

CHILDRENS COURT OF QUEENSLAND

CITATION: *PCN v Queensland Police Service* [2023] QChC 28

PARTIES: **PCN**
(Appellant)

v

QUEENSLAND POLICE SERVICE
(Respondent)

FILE NO/S: CCJ 26/23

DIVISION: Childrens Court of Queensland

PROCEEDING: Appeal

ORIGINATING COURT: Pine Rivers Childrens Court

DELIVERED ON: 8 March 2023

DELIVERED AT: Brisbane

HEARING DATE: 8 March 2023

JUDGE: Dearden DCJ

ORDER: **1. Appeal granted.**

2. Set aside the orders for 40 hours community service on each of the charges in the Pine Rivers Childrens Court, and the \$500 restitution order, made on 12 December 2022.

3. Refer both offences to the chief executive for a restorative justice court diversion referral pursuant to Youth Justice Act s.163(1)(d).

CATCHWORDS: CRIMINAL LAW – APPEAL AGAINST SENTENCE – MANIFESTLY EXCESSIVE – appellant pleaded guilty to one charge unlawful use of a motor vehicle and one charge of receiving tainted property – where appellant was sentenced to 40 hours community service and ordered to pay \$500 restitution – whether the sentence imposed was manifestly excessive - whether the learned magistrate failed to properly consider a restorative justice referral

COUNSEL: B Bowtell for the applicant
LM Devereaux for the respondent

SOLICITORS: KLM Solicitors for the applicant
Office of the Director of Public Prosecutions for the respondent

Introduction

- [1] The appellant, PCN, appeared at the Pine Rivers Childrens Court on 12 December 2022 and pleaded guilty to one charge of unlawful use of a motor vehicle, and one charge of receiving tainted property. The appellant was sentenced to 40 hours community service on each charge, and ordered to pay \$500 restitution within six months. No convictions were recorded. No evidence was offered on a charge of enter premises and commit indictable offence by break, which had been charged as an alternative to the receiving tainted property charge.

Grounds of appeal

- [2] The appellant's notice of appeal sets out the following ground:
- (1) The sentence imposed by the learned sentencing magistrate was manifestly excessive in all the circumstances.
- [3] The appellant seeks leave to amend the grounds of appeal to add the following grounds, which in my view, should be treated as sub-grounds of ground 1. Namely:
- (a) The learned magistrate placed insufficient weight on the personal circumstances of the defendant;
- (b) The learned magistrate erred in that she acted on an incorrect principle when imposing the restitution order.
- [4] At the hearing of this matter, I raised with both the appellant and the respondent, a further ground of appeal which, in my view, more appropriately identifies the relevant issue in this appeal, namely:
- (2) The learned magistrate erred by failing to consider referring the offences to the chief executive for a restorative justice process or, alternatively, failed to properly consider such a referral.
- [5] The appellant adopted the further ground and made an appropriate amendment in respect of that ground, and the sub-grounds to ground 1 were not opposed by the respondent.

The Law - Appeals

- [6] Pursuant to the *Youth Justice Act 1992* (Qld) (YJA) s.117, *Justices Act 1886* (QLD) (JA) part 9, division 1, applies to an order made by justices dealing summarily with a child charged with an offence. Accordingly, the appeal proceeds pursuant to JA s.222 and is a re-hearing.
- [7] In *McDonald v Queensland Police Service* [2017] QCA 255[47], Bowskill J (as she then was) stated:

It is well established that, on an appeal under [Justices Act] S.222 by way of rehearing, the District Court is required to conduct a real review of the trial, and the magistrate's reasons, and make its own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight to the magistrate's view. Nevertheless, in order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error. [Citations omitted]

- [8] In *Forrest v Commissioner of Police* [2017] QCA 132, Sofronoff P stated:

... an appellate court hearing an appeal by way of rehearing must conduct a real review of the evidence and make up its own mind about the case.

The law – court diversion process

- [9] The court has the power to refer an offence to the chief executive for a court diversion restorative justice process, (YJA ss163 & 164) and the court must consider such a referral when a child enters a plea of guilty to an offence (YJA s.162). A failure to consider such a referral is an error of law (*R v PBD* [2019] QCA 59, [29] – [32]).

Factual Background.

- [10] The appellant was one of five children who were in a stolen white Toyota LandCruiser, intercepted by police at 4 am on 17 October 2022 in the north Brisbane area. The children all exited the vehicle when police deployed a tyre deflation device, and the appellant was arrested shortly afterwards. The vehicle had been stolen from an address in Highgate Hill on 15 October 2022.

[11] The appellant was found in possession of money, a wallet and driver licence which had been stolen from another vehicle on 17 October 2022.¹

Submissions at sentence

[12] The respondent helpfully summarises the submissions at sentence as follows:²

4.1 The police prosecutor submitted that a period of probation was appropriate. Her Honour's response indicated that she was considering community service. The police prosecutor then submitted that restitution could be imposed.

4.2 Youth Justice appropriately made the magistrate aware of the necessity to consider a restorative justice process instead of sentencing the applicant. Youth Justice submitted that the applicant's case worker had identified the applicant would find it beneficial to meet with the victims and that restorative justice may assist his relationships with his friends.

4.3 Her Honour asked the applicant's solicitor if she also sought restorative justice, and the applicant's solicitor submitted for probation. Youth Justice submitted on a number of occasions that it was possible to impose a type of restorative justice that would still allow the matter to be finalised that day. Despite this, her Honour and the applicant's solicitor both stated a preference for a community-based order on the basis that the matter would finalise that day. The applicant's solicitor later submitted that a community service order could be appropriate, and confirmed the applicant had capacity to pay restitution within the time ordered. [Citations deleted]

[13] During the course of submissions, the youth justice representative advised the learned magistrate that the charges could be finalised under a YJA s.164 court diversion referral, the learned magistrate responded:³

...I don't think that's a sufficient penalty for the one [charge] involving the money.

[14] It should be noted that the learned magistrate made no reference whatsoever to the exercise of her discretion to refer the appellant to a court diversion restorative justice process, pursuant to YJA s.162(1), in her sentencing remarks.⁴

¹ Affidavit of Brianna Hayes, affirmed 24 February 2023, exhibit (a) 1-4 ll 2-39.

² Exhibit 2 – Outline of Submissions on behalf of the Respondent, [4.1] – [4.3].

³ Affidavit of Brianna Hayes affirmed 24 February 2023, exhibit (a) 1-10 ll 30-40.

⁴ Affidavit of Brianna Hayes affirmed 24 February 2023, exhibit (b), p 1-2.

Appellant's antecedents

- [15] The appellant had no juvenile criminal history;⁵ was aged 17;⁶ had a loving family (his mother attended court and spoke); and was in gainful employment;⁷ was a passenger, not the driver, in the stolen vehicle;⁸ and had been assessed as suitable for a restorative justice referral.⁹ The appellant's mother personally advised the learned magistrate of the significant changes the appellant had made since being charged; identified and outlined the constant support and supervision that the appellant had received from both his parents while on bail; and noted the appellant's commitment to working very hard at his job.¹⁰

Discussion

- [16] The learned magistrate was required to consider a restorative justice referral instead of sentencing the appellant (YJA s 162(1); *R v PBD* [2019] QCA 59, [29]). The learned magistrate clearly failed to consider such a referral, expressing a disinclination to utilise the diversion during the course of submissions, and making no reference whatsoever to the restorative justice process during the course of her sentencing remarks.
- [17] As the respondent correctly identifies, a referral pursuant to YJA s.164 means that, "A finding of guilt does not form part of the child's criminal history ... and ... diverts them from the criminal justice system".¹¹
- [18] The learned magistrate's failure to consider a referral under YJA s.162(1), was an error of law, and accordingly the consequence was that the sentence imposed (40 hours community service on each charge) was manifestly excessive.
- [19] In addition, the learned magistrate failed to comply with the mandatory provisions of YJA s.195, which sets out the preconditions for making a community service order.

⁵ Affidavit of Brianna Hayes affirmed 24 February 2023, exhibit (a), 1-4 l 1.

⁶ Affidavit of Brianna Hayes affirmed 24 February 2023, exhibit (a), 1-4 l 40.

⁷ Affidavit of Brianna Hayes affirmed 24 February 2023, exhibit (a) 1-10 l 47 – 1-11 l 1.

⁸ Affidavit of Brianna Hayes affirmed 24 February 2023, exhibit (a), 1-9 ll 21-26.

⁹ Affidavit of Brianna Hayes affirmed 24 February 2023, exhibit (a), 1-7 l 42 – 1-8 l 5.

¹⁰ Affidavit of Brianna Hayes affirmed 24 February 2023, exhibit (a), 1-13 ll 4-18.

¹¹ Exhibit 2 – outline of submissions on behalf of the respondent, [5.5].

- [20] For a 17 year old child with no criminal history, who was working, supported by his family, and indicated that he was willing and able to participate in a restorative justice referral process, such an order in my view is the appropriate “off-ramp” from the criminal justice system in these circumstances. I am satisfied that the preconditions of YJA s.163(1) have been met.
- [21] It follows that the substantive ground of appeal on which this appeal originally proceeded (that the sentence was “manifestly excessive”) has been made out, but more particularly, the further ground of appeal added during the course of this hearing, which was the failure to consider referring the offences for a restorative justice process, has also been made out.
- [22] It therefore follows that the appeal should be granted, the sentences and restitution order set aside, and the charges referred to a restorative justice court diversion process.

Orders

- [23] I make the following orders:
- (1) Appeal granted.
 - (2) Set aside the orders for 40 hours community service on each of the charges in the Pine Rivers Childrens Court, and the \$500 restitution order, made on 12 December 2022.
 - (3) Refer both offences to the chief executive for a restorative justice court diversion referral pursuant to Youth Justice Act s.163(1)(d).