Queensland Sentencing Advisory Council

Key Concepts

Sentencing children, *Youth Justice Act*, Youth Justice Principles, sentencing principles, detention as a last resort, recording a conviction, rehabilitation, pre-sentence report.

CASE IN FOCUS

R v SCU [2017] QCA 198

Case law summary

SCU was sentenced under the *Youth Justice Act 1992* (Qld) ('YJA')[1] to 2 years' detention for arson and shorter periods of detention for 2 other offences ordered to be served concurrently with convictions recorded. SCU applied to the Queensland Court of Appeal for 'leave' (permission) to appeal the sentences which was granted. As a child, SCU's name could not be published.[2]

The facts

Children used a vacant building in their community to smoke, drink alcohol, sniff glue and light small fires.

In the early hours one morning, SCU lit clothing and threw it into the building. It caught fire. He then threw in a small gas cylinder and ran and hid when the fire grew.

The building was destroyed. The insurer paid out $565,000.

SCU denied starting the fire and pleaded not guilty. [3]–[6] A jury convicted him after a trial. He was then held in detention until his sentence, 50 days later (declared as time served under the sentence). [1], [2], [115]

At the time of the appeal, he had been in detention for 9 months. [157]

The sentence

The sentencing judge imposed concurrent sentences of detention (meaning the sentences are served at the same time, not one after the other).

He recorded convictions (overturned on appeal) for the following Queensland *Criminal Code*[3] offences: [1]–[2]

- Stealing – ss 391, 398(1) (SCU stole a leaf blower): 3 months' detention. This was not changed on appeal.
- Attempting to enter premises with intent to commit an indictable offence (ss 421(1), 535, 536): 1 month's detention. This was not changed on appeal.
- Arson (s 461): 2 years' detention, with release after serving 50 per cent (changed on appeal to 12 months' detention, with release after serving 70 per cent). [158]

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About the offender

SCU was 15 when he offended, 16 when sentenced and 17 at his appeal. [3], [134] At the time of the offences, he lived at Woorabinda, an Aboriginal community near Rockhampton. [3]

SCU had a prior criminal history. His offending began at age 11 and was mostly property and public nuisance offences. [7]–[15] He successfully completed a good behaviour bond, community service and probation orders for some of those offences. He had not reoffended while on these sentencing orders except for one minor public nuisance offence when on probation. [8]–[14], [19]

A pre-sentence report prepared on behalf of Youth Justice described SCU as a 'follower' in a group of peers who abused substances and committed offences. He had strong family and community support, applied his talent in his local football team [17]–[21], [28] and had a job offer from his uncle's fencing company. [30] Since the age of 8 he had attended 10 different schools. [19], [109]

A submission from the local community justice group (a group of Aboriginal and Torres Strait Islander elders and other respected persons living in the community) and letter from a youth service supported SCU being sentenced to an order that would allow him to return to the community and set out ways he would be supported through reintegration programs. [21]–[29], [113]–[121]

Why the sentence was appealed

SCU had one reason ('ground of appeal') to argue before the Court of Appeal – that 'the sentence' was manifestly excessive. However, the appeal hearing was only about whether convictions should have been recorded. The Court later asked questions about the length of the detention order and both sides responded in writing.

The Court re-sentenced SCU for the arson offence because the sentencing judge had made errors in applying the Youth Justice Principles. [135]–[138], [65]

Detention - a special order for children

Youth detention, like imprisonment for adults, is a sentence of last resort. It cannot be ordered unless: (1) the court has received and considered a pre-sentence report; and (2) the court has considered all other available sentencing options as well as the desirability of not holding a child in detention and, taking these things into account, is satisfied no other sentence is appropriate in the circumstances of the case.[4]

Children sentenced to detention are subject to conditional, supervised release after serving 70 per cent of the detention period, unless the court orders release between 50 and 70 per cent due to special circumstances.[5]

SCU's initial supervised release was set at 50 per cent because of the 'more onerous bail conditions' he served for over 300 days before trial. [61], [64]

In his separate judgment, the President of the Court of Appeal, Justice Sofronoff, wrote about how the YJA requires 'other solutions' to be considered (and attempted 'if appropriate') to 'adapt a child's likely behaviour'.

He described detention as 'the last, the worst, the harshest and, usually, the least effective and bluntest instrument'. [108]

The YJA 'rightly treats detention as the least effective tool available for [maturing a child into a decent adult]'.This approach is not 'primarily for the personal benefit of the child offender or out of a sense of tenderness, but primarily for the benefit of the Queensland community as a whole and its interest in preventing continued offending'. [130]

A conviction must be recorded if an adult is sentenced to imprisonment of any kind, but a court sentencing a child to detention has a discretion (choice) whether to do so.[6]

More information about the sentencing of children is available on our website.

Visit the Queensland Courts website to find out more about the role of Community Justice Groups in Queensland.

What the Court decided

All 3 appeal judges agreed on the orders to be made. President Sofronoff wrote his own judgment with his reasons.[7] Justice of Appeal ('JA') McMurdo wrote his own judgment with different reasons for amending the original sentence, and Morrison JA agreed with him ('the 2 judges'). Theirs is the majority judgment considered in detail below.

The Court changed the detention order on appeal because the sentencing judge had not properly considered 'all relevant considerations, including the relevant principles of sentencing' in the YJA. [117], [138], [149], [156] McMurdo JA noted the YJA has specific sentencing principles.

Although the YJA overrides any sentencing laws made for adults if there is an inconsistency,[8] it applies 'the general principles' of sentencing, so the purposes for which sentences may be imposed 'can be relevant' for children. They are 'punishment, rehabilitation, personal and general deterrence, denunciation and the protection of the community'.

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Did you know? Queensland has 3 youth detention centres – 2 in Brisbane and one in Townsville.[11]

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What the Court decided *continued*

Sentencing 'commonly involves a tension between those purposes…resolved by the court giving each of them an importance, relative to one another, which is appropriate for the facts and circumstances of the individual case'. That balancing exercise still applies to children, 'but with some important differences'. Two of those differences were relevant to SCU's appeal. [150]–[151]

First was the YJA principle that 'a child's age is a mitigating factor' in deciding 'whether or not to impose a penalty, and the nature of the penalty imposed'.[9] This 'affects the weight to be given to the objects of punishment, denunciation and deterrence and thereby lessens their importance relative to the object of rehabilitation'. [152]

Second, the YJA makes rehabilitation more important as a sentencing purpose for children. [153] The sentencing judge was well aware of the 'last resort' principle, but not 2 others of equal importance regarding rehabilitation: (1) 'a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community'; and (2) rehabilitation is 'greatly assisted by the child's family and opportunities to engage in educational programs and employment'. [153]-[154].

The sentencing judge's reasoning contradicted the principle about a non-custodial order being best for reintegration. [155] He had measured the 'serious risk' of detention exposing SCU to people who would 'educate him in other criminal activity…against the other more positive rehabilitative aspects of a detention period'. These were said to be education and rehabilitation programs. [154]

McMurdo JA observed that 'this reasoning was inconsistent' with the YJA and that 'where [detention] is necessary, it will not be for a rehabilitative purpose'. [155] This reasoning was an error of law which 'affected the weighing of the purposes to be served by the sentence'. It meant that the Court should set the appropriate sentence instead. [156]

The 2 judges decided detention was 'within the discretionary power of the judge, if acting in accordance with the relevant principles of sentencing'. [157]

President Sofronoff noted the sentencing judge did not adequately explain whether a conditional release order 'would or would not be right as the final option before ordering actual detention'. [87] A conditional release order involves the young person staying in the community while participating in a structured program supervised by Youth Justice officers with strict conditions.

All 3 agreed that SCU's further detention could not be justified. A head sentence of 12 months' detention was appropriate. [157], [128]

The other issue for the Court was whether convictions should have been recorded.

The YJA requires the court to have regard to all the circumstances of the case including the nature of the offence, the child's age and any previous convictions and the impact the recording of a conviction will have on the child's chances of rehabilitation generally or finding or retaining employment.[10] [160]

McMurdo JA found that, in the specific context of recording convictions, the sentencing judge had only considered the first of those circumstances: 'The exercise of the discretion miscarried and this Court must decide on the matter'. [161]

He observed that while 'the impact of the recording of a conviction necessarily involves a degree of speculation', the likelihood that recording one for SCU, 'especially for an offence as serious as arson, would detrimentally affect his rehabilitation and his finding or retaining employment is undoubtedly high'. [162]

It was also relevant that SCU had offended previously. But it was decided that convictions should not be recorded because, balancing the relevant considerations, 'the likely impact upon his future employment and his rehabilitation, from the recording of the convictions, could be so serious'. [163] and see [131]

Why this case is of interest

This case explains, and is an example of how (and why), sentencing laws for children are different to those for adults — including the principles a court must apply in sentencing, the types of sentencing orders available, and what considerations are relevant to decisions about whether a conviction should be recorded.

A sentence for the same offence could be very different for a child than for an adult. This is often because of the importance of rehabilitating child offenders — who are still developing.

For information of a general nature about appeals and sentencing see our Queensland Sentencing Guide. Subscribe to our newsletter, *Inform*, and follow us on Twitter and Facebook to keep up to date with all things sentencing in Queensland. Call us on (07) 3738 9499 or contact us at info@sentencingcouncil.qld.gov.au.

[1] The legislation for sentencing adults is different - the *Penalties and Sentences Act 1992* (Qld) s 9 ('PSA'). [2] There are very limited circumstances in which a court may order that identifying information about a child offender, such as their name, should be published (see YJA ss 234 and 301). These did not apply in SCU's case. [3] *Criminal Code Act 1899* (Qld) schedule 1 ('*Criminal Code*'). [4] YJA ss 207, 208, 150(2)(b),(e), sch 1(18). See [53], [55], [57], [84]–[86], [107]–[108] of President Sofronoff's judgment. [5] YJA ss 227, 228, 230. [6] YJA s 183. For adults see PSA ss 111, 143, 152. [7] See especially [44]–[57], [67]–[68], [74]–[131]. [8] See YJA s 150 for the principles and the PSA s 6 regarding the YJA overriding the PSA. [9] YJA s 150(2)(a). [10] YJA s 184. For adults see PSA s 12. [11] For more information see Basics of youth detention | Your rights, crime and the law | Queensland Government (www.qld.gov.au).