# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Cunningham* [2014] QCA 88 |
| PARTIES: | **R**<br>**v**<br>**CUNNINGHAM, Luke**<br>(applicant/appellant) |
| FILE NO/S: | CA No 295 of 2013<br>DC No 256 of 2013 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Childrens Court at Brisbane |
| DELIVERED ON: | 2 May 2014 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 28 February 2014 |
| JUDGES: | Holmes and Gotterson JJA and Daubney J<br>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.**<br>**2. Appeal against sentence dismissed.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where juvenile applicant pleaded guilty to two counts of stealing, one count of receiving tainted property, one count of burglary and stealing, one count of unlawfully using a motor vehicle and two counts of attempted armed robbery – where juvenile applicant sentenced to two years detention, with convictions recorded – whether the primary judge erred in recording a conviction against the juvenile applicant<br><br>*Criminal Code* 1899 (Qld), s 668E(3)<br>*Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld), s 3<br>*Youth Justice Act* 1992 (Qld), s 183, s 184(1), s 299A<br><br>*R v B* [1995] QCA 231, followed<br>*R v BCN* [2013] QCA 226, considered<br>*R v Brown ; ex parte Attorney-General* [1994] 2 Qd R 182; [1993] QCA 271, cited<br>*R v L* [2000] QCA 448, considered<br>*R v WAJ* [2010] QCA 87, followed |

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| COUNSEL: | F Richards for the applicant/appellant<br>P McCarthy for the respondent |
| SOLICITORS: | Legal Aid Queensland for the applicant/appellant<br>Director of Public Prosecutions (Queensland) for the respondent |

[1] **HOLMES JA:** I agree with the reasons of Daubney J and the orders he proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by Daubney J and with the reasons given by his Honour.

[3] **DAUBNEY J:** On 12 September 2013, the applicant pleaded guilty in the Children's Court to the following offences:

- Count 1 – Stealing
- Count 2 – Receiving Tainted Property
- Count 3 – Burglary and stealing
- Count 4 – Unlawfully using a motor vehicle
- Count 5 – Stealing
- Count 6 – Attempted armed robbery
- Count 7 – Attempted armed robbery

[4] The applicant was sentenced on 5 November 2013. On each of Counts 1, 2, 3, 4 and 5, the applicant was sentenced to three months' detention, to be served concurrently. On each of Counts 6 and 7, it was ordered that he be detained for two years, to be served concurrently. A declaration under s 227(1) of the *Youth Justice Act* 1992 ("*YJA*") was made for his release after serving 70 per cent of the period in detention. The learned sentencing judge ordered that convictions be recorded.

[5] The learned sentencing judge also dealt with a breach of probation and several summary offences to which the applicant had pleaded guilty. The breach was found proved, but no further action taken. In respect of the summary offences, convictions were recorded but no further penalty imposed.

[6] The applicant now seeks leave to appeal against sentence. There is no proposed challenge to the penalties imposed. The sole proposed ground of appeal is that the sentence was "manifestly excessive in that convictions were recorded".

[7] The sentencing remarks were relatively brief. After referring to the applicant's offending conduct, the learned sentencing judge referred to the applicant's prospects of rehabilitation, saying:

> "I hope you have some help with that. If you do not then we will see you back here in the adult Courts and it will just be longer and longer time. Hopefully, you will not hurt anyone in the meantime, but I can only sentence you today for the matters that you have committed and I have to reflect your criminal history and the fact that you are on parole and bail."

[8] Her Honour then referred to a pre-sentence report which was "not all negative" and some positive educational outcomes, leading the learned sentencing judge to say that this "is a start to get a job when you come out". The sentencing remarks relevantly concluded:

> "You are talking about doing positive things recreationally when you are released into the community. You have been doing counselling with a mental health, alcohol, tobacco and other drug service and you

have been continuing to engage with the detention psychologist to try and get some strategies for when you get out. A glimmer of hope – I would not get too excited about it, but a glimmer of hope. On counts 1, 2, 3, 4, 5 of the indictment you are sentenced in each case to three months' detention to be served concurrently. In respect of counts 6 and 7 on the indictment I order that you be detained for two years on each count to be served concurrently. Pursuant to section 227(1) of the Youth Justice Act I order that you be released after serving 70 per cent of the period in detention. Convictions are recorded."

[9] Sections 183 and 184 of the *YJA* provide:

"**183 Recording of conviction**

(1) Other than under this section, a conviction is not to be recorded against a child who is found guilty of an offence.

(2) If a court makes an order under section 175(1)(a) or (b), a conviction must not be recorded.

(3) If a court makes an order under section 175(1)(c) to (g) or 176 or 176A, the court may order that a conviction be recorded or decide that a conviction not be recorded.

**184 Considerations whether or not to record conviction**

(1) In considering whether or not to record a conviction, a court must have regard to all the circumstances of the case, including –

(a) the nature of the offence; and

(b) the child's age and any previous convictions; and

(c) the impact the recording of a conviction will have on the child's chances of –

(i) rehabilitation generally; or

(ii) finding or retaining employment.

(2) Except as otherwise provided by this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose.

(3) A finding of guilt against a child for an offence without the recording of a conviction stops a subsequent proceeding against the child for the same offence as if a conviction had been recorded."

[10] It was not in issue that:

(a) no submissions were made to the learned sentencing judge about the existence and exercise of the discretion to record a conviction;

(b) the learned sentencing judge did not, in the sentencing remarks, refer to the *prima facie* position under s 183(1), the conferral of the discretion to record convictions, or to the matters to which the learned sentencing judge had regard when deciding to record convictions.

[11] In *R v WAJ*[1] Fraser JA, with whom Muir JA and Atkinson J agreed, said:

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1 [2010] QCA 87.

> "The applicant also argued that the sentencing judge's discretion miscarried when her Honour recorded convictions for each of the offences. The sentences which may be imposed on a child are set out in s 175 and s 176 of the *Juvenile Justice Act* 1992 (Qld) (now the *Youth Justice Act* 1992 (Qld)). The power to record convictions against children is conferred by s 183. Section 184 governs the exercise of that discretion. The prima facie position under these provisions is that a conviction is not to be recorded against a child: *R v SBP* [2009] QCA 408 at [21]; *R v B* [1995] QCA 231. Section 184(1) provides that in considering whether or not to record a conviction a court must have regard to all the circumstances, including the circumstances set out in s 184(1)(a)-(c). The sentencing judge's remarks do not include any express reference to the reasons why the sentencing judge considered it appropriate to exercise the discretion to order that convictions be recorded, but during the course of the sentencing remarks her Honour adverted to the circumstances of the offences and the applicant's personal circumstances, including the nature of the offences (s 184(1)(a)) and the child's age and any previous convictions (s 184(1)(b)). The sentencing remarks do not expressly refer either to the impact recording a conviction would have on the child's chances of rehabilitation or in finding or retaining employment (s 184(1)(c)(i)-(ii)). The evidence did not deal explicitly with either point, but the sentencing judge presumably assumed in the applicant's favour, as I assume for the purposes of this application, that recording a conviction would likely impact adversely on the applicant's chances of finding and retaining employment and upon his rehabilitation."[2]

[12] His Honour then referred to *R v B*[3], and concluded:

> "In this case, the sentencing judge in terms ordered that convictions be recorded for all offences. It seems most unlikely that her Honour was unaware either of the prima facie position that convictions are not recorded for offences committed by children or of the relevant factors which enliven the discretion to record convictions. Nevertheless, in the absence of any sentencing remarks expressly directed to the discretion or to the relevant provisions it is appropriate to proceed on the footing that that the discretion miscarried and must be exercised afresh."[4]

[13] The same considerations apply in the present case. The sentencing remarks neither articulate the reasons for the learned sentencing judge exercising the discretion to record convictions nor expose the judge's consideration of the matters prescribed by s 184(1) of the *YJA*. As in *R v WAJ*, therefore, it is appropriate to proceed on the basis that the discretion miscarried and must now be exercised afresh.

**Circumstances of the offences**

[14] The offending conduct under Count 1 occurred on dates between 6 January 2013 and 16 January 2013. On 7 January 2013, the applicant stole property (a skateboard and perfume) from two shops at the Westfield shopping centre in Strathpine.

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2 At [14].
3 [1995] QCA 231.
4 At [15].

[15] On 13 January 2013, the applicant stole a bottle of whisky from a liquor store at Morayfield. His fingerprint was located inside the open whisky case in the liquor store.

[16] On 15 January 2013, the applicant stole five large packets of rib fillet meat from a supermarket at Deception Bay. Police conducting patrols in the shopping centre spoke to the applicant after he left the store and asked what was in his bag. The applicant admitted having stolen the meat. The meat was returned to the store.

[17] On 15 January 2013, the applicant was issued with a notice to appear in respect of the stealing of the meat from the supermarket.

[18] On 18 January 2013, police located the applicant at a unit in Deception Bay. He voluntarily accompanied police to the police station, but declined to answer any questions. He admitted to appearing on CCTV footage from one of the Westfield shopping centre stores. The applicant was arrested and transported to the Redcliffe Watchhouse. He was charged with three further stealing offences, and released on bail.

[19] The offences which were the subject of Counts 2 – 5 occurred while the applicant was subject to the notice to appear issued on 15 January 2013, and only eight days after having been granted bail on 18 January 2013 in respect of the other stealing charges.

[20] At about 9.15 am on 26 January 2013, the applicant knocked on the front door of a house at Deception Bay and had a discussion with the occupant. At about 10 am, the occupant left home. While she was driving away, she saw the applicant walking a short distance from her house.

[21] Between about 10 am and 11.45 am, the applicant gained access to the house by climbing onto a patio chair, removing a fly screen from a window at the rear of the house, and smashing a portion of the window before unlocking it and climbing through. He ransacked parts of the lounge room, kitchen, dining room, four bedrooms and garage. The applicant stole property, including a 40 inch flat screen television and a satchel containing a blood pressure machine. He wrote on the wall in the main bedroom with a permanent marker pen "I'm sorry" with a smiley face symbol. He removed a set of keys from drawers in the main bedroom, and used those keys to enter the occupant's car, which was parked in the garage adjoining the house. The applicant put the stolen property in the vehicle and drove away.

[22] When the occupant returned home at about 11.45 am, she reported the matter to police. Police located three latent fingerprints belonging to the applicant at the point of entry and in the main bedroom.

[23] On 28 January 2013, police located the car abandoned about three kilometres away, with severe panel damage to the left side.

[24] At about 1.35 pm on 26 January 2013, while driving the stolen car, the applicant stole some 29 litres of unleaded petrol by filling up at the petrol station and driving off without paying. Police subsequently identified the applicant in the service station's CCTV footage. This was the subject of Count 2.

[25] When police located the stolen car on 28 January 2013, they also found inside the vehicle a pension book, drivers' licence and other identification documentation in

the name of particular people. This property, and other items, had been reported stolen from a burglary which had occurred some time during the weekend of 24-27 January 2013 in Dakabin. As a consequence, the applicant was charged with receiving tainted property (Count 5).

[26] The applicant was arrested on 29 January 2013. He participated in a record of interview, and denied any involvement in relation to any of the offending conduct under Counts 2 – 5, telling police "I don't do breaks". He could not offer any explanation for the fact that his fingerprints were found in the house.

[27] On 29 January 2013, the applicant was remanded in custody for a period of 28 days until 26 February 2013, at which time he was released on the conditional bail program.

[28] Less than two months after being released from custody on 26 February 2013, and while on bail for the stealing offences committed in January 2013, the applicant committed the offences contained in Counts 6 and 7.

[29] Count 6 concerned an attempted robbery committed at a liquor store in Deception Bay. At about 3.20 pm on 10 April 2013, the applicant entered the store. There was one shop attendant present at the time. The applicant yelled at him to give the applicant the cash – "Give me the cash you dog". The shop attendant approached the applicant and told him that he needed to leave. The applicant then produced a large yellow-handled knife with a 20 centimetre blade from the front of his pants. He held the knife in one hand, pointed it at the shop attendant and said "Get the money dog or I'll cut you". The shop attendant picked up two bottles of red wine from a shelf and held a bottle in each hand. The applicant approached the shop attendant yelling and screaming words to the effect of "You dog, I'm going to stab, cut you". The shop attendant continued moving backwards for a distance of about 3.5 metres into the store, as the applicant moved towards him holding the knife. The shop attendant was afraid the applicant was going to cut him with the knife. The applicant then turned around and walked back to the counter area, where he picked up a bottle of rum and threw it on the floor, although it did not break. The applicant then left the store and headed towards a service station on Deception Bay Road.

[30] The applicant then committed the offence which was the subject of Count 7. At about 3.35 pm, he entered the service station. He walked into the console area through an open side door, and approached the console operator. The applicant lifted his shirt and removed a knife from the front of his shorts. He yelled at the console operator, "Give me the money". The applicant then swung the knife towards the console operator. The console operator refused, and walked towards the applicant. The applicant walked back out of the console area, allowing the console operator to close and lock the door. The applicant threatened the console operator in front of the service counter. He punched a wall and stabbed the wall with the knife, embedding the blade in the wall and causing it to snap. The applicant leant across the service counter and unsuccessfully attempted to open the till. He then walked out of the service station and ran across Deception Bay Road. The applicant was pursued by members of the public. He struggled with members of the public and police, causing damage to a fence. The applicant was apprehended.

[31] The applicant was transported to the Redcliffe Watchhouse, where he refused to take part in a record of interview. He was arrested and charged. Bail was objected

to. He was remanded in custody on 11 April 2013, and remained in custody until 5 November 2013.

[32] While in custody on 10 April 2013, the applicant committed the summary offences of assaulting police and obstructing police. In short, while he was in custody, the applicant became violent and resisted police efforts to move him to a "violent detention cell" for the applicant's own safety.

**The applicant's age and any previous convictions**

[33] The applicant was born on 17 September 1996. He was, therefore, nearly sixteen and a half years old when he committed the subject offences.

[34] The applicant had a juvenile criminal history.

[35] On 6 September 2011, he was dealt with in the Redcliffe Children's Court for three shop stealing offences he had committed in August 2011. No conviction was recorded, and he was placed on a nine month good behaviour bond.

[36] Less than a month later, he was again before the Redcliffe Children's Court. On 4 October 2011, he was before the Court on some 16 charges. Most of those related to shoplifting, but also included charges of wilful damage, forgery and uttering a forged document. It is notable that one of the offences (entering premises and committing an indictable offence) was committed on 7 September 2011, the day after he had been placed on the nine month good behaviour bond. The applicant committed an offence of shoplifting on 8 September 2011, only two days after being placed on the good behaviour bond. No convictions were recorded, and he was again placed on probation.

[37] On 11 November 2011, the applicant was before the Children's Court at Caboolture on a charge of stealing. That offence had occurred on 10 November 2011. On that occasion, a conviction was recorded and he was sentenced to 40 hours of community service to be completed within six months.

[38] On 18 September 2012, the applicant was dealt with by the Children's Court at Brisbane for some 18 offences, including burglary, stealing, receiving tainted property, unlawful assault occasioning bodily harm and possession of dangerous drugs. These offences were committed between May and September 2012. On a count of burglary, the applicant was sentenced to 12 months' detention, to be released after serving 50 per cent of the detention order. In respect of the other offences, the applicant was placed on probation for two years. No convictions were recorded.

**The applicant's personal circumstances, rehabilitation and employment prospects**

[39] Apart from a pre-sentence report, to which I will refer shortly, no material or information was put before the learned sentencing judge with respect to the applicant's personal background and circumstances. Counsel for the applicant before this Court confirmed that there was no other material to be relied on for the purposes of the present application, and that if there had been any further material counsel for the applicant would have put that before the Court.

[40] Preparation of the pre-sentence report had been ordered pursuant to s 151(1) of the *YJA* when the applicant pleaded guilty to the subject offences. The report is dated

1 November 2013. The report provided details of the offences, the orders breached as a consequence of having committed the offences, and the time spent by the applicant on remand. In relation to the applicant's supervised order history, the report noted that this commenced in October 2011, and that the applicant had previously been subject to a probation order, a community service order, a detention order and a supervised release order.

[41] In respect of the factors which contributed to the offending, the case worker who wrote the report said:

> "It is the author's assessment that the following factors have contributed to [the applicant's] offending behaviour:
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> - Absence of positive role modelling and appropriate supervision
> - Exposure to people and environments permissive of drug use
> - Acquisition of a fatalistic attitude
> - Substance abuse"

[42] The author referred to departmental records which indicated the applicant having described his early childhood as characterised by exposure to domestic violence and physical retribution prior to his parents' separation at a young age. The applicant's mother disputed those claims, but the applicant continued to harbour considerable animosity towards his mother. The reports detailed the sources and extent of that animosity. It recounted that the applicant was resistant to rules and boundaries imposed within his family home and by the courts. He left the family home in June 2011 and, since that time, refused to communicate or have any contact with his mother.

[43] It is stated in the report that, when the applicant moved out of home, he became reliant on accommodation provided by friends "and in particular an adult female and her partner who are both well known to the police". He also left school. It was noted that, in this environment, the applicant was not afforded the same level of monitoring or positive adult role modelling. Rather, the home environment was now one that was permissive of drug use. The author opined that the combination of exiting school, alienation from his biological family and substance abuse have contributed to the applicant developing a fatalistic attitude towards his life. It was considered that the development of an addiction to illicit substances was fundamental to the applicant's offending. It was reported that during the period around the subject offending, the applicant was consuming speed, heroin and liquid morphine on a daily basis. He apparently resigned himself to a lifestyle of engaging in offending for the primary purpose of financing his drug addiction.

[44] In respect of the applicant's attitude to the offending and his victims, the report states:

> "In conversation with [the applicant] about his attitude and understanding of the effect of his offending on victims he became quite agitated and appeared to display limited understanding of the consequences of his actions or the impact of his behaviours on others. It is assessed that [the applicant's] agitation rather than his stated words is more indicative of his attitude. It is assessed that [the applicant's] behaviour is an attempt to conceal difficulties in dealing with the implications of his actions and the negative impact of his offending on victims. Consequently [the applicant] has little

> conscious understanding of the impacts of his offending. [The applicant] displays a tendency to rationalise his behaviour in a way that enables him to justify his offending behaviour."

[45] The author of the report went on to note that the most significant consequence for the applicant had been the 244 days in custody on remand. It did not affect the relationship with his family – he continued to refuse to have any contact with family members. His interaction with other adults was, however, curtailed.

[46] The report continued:

> "While in detention, it has been reported that [the applicant] has engaged positively in both educational and recreational programs achieving his year 10 in Maths and English and verbalising his desire to seek out positive recreational involvements when released back into the community. He engaged productively in counselling with the Mental Health Alcohol Tobacco and Other Drugs Service (MHATODS) and has devised a harm minimisation plan for when he is back in the community. [The applicant] continues to engage with the detention psychologist with a focus on cognitive distortions and the development of healthy thinking patterns including those in relation to his family."

[47] The report then addressed the various sentencing options. In the preamble to that part of the report, it was noted, amongst other things, that the applicant was "adamant he will not be returning to reside with family post release and will arrange his own accommodation". It also noted that the applicant had "achieved year 10 Maths and English and has indicated his intention to access part time work following his release from detention".

[48] The report otherwise contained little information from which one could glean an assessment of the applicant's realistic prospects of employment. It was said, for example, that, under the terms of the existing probation order, the applicant would receive employment, education and vocational support, and that the applicant "will be linked with the youth justice employment officer and community employment agency to support him in the development of work skills for the purpose of accessing employment".

[49] No other information was put before this Court to enable any further assessment to be made of the applicant's rehabilitation generally or his chances of finding or retaining employment. In particular, no information or evidence was put before this Court to demonstrate what impact the recording of a conviction in respect of the current offences would have on the applicant's chances of finding or retaining employment in circumstances where he already had a conviction recorded as a consequence of his appearance before the Caboolture Children's Court on 11 November 2011.

**Discussion**

[50] Not surprisingly, cases in which this Court has been required to exercise the discretion conferred by s 184 of the *YJA* turn on their particular circumstances, with an emphasis being placed on the impact of recording a conviction of a child's chance of rehabilitation or finding or retaining employment.[5]

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[5] It is relevant in this context to recall that the "rehabilitation period" after which conviction no longer needs to be disclosed is five years from the date of conviction for a person dealt with as a child – *Criminal Law (Rehabilitation of Offenders) Act* 1986, s 3 and s 5.

[51] So, for example, in *R v BCN*[6] the applicant, who was a 16 year old offender, pleaded guilty to four offences of wilful damage, one of unlawfully using a motor vehicle, one of attempted entry of premises with intent to commit an indictable offence, two of entering premises with intent to commit an indictable offence and three of breaking and entering premises and stealing. He pleaded guilty on 20 February 2013, and was sentenced on 5 April 2013, by which time he had turned 17. The applicant had no prior criminal history as a juvenile, but had committed three minor offences while on bail for the subject offences. The first count of wilful damage occurred when the applicant found a microwave outside a school and damaged it by throwing it on the ground. The first count of unlawful use of a motor vehicle was committed when the applicant, in company with two others, stole an unlocked vehicle from a driveway. The first count of attempted entry of premises with intent occurred when he, in company with another, attempted to steal a motor vehicle from a shopping centre, but fled when the car alarm sounded. The remaining counts were all committed when the applicant, with two others, went to a shopping centre at Helensvale and smashed into and robbed a number of premises. The sentencing judge noted the offences were serious, and had caused significant loss and damage to innocent people and companies with no real prospect of compensation or restitution. The sentencing judge considered it appropriate to record convictions, saying that the seriousness of the offending and the fact that he had continued to offend made it appropriate for the Court, which would deal with the applicant as an adult, to be aware of his previous criminal history as a juvenile. Material had been put before the sentencing judge to indicate that the applicant's capacity to find and retain work was already compromised by his limited educational achievements and by speech and language difficulties. The applicant was in receipt of a part disability pension as a consequence of those difficulties. It was submitted for the applicant in that case that he had good prospects of rehabilitation and was actively seeking work. The applicant had previously been offered, but subsequently lost, an apprenticeship.

[52] Boddice J, with whom Gotterson and Morrison JJA agreed, noted that, in re-exercising the relevant discretion, the undoubted seriousness of the applicant's offending conduct had to be balanced against his age, his personal circumstances, the fact that he had no prior history, and his prospects of rehabilitation and employment in the future.[7] His Honour referred to the applicant's offending behaviour, which involved substantial property damage and loss, but said that this "criminality is properly to be viewed as conduct engaged in as a child at a time when he had a lack of support and was subject to adverse peer pressure".[8] Boddice J continued:

> "Further, the material placed before the sentencing judge indicated the applicant had limited education, and had learning disabilities. His prospects of finding and retaining employment would be adversely affected by those circumstances. The recording of convictions would also adversely impact on the chances of finding and retaining employment, and on his prospects of rehabilitation generally."[9]

[53] After having regard to the matters referred to in s 184 of the *YJA*, and particularly the impact of recording a conviction on that applicant's ability to find and retain

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6 [2013] QCA 226.
7 At [36].
8 At [37].
9 At [38].

employment, Boddice J held that he would exercise the discretion not to record convictions in that case.

[54] In *R v WAJ*[10] the applicant pleaded guilty to five indictable offences and one summary offence. He was 15 years old when he committed the first offence and 16 when he committed the other offences. Three of the indictable offences involved violence. The other offences involved dishonesty. The offences of dishonesty involved stealing property from a car on 12 January 2009, stealing from a shop on 1 April 2009 and breaking and entering on 28 September 2009. On this occasion the applicant stole three expensive bicycles and a bicycle frame and other parts from a shed that he had broken into. The first offence of violence occurred on 22 March 2009, when the applicant, without provocation, punched another boy in the mouth. The second occurred on 29 April 2009, when the applicant was drunk and misbehaving at a petrol station. A stranger mildly intervened to diffuse the situation. The applicant and other youths later surrounded that person. The applicant punched him in the face three times and knocked him twice into a wall. The victim's jaw was broken on both sides and shattered in part and his nose and cheekbone were also broken. The victim had a significant period of pain and rehabilitation, and was emotionally affected by the assault. A few days later, on 3 May 2009, the applicant and a friend attempted to provoke a fight with a 14 year old student. After throwing rocks and following this other student, the applicant punched the student in the mouth just as the boy was saying he did not want any trouble. The punch was so strong as to cause the boy to fall backwards against a rail. The boy suffered extreme pain and was required to attend an emergency ward at a hospital. A report tendered at the sentence hearing noted that the applicant had anger management issues, a lack of proper adult supervision, a drinking problem, and that his association with others formed part of the background to his offending. He had only one prior offence recorded, relating to an event which occurred in the midst of the subject offending. On 30 March 2009, he committed an offence of threatening violence, in which he discharged a firearm. He was sentenced to probation for nine months for that, but no conviction was recorded.

[55] In the context of determining whether or not a conviction ought be recorded for that applicant, Fraser JA, with whom Muir JA and Atkinson J agreed, referred to other cases in which children had committed offences of violence, and noted the particular circumstances that pertained in those other cases. In respect of the case then under consideration, Fraser JA concluded:

> "At 15 and 16 years of age the applicant was markedly older than H and J when he committed his offences. Importantly, he committed not merely one violent offence but three violent offences, he continued to offend after he was detected in earlier offences and after he was given a notice to appear, and he committed the most serious offence of causing grievous bodily harm whilst he was on probation ordered less than a month before for earlier offending involving a threat of violence. The circumstances of this case call for the exercise of the discretion to record convictions."[11]

[56] In *R v L*[12] the applicant pleaded guilty to one count of unlawful use of a motor vehicle, two counts of stealing, and three summary offences involving two counts of

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10 [2010] QCA 87.

11 At [16].

12 [2000] QCA 448.

possessing cannabis and one count of possessing a knife in a public place. He was sixteen and a half years old at the time of offending, but 17 years old when sentenced. He was sentenced to 50 hours community service and a conviction was recorded. An application for leave to appeal against sentence was refused by a majority, with Pincus and Thomas JJA holding that the recording of a conviction in that case was within the proper exercise of the sentencing judge's discretion. McMurdo P was of the view that the circumstances of the case led to a conclusion that the sentencing judge had erred in exercising the discretion to record a conviction.

[57] Pincus JA, after referring to the circumstances of the offending, which his Honour described in part as being of "a reasonably serious character", said:

> "The other matter which influences me is that although there are some difficulties, mentioned in the report to which the learned presiding Judge made reference, in the applicant's background, he does not appear to me to have been a particularly disadvantaged youth. He has had difficulties with his relationship with his father, his parents have separated, and these are matters which, of course, are not uncommon these days, but as the President has mentioned, he has a good relationship with a large extended family and they are interested in his welfare."

[58] His Honour noted the submission by counsel for the applicant in that case that the matter was one which "might be close to the line", and held that the case was "over the line", saying:

> "It appears to me, with respect, to fall within the area where the Judge could properly exercise his discretion by recording a conviction and that is what his Honour did. It does not appear to me possible to say, at least with any reality, that the learning primary Judge imposed a sentence which was manifestly excessive and I would dismiss the application."

[59] Thomas JA noted the different considerations that apply when deciding to record a conviction for a juvenile offender, observing:

> "A higher priority is, I think, placed on the rehabilitation of juveniles and in general the Court's response in that area is to be slow to record a conviction unless good reason is seen for doing so."

[60] His Honour went on to incorporate the observations from *R v Briese*[13] to the effect that the recording of a conviction is a matter that has considerable ramifications of a public nature. Thomas JA said:

> "It was observed in that case that the non-recording of a conviction gives an offender the right to conceal the truth about what has happened in the criminal Courts and that there are various public groups that have an interest in knowing the truth, including potential employers, insurers, government departments and many others. But, of course, the factor of this public interest in having a conviction recorded arises less readily in the case of a juvenile than in the case of an adult offender. There is therefore a balancing exercise involved."

[61] Thomas JA then noted that the applicant's previous offences were "quite serious" and were followed by other incidents of offending. No economic factors had been

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[13] (1997) 92 A Crim R 75.

suggested as being relevant. His Honour noted that the main argument in favour of the non-recording of a conviction was purely the applicant's age, which, at the relevant time, was sixteen and a half. Thomas JA described this age as being "in the latter stages of his juvenile status". His Honour considered that the ordering of convictions was within the discretion of the sentencing judge, and agreed in the refusal of the application.

[62] McMurdo P, in dissent, described the applicant's personal background and the contents of the pre-sentence report which had been provided to the sentencing judge. I observe in passing that the report in that case included observations that the applicant there spoke "enthusiastically about becoming a carpenter, a cabinetmaker or a horticulturalist", said that the applicant was aware of the need to undertake study to qualify for those trades, and also spoke to the applicant's capacity to undertake those courses. The report also addressed the circle of family support available to the applicant. In concluding that the sentencing judge in that case had erred in exercising the discretion to record a conviction, McMurdo P referred to the circumstances of the case "particularly the applicant's plea of guilty and co-operation, the less serious nature of the offending, his unsettled family background and his promising prospects of rehabilitation".

[63] It is unnecessary to multiply the examples of the exercise of the relevant discretion in this Court. As I said above, each case will turn on its own circumstances.

[64] Having regard to the matters enumerated in s 184 of the *YJA*, I note the following:

(a) The subject offences demonstrated not only a preparedness on the part of the applicant to continue engaging in criminal activity, the offences committed on 10 April 2013 involved an escalation in criminality by reason of the use of the knife;

(b) The applicant's ongoing criminal conduct demonstrated complete disregard for the ongoing Court orders and sanctions to which he was subject:

- the first of the subject offences was committed while he was on probation (from his appearance before the Children's Court on 18 September 2012);
- the offences under Counts 2-5 were then committed while he was still under probation, while he was subject to a notice to appear, and only eight days after having been granted bail;
- the offences under Counts 6 and 7 were committed less than two months after being released from custody and while on bail.

(c) The applicant had a significant recent criminal history which included, notably, a conviction having been recorded on 11 November 2011;

(d) Whilst the pre-sentence report outlines factors which have undoubtedly contributed to the applicant's ongoing criminal conduct, there is, at best, only some information from which one could infer some prospects of rehabilitation generally. The report describes the applicant, while in custody, engaging positively in educational and recreational programs, expressing a desire to seek out positive recreational involvements, and undergoing counselling. On the other hand, it is objectively a matter of concern that the applicant appears intent on arranging his own accommodation when released from detention. With that attitude, the prospect of him returning to the deleterious environment in which he lived while engaging in the criminal conduct cannot be discounted;

(e) There is no evidence or information from which one can make an assessment of the impact recording a conviction will have on this applicant's chances of finding or retaining employment, particularly in light of the fact that there is already a conviction recorded from 2011. One can, of course, properly surmise that the recording of convictions may well have some impact on those chances. On the other hand, if the applicant's vocational prospects were limited in any event, recording the applicant's convictions may not in truth have a significant further detrimental impact;

(f) There is, moreover, a public interest to be considered. This applicant's ongoing and increasing course of criminality, including a previous event for which a conviction had been recorded, would be a matter in which any prospective employer could legitimately be expected to have an interest.

[65] In all the circumstances, and having regard to the matters specifically mentioned in s 184(1) of the *YJA*, convictions should be recorded for these offences.

**Identification of the applicant**

[66] After this Court reserved its decision in this application, amendments to the *YJA* were made[14] which had the effect of including the following new section in the *YJA*:

"**299A Prohibition of publication of identifying information about a child who is not a first-time offender**

(1) This section applies in a proceeding before a court for a child who—
  (a) has been charged with an offence; and
  (b) is not a first-time offender.

(2) The court may, at any time during a proceeding, make an order it considers is in the interests of justice prohibiting the publication of identifying information about the child (a ***publication prohibition order***).

(3) The court may make a publication prohibition order—
  (a) on its own initiative; or
  (b) on application by a relevant party.

(4) In considering whether it would be in the interests of justice to make a publication prohibition order, the court must have regard to the following—
  (a) the number of the child's previous findings of guilt;
  (b) the seriousness of the offence;
  (c) the period between the proceeding and any previous offence committed by the child;
  (d) the need to protect the community;
  (e) the effect of publication on—
    (i) the safety of the child; or
    (ii) the rehabilitation of the child; or
    (iii) the safety or wellbeing of a person other than the child;
  (f) any other relevant matter.

(5) A person must not publish identifying information about the child if the court has made a publication prohibition order in relation to the child.

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[14] *Youth Justice and Other Legislation Amendment Act* 2014 (commenced on date of assent, 28 March 2014).

Maximum penalty (subject to part 7)—

(a) for an individual—100 penalty units or 2 years imprisonment; or

(b) for a corporation—1000 penalty units.

(6) In this section—

***relevant party*** means—

(a) the child; or

(b) a parent or other member of the child's family; or

(c) a party or person representing a party to the proceeding, including, for example, a police officer or another person in charge of a case against the child in relation to the offence the subject of the proceeding; or

(d) the chief executive; or

(e) the chief executive (child safety); or

(f) if the child is an Aboriginal or Torres Strait Islander person—

(i) a representative of an organisation whose principal purpose is the provision of welfare services to Aboriginal and Torres Strait Islander children and families; or

(ii) a representative of the community justice group in the child's community who is to make submissions that are relevant to sentencing the child."

[67] As s 229A(1) rendered this section applicable in the circumstances of the present case, counsel for the applicant and the respondent were called on to provide written submissions as to whether a publication prohibition order should be made under s 299A(2). Those written submissions were provided.

[68] Counsel for the applicant relied on arguments similar to those which had been advanced in support of the contention that no conviction should be recorded in seeking that this court make a publication prohibition order.

[69] Counsel for the respondent submitted that the prima facie position under the legislation was that, in cases of repeat offenders, the offender ought be named. It was submitted that, having regard to the matters enumerated in s 299A(4), it is not in the interests of justice for a publication prohibition order to be made.

[70] Counsel for the respondent referred to *R v Brown; ex parte Attorney-General* [1994] 2 Qd R 182, which was concerned with the discretion conferred by s 12 of the *Penalties and Sentences Act* 1992 (Qld) to record or not record a conviction. Section 12(2) requires a court, in deciding whether or not to record a conviction, to have regard to all the circumstances of the case, including the nature of the offence, the offender's character and age, and the impact that recording a conviction would have on the offender's economic or social wellbeing or chances of finding employment. Macrossan CJ observed that, when exercising the discretion conferred by s 12, the court must take account of all relevant circumstances.[15] That particular legislation then enumerated certain specified matters, which were not exhaustive of all relevant circumstances. The Chief Justice then said:

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15 *R v Brown; ex parte Attorney-General* [1994] 2 Qd R 182 at [185].

> "In my opinion nothing justifies granting a general predominance to one of those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than another, may have claim to greater weight. It would, however, in my opinion, not be correct to say that because 'age' finds mention, the principle that should be applied is that only youthful offenders should escape a recorded conviction or because 'chances of finding employment' are mentioned, a person not likely to be seeking employment should never be spared or because 'nature of the offence' is referred to, only those offences at the more trivial end of the sentencing scale should be regarded as qualifying. Indeed, an offender's previous unblemished character and his assumed desire to maintain his social well-being and community reputation may be able to be regarded as giving him fair claims to consideration in the matter, even if he is of a mature age."[16]

[71] Lee J also made the following observations in relation to the discretion conferred under s 12:

> "The discretion is at large. The considerations are not limited to the matters contained in paras (a), (b), and (c). They are inclusive. There is nothing in the Act which requires more weight to be given to any one factor than to the others. Relative weight depends on the circumstances of each case. Nor is there any requirement that considerations of character and age are limited to young persons, although in such a case, there may potentially be longer term effects of a recorded conviction on a young person impacting on his character, economic or social well-being, or chances of finding employment. An older person may also be severely affected in the same way, and particularly in a case where such a person has otherwise had an impeccable character throughout his or her life."[17]

[72] Reference to s 299A(4) makes it clear that, whilst there is an enumerated list of matters to which the court must have regard in exercising the discretion to make or not to make a publication prohibition order, the relative weight to be ascribed to each of the enumerated factors will depend on the circumstances of each case.

[73] Dealing with each of those enumerated factors in turn:

(a) The applicant's juvenile criminal history is detailed above. He had numerous findings of guilt for offending which had commenced in August 2011. A conviction had been recorded for the offence of stealing which occurred on 10 November 2011.

(b) The present offending was serious because, as noted above, it represented not only a preparedness on the part of the applicant to continue engaging in criminal activity, it involved an escalation in criminality.

(c) The first tranche of the present offending occurred in January 2013, only months after the applicant's appearance before the Children's Court in September 2012, and at a time when he was still on probation.

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16 At 185.

17 At 193.

(d) This applicant's conduct demonstrated a complete lack of disregard for the sanctions which had previously been imposed on him as a consequence of his prior offending. It was an ongoing and increasing course of criminality. Just as this applicant's criminal history is a matter in which any prospective employer could legitimately be expected to have an interest, it seems to me that protection of the community warrants identification of this offender.

(e) For the same reasons as were canvassed above in respect of the application for no conviction to be recorded, there is no evidence that publication of this offender's identity would have an effect on:
   (i) his safety, or
   (ii) his rehabilitation, or
   (iii) the safety or wellbeing of any other person.

[74] Accordingly, I am not persuaded that it is in the interests of justice to make a publication prohibition order under s 299A(2) of the *YJA*.

**Disposition**

[75] That leaves, then, the question of the orders which ought now be made.

[76] For the reasons stated initially, the applicant should have leave to appeal. If, however, this Court re-sentences the applicant and imposes the same penalties as below with convictions recorded, the "rehabilitation period" under the *Criminal Law (Rehabilitation of Offenders) Act* 1986 for the purposes of disclosing these convictions will run from the date of this judgment, rather than the date of the sentences below.[18] That would not be a just outcome.

[77] Given that I am not of the opinion that some other sentence is warranted in law and should have been passed, it is proper for the appeal to be dismissed.[19] Accordingly, I would propose the following orders:

1. The applicant have leave to appeal;

2. The appeal be dismissed.

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18 *Criminal Law (Rehabilitation of Offenders) Act* 1986, s 3.

19 *Criminal Code*, s 668E(3).