shut as the offenders entered their home and attempted to force the door open. They were scared and feared for their safety. The incident continued for about 20 minutes before the offenders left but only after ransacking the house. They left behind knife marks on the outside of the bedroom door; broken windows; a smashed television set; and damaged walls. Three mobile telephones, three leather wallets, cigarettes, a carving knife, personal banking identification and other cards, and \$50 cash were missing.

- [16] On 7 July 2009 the applicant participated in a recorded interview with police in the presence of his father. He admitted that he and three others saw a group of Indian people whom he believed had been involved in an earlier incident with him. He and his associates kicked the front fence, forced open the front door and entered the dwelling. When they could not find the occupants, he and his associates damaged property by throwing it around the house and through glass windows before leaving. His offending was not racially motivated.
- [17] An adult co-offender, Pope, who was 18 at the time, had spent 255 days in custody which could not be formally declared as time served under the sentence. Pope was sentenced to an effective term of two years and three months imprisonment with release on parole after serving 12 months imprisonment (including the pre-sentence custody) for these and 38 other counts contained in three indictments.

The pre-sentence report

- [18] The author of the applicant's pre-sentence report considered the contributing factors to his offending were his disregard for parental rules and boundaries in favour of negative peer association; strong connection with a peer group; and pro-criminal attitudes. As a result, he spent a great deal of unsupervised time with peers, engaging in a negative lifestyle including antisocial and offending behaviour. The offending in the first indictment occurred when he had left home and was living on the streets. He committed the offences to obtain more alcohol for the group. He would benefit from intervention aimed at developing empathy towards his victims. He had spent nine days on remand.² He had been participating for an extended period in the conditional bail program but on 25 November 2010, because of his non-compliance, the Department stopped trying to engage him in the program. He had no supervised order history or any previous contact with the Department. He was receiving significant support from his family and had stable accommodation available with his parents. He had been accepted into a YMCA educational program where he could complete his senior certificate. Sentencing options included a youth justice conference; a probation order; a community service order; combined orders of probation and community service; and a conditional release order. The author noted that the applicant was considered a suitable candidate for a conditional release program.
- [19] A further option was a detention order. The author noted: "A Detention Order would provide a clear punishment and a strong message that offending behaviour is not acceptable" but added:
- "It is respectfully requested that the court take into consideration the following factors
- [The applicant] will be further exposed to an offending culture and young people who identify with pro-criminal ideation thereby increasing the risk of recidivism.
 - Detention may contribute to [the applicant] experiencing a level of institutionalisation and may diminish his capacity to function in the community.
 - [The applicant] has no previous supervised order history.
 - [The applicant] would be removed from his family which may be detrimental to his future development and relationship with them."

² After sentence it emerged that the applicant had spent 22 days in custody and the indictment was amended to reflect that.

- [20] The author further noted that a combined detention and probation order was also available to the court. This would provide clear punishment as well as ensuring an extended period of supervision and support following his release from detention.

The prosecutor's submission at sentence

- [21] The prosecutor made the following submissions at sentence. The last of the offending occurred shortly before the applicant's 15th birthday. He was 16 years and 10 months at sentence. He had no prior convictions. The prosecutor emphasised the applicant's failure to comply with the conditional bail program and the seriousness and escalation of the offending; and questioned whether the applicant was truly remorseful. The pre-sentence report raised significant doubts as to his immediate prospects of rehabilitation. A term of detention of two to three years was appropriate.
- [22] Defence counsel made the following submissions at sentence. The applicant was a troubled boy who had previously been a good student with promising academic capacity. He came from a stable supportive home. His mother was present in court. Once he began associating with his co-offenders, his parents found he became uncontrollable and they were increasingly frustrated in their attempts to discipline him. He had been in custody for the past month and had now had a wakeup call so that he was re-engaging with his education and again doing well with his school work. He had an alcohol problem at the time of his offending and he had arranged to participate in a rehabilitation program within the detention centre commencing the following week. Many of his co-offenders on various charges had been sentenced to community-based orders. LMCK, was sentenced to two years detention to serve 50 per cent followed by three years probation for her role in the offences in the first indictment and an additional four counts of robbery, one count of assault occasioning bodily harm and one count of receiving, in which the applicant was not involved. That was also the appropriate sentence to impose on the applicant considering the principles applicable to the sentencing of juveniles.

The judge's sentencing remarks

- [23] After setting out the facts of the offending and the sentences imposed on the co-offenders, her Honour noted that detention was a last resort for juvenile offenders. Defence counsel accepted that the gravity of the present offences made detention the only appropriate sentence. The applicant participated in three separate episodes of frightening pack violence and played an active role. The victims were blameless and there was some premeditation. The physical injuries were limited but the victims suffered psychologically. An adult offending at that level could expect a head sentence of six years imprisonment. His parents believed his attitude had improved but he still lacked insight into the effect of his crimes. Further custody was required, coupled with an extended period of supervision after his release to reduce the risk of re-offending. The seriousness of the offending required that convictions be recorded for the unlawful grievous bodily harm, the burglary and threatening violence at night, but the judge did not record convictions for the other offences.³

The applicant's submissions

- [24] The applicant's counsel concedes there were serious aspects to the applicant's escalating offending. He contends, however, that the effective sentence of three

³ See *R v WAN*, (Unreported, Children's Court of Queensland, Brisbane, Clare SC DCJ, 16 June 2011).

years imprisonment with release after 18 months coupled with three years probation is manifestly excessive, taking into account the applicant's age, lack of prior offending and good background, all of which made his rehabilitation more promising. Only one of the applicant's juvenile co-offenders was sentenced to actual detention: LMcK, who was 13 when she committed the offences in the first indictment, was sentenced to two years detention with release after 12 months for those counts and an additional four counts of robbery and one count of assault occasioning bodily harm. His adult co-offender on the third indictment, Pope, received an effective sentence of three years imprisonment but with release after 12 months for that and many other offences. The applicant was sentenced more harshly than any co-offender even though he was a juvenile without prior convictions and with prospects of rehabilitation.

- [25] Further, the harshest sentence, three years detention with release after 50 per cent, was imposed on count 2 on the third indictment for which the maximum penalty under the *Youth Justice Act* 1992 (Qld) was five years detention (see s 176 *Youth Justice Act*). The maximum penalty for the two counts of robbery in company with personal violence in the first indictment was 10 years detention (s 176(3) *Youth Justice Act*) and the maximum penalty for the offence of grievous bodily harm on the second indictment was seven years detention (s 176(2)).
- [26] When the Charter of Youth Justice principles are considered together with these matters, the three year detention order was manifestly excessive. An effective global sentence of 18 months detention with release after 50 per cent coupled with a lengthy probation order was appropriate to reflect all the applicant's offending.

Conclusion

- [27] The experienced primary judge correctly identified the very serious aspects of the applicant's three spates of concerning violent offending over six months, including their detrimental effect on the unfortunate victims. As her Honour explained, this was a case where, despite the applicant's youth and prior good history, a period of detention had to be imposed as a deterrent to the applicant and to others. This was so despite the Charter of Youth Justice Principle 17⁴ which states:
- "A child should be detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least time that is justified in the circumstances."
- [28] Other Youth Justice Principles include that the community should be protected from offences;⁵ and a child should be dealt with in a way that allows the child to be re-integrated into the community.⁶
- [29] Although no co-offender had precisely the same combination of offending or personal circumstances as this applicant, as his counsel points out it is significant that none was sentenced to as long a period of detention, even his adult co-offender on the third indictment, Pope. Nor was it pointed out to her Honour by counsel at sentence that, as counsel for the respondent now properly concedes, the burglary count on the third indictment carried a maximum penalty of only five years detention. It is this count on which her Honour imposed the three year detention

⁴ See s 3 *Youth Justice Act* sch 1.

⁵ Principle 1.

⁶ Principle 16.

order. Despite the extremely serious aspects of that offence, the sentence imposed by her Honour was manifestly excessive in light of the maximum penalty applicable on that count, the relevant Youth Justice Principles, the sentences imposed on his co-offenders, and the applicant's antecedents and rehabilitative prospects. It follows that the applicant was not sentenced on that count to detention for the least time that is justified in the circumstances in breach of Youth Justice Principle 17.

- [30] For these reasons, I would grant the application for leave to appeal against sentence and allow the appeal to the extent of setting aside the sentence imposed on count 2 on the third indictment. I would substitute a sentence of two years detention to serve 50 per cent. This means the applicant will serve 12 months detention before his release. If he re-offends in the 12 months after his release he will be returned to detention. He will also be subject when released to the control and assistance of a probation order for a further two years. This sentence is calculated to both assist the applicant's reintegration into the community and protect the community from his offending. If he does not rehabilitate and re-offends, he will be firmly dealt with by the courts.
- [31] During the appeal hearing, it was brought to the Court's attention that order 4 in the court order sheet attached to all three indictments wrongly refers to "indictment 748/09" when it should refer to "indictment 124/10". This error may well have been repeated in the verdict and judgment record. It should be corrected.

ORDERS:

1. Application for leave to appeal against sentence granted.
 2. Appeal against sentence allowed to the extent of setting aside the sentence imposed on count 2 in indictment 34/10 and substituting a sentence of two years detention with release after 50 per cent.
 3. Order 4 in the court order sheet attached to indictments 748/09, 34/10 and 124/10 is amended by deleting "748/09" and substituting "124/10".
- [32] **FRASER JA:** I agree with the reasons of the President and White JA, and with the orders proposed by the President.
- [33] **WHITE JA:** I have read the reasons for judgment of the President and agree with her Honour that the sentence on count 2 on indictment 34/2010 is manifestly excessive. That is not to suggest at all that the offending was anything other than a disgraceful example of serious violence in company which required denunciation by a period of detention. But for the reasons given by the President a three year detention order is not supportable in view of the sentences imposed on the applicant's co-offenders, the maximum penalty of five years for that offence, that the applicant had no previous convictions when sentenced, had promising rehabilitation prospects and the Charter of Youth Justice Principles.
- [34] I agree with the orders proposed by the President.