SUPREME COURT OF QUEENSLAND

CITATION:	*R v KAR & Ors* [2018] QCA 211
PARTIES:	**R** **v** **KAR** **BDD** **KAS** **LAM** **MCV** **NU** **SDC** (applicants)
FILE NO/S:	CA No 106 of 2018 CA No 203 of 2017 CA No 59 of 2018 CA No 173 of 2017 CA No 99 of 2018 CA No 176 of 2017 CA No 109 of 2018 CA No 204 of 2017 CA No 82 of 2018 CA No 115 of 2018 CA No 83 of 2018 CA No 111 of 2018 CA No 201 of 2017 DC No 20 of 2017
DIVISION:	Court of Appeal
PROCEEDINGS:	Applications for Extension (Conviction) Sentence Application Applications for Extension (Conviction & Sentence) Applications for Extension (Sentence)
ORIGINATING COURT:	Childrens Court at Townsville: Date of Conviction: 16 June 2017; Date of Sentence: 10 August 2017 (KAR); Date of Conviction: 5 May 2017; Date of Sentence: 10 July 2017 (BDD); Date of Conviction: 5 May 2017; Date of Sentence: 10 July 2017 (KAS); Date of Conviction: 23 June 2017: Date of Sentence: 11 August 2017 (LAM); Date of Conviction: 20 June 2017; Date of Sentence: 10 August 2017 (MCV); Date of Conviction: 20 June 2017; Date of Sentence: 10 August 2017 (NU); Date of Conviction:

23 June 2017; Date of Sentence: 11 August 2017 (SDC) (Lynham DCJ)

DELIVERED ON: 11 September 2018

DELIVERED AT: Brisbane

HEARING DATE: 29 May 2018

JUDGES: Fraser and Philippides JJA and Henry J

ORDERS: **In relation to the applications concerning the convictions in each file:**

1. **Grant leave to extend time in which to appeal against conviction.**
2. **Dismiss the appeals against conviction.**

In relation to the applications for leave to appeal against sentence should in each application be:

1. **Application for leave to appeal sentence refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – PARTICULAR CASES – where each of the seven applicants was convicted on his plea to one count of riot pursuant to s 61 of the *Criminal Code* (Qld) with two circumstances of aggravation, causing grievous bodily harm and property damage – where the applicants were part of a group of more than 12 assembled persons involved in a riot at a Youth Detention Centre – where during the course of the riot the group damaged air-conditioning units, used metal poles as weapons and retrieved other objects which were used to attack staff members – where various staff members suffered injuries – where one staff member was struck in the head with a rock which resulted in the loss of sight in an eye, which constituted the grievous bodily harm – where each applicant seeks an extension of time to lodge an appeal against conviction for the circumstance of aggravation of causing grievous bodily harm – whether refusing the extension of time to lodge an appeal against conviction would result in a miscarriage of justice – whether the pleas to the circumstance of aggravation of causing grievous bodily harm could be accepted as a matter of law

CRIMINAL LAW – GENERAL MATTERS – ANCILLARY LIABILITY – COMPLICITY – COMMON PURPOSE OR JOINT CRIMINAL ENTERPRISE – PARTICULAR CASES – where each applicant submitted that he could not be lawfully convicted of riot with a circumstance of aggravation

of causing grievous bodily harm– whether the applicants could be convicted of the circumstance of aggravation as a secondary party by virtue of either s 7 or s 8 of the *Criminal Code* (Qld) – whether a person can only be convicted of a circumstance of aggravation where the person did the act constituting the relevant circumstance of aggravation – whether the term "offence" in s 7(1)(c) and s 8 of the Code contemplates only a non-aggravated form of the offence or whether "the offence" includes a circumstance of aggravation where that circumstance of aggravation had been proven to arise – whether the decision in *R v Barlow* precludes an interpretation of "offence" in s 7(1)(c) and s 8 of the Code to include a circumstance of aggravation – whether the dicta in *R v Phillips and Lawrence* as to the application of s 7(1)(c) and s 8 to a circumstance of aggravation are reconcilable with *Barlow*

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicants pleaded guilty to riot with two circumstances of aggravation and were each sentenced to two and a half years' detention, to be released after serving 50 per cent, and convictions were recorded – where two of the seven applicants were also given concurrent sentences for other offences – where each applicant seeks leave to appeal against sentence – whether the sentence imposed on each of the applicants was manifestly excessive in all of the circumstances – whether the sentencing judge failed to give consideration to parity for some of the applicants who argued they had a lesser role in the offending – whether the sentencing judge erred in declaring time in custody

Acts Interpretation Act 1954 (Qld), s 32C
Criminal Code (Qld), s 7, s 8, s 61
Youth Justice Act 1992 (Qld), s 150(1)(b), s 150(1)(d), s 150(1)(e), s 150(1)(f), s 150(1)(h), s 150(2)(a), s 150(2)(e), s 151, s 183(3), s 184(1), s 208, s 213, s 214, s 218(1), s 227

Green v The Queen (2011) 244 CLR 462; [2011] HCA 49, cited
Herpich v Martin [1995] 1 Qd R 359; [1994] QCA 18, considered
Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, considered
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, considered
R v Barlow (1997) 188 CLR 1; [1997] HCA 19, applied
R v BBN [2008] QCA 84, considered

R v BCO [2016] 1 Qd R 290; [2013] QCA 328, considered
R v CAP (No 2) [2014] QCA 323, applied
R v De Simoni (1981) 147 CLR 383; [1981] HCA 31, considered
R v Graham [2017] 1 Qd R 236; [2016] QCA 73, distinguished
R v GV [2006] QCA 394, applied
R v McCormack [1981] VR 104; [1981] VicRp 11, considered
R v Pangilinan [2001] 1 Qd R 56; [1999] QCA 528, cited
R v Phillips and Lawrence [1967] Qd R 237, applied
R v Poynter, Norman & Parker; Ex parte Attorney-General (Qld) [2006] QCA 517, considered
R v Rizos [1994] QCA 581, considered
R v SCU [2017] QCA 198, applied
R v Taylor (2010) 203 A Crim R 302; [2010] QCA 205, considered
R v WAJ [2010] QCA 87, considered
R v WAN [2012] QCA 21, considered
R v Wyles; Ex parte Attorney-General [1977] Qd R 169, cited
Ross v The Queen (1979) 141 CLR 432; [1979] HCA 29, considered

COUNSEL: J P Benjamin for the applicant (KAR)
S J Hamlyn-Harris for the applicant (BDD) (pro bono for the sentence application)
B J Power for the applicant (KAS)
C J Cassidy for the applicant (LAM)
K Hillard for the applicant (MCV)
K E McMahon for the applicant (NU)
A S McDougall for the applicant (SDC)
M R Byrne QC, with N W Crane, for the respondent

SOLICITORS: Howden Saggers for the applicant (KAR)
Legal Aid Queensland for the applicant (BDD)
Fisher Dore Lawyers for the applicant (KAS)
AW Bale and Son Solicitors for the applicant (LAM)
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Fisher Dore Lawyers for the applicant (NU)
Guest Lawyers for the applicant (SDC)
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA**: The applicants were convicted upon their own pleas of guilty to an offence of riot, contrary to s 61 of the *Criminal Code*, with circumstances of aggravation of causing grievous bodily harm and property damage. Each applicant has applied for an extension of time within which to appeal against conviction, only in so far as each was convicted of the circumstance of aggravation of causing grievous bodily harm. An argument advanced by each applicant relies upon a doubt

expressed by McMurdo JA in considered obiter dicta in *R v Graham*,[1] whether a circumstance of aggravation within s 419(3) of the *Code* is capable of being established by the application of s 7(1)(c) of the *Code* against a person who was not the perpetrator of that circumstance.

[2] The applicants' arguments are not insubstantial or unreasonable in so far as they rely upon McMurdo JA's analysis. For that reason and the other reasons upon this issue given by Philippides JA, which I have had the advantage of reading in draft, I would grant the applications for an extension of time within which to appeal. In all other respects I agree with the reasons given by her Honour. Each appeal should be dismissed for those reasons.

[3] Each applicant also sought leave to appeal against sentence. For the reasons given by Henry J, which I have also had the advantage of reading in draft, I would refuse each application for leave to appeal against sentence.

[4] **PHILIPPIDES JA:** Each of the seven applicants, Masters BDD; KAS; KAR; SDC; LAM; NU and MCV, was convicted in the Children's Court at Townsville on his plea to one count of riot pursuant to s 61 of the *Criminal Code* (the Code) with two circumstances of aggravation, being causing grievous bodily harm and property damage.

[5] Each applicant seeks an extension of time in which to lodge an appeal against his conviction insofar as it concerns the circumstance of aggravation of causing grievous bodily harm. The applicants also seek leave to appeal against sentence.[2]

The applications for an extension of time to appeal against conviction

[6] Each applicant asserts that, because he could not, as a matter of law, be guilty of the circumstance of aggravation of causing grievous bodily harm, the acceptance of the plea to that circumstance of aggravation resulted in a miscarriage of justice. No issue is raised in respect of the other circumstance of aggravation that property was damaged.

[7] The applications were each some months out of time due to a delay in receiving legal advice as to the error said to have resulted in a miscarriage of justice. It was not controversial that a miscarriage of justice is demonstrated if a plea of guilty has been acted on for a circumstance of aggravation in an offence in respect of which the offender could not, as a matter of law, have been convicted.[3] Accordingly, the respondent accepted that, in the circumstances of this case, it was not necessary to determine whether there was good reason for the delay, since the application to extend time may be granted, in any event, if it can be demonstrated that to refuse it would result in a miscarriage of justice.[4] The determination of the extension applications

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1 [2017] 1 Qd R 236.

2 The application of a co-offender, GJS, also convicted in the Children's Court at Townsville on his plea to the same charge was adjourned for later hearing.

3 See *Meissner v The Queen* (1995) 184 CLR 132.

4 *R v GV* [2006] QCA 394 at [3]; *R v CAP (No 2)* [2014] QCA 323 at [5].

should, therefore, be determined after an assessment of the respective appeals against conviction.

[8] Each applicant's proposed ground of appeal is that he could not lawfully be convicted of riot with a circumstance of aggravation of causing bodily harm, since he was not the person who actually did the act which constituted the relevant circumstance of aggravation, and could not be a party to the circumstance of aggravation under either s 7 or s 8 of the Code. The applicants' submissions,[5] that the applicants could not lawfully be convicted of the relevant circumstance of aggravation as a secondary party by virtue of either s 7 or s 8 of the Code, rested primarily on statements by McMurdo JA in *R v Graham*[6] which expressly raised doubt as to the availability of s 7(1)(c) to prove a "circumstance of aggravation", having regard to the distinct definitions in the Code of that term and the term "offence", as well as the meaning attributed to the term "offence" in *R v Barlow*.[7]

[9] In addition, counsel for the applicant Master BDD raised an argument that the basis of that applicant's liability for the offending was as a principal for the offence of riot under s 7(1)(a), whereas the purported basis of the liability for the relevant circumstance of aggravation was s 7(1)(c), which was not in these circumstances of the case available as a matter of law.

[10] Some applicants also advanced arguments based on the textual differences between s 61(i) and s 61(ii) and the legislative history of s 61 of the Code.

The indictment

[11] The indictment charged each applicant as a co-offender in the following terms:

> "that between the ninth day of November, 2016 and the twelfth day of November, 2016 at Townsville in the State of Queensland, FTJ, BNB, PWF, GJS, PT, GLT, PAO, AMJ, BDD, KAS, KAR, LAM, MCV, NK, NU, PAQ, STA and SDC was one of 12 or more persons who were present together and used, and threatened to use, unlawful violence to persons present at the Cleveland Detention Centre, and the property of the Cleveland Detention Centre, for a common purpose and the conduct of them taken together would cause a person in the vicinity to reasonably fear for the person's personal safety.
>
> And caused grievous bodily harm to GRANT RAYMOND OAKLANDS.
>
> And property was damaged."

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5 See eg outline on behalf of the applicant LAM at [11].

6 [2017] 1 Qd R 236 at [39]-[58].

7 (1997) 188 CLR 1.

The schedule of facts

[12] For present purposes, it is convenient to adopt a brief summary of the schedule of facts, which was set out in similar terms in each of the applicant's outline of submissions.

[13] Each applicant was one of more than 12 defendants charged with riot over an incident that occurred at the Cleveland Youth Detention Centre (the CYDC) in Townsville at about 4.00 pm on 10 November 2016 and ended at about 6.30 am on 11 November 2016.

[14] On 10 November, the CYDC rugby league team were scheduled to play against a visiting team. All the rioters were members of the CYDC team. As a result of misbehaviour by two of the CYDC team members, the game was cancelled. The riot began when the rest of the team were informed of this. The rioters began a coordinated protest which lasted until some began surrendering to police from midnight, with the last surrendering at 6.17 am.

[15] The group went to the kitchen/laundry building where a large delivery van was parked. They climbed onto the van and the roof of the building where they remained for approximately two hours, singing and chanting. After about half an hour, those on the roof began damaging air conditioning units. In damaging this equipment, they gained access to metal poles which would later be used as weapons. They also retrieved other objects which they used as projectiles.

[16] At about 6.30 pm, one of the offenders called out that he wanted to speak to a particular staff member and said that he was coming down. A ladder was obtained. Fifteen of the offenders descended. As the group descended, they began attacking staff with their makeshift weapons. They struck the shields staff were using. At times, they managed to cause injury to staff. The Crown Prosecutor did not identify in the schedule, nor in his submissions, which offenders descended and which remained on the roof or the van. Four offenders were named for particular reasons during this period.

[17] The large group then returned to the kitchen and collected the remainder of the offenders from the roof. They continued to attack staff in the same way. Once they had a full complement, they moved back to the oval and visiting area. As they did so, staff attempted to contain them by creating a shield wall. The offenders were charging the wall and hitting the shields with their weapons as well as throwing rocks and other items. The staff retreated towards the visits centre.

[18] Another staff member drove a vehicle into the area. The vehicle was pelted with projectiles which smashed the windscreen. Glass went into the face and eyes of that staff member. Another staff member nearby was struck in the head with a full bottle of soft drink. As they were retreating towards the visits centre, one staff member, Mr Grant Oakland, saw an offender try to move behind the shield wall. He turned to prevent this and was struck in the eye with a rock. This injury resulted in his loss of sight in that eye which was the grievous bodily harm referred to in the first circumstance of aggravation. In addition to Mr Oakland, other staff were

injured during the attack. After staff retreated into the visits centre, a window was smashed causing glass to go into the eye of one staff member.

[19] One offender was identified as smashing through a window into the building. He also scratched his name into the glass and threatened to kill staff. Another seized a knife and lunged towards staff. One offender was identified as the first to damage the van,[8] feigning to throw an item at police as others tried to pull up the ladder,[9] and using a fire hose to flood two units of the CYDC.[10]

[20] Ultimately, 60 police riot squad members were deployed to quell the riot. When they attended, the offenders returned to the roof. They remained highly agitated into the night. At one point during the night, the offenders gained entry into the unit that secured female detainees where they caused damage and asked girls to "flash" them and "talked dirty" to them. The police remained in attendance until all of the children had surrendered.

Relevant provisions of the Code

[21] The offence of riot is dealt with in s 61 of the Code which provides:

> "**61 Riot**
>
> (1) If—
>
> (a) 12 or more persons who are present together (***assembled persons***) use or threaten to use unlawful violence to a person or property for a common purpose; and
>
> (b) the conduct of them taken together would cause a person in the vicinity to reasonably fear for the person's personal safety;
>
> each of the assembled persons commits the crime of taking part in a riot.
>
> Maximum penalty—
>
> (a) if the offender causes grievous bodily harm to a person, causes an explosive substance to explode or destroys or starts to destroy a building, vehicle or machinery—life imprisonment; or
>
> (b) if—

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8 Schedule of Facts at 4.

9 Schedule of Facts at 7.

10 Schedule of Facts at 8.

(i) the offender is armed with a dangerous or offensive weapon, instrument or explosive substance; or

(ii) property is damaged, whether by the offender or another of the assembled persons—7 years imprisonment; or

(c) otherwise—3 years imprisonment.

(2) For subsection (1)(b), it is immaterial whether there is or is likely to be a person in the vicinity who holds the fear mentioned in the subsection.

(2A) The *Penalties and Sentences Act 1992*, section 161Q also states a circumstance of aggravation for an offence against this section.

(2B) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

(3) In this section—

building includes structure;

vehicle means a motor vehicle, train, aircraft or vessel."

[22] "Offence" is defined in s 2 of the Code as follows:[11]

> "An act or omission which renders the person doing the act or making the omission liable to punishment is called an ***offence***."

[23] "Circumstance of aggravation" is defined in s 1 of the Code as:

> "… any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance."

[24] Sections 7 and 8 of the Code extend criminal liability beyond the person who actually does the act or omission which constitutes the offence (the principal) to a secondary offender. Section 7 of the Code deems certain persons to have taken part in committing an offence and to be guilty of the offence and thus liable to be charged with its actual commission. It provides:

"**7 Principal offenders**

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[11] The definition is not limited to the application of the Code and is of general application in the law of this State.

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence.

(2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission.

(3) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(4) Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission."

[25] By s 8 of the Code, persons who are party to an unlawful common purpose are deemed to have committed an offence occurring in the prosecution of a common unlawful purpose where the prescribed criteria are satisfied, and thus has the effect of extending liability, for the act or omission of the person who actually does the act or omission which renders the principal liable to punishment.[12] It provides:

"**8 Offences committed in prosecution of common purpose**

When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

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12 *R v Barlow* (1997) 188 CLR 1 at 14.

Grounds of Appeal

Submissions as to R v Graham point

Submissions on behalf of the applicants

[26] Counsel on behalf of the applicants (other than Master BDD) argued that s 8 of the Code could not apply in the present circumstances because the only "common intention to prosecute an unlawful purpose" that could be identified on the factual basis alleged was the common intention to riot. It was contended that s 8 contemplated that the offence actually committed was different from the unlawful purpose which was originally intended.[13] Consequently, it was argued that the use of s 8 as a means of establishing guilt was not open, since it was the offence of riot itself that was the consequence of the unlawful purpose. In relation to the issue of whether a co-offender can be criminally responsible for a circumstance of aggravation by virtue of s 7(1)(c) of the Code,[14] the argument put forward on behalf of the applicants was that:

(a) The offence of riot contemplates that the act which renders a person liable to punishment is the use or threatened use of unlawful violence to a person or property for a particular purpose.[15]

(b) A condition precedent to such an act rendering a person liable to punishment is that the person is one of at least twelve people engaging in a similar act for the same purpose.[16]

(c) Once the act said to give rise to the liability to punishment has occurred, the tribunal of fact is then required to be satisfied that the collective acts of those people would give rise to a reasonable fear for personal safety on the part of any person in the vicinity.[17]

(d) Where the act has been proven, with the attendant condition precedent and the satisfaction of the tribunal of fact of the reasonable apprehension, the offence of riot is proved.[18]

(e) The remainder of the subsection sets out matters relevant to the maximum penalty that may be imposed.[19]

[27] The applicants submitted that the penalty provisions in s 61(1) were concerned with a "circumstance of aggravation", that is, a circumstance by which "an offender is

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13 See eg outline of submissions of the applicant KAR at [35]; outline of submissions of the applicant SDC at [36].

14 See eg outline of submissions of the applicant SDC at [50].

15 See eg outline of submissions of the applicant SDC at [41].

16 See eg outline of submissions of the applicant SDC at [42].

17 See eg outline of submissions of the applicant SDC at [43].

18 See eg outline of submissions of the applicant SDC at [44].

19 See eg outline of submissions of the applicant SDC at [44].

liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance". It was contended that, since s 7 made no reference to a circumstance of aggravation, s 7(1)(c) could not extend criminal liability beyond the act that constituted the offence.[20] It was submitted that the view indicated by McMurdo JA in *Graham*,[21] as to the inapplicability of the parties provisions in s 7 (and it was argued by extension s 8) to a circumstance of aggravation, ought to be adopted. Indeed, counsel for KAS went so far as to submit that this Court should overrule *R v Phillips and Lawrence*[22] if it were to the contrary effect.

[28] As mentioned, the approach taken on behalf of Master BDD was somewhat different. His counsel accepted that, for the purposes of s 8 of the Code, the schedule of facts alleged that the relevant injury and damage were foreseeable to each member of the rioting group and, therefore, it could be reasonably concluded that the prosecution case was that Master BDD was a party to causing grievous bodily harm on the basis of s 8 of the Code and, as such, a probable consequence of the prosecution of the common purpose to riot.[23] However, it was also submitted that another possibility was that he "might have been regarded as a party to the causing of grievous bodily harm" on the basis of s 7(1)(c) "perhaps on the basis that the offenders by their actions encouraged each other and that [he] was in that way a 'person who aids another in committing an offence'".[24] It was accepted that, if the entirety of the offence including the circumstance of aggravation was charged by virtue of s 7(1)(c), there was no difficulty as a matter of law with the charge. The difficulty, it was argued, arose where, as was asserted to be the case with respect of Master BDD in the present case, the simpliciter offence was charged under s 7(1)(a) but the circumstance of aggravation was sought to be proved by virtue of s 7(1)(c).

[29] It was contended in oral submissions that, while it was not specified in the indictment or the schedule of facts that the applicant was, by virtue of s 7(1)(a) of the Code, convicted of riot (without the circumstance of aggravation), that should be understood as the basis for the liability for the offence of riot simpliciter, that being said to arise from the wording of the indictment.

[30] While, senior counsel for Master BDD argued in written submissions that it followed from the reasoning in *Barlow* that the "offence" in the present case was "riot", and that neither s 7(1)(c) nor s 8 applied to the circumstance of aggravation of causing grievous bodily harm, that submission was, as mentioned, modified in oral argument. It was argued instead that Master BDD was convicted of riot as a principal by virtue of s 7(1)(a) and thus could not be rendered a party by virtue of

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20 See eg outline of submissions of the applicant KAR at [49].

21 [2017] 1 Qd R 236 at [53].

22 [1967] Qd R 237.

23 See eg outline of submissions of the applicant BDD at [12]. See transcript at AB at 58 (BDD, KAS & AMJ).

24 See eg outline of submissions of the applicant BDD at [13]-[14].

s 7(1)(c) to another's act of riot accompanied by a circumstance of aggravation in respect of the distinct offence committed by that other. (This reflected the second question raised in *Graham*.)

The respondent's submissions

[31] The respondent submitted[25] that, in effect, the applicants' argument was that a person could only be convicted of a circumstance of aggravation where the person actually did the act constituting the relevant circumstance of aggravation. On that argument, an "offence" for the purposes of s 7(1)(c) and s 8 of the Code comprises only the simpliciter form of the statutory proscription of the conduct (such as robbery as opposed to armed robbery,[26] unlawful use of a motor vehicle as opposed to unlawful use of a motor vehicle and interfering with part of the mechanism thereof[27] and assault occasioning bodily harm as opposed to assault occasioning bodily harm whilst armed[28]).

[32] The respondent submitted that the effect of s 7 and s 8 of the Code was to deem persons to "have taken part in the offence" and to "have committed the offence", respectively. It was submitted that the issue raised in the present case directed attention to the concept of "the offence" and whether that term contemplates only a non-aggravated form of the offence or whether the offence involves the relevant circumstance of aggravation where that circumstance had been proven to arise.[29] Accepting that the definition of "offence" also draws attention to the linking of the offence to the liability for punishment, it was submitted that, for present purposes, the question was whether "offence" meant liability to a particular level or type of punishment depending on the proven circumstances or simply liability to punishment *per se*. The respondent submitted it was the former.[30] In so arguing, the respondent drew support from the statement of the plurality in *Barlow*,[31] which was cited by McMurdo JA in *Graham*[32] for a contrary view.

[33] The respondent accepted that use of statements made in *Barlow* required some caution in the present context. In that regard, it was submitted that the issue in *Barlow* was whether s 8 operated only to attach liability of a secondary offender to the actual offence which the primary offender had committed or whether it could attach liability for another, lesser and separately designed, offence. It was argued that the references in that case to "act or omission" without any reference to

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25 Respondent's outline of submissions at [16].

26 Section 411 of the Code.

27 Sections 408A(1A) and (1B)(a) of the Code.

28 Sections 339(1) and (3) of the Code.

29 Respondent's outline of submissions at [15].

30 Respondent's outline of submissions at [17].

31 (1997) 188 CLR 1.

32 [2017] 1 Qd R 236 at [53].

circumstances of aggravation[33] should be seen in light of the fact that the Court was considering the availability of a verdict to one statutory offence (manslaughter) where the primary offender was guilty of a different statutory offence, namely murder. Further, it was said that, in *Barlow*, the Court was considering different offences which were complete upon proof of a single act or omission. The respondent's submission contemplated that the offence involving the circumstance of aggravation would likely be comprised of more than one act or omission, so that the phrase "act or omission" should be read as including the plural.[34] There was nothing unusual about an offence containing more than one element and thereby requiring proof, nor that different acts and/or omissions may be done by different people and yet attract liability for all involved.[35]

R v Graham[36]

[34] In *Graham*, the appellant was convicted, *inter alia*, of burglary with the aggravating circumstances of being in company and using actual violence. The Court of Appeal set aside the circumstance of aggravation that the appellant had used actual violence.

[35] The issue of whether the provisions in s 7 of the Code apply to a circumstance of aggravation arose as a result of the parties being invited to provide submissions on two questions raised by the Court. The questions were:

(a) whether a circumstance of aggravation within s 419(3) of the Code was able to be established against a defendant by the application of s 7(1)(c) of the Code; and

(b) whether s 7(1)(c) was able to be used in the proof of that aggravating circumstance against the appellant in that case, when the elements of the offence under s 419(1) were sought to be proved against him only by the operation of s 7(1)(a) of the Code.

[36] As to the first question, McMurdo JA had regard to the distinct definitions in the Code of "offence" and "circumstance of aggravation". His Honour referred to the statements of Wilson J in *R v De Simoni*[37] in respect of the offence of robbery:[38]

> "… the *Code* creates only one offence of robbery, namely the offence constituted by s 391. The presence of a 'circumstance of aggravation', being a circumstance which if charged in the indictment and proved exposes the offender to liability to a greater maximum period of imprisonment, does not make the offence a

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33 (1997) 188 CLR 1 at 10.

34 Section 32C of the *Acts Interpretation Act* 1954; See also *R v Pangilinan* [2001] 1 Qd R 56 at [27].

35 *R v Wyles; Ex parte Attorney-General* [1977] Qd R 169.

36 [2017] 1 Qd R 236.

37 (1981) 147 CLR 383 at 396.

38 [2017] 1 Qd R 236 at [44].

> different offence; it remains the crime of robbery, that is to say, conduct contrary to s 391, notwithstanding the somewhat strange wording of that section. Section 393 is concerned only with punishment; it does not create a more serious offence of 'aggravated robbery'."

[37] His Honour also referred[39] to s 564(2) of the Code, which requires that a circumstance of aggravation intended to be relied upon by the prosecution is charged in the indictment, and to s 564(1), which his Honour considered distinguished between the offence itself and a circumstance of aggravation by requiring the circumstance to be set forth by the indictment (a distinction his Honour also found to be made in s 575 of the Code). His Honour thereby reasoned that "although a circumstance of aggravation appears as an allegation in an indictment, the circumstance is distinct from the offence with which the accused person is charged".[40]

[38] McMurdo JA also had regard[41] to the meaning attributed to the term "offence" as explained by the plurality in the following passage of their judgment in *Barlow*:[42]

> "Section 2 of the *Code* makes it clear that 'offence' is used in the *Code* to denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment."

[39] His Honour noted that, although *Barlow* was not concerned with whether s 7 could be employed in the proof of an aggravating circumstance, the reasoning in *Barlow* was authoritative, given that it was founded on the proposition that the word "offence" in both s 7 and s 8 took its meaning from the definition in s 2 of the Code. His Honour made the following remarks in respect of the first question:[43]

> "By s 7(1)(c), a person who aids another person in committing the offence is deemed to have taken part in committing the offence. Where an offence is constituted by an act, s 7(1)(c) deems the aider to have done the act and to be thereby guilty of the offence… Importantly, the effect of s 7(1)(b), (c) or (d) (according to the reasoning in *Barlow*), is to impose a criminal responsibility by deeming a person to have done the act (or made the omission) by which the perpetrator committed the offence and not to 'deem the secondary party to be liable to the same extent as the principal offender'.

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39 [2017] 1 Qd R 236 at [45].

40 [2017] 1 Qd R 236 at [45].

41 [2017] 1 Qd R 236 at [48].

42 (1997) 188 CLR 1 at 9.

43 [2017] 1 Qd R 236 at [51]-[53].

> Section 7 makes no express reference to a circumstance of aggravation. It does not provide, for example, that where an offence is committed with a circumstance of aggravation on the part of the person who does the act which constitutes the offence, that every person who aids in the commission of the offence is deemed to have committed that offence and be liable for the same punishment as the perpetrator.
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> How could s 7 be interpreted so as to make a s 7(1)(c) offender liable to a punishment as if he or she had done an act which for that offence is a circumstance of aggravation? The only possibility would appear to be an interpretation of 'the offence' as being constituted by the perpetrator's act or omission attended by the circumstance of aggravation. There would appear to be substantial difficulties in such an interpretation. One would be that contrary to *Barlow*, 'the offence' in s 7 would then have a different meaning from its defined meaning in s 2 and the definition of circumstance of aggravation in s 1. From those definitions, it is apparently clear that a circumstance of aggravation is not a constituent part of the offence itself. Another difficulty would come from the words of s 7 itself, because in s 7(1)(a), 'the offence' is confined to its constituent parts."

[40] Having expressed these views as to the applicability of s 7(1)(c) in respect of a circumstance of aggravation, his Honour noted[44] that there was, nevertheless, authority to support the interpretation which he had questioned. In that respect, his Honour made reference to statements of Hanger J and Hart J in *Phillips and Lawrence*,[45] and expressed the view that those statements were not easily reconciled with *Barlow*. However, since the Court had not been asked to disagree with the judgments in *Phillips and Lawrence*, and noting that "indeed, counsel for the appellant conceded that, in general, an aggravating circumstance of burglary could be proved by the operation of s 7(1)(c)",[46] McMurdo JA considered that it was preferable for the question that had been raised by the Court to be determined in a case where it was fully contested. His Honour thus did "not express a concluded view as to whether s 7(1)(c) could ever be used to prove an aggravating circumstance of burglary".[47] In any event, there was no need to do so to determine the appeal, because the employment of s 7 was found to be irregular for another reason which related to the second question raised by the Court. Clearly, the observations of McMurdo JA as to the first issue raised by the Court were *obiter*.

[41] On the second question raised by the Court (whether s 7(1)(c) was able to be used against the appellant in the proof of the aggravating circumstance when the

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44 [2017] 1 Qd R 236 at [57].

45 [1967] Qd R 237.

46 [2017] 1 Qd R 236 at [58].

47 McMurdo JA's reasons for judgment were agreed to by Gotterson JA and that Jackson J also agreed, in general, with McMurdo JA including that as to the operation of s 7(1)(c) of the Code upon a circumstance of aggravation should be left open, although agreeing with McMurdo JA's analysis of that question.

elements of the offence under s 419(1) were to be proved against him by the operation of s 7(1)(a)), McMurdo JA observed that the prosecution case was that the appellant committed an offence under s 419(1) by his own act in entering the dwelling, intending to commit an indictable offence there and that upon proof of his offence, the appellant became "the offender" for the purposes of s 419(3). His Honour also noted that the jury were directed that they might be satisfied as to whether the appellant, as "the offender", had used actual violence by the operation of s 7(1)(a) or s 7(1)(c). As to that matter, his Honour found that the jury had apparently reasoned according to s 7(1)(c) and concluded that the appellant was to be treated as having used actual violence because he had aided another offender (Williams) to use actual violence in the commission of an offence of burglary by Williams. (The appellant was not a co-offender in the offence committed by Williams.) His Honour held:[48]

> "There was an error then in the way in which this part of the case was put to the jury, in that it failed to distinguish between the distinct offences of burglary which were alleged against the appellant and Williams. Absent any violence on the part of the appellant, any assistance which the appellant had provided to Williams in the commission by Williams of his offence was irrelevant to the proof of violence as a circumstance of aggravation of the appellant's offence."

R v Phillips and Lawrence[49]

[42] In *Phillips and Lawrence*, convictions of robbery in company with personal violence were set aside on appeal. The jury were directed on s 7 and s 8 of the Code. It was held that there was a miscarriage of justice due to a misdirection in respect of the direction as to s 8 in that the trial judge failed to direct as to the element that the offence of robbery with personal violence was required to be done in the prosecution of the unlawful purpose of assault. A majority of the Court (Hart and Hanger JJ) also considered a further argument raised by the appellant which concerned whether a circumstance of aggravation was part of an "offence", at least for the purposes of applying s 8.[50]

[43] Hanger J, in rejecting the argument that an accused could not be convicted of robbery with a circumstance of aggravation where the accused had not personally done the act which constituted the offence of robbery (that is where the basis of the charge was s 8 and the accused had not actually used personal violence), stated:[51]

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48 [2017] 1 Qd R 236 at [63].

49 [1967] Qd R 237.

50 [1967] Qd R 237 per Hanger J at 260-261 and per Hart J at 284-285. The other member of the Court, Mack CJ did not directly discuss the present point but appears to have assumed that s 7 could be employed to create liability in respect of the circumstances of aggravation for an aider at 247-248.

51 [1967] Qd R 237 at 260-261.

> "The basis of the argument was that the offence is robbery *simpliciter*; that the element of personal violence merely renders the culprit liable to a greater punishment; and that s.8 merely enables a conviction to be for robbery *simpliciter*; that s.8 postulates the commission of an offence as the result of a common purpose, and that the section in saying 'each of them is deemed to have committed the offence' limits the liability to 'the offence' which is robbery.
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> Section 409 of the *Code* defines robbery; s.411 provides for a maximum sentence of fourteen years' imprisonment with hard labour. Section 411 then provides that, if personal violence is used, the liability is to imprisonment with hard labour for life. By s.1 'circumstance of aggravation' means and includes any circumstance by reason whereof an offender is liable to a greater punishment than that to which he would be liable if the offence were committed without the existence of that circumstance. As by s.411 the offender becomes liable to an increased punishment if the robbery is accompanied by the circumstance of aggravation, it appears to me that the circumstance of aggravation is an element of the offence. In these circumstances, the offence in s.8 includes the offence of robbery with any circumstance of aggravation."

[44] Hart J dealt with the argument as follows:[52]

> "Mr Nolan's point here was that the word 'offence' each time it occurs in s.8, when it is applied to the robbery charges in this case, means the offence of robbery *simpliciter* without the circumstances of aggravation, in company with personal violence. The offence of robbery is defined in s.409 as stealing with violence. Section 411 fixes the penalty for robbery as imprisonment with hard labour for fourteen years, then adds further penalties for certain circumstances of aggravation one of which is being in company and another of which is using personal violence. If the offender is found guilty of either of these circumstances of aggravation he is liable to imprisonment with hard labour for life. He says therefore the offence referred to in s.8 is robbery and this does not include the circumstances of aggravation. I do not agree with this argument. Section 2 is as follows — 'An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence.' Robbery in company makes a person liable to punishment, robbery in company with personal violence makes him liable to another punishment. I think therefore that each of these is an offence."

Subsequent judicial consideration of the factor of "a circumstance of aggravation"

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52 [1967] Qd R 237 at 284-285.

[45] The judgments of Hanger and Hart JJ in *Phillips and Lawrence* were each considered by the High Court in *Ross v The Queen*.[53] The issue before the Court in *Ross* was whether the Queensland Court of Criminal Appeal had jurisdiction to hear an appeal from a magistrate of the Children's Court in respect of a summary conviction of aggravated assault under s 344 of the Code. The contention made by the respondent was that s 344 was intended to create a new offence, different from assault, of which the circumstances of aggravation formed an element and in support of that contention reliance was placed on *Phillips and Lawrence*.

[46] Gibbs J (Barwick CJ, Stephen, Mason and Aickin JJ agreeing) appears to have endorsed the availability of s 8 for an offence where a circumstance of aggravation is also charged, although concluding that the offence accompanied by a circumstance of aggravation does not thereby become a separate offence. Gibbs J made the following observations concerning *Phillips and Lawrence*:[54]

> "…the appellants had been convicted of a number of offences, including robbery in company with personal violence. The Crown case was that the offences were committed in the prosecution of a common purpose and that s. 8 of the *Criminal Code* was applicable…
>
> It was held, for reasons not relevant to the present case, that there had been a misdirection as to the effect of s. 8. However, two members of the Court of Criminal Appeal dealt with a further argument, viz. that when the prosecution relies on s. 8 an accused person cannot be convicted of robbery with personal violence unless he himself has used personal violence. This argument rested on the contention that robbery with personal violence is not a different offence from robbery, but is the same offence with circumstances of aggravation, so that 'offence' in s. 8, when applied to the facts of the case in question, meant simply robbery, and an offender, who did not himself use personal violence, was deemed by s. 8 to be guilty of robbery only…
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> The conclusion which their Honours reached as to the effect of s. 8 may well have been right even if they were wrong in thinking that robbery with personal violence is a different offence from robbery. When persons form a common intention to rob with personal violence, and the other conditions of s. 8 are satisfied, the natural effect of the words of the section would appear to be that the participants in the common purpose are deemed to have committed the offence – robbery – with the circumstances of aggravation which it was part of common purpose to bring about: in other words, they are deemed to have committed robbery with personal violence. Neither the words of s. 2 of the *Criminal Code*, nor those of the definition of 'circumstance of aggravation' in s. 1, appear to me to

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53 (1979) 141 CLR 432.

54 (1979) 141 CLR 432 at 438-439.

> support the view that an offence committed with circumstances of aggravation is necessarily a different offence from the offence without those circumstances, although s. 575 contemplates that an element of an offence committed with circumstances of aggravation may itself constitute a different offence."

[47] Barwick CJ made the following additional remarks:[55]

> "When s. 344 of the *Criminal Code* (Q.) provides that punishment appropriate to an assault in circumstances of aggravation shall not be inflicted 'unless' the defendant 'has been charged therewith', it is quite clearly, in my opinion, not creating a new and different offence from the misdemeanour of common assault. The aggravation affects the possible penalty but does not alter the statutory nature of the offence. The presence of the word 'charged' in s. 344 means no more, in my opinion, than that the defendant, at a time when he has an opportunity of denying or dealing with the alleged circumstances of aggravation, must have been made aware of the prosecutor's intention to establish such circumstances of aggravation: and the defendant must be given notice of the particular circumstance or circumstances of aggravation alleged."

[48] The observations of Gibbs J in *Ross*, that no separate offence was constituted by proof of a circumstance of aggravation, were cited in *Herpich v Martin*[56] by McPherson and Davies JJA (Fitzgerald P agreeing) in concluding:[57]

> "Contrary to the submission advanced before us on appeal, the addition to a charge of assault occasioning bodily harm under s. 339 of a circumstance of aggravation mentioned in the third paragraph of that section does not alter the nature of the offence or turn it into a different or distinct offence. A comparable argument has been rejected in the case of aggravated assault under s 344."

[49] Further, in *R v Taylor*,[58] McMurdo P (Fraser and White JJA agreeing) concluded that sexual assault and the same sexual assault with the circumstance of aggravation are not separate offences. In so concluding, her Honour observed:[59]

> "…the offence charged in count 5 was brought under s 352(1) *Criminal Code*, sexual assault. It was the sexual assault which was the act rendering the appellant liable to punishment and which therefore constituted the offence under s 2 *Criminal Code*. Under s 352(3) *Criminal Code*, it is a circumstance of aggravation as

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55 (1979) 141 CLR 432 at 433.

56 [1995] 1 Qd R 359.

57 [1995] 1 Qd R 359 at 361.

58 [2010] QCA 205.

59 [2010] QCA 205 at [28] (footnotes omitted).

> defined in s 1 *Criminal Code* making the appellant liable to a greater penalty, namely, life imprisonment, if he is armed with an offensive weapon whilst he commits the sexual assault. Sexual assault and sexual assault whilst armed, unlike murder and manslaughter, are not separate offences. They are the same offence but the circumstance of aggravation, if established, makes the offender liable to a heavier penalty, provided that it is charged in the indictment: see s 564(2) *Criminal Code*."

[50] The respondent submitted[60] that what can be taken from *Ross*, *Herpich* and *Taylo*r is that the aggravated form of the offence is still the same offence as the non-aggravated form of it. It was submitted that a circumstance of aggravation is involved in the offence when the circumstance is proven to exist. This was said to be consistent with the observation of Wilson J in *De Simoni*,[61] cited by McMurdo JA in *Graham*.[62] The respondent argued that the point of distinction between the competing submissions of the parties in the present matter was that the applicants in effect contended that a circumstance of aggravation is never part of the offence or, as put by McMurdo JA in *Graham*, "a circumstance of aggravation is not a constituent part of the offence itself".[63]

[51] Senior counsel for Master BDD accepted, in his written submissions, that the statement of Barwick CJ in *Ross* was consistent in principle with what was said in the passages referred to above in *De Simoni* and *Barlow*. Moreover, it was accepted that the meaning attributed to "offence" in *Barlow* was binding and authoritative because it was the basis of the ultimate decision in that case that an accomplice could lawfully be convicted as a secondary offender of manslaughter under s 8 of the Code where the principal offender had been convicted of murder.

R v Barlow[64]

[52] In considering the submissions as to the issue of the availability of s 7 and s 8 in respect of liability for a circumstance of aggravation done by another, the distinct meanings that may be attributable to the term "offence", as discussed in *Barlow*, must be kept in mind.

[53] In *Barlow*, Brennan CJ, Dawson and Toohey JJ[65] expressed the question for consideration as whether "offence" in s 8 referred to "an offence as defined in the Code" or whether the term referred to "what a principal offender has actually done

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60 Respondent's outline of submissions at [27].

61 (1981) 147 CLR 383 at 396.

62 [2017] 1 Qd R 236 at [44].

63 [2017] 1 Qd R 236 at [53].

64 (1997) 188 CLR 1.

65 (1997) 188 CLR 1 at 8.

or omitted that renders the principal offender liable to punishment" and observed that in considering that question:[66]

> "… it must be borne in mind that to speak of an offence which the principal offender is found to have committed is not to refer to the jury's verdict against the principal offender; it is to refer to a finding by the jury in the case against the party who is said to be liable under s 8, the finding being made upon the evidence admitted for or against that party."

[54] In that context, Brennan CJ, Dawson and Toohey JJ stated:[67]

> "'Offence' is a term that is used sometimes to denote what the law proscribes under penalty and sometimes to describe the facts the existence of which render an actual offender liable to punishment. When the term is used to denote what the law proscribes, it may be used to describe that concatenation of elements which constitute a particular offence (as when it is said that the Code defines the offence of murder) or it may be used to describe the element of conduct (an act or omission) which attracts criminal liability if it be accompanied by prescribed circumstances or if it causes a prescribed result or if it be engaged in with a prescribed state of mind (as when it is said that a person who *strikes another a blow* is guilty of the offence of murder if the blow was unjustified or was not excused, if death results and if the blow is struck with the intention of causing death). Correspondingly, when the term 'offence' is used to denote the facts the existence of which renders an actual offender liable to punishment, the term denotes either the concatenation of facts which create such a liability (as when it is said that Barlow's co-accused committed the offence of murder) or the conduct of the offender (an act or omission) which, with other facts of the case, create such a liability (as when it is said that the co-accused who struck Vosmaer the blow which caused his death and who did so with the intention of killing him or doing him grievous bodily harm is guilty of the offence of murder)."

[55] Having identified these distinct uses of the term "offence", the plurality explained the meaning of the term in s 2 and in the Code generally as follows:[68]

> "Section 2 of the Code makes it clear that 'offence' is used in the Code to denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment. Section 7(a)

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66 (1997) 188 CLR 1 at 8-9.

67 (1997) 188 CLR 1 at 9.

68 (1997) 188 CLR 1 at 9.

> confirms that 'offence' is used to denote the element of conduct in that sense. By the ordinary rules of interpretation, the term must bear the same meaning in pars (b), (c) and (d) of s 7 as it bears in par (a). Section 8, which complements s 7 and extends the net of criminal liability for an offence to the parties who have formed a common intention of the kind therein mentioned, reveals no ground for attributing a different meaning to 'offence' in s 8.
>
> The structure of Ch V of the Code shows this to be the meaning of 'offence' generally in the Code."

[56] The plurality in *Barlow* thus made it clear that the term "offence", for the purpose of the Code, whether understood as denoting "what the law proscribes" or "the facts the existence of which render an actual offender liable to punishment" is not to be understood as the concatenation of "elements" which constitute a particular offence, nor as the concatenation of facts which render the actual offender liable to punishment. Instead, "offence" denotes the element of conduct (being an act or omission) which, combined with other factors such as a prescribed circumstance, state of mind, or result renders the offender liable to punishment.

[57] The plurality explained that, for the purpose of s 8, although "offence" referred to the conduct (the act or omission) of the principal offender, in fastening on that conduct, s 8 did not deem the secondary offender to be liable to the same extent as the principal. Rather, s 8 of the Code operated to deem the secondary party to have done the act or omission to the extent it occurred "in such circumstances or with such a result or with such a state of mind" as was a probable consequence of prosecuting the common unlawful purpose.[69] Those circumstances, result and state of mind are factors which, in combination with the proscribed act or omission, define an offence of a particular "nature". Under s 8, the principal offender's criminal liability for the act done or omission:[70]

> "… determines the 'nature' of the act which the secondary party is deemed to have done or the omission which the secondary party is deemed to have made *only in so far as* the act done or omission made by the principal offender, when taken in combination with (i) the attendant circumstances, (ii) the result of the act or omission, and (iii) the principal offender's state of mind, was a probable consequence of prosecuting the common unlawful purpose.
>
> Thus, if a principal offender does an act or makes an omission in prosecution of an unlawful purpose and, by reason of facts attendant on the doing of the act or the making of the omission, the act or omission renders the principal offender liable to punishment for any of a number of contraventions of the Code, a person who formed a common intention with the principal offender to prosecute that

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69 (1997) 188 CLR 1 at 10.

70 (1997) 188 CLR 1 at 11.

purpose is himself liable to punishment for any contravention that was a probable consequence of prosecuting that purpose."

The "offence" for the purpose of s 7 and s 8

(a) Consideration of the matters identified in Graham

[58] As observed by McMurdo JA in *Graham*, s 7 does not make express reference to a circumstance of aggravation. The point made by his Honour was that s 7 did not provide that, where an offence is committed "with a circumstance of aggravation on the part of the person who does the act which constitutes the offence", every person who aids in the commission of the offence is deemed to have committed that offence "and be liable for the same punishment as the perpetrator".[71] However, the point overlooks the distinction identified in *Barlow* by the plurality as to the different uses of the term "offence" and that in s 2 the term is not "used to denote the concatenation of elements which constitute a particular offence",[72] nor the concatenation of facts rendering the principal liable to punishment. Rather, it refers to the element of conduct (the act or omission) combined with other factors which renders that offender liable to punishment and determines the nature of the act for which the secondary offender is liable, provided the prerequisites of s 7(1)(b)-(d) and s 8 are satisfied.

[59] Likewise, difficulties identified by McMurdo JA in relation to "an interpretation of 'the offence' as being constituted by the perpetrator's act or omission attended by the circumstance of aggravation"[73] overlook the nature of the distinction made in *Barlow* as to the distinct uses of the term "offence". The difficulties identified by McMurdo JA were twofold. First, it was said that, contrary to *Barlow*, "the offence" in s 7 would then have a different meaning from its defined meaning in s 2 and the definition of circumstance of aggravation in s 1. This difficulty was said to arise because "it is apparently clear that a circumstance of aggravation is not a constituent part of the offence itself". The second difficulty identified was said to arise from the words of s 7 itself, in that in s 7(1)(a), the offence "is confined to its constituent parts". Again these difficulties are overcome when it is recalled that, as stated in *Barlow*, the definition of "offence" in s 2, makes it clear that the term is not used to describe the concatenation of elements which constitute a particular offence or facts that create a liability to punishment by the actual perpetrator. Rather, it denotes the element of conduct which, with other facts of the case, renders the person engaging in it liable to punishment. As explained in *Barlow*, s 7(1)(a) confirms that "offence" is used to denote the element of "conduct" in that sense, and not the constituent elements that constitute a particular offence.

[60] It follows that there is nothing in the definition of "offence" in s 2, as interpreted in *Barlow*, which precludes s 8 from operating to extend liability to encompass the relevant act or omission together with any circumstance of aggravation found to

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71 [2017] 1 Qd R 236 at [52].

72 (1997) 188 CLR 1 at 9.

73 [2017] 1 Qd R 236 at [53].

have been done by the principal offender, where the resulting aggravated offence was a probable consequence of the common unlawful purpose and done in prosecution of it. Likewise, there is no basis to confine the concept of "offence" in s 7(1)(c) to only the simpliciter offence where, for example the assistance is given to a principal to commit an aggravated form of the offence.

[61] Moreover, this conclusion does not proceed on the basis of equating the concepts of "unlawful purpose" and "offence" for the purpose of s 8. "Unlawful purpose" is a distinct concept. It is entirely separate from the "offence" which encompasses the elements of conduct occurring in certain prescribed circumstances that attracts criminal liability. As the plurality observed in *Barlow*, in the context of s 8:[74]

> "…it must be borne in mind that to speak of an offence which the principal offender is found to have committed is not to refer to the jury's verdict against the principal offender; it is to refer to a finding by the jury in the case against the party who is said to be liable under s 8, the finding being made upon the evidence admitted for or against that party."

[62] In the circumstances of the present case, there is no basis to conclude that for the context of s 8 the "unlawful purpose" cannot be the offence of riot simpliciter and that the "offence" (to which liability is extended to the co-accused) cannot be that of riot with a circumstance of aggravation of causing grievous bodily harm.

[63] Nor, in the circumstances of the present case, is it to the point to consider whether the circumstance of aggravation relevant to the principal's conduct, in respect of which assistance is given for the purpose of s 7(1)(c), can be characterised as an "element of the offence". The relevant point of focus is whether the assistance is rendered in relation to the conduct of the principal offender (which includes that the fact that the conduct is accompanied by an act which amounts to a circumstance of aggravation of causing grievous bodily harm) which rendered the principal liable to punishment under s 7(1)(a) of the Code. In this respect, the discussion of the meaning of "offence" in *Barlow* sits comfortably with the notion that it is irrelevant that a circumstance of aggravation may not be an "element" of the offence (in the sense explained by Wilson J in *De Simoni*) and that the proof of a circumstance of aggravation does not create a different offence.

[64] Nor is there any impediment to the above construction of "offence" arising from any textual considerations in the Code such as those discussed in *Graham*. An indictment must "set forth the offence with which the accused person is charged" (s 564(1) of the Code) and, where a circumstance of aggravation is intended to be relied upon by the prosecution, the circumstance is also required to be charged in the indictment (s 564(2) of the Code). As the respondent submitted, while the provisions might be seen as reinforcing the difference between "the offence" and "a circumstance of aggravation", that is, where "a circumstance of aggravation appears as an allegation in an indictment, the circumstance is distinct from the offence with

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74 (1997) 188 CLR 1 at 8-9.

which the accused person is charged",[75] that view should be rejected. The better view is that s 564(2) is a statutory reminder that the offence must state the circumstance of aggravation, where it arises. That approach is in line with the recognition in *De Simoni*[76] that a circumstance of aggravation which is alleged as an element of an offence does not require separate reiteration. The observation by Barwick J in *Ross* is also apposite; the requirement that the circumstance of aggravation be "charged" means no more than that:[77]

> "… the defendant, at a time when he has an opportunity of denying or dealing with the alleged circumstances of aggravation, must have been made aware of the prosecutor's intention to establish such circumstances of aggravation: and the defendant must be given notice of the particular circumstance or circumstances of aggravation alleged."

(b) Practice and procedural considerations

[65] The respondent submitted,[78] *Phillips and Lawrence* is a long standing decision and many practices of the criminal courts of this State are founded on the basis that circumstances of aggravation are part of the offence before the Court.

[66] It was argued that the criminal law in this State has long been understood to create liability for a circumstance of aggravation by reliance on the party provisions and that a clear basis for overturning what appears to be 119 years of practice and understanding is required, but is not present here. It was submitted that much practice and procedure, and the legislation underpinning it, would require amendment should the applicants' contentions be upheld as correct, introducing unnecessary uncertainty both as to the validity of prior prosecutions and the conduct of future prosecutions.

[67] The respondent referred to a number of provisions of the Code which on the applicant's arguments would have incongruous results. In that regard, reference was made to s 597C, which provides that the accused person must be informed "… of the offence with which he or she is charged, as set forth in the indictment, and is to be called upon to plead to the indictment".[79] The respondent submitted that the applicant's contention would result in the accused being informed only of the simpliciter form of the offence, but being required to plead to the indictment (including any circumstance of aggravation) without being informed to the whole contents of the indictment. Further, reference was made to s 598(1), whereby the accused person must plead to "the indictment", that requirement being refined by s 598(2) which lists the pleas that may be entered. By s 598(2)(a), the accused

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75 [2017] 1 Qd R 236 at [45].

76 (1981) 147 CLR 383 at 388.

77 (1979) 141 CLR 432 at 433.

78 Respondent's outline of submissions at [23].

79 Section 597C(1) of the Code.

person may plead "that the person is guilty of the offence charged in the indictment". That is, a plea of guilty may only be entered to "the offence". The respondent argued that, on the applicant's contention, an accused, whether charged as a primary or secondary offender, could never plead guilty to any circumstance of aggravation. It was submitted that, whilst the procedure to then be followed is unclear, an offender who does not contest that he or she committed the act or omission that constitutes the circumstance of aggravation, or is otherwise liable for it, will nonetheless be required to sit through some further process for the uncontested allegation to be proven. Additionally, it was submitted that the concluding words of s 598(2)(a) potentially include those offences made available by virtue of s 575 of the Code, which permits the return of a guilty verdict of another offence "with or without any of the circumstances of aggravation charged in the indictment". A construction that in the first part of the paragraph would permit a plea of guilty to only the simpliciter form of the offence but in the latter part to a circumstance of aggravation was undesirable. Finally, reference was made to s 578 of the Code which permits the return of guilty verdicts to various nominated alternative offences, each of which carry various circumstances of aggravation. It was argued that it would be strangely anomalous if the offender could only be sentenced for the simpliciter form of the alternate offence, which is the consequence of the applicants' submissions.

[68] In relation to these arguments, it is to be noted that in considering the meaning of the term "offence", the plurality in *Barlow* gave short shrift to the notion that consideration ought to be given to a provision such as s 576 of the Code, observing that it "is merely a procedural provision to cover a question of criminal pleading and which has no substantive operation".[80] That observation is pertinent in respect of the respondent's arguments which rely on procedural provisions of the Code and matters of practice. The view expressed above, as to the applicability of s 7 and s 8 to a circumstance of aggravation, is also, in any event, harmonious with the procedural provisions in the Code.

[69] The respondent also referred to the use of the term "offence" in other legislation to support its contention as to the meaning of "offence" in the Code. It is not necessary to consider that line of argument. For present purposes, the term offence is to be defined according to the definition in the Code. The meaning, of that term as explained in *Barlow*, provides no difficulty in respect of the use of the word "offence" in legislation where it is not defined such as the *Penalties and Sentences Act* 1992 (Qld) (the PSA) and the *District Court of Queensland Act* 1967 (Qld) (the DCA).

(c) Textual considerations in s 61 of the Code

[70] It remains to dispose of further argument advanced by counsel on behalf of the applicants KAR, SDC and KAS,[81] which relied on a textual comparison of the

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80 (1997) 188 CLR 1 at 13.

81 Outlines of submissions, KAR at [50] and SDC at [51] and [55] and oral argument on behalf of KAS adopting and tendering written submissions of GJS for that purpose.

penalty provisions in s 61 of the Code as between s 61(a) and s 61(b)(i) on the one hand and s 61(b)(ii) on the other. Section 61 relevantly provides:

> "Maximum penalty—
>
> (a) if *the offender causes grievous bodily harm* to a person, causes an explosive substance to explode or destroys or starts to destroy a building, vehicle or machinery—life imprisonment; or
>
> (b) if—
>
> (i) the *offender is armed with* a dangerous or offensive weapon, instrument or explosive substance; or
>
> (ii) *property is damaged*, whether *by the offender or another* of the assembled persons—7 years imprisonment; …". (emphasis added)

[71] These applicants submitted that the use of the word "offender" in s 61(a) and (b)(i) in contrast to the words "by the offender or another of the assembled persons" in s 61(b)(ii) reflected a legislative intention to restrict collective responsibility only to the circumstance of aggravation relating to property damage and to displace the party provisions of s 7 and s 8 with respect to punishment. On the contrary, as the respondent argued, the different terminology indicated that Parliament has legislated outside of, and beyond, the party provisions only in respect of s 61(b) which provides an example of strict liability being imposed on all of those participating in the riot once any of the rioters damages property.

[72] This is reinforced by the employment in s 61 of the active and passive forms to indicate that *mens rea* is not relevant to the circumstance of aggravation concerning property damage whereas it is relevant in respect of the circumstance of aggravation of causing grievous bodily harm. The use of the passive in (b)(ii) indicates that, in relation to property damage, there is no room for the party provisions of the Code to operate. Liability for punishment applies even though the offender does not come within the s 7 or s 8 party provisions. Those party provisions, however, as the respondent submitted, remain extant to govern liability under paragraphs (a) and (b)(i).

[73] The respondent also submitted (contrary to the contentions of the applicants) that reliance on the use of the word "offender" as though it determined that the provision can only apply to a s 7(1)(a) offender was misplaced. Whilst "offender" is not specifically defined in the Code, the ordinary English usage of the word means that an offender is a person who commits an offence. As s 7 and s 8 deem a person in certain circumstances to have committed an offence, that person is an offender. The respondent's submission is correct.

[74] In passing, it is to be observed that the legislative history of s 61, which was referred to in the outline adopted on behalf of Master KAS, is not of assistance in construing the words of the Code given the lack of ambiguity in the words of s 61.

[75] It was not disputed by the respondent that, at sentence, the prosecution could not identify, and did not purport to identify, who threw the rock that caused grievous bodily harm to Mr Oakland, which constituted the circumstance of aggravation in question.

[76] It is true that the prosecution allegation as to the statutory basis for the charges was never expressly stated on the record below, (nor specified in the schedule of facts). This is perhaps unsurprising given that the applicants, who were legally represented, pleaded guilty. The respondent contended that liability for that circumstance of aggravation arose by virtue of s 7(1)(c) or s 8 of the Code. In that regard, the respondent referred to the following extract from the schedule of facts:[82]

> "It is alleged that all rioters are jointly culpable for the detriment caused from the rioting, including damage to the centre and injuries to centre staff … [and] that it was foreseeable to each member of the rioting group that serious injury and damage would result from the group's actions, having regard to:
>
> - the organisation and co-ordination of the group;
> - the proximity of the group to each other for an extended period of time, of which threats were communicated and weapons were distributed;
> - The offenders attacked the [CYDC] workers as a group, with the use of weapons and rocks and/or other projectiles; and
> - The continued participation following the obvious detriment, and injury caused to centre workers."

[77] The prosecution did not identify an applicant as having done any act for the purpose of enabling or aiding another of the offenders to throw the rock or counselling or procuring the throwing of the rock that caused the grievous bodily harm. Accordingly, the only part of s 7 that could be put forward as apposite by the respondent in relation to the charge of riot with that circumstance of aggravation was s 7(1)(c) of the Code. The respondent, however, submitted that the reference to the foreseeability of serious injury strongly suggested liability was being asserted on a s 8 basis. But it was also submitted that any distinction between the provisions of s 7(1)(c) and s 8 of the Code was of little moment for present purposes, given the observation of the plurality of the High Court in *Barlow*[83] that the word bears the same meaning in both provisions.

[78] The respondent's submission then was that the sentence proceeded on the basis that liability for the circumstance of aggravation in question arose under either or both of s 7(1)(c) and s 8 of the Code and that the applicants had proceeded on that basis

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82 Schedule of Facts at 2.

83 (1997) 188 CLR 1 at 9.

also. The applicants did not strongly contend to the contrary, except as mentioned in the case of Master BDD.

[79] The contention that the applicant, Master BDD, was dealt with on the basis of being the principal to an offence of riot simpliciter is without substance. That is evident from the extract from the schedule of facts. There is nothing in the indictment to indicate the contrary. There is thus no basis to the submission made on behalf of Master BDD that the offence for which that applicant was convicted was to be separated into a simpliciter offence of "rioting" as a principal under s 7(1)(a) and a distinct liability under s 7(1)(c) for a circumstance of aggravation by another principal offender.

[80] In oral argument counsel for Master LAM argued that even if s 7(1)(c) or s 8 were available as a matter of law, in relation to the circumstance of aggravation going to causing grievous bodily harm, that, there was an insufficient factual basis in the schedule of facts to raise that circumstance. Accordingly, it was submitted that it was not open to find that LAM's liability rested on his being a party. That submission must be rejected. The schedule of facts clearly provides a sufficient evidential basis for liability under s 7(1)(c) or s 8.

Did s 7(1)(c) and s 8 apply to the circumstance of aggravation of causing grievous bodily harm?

[81] For the present purposes, it is important to note that the relevant "offence" for the purposes of s 7(1)(a) and s 8 is the conduct of the unnamed principal which, with other facts of the case (as admitted on sentence), rendered that person liable to punishment for the offence of riot with the circumstance of aggravation of causing grievous bodily harm.

[82] That conduct comprised being present as one of at least 12 assembled persons using or threatening to use unlawful violence as prescribed in s 61(1)(a) and in the circumstance prescribed in s 61(1)(b) with the result prescribed in s 61(a).

Conclusion as to the extension of time applications

[83] As is apparent, the applicants' submissions were largely underpinned by *obiter* comments by McMurdo JA in *Graham* made in a context where full argument had not occurred. I would grant the applications for extension of time, in the absence of detriment to the respondent and given that the issues raised involve matters of importance with significant consequences for the administration of justice and criminal practice and procedure.

Conclusion as to the proposed appeals

[84] For the reasons explained, *Barlow* does not, in my respectful opinion, support the view provisionally put forward by McMurdo JA. Nor, for the reasons given, does *Barlow* raise doubt as to the correctness of the approach of Hanger and Hart JJ in *Phillips and Lawrence* as to the application of s 7(1)(b)-(d) and s 8 to a circumstance of aggravation.

[85] There is no substance accordingly to the contention that s 7(1)(c) and s 8 were not available, as a matter of law, in respect of the circumstance of aggravation of causing grievous bodily harm to which the applicants pleaded guilty.

[86] It follows that the arguments that the pleas to the offence of riot with the circumstance of causing grievous bodily harm could not be entered as a matter of law must be rejected. The appeals against conviction are therefore dismissed.

Orders

[87] I would make the following orders as to each of the applications concerning the convictions:

1. Grant leave to extend time in which to appeal against conviction.

2. Dismiss the appeals against conviction.

Applications to appeal against sentence

[88] In relation to the sentence applications, I agree for the reasons given by Henry J that each of the applications should be refused.

[89] **HENRY J:** In respect of the applications for extensions of time in which to appeal against the convictions, this court heard complete argument on the merits of the appeals sought to be advanced. The question of potential substance identified by McMurdo JA in *R v Graham*[84] as preferably left for determination "in a case where it is fully contested",[85] was thereby fully contested before us. In light of that background, I agree the applications for extension of time within which to appeal should be granted. As to the disposition of the appeal, I agree with the detailed reasons of Philippides JA on the merits. For those reasons, I agree that the appeals should be dismissed.

The Sentence Applications

[90] In respect of the applications for leave to appeal sentence the applicants each seek leave to appeal sentences imposed upon them as children for the offence of riot with circumstances of aggravation (occasionally referred to for convenience hereunder as "riot"). It was an offence in which they and many others were co-offenders.

Schedule of Applications

[91] The applicants' sentences and appeal grounds are as follows:

Applicant	Sentence imposed	Grounds
BDD	2½ years' detention, release ordered after serving 50%, conviction recorded.	1. Manifestly excessive. 2. Conviction should not have been recorded.
KAS	2½ years' detention, release ordered after serving 50%, conviction recorded.	1. Manifestly excessive. 2. Error re parity.

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84 *R v Graham* [2017] 1 Qd R 236.

85 Ibid, 248 [58].

		3. Conviction should not have been recorded.
KAR	2½ years' detention, release ordered after serving 50%, conviction recorded.	1. Manifestly excessive. 2. Played a lesser role.
SDC	2½ years' detention, release ordered after serving 50%, conviction recorded.[86]	1. Manifestly excessive. 2. Played a lesser role.
LAM	2½ years' detention, release ordered after serving 50%, conviction recorded.[87]	1. Manifestly excessive. 2. Error re parity.
NU	2½ years' detention, release ordered after serving 50%, conviction recorded.	1. Manifestly excessive. 2. Played a lesser role.
MCV	2 years' detention, release ordered after serving 50%, conviction recorded.	1. Manifestly excessive. 2. Conviction should not have been recorded. 3. Error in declaring time in custody.

Statutory sentencing regime

[92] The applicants were all sentenced under the *Youth Justice Act* 1992 (Qld) ("the Act"). The particularly pertinent consequences of that Act's sentencing regime for the sentences presently under consideration were as follows.

[93] The sentencing court was obliged by s 150(1)(f) to have regard to pre-sentence reports prepared by Youth Justice Service case workers, which had been ordered by the court pursuant to s 151.

[94] In imposing sentence the court was obliged by the Act to have regard, inter alia, to the following principles:

(i) "a child's age is a mitigating factor in determining whether or not to impose a penalty, and the nature of a penalty imposed";[88]

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86 Given concurrent sentences for other offences.

87 Given concurrent sentences for other offences.

88 Per s 150(2)(a).

(ii) "a detention order should be imposed only as a last resort and for the shortest appropriate period"[89] and only if, after considering all other available sentences and taking into account the desirability of not holding a child in detention, the court is satisfied no other sentence is appropriate;[90]

(iii) a child should be dealt with in a way that allows the child to be re-integrated into the community.[91]

[95] The court was also obliged to have regard to considerations of a kind well known in the context of sentencing adult offenders, including the nature and seriousness of the offence, the offender's previous offending history and any impact of the offence on a victim.[92]

[96] A child must be released from detention after serving 70 per cent of the detention period, though the court may order a child to be released after a lesser period, as low as 50 per cent, if it considers that there are special circumstances, for example to ensure parity.[93]

[97] Any period for which a child is held in custody pending sentence must be counted as service of part of any period of detention imposed.[94]

[98] If a court sentences a child to detention, the court may record a conviction, pursuant to s 183(3). Section 184(1) requires that in considering whether or not to do so, the 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."

[99] Decisions by this court have repeatedly held the starting premise in sentencing a child offender is that no conviction should be recorded and a conviction should only be recorded if, on having regard to all the circumstances of the case as mandated by

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89 Per s 150(2)(e) and s 150(1)(b), incorporating principle 17 of the Charter of the Youth Justice principles in schedule 1 of the Act.

90 Per s 208.

91 Per s 150(1)(b) incorporating principle 16 of the Charter of the Youth Justice principles in schedule 1 of the Act.

92 Per ss 150(1)(d), (e) and (h).

93 Per s 227.

94 Per s 218(1).

s 184, the court is positively satisfied the discretion should be exercised in favour of recording a conviction.[95]

Common considerations

[100] Before turning to the application of the Act's sentencing regime to the individual circumstances of each applicant, it is helpful to first dispense with some considerations common to all of the applications, namely:

(i) the circumstances of the offence;

(ii) the relevant sentence range;

(iii) timeliness of guilty pleas;

(iv) age and criminal history; and

(v) parity as a consideration on sentence.

Circumstances of the offence

[101] The facts of the case have already been canvassed. The following circumstances have particular relevance to sentence.

[102] The riot was committed in a custodial institution, the Cleveland Detention Centre, by inmates, a circumstance of particular seriousness, as is explained below.

[103] The offence was prolonged, continuing over eight hours, from about 4 pm on 10 November 2016 to midnight, before the offenders progressively surrendered between midnight and 6.17 am on 11 November 2016.

[104] The offenders moved together unpermitted throughout the centre, gaining unauthorised access to roofs and to some buildings, including the female accommodation unit, and attempting to break into other buildings.

[105] The riot continued despite the repeated attempts of staff to talk the rioters into desisting.

[106] The rioters threatened staff with violence, for example saying they would "bash" them, put them on "life support", "smash ya heads in" and "get you and rape you".

[107] The rioters threw rocks and metal projectiles at staff from roofs and ground level.

[108] The rioters actively organised themselves for their attacks upon staff, with some being heard to make comments such as, "Get ready to attack".

[109] A concerted attack by the rioters as a group caused staff to retreat towards the visitors' centre, attempting to protect themselves with shields as they did so.

[110] The rioters assaulted staff, throwing rocks and swinging makeshift weapons at them and using bars like spears, attempting, with some success, to reach over the top of staff's protective shields to strike staff.

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95 *R v SCU* [2017] QCA 198, [94].

[111] After staff had retreated into the visitors' centre, the rioters continued to threaten further violence to them and attempted to break into the building, smashing windows. Staff were deprived of their liberty and sheltered in the visitors' centre for about three hours until evacuated by police officers.

[112] Even after the arrival of about 60 police and the return of the rioters to the roof, the rioters remained agitated, keeping possession of bars and piping and throwing projectiles towards police, whom they also abused.

[113] Staff were injured during the riot. As the staff were retreating from the concerted attack of the rioters, a staff member, Mr Oakland, suffered grievous bodily harm when blinded in one eye by the impact of a rock thrown by an unknown rioter. Some of the glass smashed by rioters at the visitors' centre went into the eye of a staff member, Mr Smith, who fell, struck his head and lost consciousness. Other staff suffered cuts, lacerations and bruising.

[114] The impact on staff may readily be inferred to have been psychologically and physically stressful as the events occurred. As to the aftermath impact, the victim impact statements of some staff members referred to diagnoses of post-traumatic stress disorder in consequence of the incident. Mr Oakland's victim impact statement spoke with sad eloquence of his post-traumatic stress disorder and the adverse impact upon his life of the loss of sight in his eye, occasioned by the rock which was thrown at him.

[115] Significant damage to property occurred, including the stripping of metal and piping from buildings, the vandalising of vehicles, the smashing of windows, the inscribing of graffiti and the use of a fire hose to flood two accommodation units. The cost of repair was approximately $143,000, none of which any of the offenders could proffer compensation for.

[116] The causing of grievous bodily harm and damaging of property were each alleged as circumstances of aggravation in the charge, the former circumstance elevating the maximum penalty to life imprisonment for an adult. Therefore, pursuant to s 176(3) of the Act, the maximum sentence for a child was ten years detention (with the potential for the maximum to extend to life should the judge have concluded the offence was particularly heinous).

Sentence range

[117] The offence of riot is inherently serious because it is inherently dangerous. As much was explained in *R v McCormack*:[96]

> "A riot usually carries with it an inherent danger of injury to persons or property or both. There is a danger that members of the crowd will respond to what has been called, 'the psychology of the crowd'...[t]he danger is great when the crowd can be described as a mob threatening violence. With such a mob violence may suddenly

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96 [1981] VR 104, 108.

> erupt to a high level and may quickly be directed in new directions. In our opinion the present or potential danger of injury inherent in a particular riot is a consideration relevant to the sentence of any rioter."

[118] In the present case the inherent danger of injury to persons and property manifested itself grievously, thus making it an especially serious example of the offence of riot.

[119] *R v McCormack* was cited with approval by de Jersey CJ with whom Chesterman JA agreed, in *R v Poynter, Norman & Parker; Ex parte Attorney-General (Qld)*.[97] The latter matter was concerned with the riot of about 300 Palm Island residents who laid siege to the police in the wake of a death of a local man in police custody. The former Chief Justice reasoned that the penalties in such cases should be "starkly deterrent".[98] His Honour noted the context of the riot being directed at those charged with preserving order was a consideration additional to the inherent dangerousness of riots, explaining:

> "It was additionally reprehensible for its targets – the police service, charged (under the *Police Service Administration Act* 1990 (Qld)) with the "preservation of peace and good order" of Palm Island, and the protection of its people (s 2.3). To riot against the police service is an affront to the rule of law."[99]

[120] By parity of reasoning, it is a circumstance of particular seriousness here that the riot was directed against staff of a youth detention centre, that is, the very people responsible for maintaining order and safety in the centre. Moreover, quite apart from whether staff are targeted, the mere act of participation in a riot by persons who are serving custodial sentences or are remanded in custody represents such a challenge to the state's lawful power of behavioural control over them as to inevitably require starkly deterrent punishment.

[121] The principles applicable to the sentencing of children will likely result in lesser punishment for children than adults for otherwise comparable rioting. In particular, the dynamic that immature minds are likely to be especially vulnerable to the psychology of the crowd in riots will logically tend to mitigate the culpability of children as compared to adults for such offending. Nonetheless, the special importance of deterrence in sentencing for riot in any custodial institution will mean that children who riot whilst in detention will ordinarily receive sentences of actual detention.

[122] As much was inherent in the observations of McPherson JA, with whom Davies JA and Dowsett J agreed, in *R v Rizos*.[100] There a period of actual detention was

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97 [2006] QCA 517, [33].

98 [2006] QCA 517, [38].

99 [2006] QCA 517, [34].

100 [1994] QCA 581.

imposed upon a juvenile who participated in a riot at Westbrook Detention Centre in which there was property damage. McPherson JA observed:

> "It was scarcely possible for the applicant to have expected a lesser head sentence than that imposed, having regard to the need for deterrence in relation to an offence like this. Offences committed in institutions, particularly those involving large scale riots and participation in them, would be very difficult to deal with if some condign form of deterrent was not available ."[101]

[123] Where, as here, child rioters in detention participate in the physical attacking of staff, the special need for deterrence will generally require the ensuing sentence of detention to be substantial.

[124] None of this is to suggest an offending child's personal circumstances might not result in a different outcome but the sad reality is that to have found themselves in custody on remand or serving a sentence of detention most such child offenders, like all of the present applicants, will have already accumulated significant and concerning criminal histories.

[125] It was not suggested below or before this court that there are any cases which are closely comparable to this matter. The prosecution in some of the sentence proceedings below drew upon the array of cases now discussed to identify a broad range of two to four years, within which the appropriate range for the present applicants was said to fall between two and a half to three years' detention.

[126] In the earlier mentioned case of *R v Rizos*,[102] the juvenile applicant participated in a riot at Westbrook Detention Centre when he was 15 years old. He was without previous convictions, although he was on remand for offences to which he later pleaded guilty. He pleaded guilty to riot with a circumstance of aggravation pertaining to property damage and was sentenced to eight months detention with release eligibility fixed at 50 per cent thereof. His application for leave to appeal sentence was refused. *Rizos* is of little assistance as to the appropriate range of sentence here because it involved a materially less serious riot, unaccompanied by infliction of physical injury. Moreover, unlike the applicants in the present case, Rizos did not have a significant and concerning criminal history.

[127] The prosecution also referred below to *R v WAN*[103] and *R v BBN.*[104] Neither were riot cases. *WAN* was a successful appeal by a juvenile first offender against some of his sentences for a spate of three episodes of violent offending in company. His eventual effective sentence was two years detention with release after serving 50 per cent. *R v BBN*[105] was an unsuccessful application for leave to appeal a sentence of

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101 [1994] QCA 581, p 5.

102 [1994] QCA 581.

103 [2012] QCA 21.

104 [2008] QCA 84.

105 [2008] QCA 84.

four years detention with release after serving 50 per cent, for the offence of grievous bodily harm by a juvenile offender with a substantial criminal history. *WAN* and *BBN* were evidently advanced below as illustrative of the level of criminality associated with the lower and upper end of the broad two to four year range contended for below by the prosecution.

[128] The prosecution below also referred to *R v SCR*[106] in which a juvenile offender, whose significant criminal history included prolonged past periods of detention, committed a swag of predominantly property offences and whilst in custody on remand repeatedly damaged detention centre property and assaulted corrections staff. Three of the episodes of custodial offending involved him climbing onto detention centre roofs. His effective sentence of three and half years detention with release after 70 per cent was varied only to the extent of reducing the non-release period to 60 per cent by reason of some special circumstances which had been overlooked at first instance. It was reference to this case in particular which prompted the prosecution's identification of the upper end of a range of two and a half to three years' detention as appropriate for the present applicants.

[129] None of the above discussed cases suggest the sentences imposed upon the applicants here were manifestly excessive. As explained above, substantial sentences were called for. The applicants were all sentenced to two and a half years' detention, except for Master MCV, who received two years' detention. They are clearly substantial sentences for juvenile offenders. However, they are not so significant as to exceed an appropriate range of penalty for such serious offending by juveniles in custody.

Timeliness of guilty pleas

[130] The applicants pleaded guilty and were sentenced on various dates in July and August 2017. Their pleas of guilty were variously characterised as early or timely.

Age and criminal history

[131] A comparative table of the applicants' ages and aspects of their juvenile criminal histories is Annexure A to these reasons.

[132] The comparative table shows that the applicants' ages at the time of the offence ranged between 14 and 16. There is little separating the ages of Masters KAR, NU, LAM and BDD who were born respectively in March, April, June and July of 2000. There are larger gaps separating the younger three applicants. The next youngest was Master SDC, born in February 2001, Master KAS, born in September 2001 and the youngest, Master MCV, born over a year later in October 2002. Master MCV's particular youth provides immediate insight into why he received a period of two years detention in comparison to the two and a half years detention imposed on each of the other six applicants.

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106 [2017] QCA 60.

[133] Each of the applicants have significant and concerning juvenile criminal histories. All of them have previously received sentences of probation, community service, detention with conditional release and actual detention. All of them were recidivist property offenders. KAS had nine previous offences against the person, LAM and KAR had none and the rest of the applicants had one each.

[134] In a comparative sense, Master KAS's criminal history is the worst, followed by the broadly similar level criminal histories of Masters NU, KAR, MCV and LAM. They are then followed by the criminal histories of Masters BDD and SDC, which are the least bad of a bad array of juvenile criminal histories. That KAS was only ordered to serve 50 per cent of his two and a half years detention, notwithstanding his appalling criminal history, is consistent with him being the second youngest of the applicants.

Parity as a consideration on sentence

[135] The parity principle is generally expressed as requiring that like offenders should be treated in a like manner.[107] It has relevance as a source of potential appellate intervention not only where co-offenders with comparable circumstances receive disparate sentences but also where co-offenders with disparate circumstances receive comparable sentences.[108] Thus, as Dawson and Gaudron JJ explained in *Postiglione v The Queen*:[109]

> "Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality."

[136] Whether the trigger for concern is a disparity in sentence or a disparity in circumstance or both, the criterion for appellate intervention is not the mere fact of disparity. Rather, it is that the disparity is so marked as to engender a justifiable sense of grievance, that is, as to give the appearance to an objective observer that justice has not been done.[110]

[137] Submissions by counsel for those applicants advancing a parity argument tended to highlight differences of relatively minor significance. Differences will always be present. The issue is whether the disparity is so marked as to have the unjust consequence identified above.

[138] Counsel making parity submissions also tended to ignore differences which actually placed the applicant they were representing in a comparably worse position. Differences in the circumstances of co-offenders' offending and antecedents may be of mixed effect, trending both for and against the comparable sentencing position of an applicant, with some tending to counter the significance of others. It is logically

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107 *Green v The Queen* (2011) 244 CLR 462, 473.

108 *Lowe v The Queen* (1984) 154 CLR 606; *Postiglione v The Queen* (1997) 189 CLR 295.

109 (1997) 189 CLR 295, 301-302.

110 *Lowe v The Queen* (1984) 154 CLR 606; *Postiglione v The Queen* (1997) 189 CLR 295.

necessary to consider the circumstances collectively, assessing whether their combined effect gives rise to a disparity so marked as to meet the above-mentioned criterion for appellate intervention.

[139] The applicants had much in common of relevance to sentence. All were sentenced as children. All were sentenced on the basis they had entered early pleas of guilty. All had life backgrounds which were unconducive to normal behavioural development. All had accumulated significant and concerning juvenile criminal histories. All were sentenced on the basis they were aware of the on-going threatening and violent conduct of their fellow rioters and were all involved in the concerted movement of the rioters towards staff during which an unknown rioter caused grievous bodily harm to Mr Oakland. As explained in the reasons regarding the conviction appeal, they were all liable for the offence of riot with circumstances of aggravation of causing grievous bodily harm and property damage.

[140] The areas of distinction of potential relevance to parity are mainly the variations in their ages, the degree of seriousness of their criminal histories and some slight variations in the nature of some of their specific misconduct during the riot.

[141] The only of those variations which presents as particularly significant is Master MCV's young age but that was properly reflected in his period of detention being two years, rather than two and a half years.

[142] None of this bodes well for the force of any of the individual applications to which these reasons now turn.

BDD's application

[143] Master BDD's three page juvenile criminal history commenced on 18 December 2013 when he was 13. It involves nine separate previous appearances for sentence for a total of 16 property offences, one assault or obstruct police and one possession of drug utensils. No conviction was recorded on any of those occasions. He previously had been sentenced to probation once, community service twice and detention with conditional release once.

[144] Master BDD was in custody at the time of the riot because he was sentenced three days before the riot, on 7 November 2016, to four months' detention (to be released after serving 70 per cent) for eight property offences and one drug offence. On the same occasion he was dealt with for his breach of a conditional release order and ordered to serve the two months' detention related to that order, concurrently with the four months' detention. That he participated in the riot after having been sentenced to detention only three days earlier was identified as troubling by the learned sentencing Judge.

[145] There was nothing noteworthy advanced to specifically aggravate or diminish Master BDD's individual role in the riot. Master BDD can be seen on CCTV footage of the event running over to join rioters in their concerted advance upon staff, shortly before Mr Oakland was struck. He ultimately surrendered at 2.13 am.

[146] The pre-sentence report about Master BDD noted a history of truancy from and misbehaviour at school, resistance to boundary setting and parental and other authority, adoption of pro-criminal values and attitudes and a rapid escalation through the criminal justice system. It noted his completion of some programmes in custody.

[147] In discussions with the author of the pre-sentence report about the subject offence Master BDD showed some understanding of the harm caused. He acknowledged he could see the harm being caused to detention staff during the riot but chose not to disengage because to do so would have diminished his status amongst his peers.

[148] His counsel below emphasised the absence of a past pattern of violence in his criminal history. He submitted for a sentence of 18 months to two years detention with immediate release and no conviction recorded. Nothing specific was advanced in support of the non-recording of a conviction other than that it would permit him to conclude his childhood without the recording of a conviction, no conviction having been recorded against him previously.

[149] The sentence actually imposed was two and a half years detention with release after serving 50 per cent and with a conviction recorded.

[150] The applicant's grounds are that the sentence was manifestly excessive and the sentencing Judge erred in exercising his discretion to record a conviction.

[151] The above discussion of sentence range and the applicant's own circumstances demonstrates there is no substance to the first ground.

[152] The applicant's counsel emphasised in written submissions going to that ground that Master BDD's criminal history was not as serious as a number of other offenders who received a like sentence. Nonetheless, Master BDD had a substantial criminal history, serious enough for him to have been serving a sentence of detention at the time of the riot. Such differences as existed in what was a bad array of criminal histories do not suggest any appearance of injustice to Master BDD and do not support the complaint that Master BDD's sentence was manifestly excessive. The first ground must fail.

[153] As to the recording of a conviction, much reliance was placed by the applicant's counsel upon the prima facie starting point being that a conviction should not be recorded against a child. There is however nothing in his Honour's sentencing remarks to suggest he approached the issue with other than a keen appreciation of the undesirability of recording a conviction upon a child, even in the event of serious offending. It is inherent in his remarks that he regarding the starting point as displaced in particular by the inherently grave nature of the offence. When the gravity of the offending is considered in conjunction with Master BDD's criminal history the learned sentencing Judge's exercise of the discretion to record a conviction is unremarkable.

[154] No error has been demonstrated. The application for leave to appeal sentence should be refused.

KAS's application

[155] Master KAS was the second youngest of the applicants, having been 15 at the time of the offence and the time of sentence. However, he had the worst criminal history of the applicants.

[156] His 10 page juvenile criminal history commenced on 11 September 2013, his 12th birthday. It involves 24 separate previous appearances for sentence for 112 offences, including 94 property offences, two common assaults, one charge of escaping lawful custody, four charges of assault or obstruct police, one charge of assault occasioning bodily harm whilst armed in company and two serious assaults by biting or spitting committed upon staff in the Cleveland Youth Detention Centre. No conviction was recorded on any of those occasions. Prior to the riot he had received sentences of probation on 11 occasions, community service on three occasions, detention with conditional release twice and actual detention on three occasions.

[157] Master KAS's 23rd appearance occurred two months before the riot when he was sentenced to four months detention to be served by conditional release order. He was, on one view, fortunate that the custodial component of that sentence when activated at the time of the riot sentence was ordered to be served concurrently with the riot sentence.

[158] Master KAS's 24th appearance occurred 13 days after the riot when he was sentenced, for assault offences committed as part of a group attack upon two youths on 25 September 2016, to three months' detention. He was in custody on remand for those offences at the time of the riot.

[159] There was nothing noteworthy advanced to specifically aggravate or diminish Master KAS's individual role in the riot. It was noted he can be seen on CCTV footage of the event running over to join rioters in their advance upon staff, shortly before Mr Oakland was struck. He ultimately surrendered at 4.45 am.

[160] The pre-sentence report about Master KAS noted his resistance to boundary setting, his disengagement from schooling, his lack of respect for parental and authority figures and his attachment to an antisocial peer group. It identified negative and permissive parental behaviours and inconsistent care arrangements in his formative years as factors contributing to his undisciplined, antisocial and criminal behaviour. It noted his previous periods of detention had involved destruction of property and assaults of staff members.

[161] In reflecting upon the subject offence with the author of the pre-sentence report Master KAS referred to a perceived loss of status if he did not join with his offending peers. While expressing remorse to the author he also minimised his offending, downplaying its seriousness relative to the behaviour of other offenders.

[162] His counsel sought a sentence of 18 months to two years detention, with release after serving 50 per cent and no conviction recorded. Nothing specific was submitted on the latter aspect save for a general submission that the recording of a

conviction would impact upon the applicant's chances of rehabilitation and finding or obtaining employment.

[163] The sentence actually imposed was two and half years detention with release after serving 50 per cent and with a conviction recorded.

[164] The applicant's grounds are that the sentence was manifestly excessive, there was an error in failing to apply the parity principle and there was a failure to apply proper principles to the exercise of the discretion to record a conviction.

[165] The above discussion of sentence range and the applicant's own circumstances demonstrates there is no substance to the first ground. The sentence was not manifestly excessive.

[166] As to parity, the applicant relies upon a comparison of the sentences imposed upon the applicant and the other two rioters who were sentenced on the same occasion as him, Master BDD and Master AMJ. The latter offender did not appeal his sentence, which was identical to that imposed upon the applicant and Master BDD. It is said, in effect, to be unfair that the applicant did not receive a lesser sentence than Master AMJ because Master AMJ had been described as a ringleader in the riot and was older and had a worse criminal history than the applicant.

[167] Before turning to those circumstances, it is important to appreciate there were other differences trending more favourably to Master AMJ than Master KAS. Master AMJ suffered from a number of disorders. There was tangible evidence of his remorse and he had made positive rehabilitative progress. Moreover, unlike the applicant, he did not at the time of sentence have an earlier sentence activated and ordered to be served concurrently.

[168] Turning to the complaints of disparity in age and criminal history, the learned trial judge observed in his sentencing remarks that Master AMJ had the worse criminal history in a numerical sense.[111] However, notwithstanding that observation, he also went on to observe the applicant's criminal history was "somewhat more concerning".[112] These observations doubtless derived from the escalating trend in seriousness of the applicant's criminal history. As to age, Master AMJ was only ten months older than the applicant and first commenced his offending only three months before applicant did.

[169] The ages and juvenile criminal histories of the applicant and Master AMJ were different. However, the criminal histories were each so significant, and of such similar duration, and the gap in the applicant's and Master AMJ's ages so minor as to render those differences of relatively minor significance to parity.

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111 AR 78 L15.

112 AR 78 L24.

[170] Turning to the comparable degree of criminality, the applicant emphasises the prosecution below identified Master AMJ as a ring leader or close to it.[113] However the prosecution also submitted:

> "Your Honour has seen the footage and read the schedule of facts, and whilst there is some obvious ringleaders or those who are vocal in having the group move from point to point, it is difficult in my submission to submit that the culpability of any one of the defendants before the court today is less than another. It seems apparent from – or at least the time that they came off the roof, and they were complicit in the violence that was used there. The involvement of the 20 and the conduct leading that your Honour saw in the frame before they cheered in throwing rocks at the group as a whole. The dangerousness of the riot in my submission comes from the sheer numbers who were outwardly aggressive towards the Youth Workers, and the inability of the centre management to contain such numbers … they should all receive the same head sentence, Your Honour. … That is my submission. And it's really the nature of a rioting offence, in that they move together, that they are able to – the conglomeration of the group is able to allow others to behave in the way that they did. But they are all culpable similarly, with – in terms of the real aggravating feature of the riot, which is the motivation for violence."[114]

[171] In the course of sentencing the three offenders the learned sentencing Judge observed:

> "The prosecution submit that you are each to be sentenced on the basis that you are jointly culpable for the damage and injury caused during the riot, having regard to the organisation and coordination of the group as a whole, the proximity of all 20 of the rioters to each other for an extended period of time, during which time threats were made to detention centre staff and weapons were distributed, and that the youths attacked detention centre staff as a group and participated in throwing projectiles and rocks at the staff.
>
> In my view that is the correct way to assess the overall criminality of each of you; that is, whilst there may be differences in your antecedents and in particular, your respective criminal histories, and whilst in your case, AMJ, it might be said that you involved yourself in a more prominent way in the events that gave rise to the riot, having regard to the duration over which the riot continued and what is clear from the CCTV footage, that all 20 rioters acted as a group and all

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113 AR 39 L20.

114 AR 37 L8 – AR 38 L5.

> involved themselves in the events that unfolded, it is appropriate in my view to regard your individual criminality as being equal…"[115]

[172] It is clear the learned sentencing Judge concluded that both the long duration of the riot and its gravest feature – the joining in a concerted attack upon detention staff – were considerations so significant as to render variations in the individual conduct of the three rioters immaterial to comparable culpability. Such a conclusion was reasonably open. It can be readily comprehended that the relevance to sentence of the difference in roles as between a leader and a participant in criminal activity will dissipate the longer it is that the activity is persisted in and the clearer it is that each is a willing participant in a serious component of the activity. The learned sentencing Judge's conclusion is also consistent with the focus in the elements of the offence of riot upon the assembled persons having a "common purpose" and the conduct of them "taken together" causing fear. No error has been exposed in the learned trial judge's reasoning in this context.

[173] It is apparent from the foregoing analysis that any disparity in the collective personal and offending circumstances of the applicant and Master AMJ is not so marked as to engender a justifiable sense of grievance, that is, as to give the appearance to an objective observer that justice has not been done, by reason of them receiving the same sentence.

[174] Finally, as to the recording of a conviction, the source of the applicant's complaint is the learned sentencing Judge's observation that the serious nature of the offending warranted the recording of a conviction as the inevitable or only appropriate outcome. This is said to show an absence of consideration of the other matters to which s 184(1) of the Act requires a sentencing Judge to have regard in considering whether or not to record a conviction.[116] In particular, it is submitted there was a failure to have regard to the adverse impact which the recording of a conviction may have upon the applicant's chances of rehabilitation and finding or retaining employment.

[175] A perusal of the whole of his Honour's sentencing remarks shows that in arriving at his decision a conviction should be recorded he had had regard to the adverse impact which the recording of a conviction may have upon the applicant's chances of rehabilitation and finding or retaining employment. It is likewise apparent he also had had regard to the applicant's appalling criminal history, a consideration which in its own right tended to counter balance the consideration that the recording of a conviction would have an adverse impact. In that balance it is hardly surprising his Honour apparently regarded the additional consideration of the seriousness of the offence as carrying determinative weight. Considered in the full context of his sentencing remarks his Honour's observations about the seriousness of the offence warranting the recording of a conviction do not indicate a failure to have regard to

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115 AR 69 LL32-47.

116 *R v SCU* [2017] QCA 198.

the other circumstances listed in s 184(1) in considering whether or not to record a conviction.

[176] No error has been demonstrated. The application for leave to appeal sentence should be refused.

KAR's application

[177] Master KAR's six page juvenile criminal history commenced on 6 August 2013 when he was 13 years old. It involves 13 separate previous appearances for sentence for 53 offences, 49 of which were property offences. No conviction was recorded on any of those occasions. Prior to the riot he had received sentences of probation on four occasions, community service once, detention with conditional release twice, and actual detention three times. The first of those periods of detention effectively involved immediate release because the period matched the time served awaiting sentence on remand. The second period of actual detention resulted from a breach of a conditional release order so that he was required to serve the unexpired period of that order in detention, with release after 70 per cent.

[178] The final period of actual detention, a period of four months, was imposed on 25 October 2016, a little over a fortnight prior to the riot. That was a detention period of four months, although the time served on remand awaiting sentence was to form part of that period.

[179] There was nothing noteworthy advanced to specifically aggravate or diminish Master KAR's individual role in the riot. He ultimately surrendered at 4.36 am.

[180] The pre-sentence report about Master KAR noted his offending behaviour was contributed to by poor frustration tolerance, negative peer influence and herding behaviour, and inconsistent parenting. He was described as having a pattern of poor responses to frustration and conflict, leading to substance misuse and antisocial behaviour with peers in the community. The author of the pre-sentence report expressed the opinion that the size of the offending group provided Master KAR with a sense of reduced feeling of individual responsibility, and negative peer influence was exacerbated by herding behaviour.

[181] While the report noted Master KAR had demonstrated remorse throughout discussions and was able to illustrate insight into the impact of his offending, that was somewhat undermined by him having stated "he did not consider himself as a leader but one who was coerced to participate in the event". While the word "coerced" might be that of the author of the pre-sentence report rather than Master KAR, it suggests Master KAR downplayed his individual responsibility for participating in an event he was clearly not coerced into participating in.

[182] A letter from Master KAR to the sentencing Judge was exhibited. In that letter he apologised for what he had done in the riot and expressed an ambition to join the air force and work as a chef. No specific information was advanced to the court in respect of the significance of a conviction being recorded for Master KAR's prospects of being able to join the military.

[183] His counsel below informed the court Master KAR had been on "gold privileges" for seven months on remand detention, reflecting his good behaviour subsequent to the offence. His counsel also highlighted it was apparent from the video footage that at one stage during the night he paused in his participation to cook some sausages.

[184] His counsel below sought a sentence less than the two and a half years' detention imposed upon BDD, KAS and AMJ, who had been sentenced on an earlier date, and submitted for release on the day of sentence "or in the not too distant future". It was submitted a conviction ought not be recorded because of the likelihood of it hindering his prospects in pursuing his dream of working in the Australian Defence Force.

[185] The sentence actually imposed was two and a half years' detention with release ordered after serving 50 per cent and with a conviction recorded. That is, it was an identical sentence to that imposed upon both BDD and KAS.

[186] The applicant's grounds are:

> "Master KAR played a lesser role in the riot and the sentence is manifestly excessive in the circumstances."

[187] This became an argument in written and oral submissions that the sentence was manifestly excessive, having regard to Master KAR's "lower" or "relatively limited" involvement in the offence, the pre-sentence report of his tendency to the influence of peers and herding behaviour, his age and the combined effect of the lengthy period of detention with the recording of a conviction. It was submitted that even if it were concluded the detention period of two and a half years is not of itself manifestly excessive, the recording of the conviction rendered the sentence manifestly excessive.

[188] In substance, the argument that Master KAR played a lesser or lower level role than other offenders relied upon the fact that Master KAR was not identified as engaging in specific concerning conduct. However, according to the unchallenged facts placed before the learned sentencing Judge, a "full complement" of the rioters were engaged in the concerted attack upon staff as they retreated behind shields towards the visitors' centre. It is apparent from the sentencing remarks of the learned sentencing Judge, who was the sentencing Judge in respect of all the applicants, that this violent targeting of detention centre staff and the duration of the riot were regarded as particularly concerning aspects of the offending behaviour, for which all of the rioters bore responsibility. As already discussed, such a view was reasonably open to the sentencing Judge.

[189] The above discussion of sentence range and the applicant's own circumstances again demonstrate there is no substance to the complaint that the sentence was manifestly excessive. Nor did the recording of a conviction render it so.

[190] The sentencing remarks demonstrate the learned sentencing Judge applied the correct legal principles in deciding whether or not to record a conviction. They make it plain that his Honour considered, notwithstanding the adverse impact of

recording a conviction upon the applicant, the gravity of the offending behaviour in combination with Master KAR's substantial history of repeat criminal offending called for a conviction to be recorded. Such a conclusion was readily open to the learned sentencing Judge in the exercise of his sentencing discretion.

[191] No error has been demonstrated. The application for leave to appeal sentence should be refused.

SDC's application

[192] Master SDC's four page criminal history commenced on 29 May 2013 when he was 12 years old. It involves six previous appearances for sentence for 33 property offences and one assault or obstruct police. No conviction was recorded on the first five of those appearances, but a conviction was recorded on the sixth occasion on 21 January 2016, at which time he was sentenced for the first time to a period of actual detention. He previously had been sentenced to probation on three occasions, community service on two occasions, and detention with conditional release once.

[193] The detention periods imposed in January 2016 were one month cumulative upon four months detention resulting from the breach and discharge of an earlier conditional release order. Later in 2016 he was charged with further offences and was remanded in custody about a month before the riot. He was sentenced for those offences when sentenced for the riot.

[194] One of those offences was committed during an earlier period of detention at Cleveland Youth Detention Centre. It involved an assault by spitting on a youth detention worker, after a disturbance in which some inmates had climbed on a roof and thrown rocks at staff.

[195] There was nothing noteworthy advanced to specifically aggravate or diminish Master SDC's individual role in the riot. He was a participant in the concerted movement of the rioters upon staff as they retreated to the visitors' centre and was seen to be armed at another stage of the riot. He could be seen on CCTV footage using a rock to smash a window. He ultimately surrendered at 4.18 am.

[196] The pre-sentence report in respect of Master SDC noted he had been a witness to volatile domestic disputes during his upbringing, influencing him to imitate aggressive and antisocial behaviours and normalise them as appropriate. He had a history of truancy, of resisting boundaries, rejection of authority and substance misuse.

[197] Between his remand in custody in October and the commission of the riot offence in November, he had been involved in three physical altercations at Cleveland Youth Detention Centre. His disregard for Cleveland Youth Detention Centre staff and rules was identified by the author of the pre-sentence report as a precipitating factor behind his offence. As to that offence, the author of the pre-sentence report opined that Master SDC became immersed in a pack mentality of decision-making and his involvement was precipitated by loyalty to his peers and their negative influence.

[198] When questioned about the offences before the court, Master SDC demonstrated what the author of the pre-sentence report described as "an appropriate level of

remorse and empathy". Since the offence, the report disclosed the applicant had been engaging in a variety of programmes at Cleveland Youth Detention Centre.

[199] His counsel submitted the period of detention should not exceed two years, with release after serving 50 per cent and no conviction recorded. No particular detail was advanced in support of the non-recording of a conviction.

[200] The sentence actually imposed was two and a half years' detention with release after serving 50 per cent and with a conviction recorded. Significantly, on the same occasion, Master SDC was also sentenced to concurrent terms of detention, the highest of which was four months in respect of multiple charges of enter premises and commit offence, unlawful use of a motor vehicle and driving a motor vehicle while never holding a licence, as well as charges of common assault and stealing.

[201] The applicant's grounds are:

> "Master SDC played a lesser role in the riot and the sentence is manifestly excessive in the circumstances."

[202] This ground was advanced in submissions as a parity argument, though for completeness it should be recorded, for reasons already explained, the sentence was not manifestly excessive.

[203] The argument emphasised that Master SDC was not identified as having inflicted any individual acts of violence or damage to property. The threshold force of that argument was not assisted by the fact the applicant had been seen to smash a window with a rock. The argument also targeted the personal circumstances and offending conduct of AMJ, as compared to the applicant, in support of a submission that their common sentence gives rise to a justifiable sense of grievance. It will be recalled a similar submission was made in respect of Master KAS. The above discussion of that submission applies in the same way in respect of the present argument regarding Master SDC's sentence.

[204] As already discussed, the relevance to sentence of the difference in roles between participants in criminal activity is tempered by the offence of riot's elementary focus upon combination of purpose and conduct. It also tends to dissipate the longer the activity is persisted in and the clearer it is that all are willing participants in serious components of the activity. That Master AMJ had a more serious criminal history than the present applicant, in a similar vein dissipates as a significant distinction when it is appreciated that, on any view, Master SDC's criminal history was also serious and concerning in its own right. Indeed, it even included past offending whilst in custody.

[205] Moreover, Master SDC was sentenced for the riot at the same time as he received concurrent sentences for an abundance of other offending. That is a major consideration trending against the applicant's argument. When the differences are considered collectively, there is no objective basis for any justifiable sense of grievance arising from the comparison of the sentence of Master SDC with the sentence of Master AMJ.

[206] No error has been demonstrated. The application for leave to appeal sentence should be refused.

LAM's application

[207] Master LAM's six page juvenile criminal history commenced on 1 April 2014, about two months before his 14th birthday. It involves eight separate previous appearances for sentence for 41 offences against property and multiple bail related offences. No conviction was recorded on any of those occasions. He previously had been sentenced to probation twice, community service once, detention with conditional release twice, and actual detention twice. Both of the earlier sentences involving actual detention were for periods identical to his pre-sentence custody so that he was immediately released.

[208] He was charged with further offences and entered custody on remand for them about three weeks prior to the riot.

[209] There was nothing noteworthy advanced to specifically aggravate or diminish Master LAM's individual role in the riot. He was amongst the group of rioters involved in the concerted movement towards the staff members as they retreated to the visitors' centre. It was also acknowledged by his counsel that at some stage of the riot he held a weapon. At the latter stages of the riot Master LAM was one of a number of offenders who were seen to desist from the riot, at least for a short period, to move a drink machine in order to allow Mr Oakland to receive medical assistance. However, he did not surrender then. He ultimately surrendered at 4.45 am.

[210] The pre-sentence report in respect of Master LAM opined the absence of his mother following his parents' separation had resulted in disregard for parental rules and boundaries as he increasingly engaged in negative peer association and substance abuse.

[211] The author of the pre-sentence report opined Master LAM was caught up in the moment during the riot and his desire to gain and maintain the approval of his peers was a predominant factor in his participation and in being influenced by a mob or herd mentality. The pre-sentence report indicated Master LAM "felt bad" and understood that what he did was wrong. He is said to have understood the seriousness of the offence and he expressed regret for his involvement.

[212] A letter was exhibited from Master LAM in which he apologised for his involvement in the riot and noted that he had been a "gold" behaviour category inmate for over three months.

[213] His counsel sought a sentence of "something less than two years" with release after serving 50 per cent and no conviction recorded. In support of the latter submission it was observed, as reported in the pre-sentence report, that Master LAM was desirous of pursuing a trade as a carpenter.

[214] The sentence actually imposed was two and a half years' detention with release after serving 50 per cent and with a conviction recorded.

[215] The applicant's grounds are that the sentence was manifestly excessive and the sentencing Judge erred in failing to properly apply parity principles.

[216] The above discussion of sentence range and the applicant's own circumstances demonstrate there is no substance to the first ground. The sentence was not manifestly excessive.

[217] As to parity, counsel's written submissions engaged in a lengthy comparative analysis of the circumstances of a variety of sentenced rioters. It was an exercise which demonstrated the ease with which differences in the personal circumstances in criminal conduct of co-offenders can be identified. The submissions emphasised that, unlike Master LAM, a number of the other rioters had been identified as doing discretely observable acts during the riot. However, as already explained, such distinctions pale in significance when it is borne in mind that the riot lasted over a very long time and that all of the present applicants participated in the concerted movement into the staff as they retreated towards the visitors' centre. It was during that movement that the grievous bodily harm was inflicted upon Mr Oakland. Distinctions in criminal histories also tend to pale in significance when it is recalled that all of the applicants had concerning and significant juvenile criminal histories.

[218] A significant distinguishing feature trending heavily against Master LAM's parity complaint is that, unlike Masters KAS, AMJ and BDD, who were the subject of particular focus in the written submissions on this issue, Master LAM was sentenced for the riot offence at the same time as he was sentenced for three charges of unlawful use of a motor vehicle, two charges of driving a motor vehicle while never holding a licence and one breach of bail. His various terms of detention for those sentences, the highest of which was three months, were ordered to be served concurrently with his sentence for the riot.

[219] After consideration of Master LAM's collective circumstances, vis-à-vis those of his co-offenders, the combined effect is not such as to give rise to a disparity so marked as to engender a justifiable sense of grievance of an appearance that justice has not been done.

[220] No error has been demonstrated. The application for leave to appeal sentence should be refused.

NU's application

[221] Master NU's six page juvenile criminal history commenced on 20 May 2014, soon after his 14th birthday. It involves seven separate previous appearances for sentence for 62 offences including 57 property offences and one armed robbery in company with violence. No conviction was recorded on five of those appearances, but convictions were recorded on two of them.

[222] Prior to the riot he had received sentences of probation on four occasions, community service once, detention with conditional release once, and actual detention once. His seventh appearance occurred on 24 February 2017, three and a half months after the riot, at which time convictions were recorded and he was sentenced to concurrent sentences of detention in respect of three property offences and armed robbery in company with violence. Those offences were committed in May 2016 and he was apparently in custody on remand for them at the time of the riot.

[223] At the time Master NU was sentenced for those offences in February 2017 he had already served 278 days on remand. The sentencing Judge fixed the longest of the concurrent periods of detention at 278 days, with the generous intention that from that point Master NU would have the benefit of his time in custody counting towards his eventual period of detention for the riot offence.

[224] There was nothing noteworthy advanced to specifically aggravate or diminish Master NU's individual role in the riot. It was noted in the course of submissions that the tendered summary of facts neglected to but should have named him as one of the rioters who took to the roof of the van in the initial stage of the riot. It is implicit in the wording of the exhibited summary of facts that he was amongst the complement of rioters which engaged in the concerted advance upon staff as they retreated to the visitors centre. He ultimately surrendered at 6.17 am.

[225] At the time of sentence Master NU was also sentenced for a serious assault committed by him while in custody about a month and a half after the riot. That misconduct involved him approaching a female detention centre worker, putting his hands around her neck and pulling her down from behind her.

[226] The pre-sentence report about Master NU noted he had negative formative childhood experiences, including physical abuse and exposure to violence. He was disengaged from education, lacked positive role models and associated with offending peers. He is already a father. He completed a number of programmes while in custody awaiting sentence and had been on a "gold" accommodation rating for about three months. He aspires to become a stockman after his release.

[227] Master NU wrote a short letter of apology to the court. He demonstrated remorse to the author of the pre-sentence report and acknowledged his joint culpability for the offence.

[228] His counsel sought a sentence of two years detention while implicitly acknowledging a sentence of two and a half years detention was within range if tempered by an order for release after serving 50 per cent. While not conceding a conviction should be recorded the fact convictions had already been recorded for other offending was acknowledged to be a "difficult hurdle".

[229] The sentence actually imposed was two and half years detention with release after serving 50 per cent and with a conviction recorded. Master NU was also sentenced to a concurrent term of three months detention in respect of the serious assault offence committed upon a detention centre staffer.

[230] In arriving at the above sentence, particularly in setting the release date at 50 per cent rather than 70 per cent, the learned sentencing Judge explained he had done so taking into account that Master NU's period of remand was additional to another 278 days in remand custody, formally attributable to his sentence of 24 February 2017. It appears his Honour did not take it into account as a mathematical deduction from the period of detention which would otherwise have been imposed; properly so, given a quite separate and earlier body of offending had attracted the earlier sentence. Rather, his Honour appears to have correctly taken the onerous effect of the consecutive periods of custody into account in ensuring the sentence of detention he imposed was, as the Act requires, for the shortest appropriate period.

[231] The applicant's grounds are:

> "Master NU played a lesser role in the riot and the sentence is manifestly excessive in the circumstances."

[232] The above discussion of sentence range and the applicant's own circumstances demonstrates there is no substance to the complaint that the sentence was manifestly excessive.

[233] Further to the authorities already discussed above Master NU's written submissions also alluded to a number of single judge decisions in which lesser periods of detention had been imposed upon child rioters but they are unhelpful because they involved less serious riots and were without a circumstance of aggravation that grievous bodily harm was caused. Reference was also made to a first instance sentence of a juvenile in connection with the riot on Palm Island (with which *R v Poynter, Norman & Parker; Ex parte Attorney-General (Qld)* was also concerned) but it was not submitted, unsurprisingly, that the offending circumstances of that offender were comparable to those of the applicant.

[234] As to parity, the applicant's counsel focussed particularly upon sentences of detention imposed upon two of the applicant's many co-offenders, Masters PAO and PAQ. They received two years detention as opposed to the two and half years received by the applicant. It was submitted, based on their sentencing remarks, there was no significant difference between them and the applicant. More information might have assisted with this argument, but the sentencing remarks reveal an apparently material difference in circumstance. In sentencing Masters PAO and PAQ the learned sentencing Judge expressly reduced their sentence to preserve parity on account of significant portions of their lengthy periods of pre-sentence custody not formally counting towards the riot sentence. In contrast, two points ought be made about Master NU's position on sentence.

[235] Firstly, it will be recalled that the only component of Master NU's pre-sentence custody which could not formally be taken into account had already been counted as his service of a sentence of detention for other offences. The learned sentencing Judge did not take that component into account as a mathematical reduction to be informally made for remand time which would not otherwise count towards any sentence, for in fact it had so counted. Rather, he took informal account of it as a factor to be weighed in fixing the shortest appropriate period of custody.

[236] Secondly, when Master NU was sentenced for the riot offence he also fell to be sentenced for a serious assault committed subsequent to the riot whilst in detention. This placed him in a relatively worse position than Masters PAO and PAQ at the time of sentence.

[237] The submissions of Master NU's counsel also emphasised that like Master NU, Masters PAO and PAQ came from Aurukun, a community of inherent childhood disadvantage. In connection with this Master NU's counsel's submissions implied the learned sentencing Judge had overlooked that consideration in respect of Master NU. The remarkable premise for this implication was that at some subsequent date when sentencing more co-offenders his Honour mentioned the number of previously sentenced co-offenders from Aurukun was three rather than the apparently correct number of four. It is an illogical premise for such an implication. At the time of Master NU's sentence his Honour would well have appreciated Master NU came from Aurukun and a disadvantaged upbringing, for as much was highlighted in both the pre-sentence report and the submissions of Master NU's counsel.

[238] The applicant's counsel also submitted a parity issue arose from the fact that at the time of sentence of Masters PAO and PAQ his Honour alluded to the existence of some rehabilitative programmes available to such offenders in Aurukun but there was no evidence of such rehabilitative programmes at the time of Master NU's sentence. That is factually wrong. There was such evidence in the pre-sentence report on Master NU. It alluded to the support available to the applicant on release at Aurukun, particularly the Aurukun release monitoring group and the Aurukun Transition to Success Programme. In any event the submission is legally misconceived. By reason of s 150(2)(d) of the Act a more severe sentence should not be imposed where there is a lack of available programmes and there is no indication at all that such an erroneous consideration influenced the sentence of Master NU.

[239] No error has been demonstrated. The application for leave to appeal sentence should be refused.

MCV's application

[240] Master MCV's five page juvenile criminal history commenced on 14 January 2015 when he was 12 years old. It involves eight previous appearances, for 52 property offences, one public nuisance and one sexual assault whilst armed in company. No conviction was recorded on any of those occasions. Prior to the riot he had received sentences of probation on four occasions, community service once, and detention with conditional release once.

[241] His only period of actual detention was imposed on 31 March 2017 after the riot for an array of offending committed during 2016 prior to the riot. He was in custody on remand in respect of those matters at the time of the riot.

[242] There was nothing noteworthy advanced to specifically aggravate or diminish Master MCV's individual role in the riot. He admitted he had thrown a rock and hit a staff member in the face, however the prosecution did not rely upon this admission as constituting an admission that Master MCV was the person who threw

the rock which hit and occasioned grievous bodily harm to Mr Oakland. Master MCV was one of the last three offenders to surrender at 6.17 am.

[243] The pre-sentence report in respect of Master MCV identified the development of a lack of regard for rules and boundaries as stemming from the lack of a consistent capable guardian during his upbringing. It described his offending behaviour as being contributed to by entrenched peer influence, antisocial attitudes, diffusion of responsibility in relation to hurting, and poor frustration, tolerance and impulse control. The author of the pre-sentence report opined that, on the occasion of the offending, the size of the offending group provided Master MCV "with a sense of reduced feeling of individual responsibility and that negative peer influence was exacerbated by herding behaviour".

[244] The pre-sentence report noted Master MCV illustrated little insight into the impact of his offending upon the victims and attempted to minimise the nature of the offence as well as his level of involvement, indicating limited remorse and a lack of responsibility. The report noted when Master MCV was confronted with his admission of having thrown a rock and hit a staff member, he asserted he did not throw any objects directly at staff and, rather, had dropped objects off the roof so they could not be used as weapons. At the time of sentence Master MCV's counsel indicated Master MCV did not dispute the making of the admission (which in any event was not, and was not acted upon as, an admission he had thrown the rock which blinded Mr Oakland).

[245] His counsel sought a sentence less than the two and a half years' detention imposed upon earlier sentenced offenders. No specific submission was advanced in respect of the recording of a conviction.

[246] The sentence actually imposed was two years' detention with release ordered after serving 50 per cent and with a conviction recorded. The period of detention imposed was therefore six months shorter than that imposed upon the other applicants; understandably so given he was materially younger than the other applicants.

[247] The applicant's grounds are that the sentence was manifestly excessive, there was an error in the exercise of discretion to record a conviction, and there was an error in not properly declaring time in custody.

[248] The above discussion of sentence range and the applicant's own circumstances demonstrates there is no substance to the first ground. The sentence was not manifestly excessive.

[249] In advancing the ground of manifest excess, Master MCV's counsel's submissions trended more in support of a complaint about lack of parity. Those submissions emphasised the penalties imposed upon three other rioters, namely Master SDC, Master GLT and Master NK (not to be confused with applicant NU). However, those offenders' sentences had significant points of distinction from the applicant's.

[250] Master SDC received a longer head sentence of two and a half years and was sentenced concurrently for other offences. Master GLT was sentenced to 21 months'

detention and no conviction recorded, but he had severe mental impairment. Master NK was sentenced to two years' detention, but that sentence was specifically moderated to take account of six months' detention which would not otherwise have been allowed for. A comparison of the sentences and circumstances of those offenders and Master MCV's does not give rise to a justifiable sense of grievance or give the appearance to an objective observer that justice has not been done.

[251] The error complained of in respect of the exercise of a discretion to record a conviction is novel. It morphs the absence of submissions on the topic below by Master MCV's counsel into an alleged error on the part of the trial judge in not seeking such submissions. There is no material before the court to show that the decision of the applicant's counsel below to not submit as to the recording of a conviction was the product of oversight. Nor is there any material to suggest it would have been a submission supported by any specific aspect of Master MCV's known circumstances. The irresistible inference is that a pragmatic forensic decision was made to not advance a submission which was likely to fail and likely to distract from the force of a more compelling, and ultimately successful submission, that Master MCV's period of detention should be less than the two and a half years imposed on his co-offenders.

[252] In any event, other aspects of what was said below make it obvious the learned sentencing Judge did consider and apply the correct principles in exercising his discretion to record a conviction against Master MCV. A number of other co-offenders were sentenced at the same time as Master MCV and various submissions were advanced as to the exercise of the discretion whether or not to record a conviction. More particularly, in sentencing all of the co-offenders then before him, the learned sentencing Judge referred to ss 183 and 184 of the Act and their effect. He referred to a variety of decisions in support of the starting point that a conviction ought not be recorded against a child.[117] He also noted the observation of Mullins J in *R v BCO*[118] that:

> "Courts have proceeded on the assumption that the recording of a conviction will impinge adversely on a child's rehabilitation and employment prospects."

[253] In proceeding to record a conviction against Master MCV the learned trial judge concluded the objective seriousness of the offending, even having regard to matters in mitigation, justified the recording of a conviction. That conclusion was comfortably open to the learned trial judge and no error of approach has been shown.

[254] The complaint of supposed error in the calculation of the pre-sentence detention appears to originate from a recording, in the remand in custody report found in annexure A, part C, to the pre-sentence report, of 41 days "remand credit". That remand

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117 *R v WAJ* [2010] QCA 87, [14], *R v BCO* [2013] QCA 328, [21].

118 [2013] QCA 328, [21].

credit period is listed as attributable to a matter in which Master MCV was sentenced on 29 July 2016, to three months' detention to be served by way of conditional release order. The conviction for the riot breached that order. In sentencing Master MCV for the riot, the learned sentencing Judge was persuaded that the simplest way to deal with the conditional release order was to find the breach proved and revoke the order. Indeed, he was encouraged to take such a course by the Department's representative who appeared at sentence.

[255] The learned sentencing Judge therefore found a breach of the conditional release order proved, revoked the order and declared 74 days of it as time served in respect of the breach.[119] The 74 days represents the period since the imposition of the conditional release order on 29 July 2016 and the date of its suspension on 17 October 2016, a day after he had been arrested for further offending. The sentencing remarks contained no express order as to whether the activated sentence was to be served concurrently with the sentence for the riot. Pursuant to ss 213 and 214 of the Act, where, as here, there was no specific order requiring the sentences to be served cumulatively the sentences must be served concurrently.[120] That default position is correctly reflected in the relevant Verdict and Judgment Record, which is endorsed, "Detention orders to be served concurrently".

[256] The upshot is that the activation of the order will not require Master MCV to serve any time in detention additional to the time he will serve for the riot. That appears to be an outcome which is very generous to Master MCV. Notwithstanding that generosity, the applicant now seemingly contends the head sentence for the riot should have been discounted to allow for some time Master MCV spent in custody on remand between 16 October and 30 November. That appears to be a period of 44 days rather than the earlier mentioned 41 days marked as "remand credit" in the remand in custody report.

[257] It will be recalled the riot occurred on 10 and 11 November 2016. It may immediately be observed that was 25 days into the afore-mentioned 44 day period – 25 days which cannot in any sense be attributable to a riot which was yet to occur. During that time Master MCV was already in custody on remand for an array of fresh offending, which appears to have included burglaries and sexual assault whilst armed in company. He was not formally remanded in custody for the riot until 30 November 2016, about 19 days after the riot. It is difficult to see how even that 19 days ought be regarded as time by which the riot sentence ought inevitably have been reduced. It will be recalled Master MCV was on remand during that time for the other offending for which he was sentenced in March 2017. There is a dearth of evidence regarding the attribution of remand time in respect of those matters but, prima facie, s 218 of the Act would have operated so that the period of time the applicant was on remand for those matters, which on the face of it included the 44

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119 The applicant's counsel contends that period should have been 79 days but the point is academic given the concurrency of the activated sentence with the riot sentence.

120 The position is different for adult offenders who offend when serving a term of imprisonment, per s 156A *Penalties and Sentences Act* 1992 (Qld).

day period, would have counted as part of the period of detention imposed in March 2017.

[258] The applicant characterises the learned sentencing Judge's allusion in the course of his sentencing remarks to the time spent on remand as a declaration. It was not. The Act does not involve declarations regarding pre-sentence custody, as occurs in the adult sentencing regime.[121] Rather, s 218 of the Act obliges those administering detention to count time on remand pending sentence to be counted as part of the period of detention the offender is sentenced to serve. Nor was the learned sentencing Judge's allusion to the applicant's time on remand for the riot charge as being 253 days incorrect. It correctly reflected the period from his initial remand for the riot on 30 November 2016 through to the time of his sentence for the riot.

[259] There was no error. In hindsight it can be seen counsel at first instance might arguably have submitted that the 19 day gap between the riot offence and the initial remand date for the riot ought be borne in mind in appropriately moderating the sentence to be imposed. However, the concurrency of the revoked conditional release sentence with the riot sentence was an outcome which so amply moderated the effective sentence as to have met the aim of such a submission even if it had been made.

[260] No error has been demonstrated. The application for leave to appeal sentence should be refused.

Orders re application for leave to appeal sentences

[261] The orders in respect of the applications for leave to appeal against sentence should in each application be:

1. Application for leave to appeal sentence refused.

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[121] Per s 159A *Penalties and Sentences Act* 1992 (Qld).

ANNEXURE A – R v BDD; KAS; KAR; SDC; LAM; NU; MCV.

Applicant	DOB (age at time of offence/ sentence)	Number of past court appearances:								Number of past:		
		when sentenced	when dealt with for breach	when no conviction recorded	when conviction recorded	when sentenced to -				Property offences	offences against the person	other offences
						prob-ation	comm-unity service	Detention with conditional release	Actual detention			
BDD	25.7.00 (16/16)	9	2	9	0	1	2	2	1	16	1	1
KAS	11.09.01 (15/15)	24	1	24	0	11	3	2	4	94	9	9
KAR	15.03.00 (16/17)	13	5	13	0	4	1	2	3	49	0	4
SDC	28.02.01 (15/16)	6	2	5	1	3	2	1	1	33	1	0
LAM	08.06.00 (16/17)	8	1	8	0	2	1	2	2	41	0	18[122]
NU	23.04.00 (16/17)	7	0	5	2	4	1	1	2	57	1	3
MCV	03.10.02 (14/14)	8	0	8	0	4	1	1	1	52	1	1

[122] These were all minor bail related offences which were before the court during a single appearance.