

# SUPREME COURT OF QUEENSLAND

CITATION: *R v TAO* [2020] QCA 4

PARTIES: **R**  
**v**  
**TAO**  
(applicant)

FILE NO/S: CA No 174 of 2019  
DC No 58 of 2019

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Childrens Court at Brisbane – Date of Sentence: 10 June 2019 (Allen QC DCJ)

DELIVERED ON: 4 February 2020

DELIVERED AT: Brisbane

HEARING DATE: 29 November 2019

JUDGES: Sofronoff P and McMurdo JA and Boddice J

ORDERS: **1. The application for leave to appeal against sentence be granted.**  
**2. The appeal be allowed.**  
**3. The sentences be set aside, to the extent that it be ordered that no convictions be recorded, but not otherwise.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – OTHER MATTERS – where the applicant was convicted of one offence of assault occasioning bodily harm whilst in company and two offences of robbery in company with personal violence – where the applicant was sentenced to detention for 18 months suspended immediately for each count of robbery in company with violence – where the applicant was sentenced to probation for 18 months for the count of assault occasioning bodily harm whilst armed and in company – where convictions were recorded for each count – where the applicant had a relevant juvenile criminal history – where the offences were committed in the company of two others – where the applicant grabbed one complainant by the hair and punched and kicked the complainant – where all three complainants had their mobile telephones taken – where the applicant’s living conditions at the time of sentence had changed from the time of the offending – where the applicant had taken positive steps towards rehabilitation – where the

sentencing Judge considered factors set out in the *Youth Justice Act 1992 (Qld)* in the exercise of the sentencing discretion – where the applicant appeals against the sentences on the ground that the recording of the convictions rendered the sentences manifestly excessive – whether the sentencing discretion miscarried by reason of misapplication of principle

*Youth Justice Act 1992 (Qld)*, s 183, s 184

COUNSEL: C R Smith for the applicant  
J D Finch for the respondent

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

- [1] **SOFRONOFF P:** I agree with Boddice J.
- [2] **McMURDO JA:** I agree with Boddice J.
- [3] **BODDICE J:** TAO makes application for leave to appeal sentences imposed in the Childrens Court of Queensland at Brisbane on 10 June 2019 for one offence of assault occasioning bodily harm whilst in company and two offences of robbery in company with personal violence.
- [4] The sole ground of appeal, should leave be granted, is that the recording of convictions rendered the sentences manifestly excessive.

### **Background**

- [5] On 7 March 2019, the applicant, then aged 16, entered pleas of guilty to the three offences committed on 15 July 2018. At the time of the offending, the applicant was 15 years of age. The applicant was sentenced, in respect of each count of robbery in company with violence, to detention for a period of 18 months, suspended immediately with the applicant released on a conditional release order for three months. The applicant was sentenced to probation for a period of 18 months in respect of the count of assault occasioning bodily harm whilst armed and in company. Convictions were recorded in respect of each count.

### **Submissions**

- [6] The applicant submits that, whilst she had a prior and relevant juvenile criminal history, including breaching previous Court orders, the applicant's age, prospects of rehabilitation and changes in her life subsequent to the offending, meant that the recording of convictions resulted in sentences which were manifestly excessive in all the circumstances.
- [7] The Crown submits that the recording of convictions represented a proper exercise of the sentencing discretion in all the circumstances. There was no misapplication of principle. The sentencing Judge had regard to all relevant factors.

### **Offences**

- [8] The offences were committed by the applicant whilst in the company of two other females. The three complainants were total strangers to the applicant. They were confronted by the applicant and her co-offenders whilst taking photographs on their mobile phones in a public square.
- [9] The applicant was an active participant in the offences. Her conduct included grabbing one complainant by her hair and punching and kicking that complainant, including a kick to the head. The other two complainants were assaulted by the applicant's co-offenders. Each suffered significant blows to the head. Their mobile telephones were also taken, without their consent.

### **Sentencing remarks**

- [10] The sentencing Judge characterised the applicant's behaviour as vicious, bullying and cowardly. That behaviour was said to be more disgraceful as the applicant had engaged in similar behaviour in the past, for which she had been sentenced to detention with a conditional release order and two years' probation.
- [11] The sentencing Judge observed that the offending had occurred in the context of the applicant living for extended periods on the streets and associating with other young and older offenders. That situation was accepted as having changed at the time of sentence. The applicant was now living in a more stable domestic situation. The applicant had taken positive steps towards rehabilitation, with an acknowledgment by the applicant's mother and the author of the pre-sentencing report that there were signs of developing maturity and changes for the better.
- [12] The sentencing Judge found that, notwithstanding those positive circumstances, the nature of the applicant's previous offending and the nature of the offences rendered detention appropriate in the circumstances. However, to facilitate the ongoing rehabilitation, the sentencing Judge determined to make a conditional release order in respect of the periods of detention and an order for probation on the remaining count.
- [13] In respect of the recording of the conviction, the sentencing Judge observed that the Court had a discretion. The sentencing Judge specifically had regard to the factors required to be considered in the exercise of that discretion, pursuant to s 184 of the *Youth Justice Act 1992 (Qld)* ("**the Act**").
- [14] The sentencing Judge accepted that the recording of convictions may have an impact on the applicant's rehabilitation generally and on her chances of finding or attaining employment. Having regard to all of the circumstances, and in particular the serious nature of the offences, the applicant's age and her previous convictions for like offences, the sentencing Judge determined that convictions should be recorded.

### **Discussion**

- [15] A consideration of the sentencing remarks, the circumstances of the offences and the applicant's age and personal circumstances, support a conclusion that detention fell well within a proper exercise of the sentencing discretion.
- [16] The applicant did not have favourable factors such as an absence of previous criminal history or particular youth or disabilities. The applicant had a relevant prior

criminal history, including for offending of a like nature and the applicant had reoffended in breach of previous court orders.

- [17] As to the recording of convictions, whilst the Act provides that a conviction, generally, is not to be recorded, the Act specifically gives a discretion in respect of the recording of a conviction. That discretion, although to be exercised having regard to the purposes of the Act and consistently with its principles, is a wide discretion. Relevant factors include a child's previous offences. That factor cannot be overshadowed, in an appropriate case, by the considerations of the consequences of a conviction on the child's future rehabilitation and employment. Otherwise there would be no purpose in the existence of a discretion to record a conviction.
- [18] The sentencing Judge specifically referred to the discretion provided to a Court under s 183 of the Act. The sentencing Judge correctly identified the factors to be considered pursuant to s 184 of the Act, when exercising that discretion.
- [19] The sentencing Judge then observed:

“I accept that the recording of convictions may have an impact upon your rehabilitation generally, and your chances of finding or attaining employment. Notwithstanding that, having regard to all the circumstances, in particular the nature of the offences, your age, and in particular the previous convictions, in particular for like offences, convictions are recorded for all three offences.

Unfortunately, you have no one to blame but yourself for the adverse impact that may have upon you. You do have the capacity, you have shown over the last 12 months, to change your life around and you have got the rest of your life ahead of you. And every prospect of spending that in the community, rather than behind bars. But ultimately, the choice is up to you whether you take advantage of the assistance that has been offered you, because you have been dealt with leniently in the past, and I expect many would say leniently today. You cannot expect to enjoy lenient treatment in the future if you reoffend.”<sup>1</sup>

- [20] Whilst leniency in the past may be a relevant consideration in respect of the applicant's previous convictions, the sentencing Judge's reference to that leniency must be considered in light of the earlier observation by the sentencing Judge that the applicant had “previously been given opportunities whereby convictions were not recorded”.<sup>2</sup> In context, these observations support a conclusion that the applicant's past performance, when previously having been given opportunities whereby convictions were not recorded, impermissibly constrained the sentencing Judge's exercise of the discretion whether to record convictions in respect of the present offences.
- [21] Whatever may have been the applicant's past approach to those opportunities, a proper exercise of the sentencing discretion required consideration of not only the nature of the offences, the applicant's age, her previous convictions and the impact of the recording of a conviction upon her chances of rehabilitation generally or

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<sup>1</sup> AB46/22-35.

<sup>2</sup> AB46/19-20.

finding or obtaining employment, but also of the factors in the applicant's favour, including positive changes in her life and attitudes since the offences.

- [22] In the applicant's case, those changes were significant. They included being in a more stable domestic situation, including stable accommodation; the completion of an agreement resulting from a restorative justice process referral; a letter of apology to her victims; and favourable observations in the presentence report as to a change in her attitude towards her offending and the victims, including remaining in her stable accommodation and separating herself from her anti-social peers.
- [23] There was also material placed before the sentencing Judge to the effect that the applicant's mother had the impression there were changes for the better, with the applicant exhibiting a more respectful attitude towards her and the family home. The applicant was attending school and had taken advantage of the terms of the probation order, including involvement in transition to success program and completing a certificate in school for vocational pathways as well as a number of other courses.
- [24] Many of those factors were referred to by the sentencing Judge prior to exercising the sentencing discretion to impose a detention order and the conditional release order. Those favourable matters only received reference, in the context of the exercise of the discretion to record convictions, after that discretion had been exercised by the sentencing Judge. The failure to specifically refer to those matters, when exercising that sentencing discretion, supports a conclusion that the sentencing discretion miscarried by reason of misapplication of principle.
- [25] This conclusion requires a re-exercise of that discretion.
- [26] In re-exercising that discretion, the significant changes in the applicant's circumstances subsequent to the commission of the offences, in the context of legislation which provides that a conviction generally is not to be recorded, favours the exercise of a discretion that convictions not be recorded in respect of the offences.
- [27] As the sentencing Judge observed, the recording of convictions may have an impact upon the applicant's rehabilitation generally and on her chances of finding and attaining employment. That impact is likely to be substantial and particularly detrimental in respect of an applicant who has shown genuinely positive attempts to move away from the circumstances and environment in which she committed offences to an environment consistent with a genuine wish to obtain skills in the hope of securing employment.
- [28] I would re-exercise the sentencing discretion by ordering no convictions be recorded.

### **Conclusion**

- [29] I would order:
1. The application for leave to appeal against sentence be granted.
  2. The appeal be allowed.

3. The sentences below be set aside, to the extent that it be ordered that no convictions be recorded, but not otherwise.