
JURISDICTION : CHILDREN'S COURT OF WESTERN AUSTRALIA
IN CRIMINAL

LOCATION : PERTH

CITATION : THE STATE OF WESTERN AUSTRALIA -v-
DMRM [2012] WACC 3

CORAM : JUDGE REYNOLDS

HEARD : 22 FEBRUARY 2012

DELIVERED : 2 MARCH 2012

FILE NO/S : C JO 203 of 2011
C JO 360 of 2011
C JO 549 of 2011

BETWEEN : THE STATE OF WESTERN AUSTRALIA
Applicant

AND

DMRM
Respondent

Catchwords:

Review by Children's Court President - Unlawful wounding - Strike with broken bottle in hand - Intention to harm within factual circumstances - Deterrence - Whether community order adequate - Turns on own facts

Legislation:

Children's Court of Western Australia Act 1988 (WA)
Criminal Code (WA)
Sentencing Act 1995 (WA)
Young Offenders Act 1994 (WA)

Result:

Intensive youth supervision order set aside and substituted with a sentence of 6 months imprisonment conditionally suspended for a term of 12 months.

The sentences imposed for the offences of assault occasioning bodily harm and assaulting a public officer performing a function of his office are confirmed.

Representation:

Counsel:

Applicant : Mr S M Stocks
Respondent : Ms C J Rossi

Solicitors:

Applicant : Director of Public Prosecutions (WA)
Respondent : Legal Aid (WA)

Case(s) referred to in judgment(s):

DBW (a child) v The State of Western Australia [2011] WASCA 2006

JUDGE REYNOLDS:**Introduction**

1 This is an application for review pursuant to s 40 of the *Children's Court Act of Western Australia 1988* (WA) (the CC Act) of sentences imposed by a magistrate of the Court on 18 November 2011. On that date the respondent was sentenced to three 12 month intensive supervision orders subject to supervision and 100 hours community service work, all concurrent, on each of the following offences. The first in time, the subject of charge number 360 of 2011, is an offence of assault of a public officer then performing a function of his office committed on 5 February 2011 at Warwick. The second, is the subject of charge number 203 of 2011, is an offence of unlawful assault occasioning bodily harm committed on 7 March 2011 at Greenwood. The third, the subject of charge number 549 of 2011, is an offence of unlawful wounding committed on 28 April 2011 at Kingsley.

2 The respondent was born on 21 August 1993. He was 17 years old when he committed the offences. At the time of sentence he was 18 years old and so pursuant to s 50B of the *Young Offenders Act 1994* (WA) (the YO Act) he had to be sentenced under the *Sentencing Act 1995* (WA) (the Sentencing Act).

3 The State contends that the offence of unlawful wounding should have been dealt with by the imposition of an order of suspended imprisonment or conditional suspended imprisonment but that immediate imprisonment would also be open. No objection is taken to the sentences imposed for the other two offences but because all of the sentences were ordered to be served concurrently and that a sentence of immediate imprisonment could not be imposed with a sentence of an intensive supervision order, all of the sentences have been included in the application for review.

The facts on the three offences

4 I will deal with the facts of the offences in chronological order. The facts of the offence of assaulting a public officer then performing a function of his office are as follows. At about 2:15pm on 5 February 2011 the respondent was waiting at a bus stop in Warwick on Beach Road. He was in company with three other youths. The respondent and the youths flagged down a Transperth bus, which was being driven by the victim. One of the youths attempted to use an expired bus ticket and the victim told him that the ticket was not valid and asked him and the others to

leave the bus. The respondent was the last to leave the bus and as he was stepping off the bus, he stopped and turned to face the victim. He then spat at the victim with the spit landing on the window of the bus behind the victim with some of the saliva spraying and contacting the victim. The respondent then showed his little finger to the victim and left the bus.

5 The offence of unlawful assault causing bodily harm was committed at about 6:30pm on 7 March 2011. The victim was waiting with two friends on the grounds of the Greenwood Senior High School. The respondent and three other males approached the victim and demanded a cigarette. The victim explained that the one he was smoking was his last cigarette. One of the males accused the victim of slashing his tag and replacing it with a tag of his own. The victim sought to assure the male that he did not know what he was talking about. The male then struck the victim to the head and the respondent and the other males then all assaulted the victim by punching and kicking him to the head and body as he was on the ground. The victim lost consciousness during the assault. The respondent and all of the other males fled the scene when they saw Police arriving.

6 The victim was 15 years of age at the time of the offence. As a result of the assault he was conveyed to hospital and treated for multiple breaks to his right cheekbone and lacerations and grazing to his upper torso and stomach. He also sustained cuts to his head.

7 The offence of unlawful wounding was committed on 28 April 2011 between 8:00pm and 11:30pm. When the respondent committed this offence he had already appeared before the Court and was on bail for the offence of assault occasioning bodily harm. The respondent and the victim were guests at a house party in Kingsley. They both knew each other at the time. Each of them attended the party with several friends and associates and before the incident giving rise to the charge had consumed a substantial amount of alcohol.

8 Sometime into the night an argument developed between the respondent and the victim about the respondent's behaviour in one of his earlier offences. The verbal argument escalated to shouting. The respondent stood up, picked up a beer bottle by the neck, turned towards a brick wall, and then forcefully dropped the bottle on the floor causing it to smash. He then picked up the broken beer bottle by the neck and turned back and faced the victim who was on the other side of the table. The respondent adopted a stance with both hands up. He was holding the neck

of the broken bottle in his right hand and the jagged edges of the broken bottom of the bottle would have been clearly visible.

9 From this position, the respondent walked around the table and approached the victim. A number of statements of witnesses on the State brief set out that when the respondent approached the victim, the victim moved away from the respondent. A physical altercation then occurred, with the respondent striking the victim to the left side of his face with his right hand and while still holding the broken bottle in his hand. The respondent and the victim were separated by witnesses, at which time bleeding was noticed on the victim's face.

10 Counsel for the respondent gave the respondent's version of the incident to His Honour in her plea in mitigation. She stated that both parties were affected by alcohol and that the victim was verbalising the respondent about previous behaviour by the respondent. She said that the respondent told the victim that he was not proud of his behaviour and that he did not want to fight the victim. The respondent, being affected by alcohol and frustrated by what the victim was saying, broke the bottle and held it in his hand but only with the intention of threatening the victim for the purpose of getting him to back off and leave him alone and stop going on about his previous conduct.

11 Counsel conveyed to His Honour that the victim then made some further comments which the respondent construed as provocative. The respondent then moved around to the victim's side of the table and the two of them engaged in verbal exchanges. They then started fighting and in the course of the fight the respondent hit the victim while he was still holding the bottle in his hand. It is accepted that the victim sustained his facial injuries from the impact of the broken bottle. Counsel sought to emphasise the point to His Honour that the respondent's intention was not to use the bottle against the victim other than to try and make the victim back off and leave him alone. Counsel stated that unfortunately the respondent did not get rid of the broken bottle before he struck the victim when holding it in his hand. Counsel submitted that this was not an instance where the respondent moved towards the victim and struck him to the face straight away with a broken bottle. Counsel also submitted that this was a case where the respondent and the victim were both trading blows and that in the course of trading blows or punching the respondent has cut the victim with the broken bottle without any intent to cause that result.

His Honour's reasons for the sentences imposed

12 In the course of submissions, reference was made to the case of *DBW (a child) v The State of Western Australia [2011] WASCA 2006*. That was a case where at first instance I imposed an immediate detention sentence for an offence of unlawful wounding which I regard as a serious offence of personal violence. It involved the offender without any provocation at all, striking the victim across the upper arm with a meat cleaver and causing a serious wound to the bone. The offence was committed on the Narrows Bridge in Perth after the fireworks display on an Australia Day. The imposition of a sentence of 18 months immediate detention was upheld on appeal.

13 His Honour gave carefully considered and comprehensive reasons to support the sentences he imposed.

14 At the time of sentence, the respondent had been engaging in the YSTIR program in relation to the two earlier offences of assaulting a public officer in the performance of his duty and the assault occasioning bodily harm. The respondent had not been attending the YSTIR program in relation to the offence of unlawful wounding.

15 His Honour referred to similarities and differences, as he judged them, between the circumstances in the case of *DBW* and the circumstances in the respondent's case. He noted the similarities as both offenders were first offenders and that both had done things to rehabilitate themselves since the offending. His Honour noted the differences as follows. In the case of *DBW* the offender was sentenced to a period of detention. If a custodial sentence was imposed against the respondent then it would have to be served in an adult jail. The second difference that His Honour noted was the far greater effort made by the respondent to rehabilitate himself prior to sentence than that of *DBW*. His Honour referred to the extent and positive engagement by the respondent in the YSTIR program relating to his first two offences. The respondent participated in the YSTIR program from 17 June 2011 to when he was sentenced. The third point of difference referred to by His Honour was the need for greater weight for general deterrence in the case of *DBW* as it involved an offender taking a dangerous weapon to what was always going to be a well attended event in a public place. His Honour also noted a difference in the weapon used to inflict the wounding.

16 The final point of difference between the two cases noted by His Honour concerned the factual issue of the offender's intent at the time of the commission of the offence. In the case of *DBW*, there was no

provocation at all by the victim and the circumstances clearly showed that the offender intended to harm the victim with the weapon used. In the current case, His Honour made the following comments on the issue of intent to cause injury by the use of the broken bottle:

... You got yourself into an argument and whilst you should have left, and I made comments earlier about that, your actions were not justified in any sense whatsoever.

The weapon that you got was not something you carried all night. You created it then and there and then it's not clear from the facts that you intended to stab the person with it, but it is quite clear that whilst you may not have intended to, you without doubt were so reckless in the use of it and you were clearly aware that you had it in your hand, you just punched nevertheless with that weapon in your hand.

17 Clearly an intent to harm or to wound is not an element of the offence of unlawful wounding pursuant to s 301(1) of the *Criminal Code* (WA). Indeed, having an intent to harm and causing bodily harm pursuant to s 304(2) of the *Criminal Code* is an even more serious offence by nature than an offence of unlawful wounding. That said, in a case of unlawful wounding, it would be proper to take into account the issue of intent as part of the factual matrix for the purpose of sentence. This could only be done in a way that was adverse to an offender if it was open on the facts to properly make a specific finding that the offender had an intent to harm or wound.

18 Whether in this case the respondent had an intent to harm or wound the victim with the broken bottle or whether he just acted recklessly is an important issue on the question of sentence. I will deal with that point later in my analysis.

Whether magistrate had power to impose suspended imprisonment or conditional suspended imprisonment

19 In the course of submissions the question arose on whether His Honour had any power to impose a sentence of suspended imprisonment or conditional suspended imprisonment under the *Sentencing Act*. No decision was made by His Honour on that question. In my view this Review requires that question to be resolved.

20 The relevant statutory provisions that need to be considered to decide this question are contained in ss 50B and 118 of the YO Act and s 21 of the CC Act.

21 Section 50B of the YO Act relevantly provides:

50B. Offender aged 18 or over at time of sentence, options

- (1) This section applies to and in respect of a young person found guilty of an offence who at the time of being sentenced is 18 years old or older (*the offender*).
- (2) Subject to the *Sentencing Act 1995* the court dealing with the offender must dispose of the matter by sentencing the offender under that Act, and that Act and the *Sentence Administration Act 2003* apply to and in respect of the sentence imposed.
- ...
- (4) If the court dealing with the offender is the Children's Court, subsection (2) is subject to section 21 of the *Children's Court of Western Australia Act 1988*.
- ...

22 Section 21(2) of the CC Act relevantly provides:

- (2) The Court when constituted by or so as to include a magistrate cannot —
 - (a) sentence an offender to a term of detention longer than 12 months; or
 - (b) sentence an offender who at the time of being sentenced is under 18 years of age to a term of imprisonment longer than 3 months; or
 - (c) sentence an offender who at the time of being sentenced has reached 18 years of age to a term of imprisonment longer than 6 months,

for one offence, or as the aggregate of the sentences imposed on the one occasion for more than one offence.

23 Section 118 of the YO Act provides as follows:

118. Offences punishable by imprisonment, options

- (1) If the statutory penalty for an offence is or includes imprisonment and the court dealing with the offender decides to impose a custodial sentence, the court may —
 - (a) impose a term of imprisonment under Part 13 of the *Sentencing Act 1995* but may not impose suspended imprisonment under Part 11 of that Act or conditional suspended imprisonment under Part 12 of that Act; or

- (b) sentence the offender to a term of detention that is not longer than the term of imprisonment to which the offender would have been liable if the offender were not a young person.
- (2) Despite section 86 of the *Sentencing Act 1995* the court sentencing a young person to a term of imprisonment or a term of detention may impose a term of 6 months or less.
- (3) If the court sentences an offender to imprisonment it may, subject to Part 14 of the *Sentencing Act 1995*, also sentence the offender to indefinite imprisonment.
- (4) If the court sentences an offender to imprisonment it may, if the offender is at least 16 and under 18 years old and having regard to the matters in section 178(4)(a), direct that the offender serve the sentence in a prison under the *Prisons Act 1981*.
- (5) If the court sentences the offender to a term of imprisonment, the *Sentencing Act 1995* and the *Sentence Administration Act 2003*, with any necessary changes, apply to and in respect of the sentence imposed.

24 Can I first refer to s 118 of the YO Act. In my view, s 118 applies when the Court sentences an offender who is aged less than 18 years at the time of sentence. While s 118(1)(a) empowers the Court to impose a term of imprisonment under Part 13 of the *Sentencing Act*, the matter is nevertheless still disposed of under the YO Act with the option of imprisonment added to the sentencing options available under the YO Act by reason of s 118(1)(a). That can be contrasted with s 50B of the YO Act which clearly applies to sentencing an offender who is 18 years old or older at the time of sentence and who, by reason of s 50B(2), must be sentenced under the *Sentencing Act*. Therefore, in such cases, the only sentencing options open to the Court are those provided in the *Sentencing Act*.

25 That analysis is important because flowing from it is the conclusion that the prohibition of imposing suspended imprisonment under Part 11 of the *Sentencing Act* or conditional suspended imprisonment under Part 12 of the *Sentencing Act* as provided in s 118(1)(a) of the YO Act only applies when sentencing an offender who is less than 18 years of age at the time of sentence.

26 The sense of that is readily apparent. If an offender less than 18 years of age could be sentenced to suspended imprisonment or conditional suspended imprisonment then upon a breach of the order, unless there was

a reason that would make it unjust, the offender would have to serve time in an adult prison. In my view that was never intended and generally, it would be undesirable. It should also be noted that the YO Act does provide for a custodial sentence short of immediate custody in the form of a conditional release order for offenders less than 18 years of age.

27 The next step in the analysis is to consider the provisions of s 50B(4) in combination with the provisions of s 21(2)(c) of the CC Act. The conclusion from reading these provisions in combination is that the Court when constituted by or so as to include a magistrate can sentence an offender who is 18 years old or older at the time of sentence to a sentence of imprisonment under the *Sentencing Act* of 6 months or less.

28 In my view, this interpretation is further supported by and consistent with the provisions of s 118(2) of the YO Act which properly interpreted means that the prohibition of sentences of imprisonment of 6 months or less as provided in s 86 of the *Sentencing Act* does not apply when sentencing young offenders under the YO Act.

29 The final step in the analysis is that if s 50B of the YO Act applies and the sentence is being imposed under the *Sentencing Act*, then the Court if constituted by a magistrate can impose a sentence of imprisonment of 6 months or less under the *Sentencing Act*. In my view, flowing from that the Court so constituted could also then impose suspended imprisonment under Part 11 of the *Sentencing Act* or conditional suspended imprisonment under Part 12 of the *Sentencing Act*.

30 I wish to add that when this analysis is applied to the Court when constituted by a judge, it would be open to the Court when sentencing an offender 18 years old or older under the *Sentencing Act*, to impose suspended imprisonment under Part 11 of the *Sentencing Act* or conditional suspended imprisonment under Part 12 of the *Sentencing Act* with the term of imprisonment suspended being longer than 6 months.

31 For all these reasons, I am of the view that when His Honour sentenced the respondent he had available to him the sentencing options of suspended imprisonment or conditional suspended imprisonment under the *Sentencing Act* but subject to the limitation that the term of imprisonment suspended had to be 6 months or less. As to the length of the term of the suspension of any imprisonment term, the relevant provisions of the *Sentencing Act* applied.

32 Given that His Honour did not decide or at least indicate whether the sentencing options of suspended imprisonment or conditional suspended

imprisonment under the *Sentencing Act* were available, I think it fair to conclude that he proceeded on the basis that the only sentencing options really open for consideration on each of the offences, and in particular the unlawful wounding offence, were the options of immediate imprisonment and an intensive supervision order. With respect, I think that His Honour erred in approaching the sentencing in that way.

The respondent's antecedents and mitigating factors

33 The respondent pleaded guilty to all of the offences. He had no record of any prior convictions. Having no record of course carries great weight, but in the respondent's case the favourable weight is progressively reduced when consideration is given to the second and then the third of the three offences respectively.

34 As already mentioned, the respondent was 17 years old at the time of the offences and is now only 18 years old. Accordingly, weight must be given to his youth, but not as much as if he was extremely young.

35 At the time that the respondent committed each of the offences he was using alcohol and illicit substances, and associating with negative peers. His Honour properly took into account the respondent's voluntary engagement in the YSTIR program. When the respondent came to be sentenced he had ceased using illicit substances. He was still binge drinking from time to time. He also continued to have an anger management problem.

36 The respondent's engagement in the YSTIR program was only connected to his first two offences. He would not have been eligible for the YSTIR program for the offence of unlawful wounding because of its high level of seriousness and the real potential for an immediate custodial sentence. His Honour indicated to the respondent that had he not done the YSTIR program then he would have been sentenced to an immediate custodial sentence and that he had avoided imprisonment by the skin of his teeth.

37 Subsequent to the offending, the respondent has re-established his relationship with his parents, continues to have the support of both of his parents, has been working (more recently with his father) and has completed the 100 hours of community work the subject of the intensive supervision orders. Both of his parents have indicated that they have noticed extraordinary changes (positive) in the respondent. He is currently living with his parents.

38 The pre-sentence report recommends that the respondent engage in a cognitive brief intervention program and a substance abuse program, and that he consult a general practitioner on his Attention Deficit Hyperactivity Disorder. Counsel for the respondent submitted at first instance that if His Honour considered imprisonment appropriate because of the seriousness of the unlawful wounding offence, that he should suspend it to be served in the community.

Analysis and conclusions

39 In my view, this Review can be fairly determined by focusing on the sentence imposed for the offence of unlawful wounding.

40 Can I first deal with the factual issue of whether the respondent intended to harm the victim with the broken bottle or rather whether he struck the victim with the broken bottle in his hand with reckless indifference.

41 On my assessment of the facts which were not an issue, namely, that the respondent was angry with the victim, that he deliberately smashed the bottle and then took hold of it by the neck to threaten the victim with it, that he then almost immediately upon breaking the bottle moved around the table and approached the victim with it in his hand, that the victim stepped away from him as he did so, that there is no suggestion at all by anyone including the respondent that the victim struck him first, that almost immediately after confronting the victim he engaged in a fight with the victim and punched him to the face with the broken bottle in his hand, the only reasonable inference open is that when the respondent punched the victim with the broken bottle in his hand, he intended to harm the victim with the broken bottle.

42 With respect, I think that His Honour should have considered the seriousness of the facts of the offence and his overall consideration of sentence on that basis. Approaching the overall consideration on that basis, I think that a custodial sentence was and is warranted. In my view, great weight should be attached to deterrence, both personal and general, in cases where an offender deliberately arms himself with a broken bottle and strikes a victim in the face with it with the intention of harming the victim with the broken bottle. Such behaviour carries the real potential for life threatening injury, loss of eyesight, facial nerve damage, dental injury, and permanent scarring. In this particular case the greater weight for deterrence needed to be given to general deterrence.

43 In my view a community based order did not and would not properly
reflect the seriousness of the factual circumstances and the need for
deterrence.

44 With respect, I think that His Honour erred in his overall
consideration of the proper sentence for the offence of unlawful
wounding. In addition to not giving sufficient weight to the seriousness of
the circumstances of the offence by reason of the respondent's intention to
physically harm the victim, I think that he placed too much weight on the
respondent's engagement in the YSTIR program.

45 I also think that while His Honour properly distinguished the factual
circumstances in this case from those in the case of *DBW*, he did not after
doing so then consider and give proper weight to the objective seriousness
of the facts in this particular case.

46 On my assessment of everything, a sentence of 6 months
imprisonment was and is the appropriate sentence for the offence of
unlawful wounding. The key question in this case on the offence of
unlawful wounding, is whether or not the term of imprisonment should be
suspended or conditionally suspended.

47 Considering everything again and applying the relevant objectives
and principles in the YO Act I think that the combination of the
respondent's plea of guilty, lack of record, youth, positive engagement in
the YSTIR program and steps towards rehabilitation, good prospects of
rehabilitation given the positive changes he has made to his lifestyle and
with the support of his parents, and his proven good work ethic, provides
sufficient weight to outweigh the seriousness of the offence and the need
for deterrence by the barest of margins, such that a sentence of conditional
suspended imprisonment is appropriate.

48 In settling the terms and conditions of the conditional suspended
imprisonment order, I need to take into account that the respondent has
done the 100 hours community work and that such work was ordered to
be done concurrently for all three offences and not just for the offence of
unlawful wounding.

49 In my view, the proper sentence for the offence of unlawful
wounding is a term of 6 months imprisonment conditionally suspended
for a term of 12 months on condition that he attends substance abuse
counselling as directed and that he engages in the cognitive brief
intervention program as directed.

50 In my view that sentence of conditional suspended imprisonment sits comfortably with the sentences of the intensive supervision orders for the other two offences. I also think that all of these sentences properly deal with the totality of the respondent's criminality.

Final orders

51 For all of these reasons:

1. The sentence imposed by His Honour for the offence of unlawful wounding is set aside and substituted with a sentence of 6 months imprisonment conditionally suspended for a term of 12 months on condition that he attends substance abuse counselling as directed and engages in the cognitive brief intervention program as directed, with such order being effective from today, and
2. The sentences imposed by His Honour for the offences of assault occasioning bodily harm and assaulting a public officer performing a function of his office are confirmed.