CHILDRENS COURT OF QUEENSLAND

CITATION:	*JPG v The Queen* [2019] QChC 10
PARTIES:	**JPG** (Applicant) **v** **THE QUEEN** (Respondent)
FILE NO/S:	178/2019
DIVISION:	Appellate
PROCEEDING:	Sentence review
ORIGINATING COURT:	Mount Isa Childrens Court
DELIVERED ON:	29 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2019
JUDGE:	Richards P
ORDER:	**Application granted. Conditional release order set aside. The child is ordered to participate in a restorative justice process pursuant to s175(1)(db) of the *Youth Justice Act 1992*.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – SENTENCING OF JUVENILES – where the applicant was 14 years of age – where the applicant had previous relevant criminal history – where the applicant had served 34 days in pre-sentence custody – where the applicant was sentenced to a conditional release order without a specified detention period – whether juvenile sentencing principles under the *Youth Justice Act* were adequately applied – where the magistrate failed to consider ordering the applicant to participate in a restorative justice process as recommended in the pre-sentence report – where the sentencing magistrate applied irrelevant and inappropriate considerations – where the *Youth Justice Act* stipulates that detention should only be imposed as a last resort and for the shortest appropriate time
LEGAL REPRESENTATIVES:	C Hollett of Legal Aid Qld for the Applicant J Guy of the Office of the Director of Public Prosecutions for the Respondent

[1] The applicant was charged with the following offences:

(a) enter a dwelling and commit an indictable offence (7/12/18);

(b) unlawful use of a motor vehicle (7/12/18);

(c) trespass (10/12/18);

(d) unlawful use of a motor vehicle (22/12/18);

(e) driving a motor vehicle without a driver licence (22/12/18); and

(f) dangerous operation of a motor vehicle (22/12/18).

[2] A pre-sentence report was ordered in relation to the charges of enter a dwelling and commit indictable offence, unlawful use of a motor vehicle and trespass. The applicant was granted bail on a conditional bail program.

[3] On 24 December 2018 he was brought before the court in relation to further charges of unlawful use of a motor vehicle, driving a motor vehicle without a licence and dangerous operation of a motor vehicle and was remanded in custody. He was sentenced on 22 January 2019. He was given a conditional release order in relation to the burglary and unlawful use of a motor vehicle. He was sentenced to nine months' probation for dangerous operation of a motor vehicle, unlawful use of a motor vehicle and driving of a motor vehicle without a driver's licence and was reprimanded for the trespass offence. No convictions were recorded.

[4] He was born on 28 April 2004 so he was 14 at the time of the offending and at the time of sentence. He had a relevant criminal history.

[5] In relation to the offending on 7 December 2018 the applicant, together with others, walked onto a property situated at 17 Stanley Street, Mt Isa. D, one of the co-offenders, approached the dwelling and tried to open the door but it was locked. He then returned a short time later with three other juveniles including the applicant.

They then stood around while D tried to open the door. He eventually gained entry to the dwelling through a second door and three of the juveniles entered the dwelling while one acted as a lookout. They then all ran to the vehicle parked in the parking bay. At that stage D was in possession of the car keys and entered the driver's seat. This applicant entered the front passenger seat while the other two were in the rear passenger seat. The vehicle was driven away and about 5.20 a.m. it was returned, reversed into the same car space and position as before.

[6] On 10 December 2018 police were conducting patrols in Mt Isa when they saw a group of juveniles walking the street. They conducted a U-turn and three of those children disappeared into 83 Simpson Street. Police followed the children to 148 Camooweal Street where they observed the applicant under the house. He crawled out under the house under instruction and was arrested.

[7] On 22 December 2018 the applicant together with three other males were in the car park of the Mt Isa Irish Club. The applicant approached the vehicle and smashed the front driver window of the vehicle. He then located spare car keys which were left in the motor vehicle and turned the car on. They exited the car park with the applicant driving. At 10.00 p.m. on 22 December he was driving the vehicle along Sue-See Avenue when he lost control of it at high speed and it crashed into the front yard of a house. Damage was incurred to the front fence of the property and two motor vehicles that were parked in the driveway. He was unlicensed at the time. Fortunately, no one was seriously injured.

[8] At the time of sentence the applicant had previous entries on his criminal history. He had previous entries for property offences and one offence of violence. On 26 June 2018 he was placed on nine months' probation and on 30 October 2018 twelve months' probation. There were some other minor offences for which he was

reprimanded. At the time of sentence been remanded for 34 days at Cleveland Youth Detention Centre in Townsville which meant separation from his family in Mt Isa. He found this period of time in custody difficult.

[9] A pre-sentence report was before the court which recommended that the applicant should be given the opportunity to participate in a restorative justice process. He had not done participated in such a process before the report was furnished and was willing to agree to a restorative justice process or a restorative justice order as part of his sentence. By the time of his sentence he had successfully participated in a restorative justice referral diversion for an offence of wilful damage.

Conditional Release Order

[10] In sentencing the applicant the magistrate did not specify a period of detention when imposing a conditional release order. The verdict and judgment record indicates a three month period of detention was imposed but there is no evidence of that on the face of the transcript.

[11] Section 220(1) of the *Youth Justice Act 1992* states:

> "A court that makes a detention order against a child may immediately suspend the order and make an order (***conditional release order)*** that the child be immediately released from detention."

In order to impose a conditional release order, a specific period of time in detention must be ordered. This was not done and accordingly the sentence is invalid. The error is not remedied by the file being endorsed with a specific period of time in custody. If the magistrate forgot to mention the period of detention that was suspended under s220 of the Act then the appropriate course was to reconvene the court and remedy the error in open court. Additionally, although it is clear from the record that the magistrate intended to impose the conditional release order in

relation to the offences on 7 December 2018, the verdict and judgment record includes the unlawful use of a motor vehicle on 22 December 2018 in the order. The magistrate was unable to impose a period of detention for that charge because no pre-sentence report was prepared for that charge. For these reasons alone the conditional release order must be set aside.

[12] Further, it was submitted that the magistrate did not place sufficient weight on the child's age, the proportion between the offence and sentence, the period of remand and the principle that detention should be imposed only as the last resort when arriving at the appropriate sentence for this young offender.

[13] The Crown submits that while the sentence was high it was imposed as a result of the magistrate exercising his discretion with regard to the circumstances of the offending, the child's age, criminal history and time spent in pre-sentence custody.

Restorative Justice Order

[14] Despite the recommendation for a restorative justice order the magistrate did not appear to consider restorative justice in this case. Given that the child was only 14 years of age and that he was willing to engage in the restorative justice process, in my view, this would have been an appropriate order as part of the sentence. In any event even if the order was not appropriate the magistrate should have at least considered it and given reasons why it was not appropriate in this case.

Other Considerations

[15] The child had a deprived background. His mother died when he was two. He has been in the care of the Department and he is currently in the custody of his aunt and

uncle. He had ceased going to school in June the year before and therefore was at a loose end in terms of engagement during the day at the time of the offending.

[16] In sentencing the offender, the magistrate was in my view somewhat overwhelmed by what he saw as the prevalence of Aboriginal youths committing offences in Mt Isa. He stated at paragraph 2 of his decision:

> "You have been in custody for 34 days, [JPG], and rightly so. You ought to be in custody longer, in my view. You have gone around stealing cars. The windows are – the cars are locked but that is still not good enough for you kids. You smashed the window then, unfortunately for Ms Adams – stupidly enough for her – she left a spare set of keys in the car. So it is an opportunistic offence. That is from the Irish Club where you stole the car with [D], [H] and [R]. But that would not have happened if you had not smashed the window.
>
> I mean the Mt Isa people are sick of Aboriginal kids breaking into their houses, their property, stealing everything that they are not entitled to. You go around terrorising the streets, and then, when you get locked up, it is everybody else's fault. I mean the only good thing happens for you when you are sitting in detention."

[17] These comments were inappropriate and ill considered generalisations to make when sentencing the child in question. Whilst the child had previous history for property offences there were no previous convictions for unlawful use of a motor vehicle. Statements of this nature are not in keeping with the *Charter of Youth Justice Principles* in particular "3. A child being dealt with under this Act should be – (a) treated with respect and dignity including while the child is in custody…"

Discussion

[18] The Crown submits that the court needs to look at the offending in its full context and that is true. However the court must also consider the appropriate punishment for the offences that are the subject of the order. The fact that there may have been other Aboriginal children committing offences in Mt Isa should not have reflected on the sentence imposed on this particular child. Further, the most serious

offending in this series of offences is obviously the dangerous operation of a motor vehicle. The child drove a stolen car at high speed and lost control of it. The driving could easily have resulted in serious injury to the passengers and/or residents of the property into which he drove. For this more serious offending he received nine months' probation.

[19] Even taking into account the offending as a whole, it is against sound sentencing principle to attach the head sentence to the less serious offence in consideration of more serious conduct.

[20] The magistrate was clearly overwhelmed by what he saw as the prevalence of offending of aboriginal juveniles in the Mt Isa area. It is important to bear in mind that this was a young child only 14 years of age. He had spent his first time in custody as a result of his offending and whilst he had a serious criminal history for one so young the fact was that the offending for which he received detention was not particularly serious.

[21] In *Veen* (*No. 2*) *v Queen* (1988) 164 CLR 465 at 477:

> "The court noted the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the incident offence. To do so would be to impose a fresh penalty for past offences."

[22] This particular child had spent 34 days in custody away from his family over the Christmas and New Year holiday period. The fact that the magistrate suggested that he should have been in custody for longer simply underlines the fact that the magistrate was overwhelmed by irrelevant considerations and in doing so lost sight of the youth justice principles that must be applied when sentencing juveniles.

[23] The magistrate was not assisted by the child's legal representative who submitted that a conditional release order was appropriate. No submissions on sentence were received from the prosecution.

[24] In my view given that the child has spent 34 days in pre-sentence custody for this offence which would equate to a sentence of actual detention of almost two months, the fact that he pleaded guilty, that his role in these offences was minor and he was willing to participate in a restorative justice order, the appropriate order is for a restorative justice process.

[25] The application is granted, the conditional release order is set aside and the child is ordered to participate in a restorative justice process as directed by the chief executive pursuant to s175(1)(db) of the *Youth Justice Act 1992*.