CHILDRENS COURT OF QUEENSLAND

CITATION:	*David (a pseudonym) v Director of Public Prosecutions* [2021] QChC 30
PARTIES:	**DAVID (a pseudonym)** (applicant) **v** **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS** (respondent)
FILE NO:	211/21
DIVISION:	Appellate
PROCEEDING:	Sentence Review
ORIGINATING COURT:	Childrens Court at Brisbane
DELIVERED ON:	12 August 2021
DELIVERED AT:	Brisbane
HEARING DATE:	28 July 2021
JUDGE:	Richards P
ORDER:	**The application is dismissed.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING OF JUVENILES – where the child was sentenced to 3 months' probation with no convictions recorded for a variety of offences – where the child had spent four nights in detention – where the child was 14 years old at the time of offending – where the child had no Queensland criminal history – where the Crown submitted there may have been children in the community peer pressuring the child to commit these offences – where the child was unwilling to partake in restorative justice – where the child indicated to Youth Justice a willingness to reoffend and that the child liked detention – where the child's parents expressed being unable to control him – where the offending was persistent and potentially dangerous to himself and others – whether the sentence imposed was excessive in the circumstances
LEGISLATION:	*Youth Justice Act* 1992 (Qld) s 21, s 22, s 24A
COUNSEL:	Mr N Bennett for the Applicant Mr T O'Brien for the Respondent Ms A Brazel for Youth Justice
SOLICITORS:	Legal Aid Queensland for the Applicant Office of the Director of Public Prosecutions for the

Respondent

Introduction

[1] The applicant pleaded guilty on 28 May 2021 to charges of enter premises and commit indictable offence by breaking on 14 April and 23 May 2021; enter premises and commit indictable offence on 24 March 2021; unlawful use of motor vehicles (2 charges between 21 May 2021 and 25 May 2021); stealing between 22 May 2021 and 25 May 2021 and enter premises with intent to commit indictable offence between 22 May and 25 May 2021. He was sentenced to three month's probation and no convictions were recorded. He was 14 years of age at the time of the offending and had no Queensland criminal history.

[2] The facts of the offending are as follows:

- On 24 March 2021, he entered the complainant's shed through a partially opened door and went into a Mercedes Benz vehicle and a utility looking for coins. He stole $30.

- On 14 April 2021, he searched through a Land Rover and removed two containers of coins that contained an unknown quantity of money.

- On 23 May 2021 at 8.00pm, he went to a motor vehicle establishment and tried to open a vehicle door. He then went to a nearby address and used the applicant's phone to call his mother and his mother collected him.

- Between 21 and 25 May 2021, he went to Moreton Bay Automotive at 11.56pm, entered the premises and tried to open several car doors. He managed to get into an unlocked Ford Ranger, the keys were inside the vehicle and he drove it around the premises. He then exited that car and started another vehicle using keys driving it around the premises. He attempted to park the vehicle and struck a pole when doing so causing damage to the car.

- Between 22 and 25 May 2021, he entered a closed, but unlocked door to a building at Redlands Mazda. Whilst in that building, he stole a set of keys, a wallet and headphones.

[3] He initially denied the offending, but later confessed saying that he had been told to commit the offences and was scared not to comply. He had spent four nights in detention. He lived with his mother, stepfather and two younger siblings. The Prosecutor indicated police were mindful that there may have been some people in the community who were in fact telling children to do these things and that they could not say that it was not what was happening. The Prosecutor submitted that in the circumstances there could be a lighter penalty, but submitted probation was appropriate because he needed to learn how to get himself out of these scenarios and do the right thing and that even while he is going to school, he is still committing these offences.

[4] The Magistrate initially indicated that she would make a court diversion referral, but the child was unwilling to participate in restorative justice.

[5] The child indicated there were some aspects of detention that he liked such as being able to do school, but that he missed his family, particularly his mother. He had recently re-engaged in Grade 9 at Alexander Hills State High School but was only attending for two hours a day because he has been diagnosed with ADHD. The child's representative submitted that a reprimand was appropriate, and that probation was not. It was during these discussions that the learned Magistrate asked whether the defence considered a s 24A order appropriate.

[6] Section 24A of the *Youth Justice Act* 1992 (Qld) applies in a situation where the court is satisfied that the offence should have been referred to restorative justice process under s 22, namely a police referral diversionary restorative justice process and the child's solicitor makes an application for the dismissal of the charges in those circumstances. When such an application is made the Childrens Court may have regard to any cautions administered to the child for any offence and whether any previous restorative justice agreements have been made by the child.

[7] In this case the child's representative did not make an application under s 24A, however, as soon as the Magistrate raised the question of s 24A the Police Prosecutor indicated that they would oppose any application because he had had at least 23 cautions and he still has to participate in a restorative justice conference that was pending as part of a police caution. The Youth Justice representative similarly indicated that a restorative justice conference would have to take place as part of

that dismissal (I note that is not actually a correct interpretation of the Act). None of those submissions should have been made before an application was made by the defence for dismissal of the charges

[8] The Magistrate then sought submissions from Youth Justice, and the following statement was made:[1]

> "I've spoken to his mother a lot. I've considered his history. I've considered what's going on with the interventions and his risk factors, the previous cautions. It wasn't that long ago we were in this court and he got cautioned for stealing a car and doing a petrol run."

[9] He concluded that he needed intervention and support. The Youth Justice representative was concerned that if he was simply reprimanded, he would be out reoffending in two weeks' time. The Magistrate agreed, particularly in light of the cautions that he had had in the past. The child had made a comment to the Youth Justice representative that he'd probably reoffend and didn't really mind being in detention.

[10] The legal representative for the child submitted that given his age the Court was not at a stage where probation was appropriate, particularly where he had a supportive family who was willing to help him. His parents spoke at his sentence indicating that they felt like they tried everything, including counselling and psychologists and that nothing was working and they were unable to get him back on track.

[11] In sentencing the child, the Magistrate clearly was looking for a way to assist the child to stay in the community and not commit further offences. She said:

> "I feel that you are going to keep going back to detention and you are going to keep getting in trouble if we do not give your mum some further help. At the end of the day mate, you're 14, you're not a child, it is time for you to start realising that you have some power over your own life. You have some choices, and it would be nice for you, and for your mum, that eventually especially for you if you made the right choices. You do not want to spend your teenage years being picked up by police over and over and over again – taken back

[1] T1–12, l 40.

> to the watchhouse – questioned – have to sit there for hours waiting – appearing in court."

[12] It is submitted by the applicant that the Magistrate wrongly took into account cautions that were administered in deciding that the sentence of probation was appropriate. I accept that the Magistrate should not have been told about the cautions in the absence of an application for a dismissal pursuant to s 24A of the *Youth Justice Act* 1992 (Qld). It is only upon application of the child that such a consideration can be made, and cautions revealed. Clearly there were sound reasons for not making that application such as the fact that there were a large number of cautions and little hope of that course being taken once the Magistrate knew of those cautions.

[13] It is submitted by the Crown that there was no error in the Magistrate inviting the legal representatives to make an application under s 24A of the Act and that the legislation doesn't preclude the learned Magistrate from considering the appropriateness of such orders and inviting submissions from the parties in respect of it.

[14] I accept that nothing precluded the Magistrate from enquiring as to whether the defence had considered either of those provisions. The error was that the Police Prosecutor advised the court of the cautions before the defence had a chance to indicate that they were not making any such application. Where a Magistrate is inclined to enquire as to whether such an application would be made, the other parties should remain silent unless the defence indicate that they intend to make such an application so as to ensure that inadmissible material is not placed before the court. That did not happen in this case.

[15] The submissions of the applicant suggest that the learned Magistrate initially agreed with the suggestion that a probation order was inappropriate, but it is not clear from the record whether she agreed with the submission that a reprimand was appropriate. Her suggestion that a diversionary restorative justice process was more appropriate seemed to be the one that she favoured; however, the child was not willing to engage in restorative justice.

[16] Clearly there was an error in placing the cautions before the court. The question is whether the sentence imposed was manifestly excessive given the nature of the offending.

[17] The offending took place over a period from 24 March 2021 to 25 May 2021. The child entered premises on five different occasions. He was driving in motor vehicles at the age of 14. He was wandering the streets around midnight and 12.46am. According to his parents they were unable to control him. The question became, in the absence of his agreement to participate in restorative justice, which would have given him some supervision and assisted in providing appropriate interventions that may have helped him stay out of trouble, which sentence was appropriate.

[18] The child had spent four days in pre-sentence custody which was a significant period of time, however the offending was also persistent and potentially dangerous to himself and others, particularly the unlawful uses of motor vehicle where he attempted to get out of the car yard. He was acting by himself and told police that he was doing that at the behest of others of whom he was frightened.

[19] In those circumstances it cannot be said in my view that the sentence was outside the sentencing range given that it was not isolated offending, it was persistent, it involved him being out at a time when a 14-year-old should not be out, and his parents indicated that he was, in effect, out of control.

Order

[20] In my view, the sentence imposed, given his attitude to restorative justice, was appropriate. The application is dismissed.