

CHILDRENS COURT OF QUEENSLAND

CITATION: *Daniel (a pseudonym) v The Office of the Director of Public Prosecutions* [2021] QChC 2

PARTIES: **Daniel (a pseudonym)**
(applicant)
v
THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
(respondent)

FILE NO: 412/2020

DIVISION: Childrens Court

PROCEEDING: Sentence Review Application

ORIGINATING COURT: Brisbane

DELIVERED ON: 16 February 2021

DELIVERED AT: Brisbane

HEARING DATE: 4 February 2021

JUDGE: Richards P

ORDER: **The sentence is set aside. The child is ordered to engage in restorative justice process pursuant to s 175 of the *Youth Justice Act 1992*.**

CATCHWORDS: CRIMINAL LAW – APPEAL AGAINST SENTENCE – SENTENCING JUVENILES – where the child was sentenced to three months’ probation for various offences – where the child was subject to a conditional bail program at the time of sentence – where the child had already served 43 days in custody for separate offending at the time of sentence – where the child was young with no previous criminal history – where the child was not in breach of any orders at the time of the offending or on bail – where a child must be asked if they are willing to comply with a probation order pursuant to s 194 of the *Youth Justice Act 1992* (Qld) before such an order is imposed – where the learned Magistrate failed to ask the child if he was willing to comply with a probation order – whether the sentence imposed by the learned Magistrate was manifestly excessive

LEGISLATION: *Youth Justice Act 1992* (Qld) s 175, s 194, Part 7 Division 7

COUNSEL: A Radford for the applicant
D Sampey for the respondent

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

- [1] On 29 October 2020 the child pleaded guilty to charges of stealing from the person, common assault, burglary and stealing, unlawful use of a motor vehicle and stealing. He was sentenced to three months' probation with no conviction recorded. It is against this sentence that he has applied for a review.
- [2] The circumstances of the offending are as follows:

9 May 2020 – Common assault, stealing from the person – at 6.00 pm on 9 May 2020 the victim phoned police to advise that a group of males had physically removed and stolen his phone, wallet and his friend's bum bag. He said that while waiting for a bus the child approached him and demanded that he give him his phone. He later returned and demanded that he give him his pin code.

14 May 2020 – Burglary and commit indictable offence and unlawful use of motor vehicle – at approximately 1.45 am on 14 May 2020 the child and three others entered a house through an unlocked side laundry door. They stole an Apple watch, \$8,000 – \$9,000 cash, car keys, two debit cards, identification cards and paperwork. They drove away in a vehicle owned by the residents. The next day the police found the child in possession of the car keys. He admitted to driving the car and told police where it was parked. Most of the property was recovered including \$2,450 in cash.

23 July 2020 – Stealing – at 2.30 pm the child was on a bus with the victim. The victim approached the child and another child took the victim's phone. He tried to get it back and eventually did. Later on the child demanded his shoes. He refused. He then asked for his phone and he refused. As he got up to leave the child took the phone from his pocket. The child victim was then told he could fight for his phone, a

small fight followed and the other child stole a backpack and jacket from the victim. The next day they were found at Garden City in possession of stolen items.

- [3] The child was 14 at the time of the offences and at sentence. He had spent a total of 43 days in custody although none of that time was in relation to these offences. He had no criminal history and was not subject to any supervised orders at the time of sentence.
- [4] It was submitted on his behalf that given his age, lack of criminal history and the time that he had spent in custody this was a situation where any period of probation was excessive. It was submitted that a restorative justice process should have been considered and applied in this particular case.
- [5] It was submitted on behalf of the respondent that the offences involved violence and a significant amount of property stolen. That the age and lack of criminal history was balanced against the seriousness of the offending and in those circumstances three months' probation was appropriate.
- [6] At the time of sentence the child was in custody for other matters and also had been subject to a conditional bail program.
- [7] During the conditional program he was attending programs every Wednesday, Thursday and Friday and had only failed to attend on one occasion. He had had discussions about exploring his education options and was addressing some drug and alcohol issues. He was linked with the Youth and Family Support Service in Logan. He was in custody on other charges at the time of sentence. The prosecutor at sentence submitted that four to six months' probation was appropriate. The learned Magistrate decided to reduce that sentence to three months taking into account the time he had spent in custody.
- [8] Sections Part 7, Division 7 of the *Youth Justice Act 1992* (Qld) deals with probation orders. Section 194 of the *Act* provides:

“194 Child must be willing to comply

A court may make a probation order against a child only if the child indicates willingness to comply with the order.”

- [9] It is conceded by the Crown that at no stage did the Magistrate ask the child if he was willing to comply with the order [or even if he knew what the order required of him]. Clearly, that was an error of law and the sentence must be set aside on that basis alone.
- [10] The Crown submits nonetheless that three months' probation was appropriate given the serious nature of the offences. There is still no indication from the child that he would be willing to comply with a probation order, but in any event given that the child was very young with no previous history, that he was not in breach of any orders and was not on bail at the time of the offending and that he had spent time in custody, an order that would assist him to gain insight into the impact of his offending was appropriate.
- [11] The child was already on conditional bail programs. If he should be released from custody he would have significant supervision from Youth Justice. A restorative justice conference may assist him to develop empathy. The child has been assessed by Youth Justice as suitable for the program and he is willing to participate.

Order

- [12] The sentence is set aside. The child is ordered to engage in a restorative justice process pursuant to s 175 of the *Youth Justice Act 1992*.