

CHILDRENS COURT OF QUEENSLAND

CITATION: *Commissioner of Police v DT* [2013] QChC 14

PARTIES: **COMMISSIONER OF POLICE**
(applicant)
v
DT
(respondent)

FILE NO/S: 129 of 2013
130 of 2013
131 of 2013

PROCEEDING: Application for sentence review

ORIGINATING COURT: Childrens Court at Caboolture

DELIVERED ON: 6 June 2013

DELIVERED AT: Brisbane

HEARING DATE: 31 May 2013

JUDGE: Rafter SC DCJ

ORDERS:

- 1. Set aside the orders for probation and community service imposed by the Childrens Court at Caboolture on 26 April 2013 insofar as those orders relate to the charge of trespass contrary to s.334 *Education (General Provisions) Act 2006*.**
- 2. In respect of the charge of trespass contrary to s.334 *Education (General Provisions) Act 2006* order pursuant to s.175(1)(b) *Youth Justice Act 1992* that the respondent be of good behaviour for six months upon the condition in s.188 that he abstain from violation of the law for the period of the order. A conviction is not recorded.**
- 3. Set aside the order that the respondent pay \$1,986.50 by way of compensation and restitution to the State Penalties Enforcement Registry.**
- 4. That in respect of the charge of assault occasioning bodily harm while armed, pursuant to s.235 *Youth Justice Act 1992* the respondent pay \$300 to (the complainant) to be paid in the first instance to the Registrar of the Childrens Court at Caboolture within 12 months.**

5. That in respect of the charge of breaking and entering premises and committing an indictable offence, pursuant to s.235 *Youth Justice Act 1992* the respondent pay \$500 to (the complainant) to be paid in the first instance to the Registrar of the Childrens Court at Caboolture within 12 months.
6. That in respect of the charge of attempted enter premises with intent to commit an indictable offence, pursuant to s.235 *Youth Justice Act 1992* the respondent pay \$500 to (the complainant) to be paid in the first instance to the Registrar of the Childrens Court at Caboolture within 12 months.
7. That in respect of the charges of injuring animals at night, pursuant to s.235 *Youth Justice Act 1992* the respondent pay \$686.50 to the Minister for Education c/o the Caboolture State High School to be paid in the first instance to the Registrar of the Childrens Court at Caboolture within 12 months.
8. Order pursuant to s.183 *Animal Care and Protection Act 2001* that the respondent be prohibited from purchasing or otherwise acquiring or taking possession of any animal (apart from domestic animals and chickens at the premises where the respondent resides) for a period of 2 years.
9. Otherwise confirm the sentence orders imposed by the Childrens Court at Caboolture on 26 April 2013.
10. Direct pursuant to s.158(2) *Youth Justice Act 1992* that the solicitor for the respondent explain to him the purpose and effect of the orders and any consequences that may arise from a failure to comply with them.

CATCHWORDS: CRIMINAL LAW – SENTENCE – SENTENCING JUVENILES – SENTENCE REVIEW – where the respondent pleaded guilty to eight offences – where the respondent was 16 years old when sentenced – where the respondent has a criminal history including offences of possessing a knife in public, possessing graffiti instrument and possession of suspect stolen property – where the respondent was reprimanded for those offences – where the respondent had been sentenced for an offence, enter premises with intent to commit an indictable offence, committed within the same period as the present series of offences – where convictions not recorded – where the respondent took part in a Youth Justice Conference in November 2012 for eight offences – where this was taken into account by the magistrate when sentencing for the subsequent offences

CRIMINAL LAW – SENTENCE – SENTENCING JUVENILES – SENTENCE REVIEW – where the Childrens Court magistrate made a compensation order requiring the payment of \$1,986.50 – where the respondent was ordered to

pay this amount to the State Penalties Enforcement Registry – whether this was a valid order

CRIMINAL LAW – SENTENCE – SENTENCING
 JUVENILES – SENTENCE REVIEW – where the respondent was ordered to complete 12 months probation and 80 hours of community service – where convictions not recorded – whether the sentence was sufficient when regard was had to the combination of offences committed – whether the sentence was able to be imposed for the offence of trespass – whether a period of detention should be served by way of a conditional release order – whether additional hours of community service should be ordered to be served – whether a conviction should be recorded

CRIMINAL LAW – SENTENCE – SENTENCING
 JUVENILES – SENTENCE REVIEW – where two of the offences were injuring animals at night – where s.183 *Animal Care and Protection Act 2001 (Qld)* prohibition order was not made – whether such an order would be appropriate

Youth Justice Act 1992 (Qld), ss 37(9), 40(5), 150, 154, 175, 181, 182, 183, 184

State Penalties Enforcement Act 1999 (Qld), s 5

Animal Care and Protection Act 2001 (Qld), ss 3 and 183

Education (General Provisions) Act 2006 (Qld) s 334

COUNSEL: D Nardone for the applicants

D Law, solicitor, for the respondent

SOLICITORS: Director of Public Prosecutions for the applicants

Legal Aid Queensland for the respondent

Introduction

- [1] The applicants are three police officers who were the arresting officers in relation to a total of eight charges against the respondent.
- [2] On 8 February 2013 the respondent pleaded guilty to six charges in the Childrens Court at Caboolture. The charges were as follows:
- One charge of wilfully and unlawfully killing an animal at night contrary to s.468 *Criminal Code*;
 - One charge of wilfully and unlawfully wounding an animal at night contrary to s.468 *Criminal Code*;
 - One charge of trespass contrary to s.334 *Education (General Provisions) Act 2006*;
 - One charge of stealing contrary to s.398 *Criminal Code*;

- One charge of breaking and entering premises and committing an indictable offence contrary to s.421 *Criminal Code*;
 - One charge of attempting to enter premises with intent to commit an indictable offence contrary to s.421 and s.535 *Criminal Code*.
- [3] The court ordered a presentence report pursuant to s.151 *Youth Justice Act* 1992 (“*YJ Act*”).
- [4] On 5 March 2013 the respondent pleaded guilty to two further charges. Those charges were assault occasioning bodily harm whilst armed, contrary to s.339 *Criminal Code* and wilful damage contrary to s.469 *Criminal Code*. The court ordered a psychological report and the sentence was adjourned to 26 April 2013.
- [5] On 26 April 2013 the respondent was sentenced to 12 months probation and ordered to perform 80 hours community service. Convictions were not recorded. The respondent was ordered to pay a total amount of \$1,986.50 by way of compensation. The Childrens Court magistrate declined to make a prohibition order pursuant to s.183 *Animal Care and Protection Act* 2001.
- [6] The arresting officers apply for a review of the sentence orders pursuant to s.118 *YJ Act*. An arresting officer may make an application for review by reason of s.119(1)(c).

Nature of the review

- [7] Section 122(1) *YJ Act* provides that the review must be by way of rehearing on the merits. The court may have regard to the record of the proceedings before the Childrens Court magistrate and any further submissions and evidence.¹
- [8] An appeal conducted by way of rehearing requires the appellate court to review the evidence at the trial and to reach its own conclusions.² An application for review pursuant to s.118 *YJ Act* is not an appeal. An applicant for review under s.118 does not need to establish any error. However there were errors in the proceedings before the Childrens Court magistrate which require correction.
- [9] The powers of the court on a sentence review application are set out in s.123 *YJ Act*. The court may only substitute another sentence order that was within the jurisdiction of a Childrens Court magistrate to make.³ For example, the maximum period of detention that a Childrens Court magistrate can impose is one year.⁴
- [10] On the hearing of this application, further evidence was placed before the court without objection. The additional evidence related to the respondent’s compliance with a four month probation order that had been imposed on 16 November 2012. There was also evidence of offences in respect of which the respondent was ordered to engage in a youth justice conference in November 2012.⁵ In addition there was evidence of the respondent’s compliance with the community service order imposed

¹ s.122(2) *YJ Act*.

² *Fox v Percy* (2003) 214 CLR 118 at 126-127 para [25].

³ s.123(1)(c) *YJ Act*.

⁴ s.175(1)(g)(i) *YJ Act*.

⁵ See Exhibit 1.

on 26 April 2013. The respondent's solicitor also filed an affidavit, which contained details of the respondent's present circumstances.

Error in sentence for trespass

- [11] The Childrens Court magistrate made probation and community service orders in respect of all offences. Section 178 *YJ Act* permits a court to make both orders for a single offence. Section 182 applies where a court makes more than one sentence order against a child for more than one offence. However s.175(2) provides that probation and community service orders may only be made against a child found guilty of an offence of a type that, if committed by an adult, would make the adult liable to a term of imprisonment. The maximum penalty for trespass contrary to s.334 *Education (General Provisions) Act 2006* is 20 penalty units. Accordingly, the Childrens Court magistrate erred in imposing probation and community service orders for the offence of trespass. The probation and community service orders must be set aside insofar as they relate to the trespass offence.
- [12] In my view the appropriate order for trespass is a good behaviour order pursuant to s.175(1)(b) *YJ Act*. The court is required to impose a condition that the child abstain from violation of the law for the period of the order.⁶ The court must not record a conviction where an order is made pursuant to s.175(1)(b) by virtue of s.183(2).

Errors in the compensation order

- [13] The Childrens Court magistrate ordered that the respondent pay a total amount of compensation of \$1,986.50. The orders were referred to the State Penalties Enforcement Registry. At the time of sentence the respondent was in employment and his solicitor submitted that the respondent could pay compensation if given sufficient time.⁷
- [14] The amounts of compensation were as follows:
- the sum of \$300 to the complainant in respect of the offence of assault occasioning bodily harm while armed;
 - the sum of \$500 to the complainant in respect of the offence of breaking and entering premises and stealing;
 - the sum of \$500 to the complainant in respect of the offence of attempted enter premises with intent to commit an indictable offence;
 - the sum of \$686.50 to the complainant in respect of the offences of injuring animals.
- [15] The order that compensation be paid to the State Penalties Enforcement Registry was not valid. Section 5 *State Penalties Enforcement Act 1999* provides:

⁶ s.188 *YJ Act*.

⁷ Childrens Court at Caboolture, 26 April 2013, transcript page 23 line 10.

5 Act has limited application to children

- (1) This Act does not apply to a child within the meaning of the *Youth Justice Act 1992* other than to the extent it allows a child to pay a fine stated in an infringement notice for an offence in full or by instalments to an administering authority instead of being prosecuted for the offence.
- (2) However, an enforcement order, fine collection notice or warrant may not be issued under this Act against a child within the meaning of the *Youth Justice Act 1992*.

[16] The term “infringement notice offence” is defined in the dictionary contained in Schedule 2 as meaning “an offence, other than an indictable offence or an offence against the person, prescribed under a regulation to be an offence to which this Act applies.”

[17] The offences in respect of which the compensation orders were made are indictable offences and therefore the *State Penalties Enforcement Act 1999* did not apply.

[18] A Childrens Court may make restitution and compensation orders against a child in relation to “offence affected property” pursuant to s.235 *YJ Act*. An order for compensation must be for not more than 20 penalty units.⁸

[19] The court may only make an order for compensation if it is satisfied that the child has the capacity to pay it.⁹

[20] Section 235(3) states:

An order under this section requiring a child to pay an amount by way of compensation or making restitution must direct—

- (a) that the amount must be paid by a time specified in the order or by instalments specified in the order; and
- (b) that the amount must be paid in the first instance to the proper officer of the court.

[21] Accordingly the order of the Childrens Court magistrate referring the compensation orders to the State Penalties Enforcement Registry must be set aside. Furthermore orders must be made in accordance with s.235(3). Mr Law for the respondent requested that the respondent be allowed 12 months to pay the compensation orders. Mr Nardone for the applicants did not oppose that period of time.

[22] The mode of enforcement of an order for compensation is set out in s.310 *YJ Act*. This provision states that the amount of compensation is a debt owing to the person in whose favour the order was made. Section 310(b) provides that the order may be filed in the Registry of a Magistrates Court under the *Magistrates Court Act 1921*. In those circumstances, it is desirable that separate orders be made in respect of each particular complainant, so that if any of them wish to take steps for enforcement, the order can be filed in the manner described in s.310(b).

⁸ s.235(2)(b) *YJ Act*.

⁹ s.235(5) *YJ Act*.

The respondent's antecedents

- [23] The respondent is 16 years old. He was 16 years of age at the time of the offences which occurred in the period August to November 2012. The respondent has a criminal history that pre-dates the present series of offences and other offences committed in the same time period in August 2012.
- [24] On 20 May 2011 the respondent appeared in the Caboolture Childrens Court for possession of a knife in a public place, possession of a graffiti instrument and unlawful possession of suspected stolen property. Those offences all occurred on 21 April 2011. The offences arose when the police intercepted the respondent walking along a Caboolture street. He was searched and found to be in possession of an eight inch, fixed blade, hunting-style knife in a sheath. He had been warned by police two days earlier not to carry that knife in a public place. He was also in possession of a black permanent marker which he agreed could be used for the purposes of graffiti. He was also in possession of an 18+ identity card that was not in his own name.
- [25] On 16 November 2012 in the Caboolture Childrens Court the respondent was placed on probation for four months for entering premises with intent to commit an indictable offence. A conviction was not recorded. The offence occurred on 20 August 2012, which is within the same time period as the present offences. The respondent and a co-offender gained entry into a takeaway business. The author of the presentence report informed the Childrens Court magistrate that the respondent's compliance with that probation order "was more than satisfactory" and included the respondent engaging with a priest. However the additional evidence adduced on the hearing of the present application revealed that due to the respondent's work commitments he was permitted to report to a probation officer fortnightly by sending a text message. This seems to be an unsatisfactory mode of supervision under a probation order. It is unlikely that such limited contact with a probation officer would provide any assistance in the rehabilitation of a child. It may be that the requirements of a probation order will impact on other aspects of the child's life. The four month probation order imposed on 16 November 2012 expired on 15 March 2013. In that period it seems that the respondent did no more than send eight text messages to the supervising probation officer. It was therefore something of an overstatement for the author of the presentence report to inform the Childrens Court magistrate that the respondent's compliance "was more than satisfactory".
- [26] In November 2012 the respondent was ordered to participate in a youth justice conference in relation to a total of eight offences pursuant to the now repealed s.161 *Youth Justice Act* 1992. The offences which were the subject of the youth justice conference were stealing, assault occasioning bodily harm, wilful damage, breaking and entering premises and committing an indictable offence, and entering premises with intent to commit an indictable offence. The time period over which those offences were committed was 3 August 2012 to 21 August 2012. The option for a court to refer a child for a youth justice conference was removed by the *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Act* 2012. Nevertheless the transitional provisions enabled the youth justice conference that was ordered in November 2012 to proceed. The conference seems to have been

finalised on 4 February 2013.¹⁰ It is not necessary to set out the details of all of those offences. However one of the offences has some similarity to an offence for which the respondent was sentenced on 26 April 2013. On 3 August 2012 the respondent stole a fire extinguisher from a service station. At about 11.50 p.m. the respondent and another person ordered a taxi to pick them up from a house at Caboolture. When the taxi arrived at the address the driver noticed that the house was in darkness. The respondent then went to the driver's side door and said that he had some grocery bags. The taxi driver observed that the other male person had a fire extinguisher and he stated that he wouldn't be able to transport that item. The respondent and the other male person then sprayed the fire extinguisher at the taxi driver. The powder substance from the fire extinguisher covered his body, neck and head. The taxi driver experienced cloudy vision and difficulty breathing. The offences that were the subject of the youth justice conference involve considerable damage. There were eight offences which caused loss and damage in excess of \$13,000. Having regard to the seriousness of the offences and the magnitude of the damage caused by the respondent it is perhaps doubtful that it was a suitable case for an indefinite referral order pursuant to the now repealed s.161 *YJ Act*.

- [27] The offences to which the respondent pleaded guilty and which were the subject of the indefinite referral order pursuant to s.161(3)(a)(i) *YJ Act* form part of the respondent's childhood criminal history by virtue of s.154 which states:

154 Finding of guilt as child may be disclosed while a child

- (1) A finding of guilt against a child by a court for an offence, whether or not a conviction has been recorded, is part of the criminal history of the child to which regard may be had by a court that subsequently sentences the child for any offence as a child.

- [28] In *R v BBX*¹¹ the Court of Appeal rejected an argument that s.166(11) precluded offences that were the subject of a youth justice conference forming part of a child's criminal history. Section 166(11) has been repealed by the *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Act 2012*. Clearly the eight offences the subject of the indefinite referral order form part of the respondent's childhood criminal history.

The facts

- [29] On 11 August 2012 the respondent stole a fire extinguisher from a service station at Caboolture. He began to spray the fuel pumps with the contents of the fire extinguisher before running away with it.
- [30] The offence of assault occasioning bodily harm while armed occurred on 18 August 2012. The respondent removed a fire extinguisher from the front of a Chinese takeaway restaurant. The respondent and a co-offender had decided to spray the complainant with the fire extinguisher. The respondent handed the fire extinguisher to the co-offender who sprayed the complainant in the face.

¹⁰ Childrens Court at Caboolture, 26 April 2013, transcript page 15 line 50.

¹¹ [2011] QCA 8.

- [31] On 21 August 2012 the respondent and a co-offender broke into a Chinese takeaway shop at Caboolture. They were disguised with stockings over their heads. Entry was gained through a rear door. The security door was jemmied off its hinge. A piece of concrete paving was used to smash a hole in the door which permitted access to the premises. Once inside the telephone cord was cut. Food and drinks were stolen. The offenders also threw eggs, cooking sauces and oil over the walls, floors and ceiling. The total amount of loss was \$500. On the same night the respondent and his co-offender attempted to gain entry to a liquor shop by attempting to jemmy open a padlock at the bottom of a roller door. They were unsuccessful in gaining entry but caused damage of \$500.
- [32] On 13 October 2012 between 4.50 am and 5.20 am, the respondent and a co-offender, who was 19 years of age, went to the grounds of the Caboolture State High School. They entered the agricultural unit where a bull, cows, ponies and two alpacas were housed. They herded two ponies and the two alpacas into a smaller enclosure and closed the gates. They then threw what appeared to be rocks at the visibly distressed ponies and alpacas. They then used a hose to whip the animals and continued to throw rocks at them. A metal pole that supported a fence was removed and used to strike the alpacas, causing them to fall to the ground where they were struck further. One of the alpacas lifted itself up off the ground and the offenders continued to strike it until it fell again. When a staff member of the school arrived at about 9 a.m. one of the alpacas was dead and the other was kneeling against a fence. A veterinarian was called and the second alpaca was euthanized.
- [33] On 3 November 2012 the respondent smashed a plastic garden chair and a child's climbing frame at his mother's residence.

Presentence report

- [34] The presentence report identified four factors which were assessed as contributing to the respondent's offending:
- Problematic relationship with his mother;
 - Ill-conceived learnt coping strategy;
 - Displaced aggression;
 - Excessive alcohol consumption.
- [35] The report noted that the respondent was now living with his father and was well-supported and engaged in full-time employment. It was said that alcohol did not present as a current issue in the respondent's life.

Psychologist's report

- [36] The psychologist stated that:
- “(The respondent's) offending behaviour was redolent of *Displaced Aggression*. This was the definition of ‘Displaced Aggression’ cited in Denson et al (2006):
- ‘When a person is provoked, is unwilling or unable to retaliate against the original provocateur, and subsequently aggresses against a seemingly innocent

target' (Dollard, Doob, Miller, Mowrer & Sears, 1939; Hovland and Sears, 1940).”

- [37] The psychologist was of the view that the respondent’s problematic relationship with his mother made him deeply angry. The psychologist seems to have uncritically accepted all that was said by the respondent including, for example, a bizarre incident on a trawler.
- [38] It can be difficult to predict an offender’s risk of reoffending. However, the respondent’s prospects of rehabilitation would undoubtedly be enhanced by proper supervision.

Submissions for the applicants

- [39] Mr Nardone for the applicants submitted that a sentence of 12 months probation and 80 hours community service may have been appropriate for the offences of breaking and entering premises and stealing and attempted entering premises with intent alone. He submitted that the additional offences of injuring the animals and assault occasioning bodily harm while armed increased the seriousness of the respondent’s offending. He submitted the further offences of injuring the animals and assault occasioning bodily harm whilst armed indicated that the respondent had a proclivity towards violence, particularly irrational violence. Mr Nardone submitted that the need to protect the community from further similar conduct and the need for accountability required the imposition of a sentence involving detention. He submitted that a sentence of three months detention was within the court’s discretion. Mr Nardone accepted that the mitigating factors including the respondent’s pleas of guilty and his continuing positive work ethic could result in the sentence of detention being ordered to be served by way of a conditional release order. Alternatively, Mr Nardone submitted that if the court was of the view that a sentence of detention was not the only available option, then the number of hours of community service could be increased. The maximum number of hours of community service that can be ordered is 200 hours.¹² The maximum period of probation that can be imposed by a Childrens Court magistrate is one year.¹³
- [40] Mr Nardone submitted that the overall circumstances of the offences required that convictions be recorded. He pointed out that the offences viewed individually and in combination were very serious and demonstrated that the defendant had little regard for property or person. Moreover, the respondent was 16 years old and was on bail when he committed a number of the offences.
- [41] Mr Nardone also submitted that a prohibition order pursuant to s.183 *Animal Care and Protection Act* 2001 ought to have been made for a period of at least 12 months. The Childrens Court magistrate was informed that the respondent intended to seek employment on a cattle station or enrol in an agricultural course at TAFE college. Mr Nardone acknowledged that a prohibition order would at least delay the respondent’s career plans but he submitted this was entirely appropriate until the respondent had undergone the supervision and support that might assist in preventing similar conduct in the future.

¹² s.175(1)(e)(ii) *YJ Act*.

¹³ s.175(1)(d)(i) *YJ Act*.

Submissions for the respondent

- [42] Mr Law for the respondent emphasised the sentencing principles in s.150(1) *YJ Act* and the special considerations in s.150(2).
- [43] Mr Law submitted that the respondent pleaded guilty to the offences and showed remorse for his conduct. Furthermore, he submitted that the respondent had sought counselling and assistance from his family. He pointed out that the respondent had left the Caboolture area and was residing with his father in North Queensland. He had disassociated himself from his offending peers and his negative home environment. He had stopped drinking alcohol. He pointed out that the respondent was employed and submitted that he had good prospects of rehabilitation. He submitted that the sentence orders made by the Childrens Court magistrate were appropriate.

Consideration

- [44] It is significant that the respondent was granted bail on 31 August 2012 for the offence dealt with ultimately in the Caboolture Childrens Court on 16 November 2012. Therefore he was subject to that grant of bail when he committed four of the present offences including the two charges of injuring animals at night on 13 October 2012. This was a serious aggravating factor.
- [45] The respondent's arrest on 31 August 2012 did not deter him from continuing to offend. The offences at the Caboolture State High School were particularly callous and cruel. The respondent had little regard for the impact of his offending on the school community. Victim impact statements, written by a student, a teacher and the head of the agriculture department at the school, indicated the serious impact of the death of the alpacas on the school community. The agriculture teacher wrote, that in all the time he had been associated with agricultural industries he had not seen more deplorable or barbaric treatment of animals than what was shown in the CCTV footage.
- [46] The respondent told the psychologist that when the first alpaca dropped to the ground he and the co-offender "freaked out". He said that he "felt bad" after the first alpaca dropped to the ground. While the psychologist seems to have accepted those statements by the respondent, they are somewhat inconsistent with the CCTV footage, which shows the respondent continuing to attack the alpaca after it fell to the ground.
- [47] The sentence orders imposed by the Childrens Court magistrate at Caboolture are undoubtedly lenient. However the information that was placed before this court on the hearing of the application for sentence review indicates that the respondent is compliant with the orders. He has completed seven hours of the community service order. Information from the Youth Justice Court Services Unit indicates that the respondent has a high level of enthusiasm to complete the community service hours. The respondent is in full-time employment, which has restricted his opportunities to perform community service. Nevertheless, arrangements have been made for the respondent to perform community service on Saturday mornings.
- [48] Section 150(1)(c) *YJ Act* requires a court sentencing a child for an offence to have regard to the special considerations set out in s.150(2) which states:

- (2) Special considerations are that—
- (a) a child’s age is a mitigating factor in determining whether or not to impose a penalty, and the nature of a penalty imposed; and
 - (b) a non-custodial order is better than detention in promoting a child’s ability to reintegrate into the community; and
 - (c) the rehabilitation of a child found guilty of an offence is greatly assisted by—
 - (i) the child’s family; and
 - (ii) opportunities to engage in educational programs and employment; and
 - (d) a child who has no apparent family support, or opportunities to engage in educational programs and employment, should not receive a more severe sentence because of the lack of support or opportunity; and
 - (e) a detention order should be imposed only as a last resort and for the shortest appropriate period.

[49] The Charter of youth justice principles in Schedule 1, which underlie the operation of the *YJ Act*,¹⁴ reinforces the principle that a sentence of detention is one of last resort. The Charter states in principle 17:

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.

[50] The Prosecutor submitted that the Childrens Court magistrate should consider imposing a conditional release order and a period of probation.¹⁵ A court that imposes a detention order may immediately suspend the order and make a conditional release order.¹⁶ The purpose of a conditional release order is to provide the court with an option instead of actual detention, which involves the immediate release of the child into a structured program with strict conditions.¹⁷ As a conditional release order is a sentence of detention it remains an option of last resort.¹⁸ The maximum program period under a conditional release order is three months.¹⁹

[51] At the hearing of this application for sentence review I was informed by the representative of the Youth Justice Court Services Unit that the respondent’s probation order involved actual supervision rather than fortnightly text messaging which was permitted in relation to the probation order made on 16 November 2012.

[52] In the circumstances since the respondent is apparently complying with the probation order I would not vary the sentence by making a conditional release order.

¹⁴ s.3 *YJ Act*.

¹⁵ Childrens Court at Caboolture, 26 April 2013, transcript page 17 lines 25-35.

¹⁶ s.220(1) *YJ Act*.

¹⁷ s.219 *YJ Act*.

¹⁸ s.150(2)(e) *YJ Act*; Charter of Youth Justice Principles, no. 17.

¹⁹ s.221(1)(a) *YJ Act*.

Although the 80 hour community service order is somewhat low, the respondent has work commitments and I would not disturb that order.

[53] As I have already mentioned it is necessary to set aside the probation and community service orders insofar as they relate to the offence of trespass.

[54] As I have already said, the sentences imposed by the Childrens Court magistrate were very lenient. An adult offender would face the distinct prospect of a sentence of imprisonment: *R v Kelly*²⁰; *R v Romano*²¹. The sentences imposed by the Childrens Court magistrate should not be regarded as establishing a benchmark. For offences involving such a high degree of cruelty to animals together with a serious offence of violence to a person a sentence of detention would clearly be within range. The Charter of youth justice principles requires that a child who commits an offence be held accountable and encouraged to accept responsibility for offending behaviour.²²

Recording convictions

[55] Section 184 *YJ Act* provides:

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.

[56] In *R v JO*²³, *R v WAJ*²⁴, *R v SBR*²⁵ and *R v TX*²⁶ the Court of Appeal has held that the prima facie position is that convictions ought not be recorded against a child. In considering whether or not to record a conviction the court is required to have

²⁰ [2006] QCA 467.

²¹ [2008] QCA 140.

²² Charter of youth justice principles, no. 8(a).

²³ [2008] QCA 260 at paras [12]-[16].

²⁴ [2010] QCA 87 at paras [14]-[15].

²⁵ [2010] QCA 94 at para [15].

²⁶ [2011] QCA 68 at para [33].

regard to *all the circumstances* of the case including those factors set out in s.184(1)(a), (b) and (c).

[57] An important consideration in relation to the recording of convictions in this matter is the stance taken by the Prosecutor before the Childrens Court magistrate. When asked whether the Prosecutor wished to be heard on the issue of recording a conviction, she stated, “No, your Honour. The legislation speaks for itself, but the offences before the court, it’s certainly open for the court to do it, I don’t make submissions, though.”²⁷

[58] Ordinarily a party is bound by the way in which the case was conducted at first instance.²⁸ Where the prosecution did not press for the recording of convictions at first instance it would be quite exceptional for the court to do so on an application of this nature. While it was certainly open for convictions to be recorded in respect of the offences of killing an animal, wounding an animal and assault occasioning bodily harm whilst armed, I do not consider that it would be appropriate to do so on this application.

Prohibition order under the *Animal Care and Protection Act 2001*

[59] Section 183 *Animal Care and Protection Act 2001* provides:

183 Prohibition order

- (1) The court may order (a *prohibition order*) that a person convicted of an animal welfare offence must not purchase or otherwise acquire or take possession of—
 - (a) any animal; or
 - (b) a stated type of animal; or
 - (c) any animal, or a stated type of animal, for trade or commerce or another stated purpose.
- (2) A prohibition order may be made permanently or for a stated period.

[60] An animal welfare offence is defined to include an offence against s.468 *Criminal Code*.

[61] The term “conviction” is defined to mean:

- (a) generally – a finding of guilt, or the acceptance of a plea of guilty, by a court, whether or not a conviction is recorded.²⁹

[62] Offences against the Act are summary offences.³⁰ By virtue of s.65 *YJ Act* a Childrens Court magistrate has the same powers and jurisdiction as a Magistrates Court. In addition s.66 *YJ Act* states that subject to certain exceptions which are not relevant in the present case, for the purposes of the powers and jurisdiction of a Childrens Court, the provisions of the *Criminal Code*, *Justices Act 1886* and other

²⁷ Childrens Court at Caboolture, 26 April 2013, transcript page 27 line 55.

²⁸ *R v Henderson; ex parte Attorney-General (Qld)* [2013] QCA 63 at para [51].

²⁹ Dictionary contained in the schedule to the *Animal Care and Protection Act 2001*.

³⁰ s.178 *Animal Care and Protection Act 2001*.

Acts apply to the exercise by a Childrens Court of its powers and jurisdiction. It was therefore open to the Childrens Court magistrate to make a prohibition order.

- [63] The Childrens Court magistrate's reasons for declining to make a prohibition order were:

"I've considered whether or not to make the orders sought under the *Animal Care and Protection Act 2001*, the prohibition order, which was an application that you not purchase, otherwise acquire, or take possession of any animal for a period of two years, I think the application was.

I've considered the nature of the animal welfare offence, and these are right up there amongst the most heinous of offences that you can commit. The effect on the animals, obviously, was devastating. I've considered the welfare of any other animal owned by you, and you don't own any other animal, and I've considered the likelihood of you committing another animal welfare offence.

These offences were committed against animals that belonged to a school. I don't know, you may well have had some issues with the school, none of that has been brought before me today. You're living in a situation where the family with which you live, your family, has pets, and from time to time you'll come into possession of them, and I don't wish to affect that in any way by the making of such an order.

I've also considered that in the future you may well work with animals. I consider that to be best for the community, rather than you be banned from working with animals, which cuts off one further objective of your pathway to employment. So for those reasons, I am not going to make the protection order (sic)."

- [64] At the hearing before the Childrens Court magistrate the respondent's solicitor pointed out that at the premises where the respondent lived with his father there was a dog, three cats, hens and roosters.³¹ The Childrens Court magistrate gave no consideration to tailoring the order so that the respondent could be permitted to remain at his place of residence while being precluded from having access to other animals. The further evidence admitted on the hearing of this application included the fact that his family have chickens from local battery-chicken farms for the purpose of providing eggs for consumption.
- [65] The respondent had sought employment on a cattle station in the Northern Territory but his father had not permitted him to take up the position because of the pending court proceedings. However it was submitted that the respondent wanted to enrol in a TAFE college to undertake an agricultural course. The course involves work with cattle and horses.
- [66] The respondent's cruel and callous conduct towards the alpacas is deeply disturbing. Whether or not his behaviour is due to displaced aggression, it is desirable that the respondent complete his probation order before having access to animals.

³¹ Childrens Court at Caboolture, 26 April 2013, transcript page 21 line 35.

[67] One of the purposes of the *Animal Care and Protection Act 2001* is to protect animals from unjustifiable, unnecessary or unreasonable pain.³² The criteria for making a prohibition order are set out in s.185 which states:

185 Criteria for making disposal or prohibition order

- (1) The court may make a disposal or prohibition order against a person only if the court is satisfied, on the balance of probabilities, it is just to make the order in the circumstances.
- (2) In considering whether it is just to make the order, the court must consider the following—
 - (a) the nature of the animal welfare offence to which the hearing relates;
 - (b) the effect of the offence on any animal that was the subject of, or used to commit, the offence;
 - (c) the welfare of the animal and any other animal owned by the person;
 - (d) the likelihood of the person committing another animal welfare offence.
- (3) Subsection (2) does not limit the matters the court may consider.
- (4) The court may make the order, to the extent it relates to an animal, whether or not it considers another animal welfare offence is likely to be committed in relation to the animal.

[68] The respondent's conduct was irrational and protracted. He subjected the alpacas to incredible suffering. In my view the Childrens Court magistrate gave undue weight to the respondent's career aspirations while disregarding the need to protect animals.

[69] Mr Nardone submitted that the prohibition period should be for at least 12 months.

[70] In the circumstances I consider that there should be an order pursuant to s.183 *Animal Care and Protection Act 2001* prohibiting the respondent from purchasing, otherwise acquiring or taking possession of any animal, apart from the domestic animals and chickens at the premises where he resides for a period of 2 years.

Orders

[71] I will therefore make the following orders:

1. Set aside the orders for probation and community service imposed by the Childrens Court at Caboolture on 26 April 2013 insofar as those orders relate to the charge of trespass contrary to s.334 *Education (General Provisions) Act 2006*.
2. In respect of the charge of trespass contrary to s.334 *Education (General Provisions) Act 2006* order pursuant to s.175(1)(b) *Youth Justice Act 1992*

³² s.3(c) *Animal Care and Protection Act 2001*.

that the respondent be of good behaviour for six months upon the condition in s.188 that he abstain from violation of the law for the period of the order. A conviction is not recorded.

3. Set aside the order that the respondent pay \$1,986.50 by way of compensation and restitution to the State Penalties Enforcement Registry.
4. That in respect of the charge of assault occasioning bodily harm while armed, pursuant to s.235 *Youth Justice Act* 1992 the respondent pay \$300 to (the complainant) to be paid in the first instance to the Registrar of the Childrens Court at Caboolture within 12 months.
5. That in respect of the charge of breaking and entering premises and committing an indictable offence, pursuant to s.235 *Youth Justice Act* 1992 the respondent pay \$500 to (the complainant) to be paid in the first instance to the Registrar of the Childrens Court at Caboolture within 12 months.
6. That in respect of the charge of attempted enter premises with intent to commit an indictable offence, pursuant to s.235 *Youth Justice Act* 1992 the respondent pay \$500 to (the complainant) to be paid in the first instance to the Registrar of the Childrens Court at Caboolture within 12 months.
7. That in respect of the charges of injuring animals at night, pursuant to s.235 *Youth Justice Act* 1992 the respondent pay \$686.50 to the Minister for Education c/o the Caboolture State High School to be paid in the first instance to the Registrar of the Childrens Court at Caboolture within 12 months.
8. Order pursuant to s.183 *Animal Care and Protection Act* 2001 that the respondent be prohibited from purchasing or otherwise acquiring or taking possession of any animal (apart from domestic animals and chickens at the premises where the respondent resides) for a period of 2 years.
9. Otherwise confirm the sentence orders imposed by the Childrens Court at Caboolture on 26 April 2013.
10. Direct pursuant to s.158(2) *Youth Justice Act* 1992 that the solicitor for the respondent explain to him the purpose and effect of the orders and any consequences that may arise from a failure to comply with them.