[2012] WACC 19

JURISDICTION	**:**	CHILDREN'S COURT OF WESTERN AUSTRALIA IN CRIMINAL
LOCATION	**:**	PERTH
CITATION	**:**	BEAA -v- THE STATE OF WESTERN AUSTRALIA [2012] WACC 19
CORAM	**:**	JUDGE REYNOLDS
HEARD	**:**	26 OCTOBER 2012, 2 NOVEMBER 2012
DELIVERED	**:**	16 NOVEMBER 2012
FILE NO/S	**:**	CFR 360 of 2012
BETWEEN	**:**	BEAA Applicant AND THE STATE OF WESTERN AUSTRALIA Respondent

Catchwords:

Criminal law - Reviews by President of the Children's Court - Assaults on police officers - Bodily harm caused - Child offender 17 and a half years - General deterrence - Custodial sentence - Turns on own facts

Legislation:

Children's Court of Western Australia Act 1988 (WA)
Criminal Appeals Act 2004 (WA)
Criminal Code (WA)
Young Offenders Act 1994 (WA)

Result:

On review, sentence of 3 months immediate detention increased to 8 months immediate detention.

Representation:

Counsel:

Applicant	:	Mr S A Gabriel
Respondent	:	Ms C L Noonan

Solicitors:

Applicant	:	Stephen Gabriel, Barrister
Respondent	:	Office of the Director of Public Prosecutions

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

Chan v The Queen (1989) 38 A Crim R 337
R v Walker (unreported, Court of Criminal Appeal, WA, No 115 of 1985)
Whittaker v The King (1928) 41 CLR 230

JUDGE REYNOLDS:

Introduction

1 This is an application pursuant to s 40 of the *Children's Court of Western Australia Act 1988* (WA)(the CCt Act) for the review of a sentence made by a magistrate of this Court on 13 September 2012 whereby a sentence of 3 months immediate detention was imposed against the offender.

2 The offender was sentenced for the offence that on 22 April 2012 at Spearwood he assaulted a public officer (a police officer) then performing a function of his office.

3 The offender pleaded not guilty on 17 May 2012 when he first appeared before the Court on the charge. On 24 May 2012 he pleaded guilty but took issue with part of the statement of material facts. A hearing to determine the facts for sentence was conducted by a magistrate on 31 August 2012. The magistrate determined the facts and adjourned the matter to 13 September 2012 for a pre-sentence report and sentence.

4 On 13 September 2012 the offender was sentenced to a term of 3 months immediate detention for the offence. That was not the only offence for which he was sentenced on that date. I will refer to the other offences later in these reasons when I set out and comment on the offender's record.

The ground of the application

5 The application provides that the offender seeks to discharge the order imposed by the magistrate and to substitute it with a juvenile conditional release order so that his employment is not further jeopardised by this matter. The application is opposed by the State.

Comments on reviews and potential for higher sentence

6 When the application first came before the Court on 21 September 2012 the offender was released on bail pending the hearing. The material presented to the Court on that date was somewhat deficient. It is desirable to finalise applications for reviews quickly. For that to happen applicants should file the necessary material in a timely way. I intend to issue a practice direction to ensure that happens in future.

7 I need to mention an important issue which arose during the hearing of this application. It concerns the power of the President of the Court on

an application for review pursuant to s 40(1) of the CCt Act to discharge and substitute the sentence of the magistrate which is under review with a higher sentence when the application is for the magistrate's sentence to be reduced. To better understand the issue and how it arose in this case it is first necessary to highlight the distinction between a review and an appeal from an order of a magistrate of this Court.

8 Section 40 of the CCt Act deals with reviews of orders of magistrates by the President of this Court and s 41 of the CCt Act deals with appeals from orders of magistrates to the Supreme Court of Western Australia. The separate provision for each of reviews and appeals in the CCt Act makes it clear that there is a distinction between the two.

9 Pursuant to ss 40(1) and (2) of the CCt Act, the Court when constituted by the President may of its own motion or upon application made by the prosecutor or the offender, reconsider the order and confirm it or discharge it and substitute it with any other order that the Court, if constituted by the President, could have made in relation to the offence.

10 Section 41 of the CCt Act provides that an appeal against a magistrate's order may be made under and subject to Part 2 of the *Criminal Appeals Act 2004* (WA) (the CA Act). Section 8(1) of the CA Act provides that such an appeal may be made if the magistrate made an error of law or fact, or of both law and fact, acted without or in excess of jurisdiction, imposed a sentence that was inadequate or excessive, or because there has been a miscarriage of justice.

11 Section 8(1) of the CA Act essentially puts in statute what the common law position was in cases such as ***Whittaker v The King (1928) 41 CLR 230***, ***R v Walker (unreported, Court of Criminal Appeal, WA, No 115 of 1985)*** and ***Chan v The Queen (1989) 38 A Crim R 337***.

12 In my view a review is not an appeal and should not be equated with an appeal. If a review by the President was intended to be the same as an appeal then the CCt Act would have provided that appeals could be made to the President or the Supreme Court.

13 When the legislation was introduced to Parliament, the then relevant Minister stated that the provisions of s 40 of the CCt Act would provide for consistency of sentences in this Court and also provide a speedy, accessible and relatively inexpensive alternative to appeals to the Supreme Court against sentences of this Court.

14 Given all of that, in my view when the President conducts a review pursuant to s 40(1) of the CCt Act, it is not necessary for the President to find that the magistrate made an error of law or fact or both or that the sentence was inadequate or excessive before the President can reconsider the sentence and then confirm it or discharge it and substitute it with another sentence.

15 A review is a hearing de novo. Consistent with that, it is open for the parties to put additional information before the President to be included in the reconsideration. Indeed, additional information has been provided and relied upon by the offender in the hearing of this application. It is also open to the President to call for more information to be provided including an updated pre-sentence report or psychiatric or psychological report.

16 A key point arising from all of that is that the President is in no way limited by the sentence ordered by the magistrate. After a reconsideration of all of the relevant material, including fresh material, it is open to the President to decide and impose a lower or higher sentence by reference to option and/or term and conditions. That is the case no matter which party, the prosecution or the defence, applies for the review, subject of course to the rules of procedural fairness always being applied. It is clear from an exchange between myself and counsel for the offender that he was well aware that the hearing of the application is a hearing de novo and that it is open to me to impose a higher sentence if I considered it proper. Of course in fairness I should add that he has argued that I should not do that in this particular case.

17 All of that said, I should add that clearly it is not desirable for parties to make applications pursuant to s 40(1) of the CCt Act simply to have another go. The President being empowered by s 40(1) to substitute the sentence of the magistrate with a sentence that the President could have made will provide a disincentive to some offenders in some cases given that the President has far greater sentencing powers than a magistrate. In addition to that, I have always approached reviews, and properly so in my view, on the basis that while a review is a hearing de novo, as President, I will not change the sentence of the magistrate unless upon a reconsideration I find that a different sentencing option should have been imposed and/or that the term and/or the conditions of the order was not or were not within an exercise of a sound sentencing discretion.

18 I now come to mention the important issue which arose during this hearing. After hearing the submissions from both counsel for the applicant

offender and the State on 26 October I adjourned the application to 2 November 2012 to enable me to reconsider the order of the magistrate. After considering everything I reached the preliminary view that the order was arguably manifestly inadequate. To be more particular, I reached the view that immediate detention is the only proper sentencing option and that the proper length of the term is arguably longer than three months as ordered by the magistrate.

19 When counsel for the parties and the offender appeared on 2 November 2012 for my decision I told them my preliminary view. I also said that to ensure procedural fairness, and particularly for the offender, I would give his counsel whatever reasonable length of time he needed, including an adjournment, to prepare further submissions. He sought an adjournment to 5 November 2012 which I granted. I remanded the offender in custody.

20 On 5 November 2012 counsel for the offender applied to withdraw the application for review. I refused to grant leave for the application to be withdrawn. The basis of the refusal was that the application had already been the subject of a bail application, submissions and a consideration by me which had resulted in me giving a preliminary indication of my view on it. I also indicated that anyway, I considered it both necessary and proper for me to reconsider the order of the magistrate on my own notion pursuant to s 40(1) of the CCt Act.

21 After refusing to grant leave and hearing a few brief submissions, the application was further adjourned on the request of counsel for the offender to 7 November 2012 for further submissions to be prepared and then presented to me. On 7 November 2012 I heard some further brief submissions. These are my reasons and my decision.

The factual circumstances of the offence

22 At about 11:15 pm on Saturday 21 April 2012 the police officer who was assaulted in this incident, heard a radio call from other police officers for urgent back up to attend a park in Spearwood where about 80-100 youths were fighting on an oval. The police officer activated the emergency lights on his police vehicle and travelled to the scene. He arrived there at or shortly after midnight. Upon arrival, he observed more than about 80 youths running around and minor fights breaking out. The police dispersed most of the youths but a small number remained.

23 At the hearing on the facts the police officer gave evidence as follows on what happened after he arrived at the scene. He estimated that

the 80-100 youths ranged in ages from 15-16 through to about 20-22 years of age. There were small spot fights breaking out. There were youths engaging in intoxicated behaviour such as yelling, screaming, and being abusive. Some youths were holding alcoholic drinks. He spent about ten minutes with others trying to break up fights and when doing so was conscious of making sure that he and other officers were safe.

24 There came a point when he observed two police officers on the ground trying to arrest someone. As they were trying to do so, a crowd of about 30-40 people moved, not quite running but in a fast manner, towards the officers on the ground. Then, with about another five or six police officers, he approached the officers on the ground to form a protective ring around them to enable them to protect them from the group and to do their job. In the course of doing that he moved one person out of the way.

25 After the police officer had positioned himself in this way, he noticed a person move towards the two officers and the person on the ground and try to reach down to grab at the police officers. To prevent that person from interfering, the police officer pushed him to the side and in the course of doing so the police officer slipped over and landed on his knees on the ground. That person is the offender. While on the ground on his knees the complainant police officer turned his attention to his firearm to check that it was still secure. As he started to get up he felt a stinging blow to the left side of his jaw. It is clear from the officer's evidence that he did not see the punch coming.

26 Another police officer who was at the scene on the night also gave evidence. He observed a police officer on the ground attempting to gain some control over a male. He saw the complainant police officer in his police uniform standing nearby. He also saw a number of youths suddenly approaching them and he sought to ensure officer safety for the officer on the ground. When he next observed the complainant police officer that officer was checking on the security of his firearm. The other police officer then observed a male person slightly to the rear of the complainant police officer. That male person appeared to be moving backwards and forwards and then moved towards the complainant police officer and appeared to use his right fist to strike him to the left side of his face. As a result of the blow the complainant police officer appeared to be a little disorientated.

27 At the hearing on the facts the offender gave evidence that after the party was broken up, everyone went outside and fighting started. He said

that his girlfriend got knocked over and as he tried to help her up someone punched him and they had a fight. He then walked off towards his car and after he had gone some distance a couple of mates of the person he had been fighting with jumped him from behind. The offender went on to say that police tackled the guys that were on top of him. He says that after that he was again tackled from behind. He thought that it was one of the guys who had tried to fight him and so he just swung a punch with his right hand. He described it as a kind of upper cut. The punch landed on the face of the person who must have been the police officer. He said that at the time he did not know that it was a police officer.

28 In cross-examination the offender said that no one pushed him away from trying to get at police and another person wrestling on the ground. He also denied that he was agitated and jumping around before he punched the police officer.

29 Also during cross-examination the offender gave evidence that he got a bit drunk that night. He said that he started drinking on the day in question as soon as he arrived at the party at 9:00pm. He then had eight to ten cans of Jack Daniels which he accepted had a fairly strong alcohol content. I note that a police officer who gave evidence at the hearing on the facts said that he did not conduct a video record of interview with the offender because the offender had told him that he had consumed ten cans of alcohol. When asked how good was his recollection of the night he said that it was not that good and that he did not remember anything. I note that when it was put to him in cross-examination that he had been pushed back by the officer before the assault he said no and that he did not even see any police officers around.

30 Two friends of the offender were called to give evidence at the hearing on the facts. I note that one of them said that the offender was intoxicated when he showed up at the party which is inconsistent with the offender's account.

31 After all of the evidence and submissions in the hearing on the facts, the magistrate gave reasons in which he stated that he found beyond reasonable doubt that the facts were as presented by the prosecution. His reasons included the following passages:

> The essence of it is police were on the ground struggling with an individual and the complainant and other police officers went to assist the police who were struggling on the ground by forming a semicircle around the struggle on the ground to form a barrier against an approaching group of 30 or 40 youths.

> One person was moved out of the way, the accused who was on his feet, not on the ground, was seen by the complainant to reach out or move in towards the police officer on the ground as if the grab them, or one of them. The complainant then pushed him out of the way, and in the course of doing so lost his balance and fell. The accused then fairly quickly was on his feet or had not been – it is unclear whether he was – whether he ever lost his footing.
>
> The accused was seen by another officer to be in an agitated state moving backwards and forwards, and as the complainant was getting up, he looked down to check that his weapon was secure and then was struck by the accused from the side and slightly behind. The accused was then arrested. The accused on the other hand said that he was being attacked, punched and kicked by two youths. He was on the ground, police tackled the guys who were on top of him and then they tried to tackle him.
>
> He says that he thought it was the guys who first attacked him, even though he was aware there were police around. He thought it was the guys who had first attacked him, and as he was getting up he swung a punch with his right hand which connected on a police officer's face. He also said that he was very drunk and he, under cross-examination, indicated that his memory was very vague.

The injuries suffered by the police officer

32 The police officer suffered soft tissue injuries to his neck, shoulder and throat. At the hearing on the facts he described the pain to his neck muscles as 'extreme discomfort and soreness'. He also suffered bruising to the left side of his face. The soft tissue injuries resulted in restriction of the range of movement of his neck. He lost consciousness and suffered mild concussion on the night. He was treated at Fremantle Hospital after the incident and prescribed analgesia and has had numerous sessions of physiotherapy. He was also required to wear a mould at night to realign his jaw.

33 The police officer also suffered serious dental injuries which required numerous dental appointments. The dental injuries included cracking to the root of an upper right pre-molar and two chipped teeth. A temporary filling placed on the pre-molar failed and the tooth had to be extracted. The two chipped teeth were repaired by fillings. The process of replacing the pre-molar with a false tooth may require a bone graft and other facial surgery. It may take another six months or so before that is completed.

34 The police officer has had to endure a variety of symptoms as a result of the injuries. He suffered from constant headaches during the day for the first month after the offence. The medication he was required to

take made him feel drowsy. He has had problems sleeping. The soft tissue and dental injuries have caused pain. He has a very young child and has been unable to lift and hold him as a parent would wish.

35 Prior to the offence the police officer was obviously keen on maintaining a high level of fitness and frequently attended a gym. The injuries have significantly curtailed his physical activities including his gym work. They have also for the time being at least prevented him from moving to another section of the police force which he was looking forward to. Finally, the injuries have caused financial loss because he has missed working some shifts and overtime.

36 Bodily harm is defined in the *Criminal Code* to mean any injury which interferes with health or comfort. In my view when the injuries of the police officer are applied to that meaning it is open to conclude, and I do, that the bodily harm suffered by the police officer is a serious case of bodily harm.

Personal circumstances of the offender

37 The offender was born in Perth on 25 November 1994. Therefore he is now 17 years and 11 months of age. At the time of the offence he was about 17 years and 6 months of age.

38 In a psychological report dated 14 May 2012 (the psychological report) the offender's mother reported that the offender had always been 'hyperactive and impulsive' and that when he was 7 years of age he was diagnosed with Attention Deficit Hyperactivity Disorder. For a number of years the offender was on prescribed medication for this disorder. The offender's mother informed the clinical psychologist that it was decided to stop using the medication because it completely altered the offender's behaviour and personality.

39 The offender has lived all of his life in Perth save for a brief period in 2010. In July 2005 when the offender was only about 12 years of age, sadly his father passed away. Thereafter he continued living with his mother and two sisters. In 2008 his mother entered into another relationship.

40 On the material before the Court it seems that the offender initially had a positive relationship with his step-father. In about July 2010 the offender moved to Queensland to live with his step-father and step-brother. It seems that the thinking behind the offender moving to Queensland was to get him away from negative peers and for him to put

more time into his studies. It appears that the offender has always had difficulty with regulating his behaviour in a school setting and particularly since his father's death. During high school he was consistently suspended for verbal aggression and fighting.

41 The offender's step-father had difficulty managing him in Queensland and without prior warning or discussion sent him back to Perth in December 2010 to live with his mother. His mother has indicated that her partner was not used to the offender's behaviour, which she described as developmentally appropriate for a teenage boy, and that this had lead to conflict between the offender and his step-father. It seems that the offender feels a sense of abandonment and rejection from his step-father sending him back to Perth.

42 While the psychological report was prepared for other offences, those other offences included two common assaults committed on 28 April 2012 which is only six days after this offence of assault against the police officer and so very proximate to it. Therefore, some of the comments made by the clinical psychologist in the psychological report can be applied in this case.

43 In the psychological report at page 4, the clinical psychologist stated:

> …it is clear that he has difficulty managing his anger and distress; something that has become more problematic in recent times. By all reports [BEAA] has always been an impulsive individual, however his anger appeared to become an issue following his father's death. Indeed, it is not unusual to see unresolved grief manifest in anger and aggressive behaviour – particularly in young males. [BEAA]'s unresolved grief and a lack of a father figure seems to have been exacerbated by the difficult relationship he shares with his step-father.

44 And:

> It is clear that [BEAA] has difficulty dealing with any form of distress in an adaptive manner, meaning when he is presented with a situation that makes him sad, angry, frustrated or anxious he physically acts out.

45 After the offender returned to Perth he chose to abandon schooling and to pursue employment. He obtained work for some periods of time during 2011. In September 2011 his step-father returned to Perth and employed the offender in his business until February 2012.

46 Between February 2012 and the end of March 2012 the offender was generally unemployed. He obtained employment in early April 2012 but decided to leave after about two weeks. In late April 2012 he obtained

employment which he maintained until July 2012. Within that period of time he spent 23 days in detention as a result of a sentence imposed on 21 May 2012 for the two common assaults. Thereafter he commenced employment as a trade's assistant with an electrical business and is still currently working full time in that employment. His employer has provided a reference which is worded in positive terms. I have been informed that the offender is an apprentice with this employer.

47 It seems to me that the offender clearly had a problem with alcohol well before and at about the time of this offence. In my view it is likely that he still has a problem with alcohol. I say that he likely still has a problem because there is no suggestion that he has engaged in any substance abuse program since the offence and his word on his alcohol consumption, put simply, cannot be trusted. Although he is currently working, that does not necessarily mean that he does not have an alcohol problem. Indeed, he was employed in the past when he clearly had an alcohol problem.

48 On the night of the assault he had consumed a lot of alcohol. I note that in the hearing on the facts, in cross-examination, he was asked whether or not he was a seasoned drinker and he answered 'no, I stopped drinking after that night'. That can be weighed against the contents of the psychological report in which mention was made that he had consumed alcohol prior to committing the two common assault offences on 28 April 2012. I note the statement of the clinical psychologist in the psychological report that in her view the offender minimised his difficulties with alcohol.

49 The issues relating to the death of the offender's father and abandonment by his step-father may have contributed to and still be contributing to a drinking problem. Alternatively, it may be solely attributable to him with peers being part of a drinking culture. It may be a combination of the two. Whatever the situation may be, it seems to me that he has minimised drinking as a problem.

50 I do not weigh any of that against the offender when considering the proper sentence. What I do wish to say about it is, first, that his intoxication in relation to this offence is no excuse for his behaviour, and secondly, that while he is in custody he should be offered a substance abuse program.

51 The offender has a record which shows that between February 2011 and April 2012 he frequently engaged in anti-social behaviours. The

record also shows that he has failed to give proper regard to orders of the Court.

52 On 10 March 2011 the offender was placed on a youth community based order for a term of three months. That order related to offences of disorderly behaviour and escaping lawful custody both committed on 13 February 2011. The escape was no doubt an escape from police. On 21 April 2011 the offender breached that order by committing an offence of trespass. He was placed on a good behaviour bond for a term of three months for that trespass offence. At the time he committed the trespass he was engaged in a Juvenile Justice Team referral. I have not mentioned and included the offence for which the Juvenile Justice Team referral was made because it cannot be taken into account to decide the sentence on this matter. I have only mentioned it to show that the offender committed the trespass offence at a time when he was subject to a prevention and diversion regime.

53 On 10 November 2011 the offender appeared before the Court for four more trespass offences, two stealing offences and two wilful damage offences committed between 13 June 2011 and 14 July 2011. He was also before the Court on that date to be dealt with for breaching the good behaviour bond. Some of those new offences further breached the youth community based order imposed on 10 March 2011. On 12 January 2012 he appeared before the Court for an offence of stealing a motor vehicle which he committed on 17 June 2011. He was fined for that offence.

54 On 19 April 2012 the offender appeared before the Court for sentence for a new offence of trespass committed on 14 March 2012 and also for offences of damage and being armed or pretending to be armed in a way that may cause fear, both committed on 3 March 2012. He was placed on an intensive youth supervision order for a term of six months for those three new offences. I should add that the offence of being armed involved him using a machete to threaten a security officer at a shopping centre after the security officer had required him to clean the floor when he had knocked a bucket over and spilled its contents on the floor in the shopping centre. I note that the offender ran outside to a car in the shopping centre car park after he had knocked over the bucket and then got the machete out of a car and ran back into the shopping centre and threatened the security officer with it. I mention that because it shows that the offender reacts aggressively even after he has had some time for his anger to cool.

55 The current offence under review of assaulting the police officer was committed only three days after the offender was placed on the intensive youth supervision order.

56 On 21 May 2012 the offender appeared before the Court on two fresh charges of common assault to which I have previously referred both committed on 28 April 2012 and also for breaching the intensive youth supervision order. He was ordered to serve 23 days of immediate detention on each of the two common assault offences to be served concurrently.

57 I am very aware that the two offences of common assault just mentioned are not prior offences for the purpose of sentencing the offender on this assault against the police officer. However, the point that I wish to make is that not only did the offender breach the intensive youth supervision order by committing the offence of assault under review, but he also committed those two offences of common assault only six days after he had been released on bail for the offence of assault under review.

58 Returning to 13 September 2012 when the offender was sentenced for this offence of assault under review, he was also sentenced on that date to one day of immediate detention for failing to pay fines on the six trespass offences, the two stealing offences, and the two wilful damage offences to which I have earlier referred. Those terms of 1 day in immediate detention were ordered to be served concurrently with the term of immediate detention of three months for this offence of assault.

59 It is true that the offender's record contains no prior offence of assaulting a police officer or any other public officer. That provided some mitigation. However, in the overall consideration of the proper sentence for this offence under review, I think it fair to say that the offender's record as a whole provided him with little mitigation. The offender's record shows that he was engaging in anti-social behaviour, including threatening behaviour with a machete, for a lengthy period of time before this assault on the police officer.

Analysis

60 Parties at night which deteriorate to young adults and/or children engaging in violent and other anti-social behaviours in and about houses, community facilities and public streets, and then defying police and being aggressive towards police when they arrive at the scene, have become a serious problem in suburbs of Perth. Usually those involved have consumed too much alcohol.

61 When these incidents happen, members of the community call on the police to come and restore peace and good order.

62 Unfortunately the practical reality is that the work of police officers in the field is always difficult and carries an element of personal risk. Some situations will be more difficult and carry greater personal risk than others. No matter what the level of difficulty and personal risk may be, police officers meet the expectations of the community and answer calls for assistance generally and for these kinds of incidents.

63 There are no doubt many situations where police officers would be reasonably apprehensive about their own safety and wellbeing when they attend a scene. It seems to me that this incident would have been one of those situations. The police officer who is the victim of this offence answered a call at 11:15 at night for urgent back up to attend a park in a southern suburb of Perth where about 80-100 youths were fighting on an oval. When he received the call it would have been reasonable for him to believe that upon his arrival at the park he would have to deal with youths who were intoxicated. Indeed, that is precisely what he had to contend with when he arrived at the park and one of the intoxicated youths was the offender.

64 When police officers answer calls from the community and attend such incidents and lawfully go about trying to restore peace and good order, they are entitled to expect and should be given the full protection of the law. It is very important that young persons who engage in such anti-social behaviour and violence against police understand clearly that when police officers arrive at the scene they should stop their anti-social behaviour and comply with the lawful directions of the police officers. It is also necessary that they clearly understand that if they fail to do so and unlawfully assault a police officer who is lawfully carrying out his or her duty and cause him or her bodily harm then they will expose themselves to the risk of being sentenced to immediate detention and for a lengthy term in the more serious cases.

65 I think that it can be properly said that the community by its legislature has empowered police officers to enforce its laws and to maintain its peace and good order. An extension to that proposition is that an offence against a police officer lawfully performing his or her duty is an offence against the community itself.

66 While rehabilitation is always a relevant principle to be applied when sentencing a child, offences of unlawful assault against police officers and

particularly those unlawful assaults which cause bodily harm, also require substantial weight to be given to general deterrence and the protection of the community.

67 It is interesting to note that the charge in this case does not carry the element that the assault caused bodily harm to the police officer. If it did, then the offender would have been liable to be sentenced under the mandatory provisions set out in ss 318(1)(d), (1)(l), (2) and (5)(a)(i) of the *Criminal Code.* There was an application by the prosecution very late in the proceedings and after the offender had pleaded guilty to add bodily harm as an element to the charge. That application was refused. The failure to add bodily harm as an element when the charge was formulated in this case was probably an oversight.

68 In my view none of that is of any consequence and does not change what the proper ultimate decision on sentence can and should be in this particular case. I say that because when the offender is sentenced for this offence under the provisions of s 318(1)(m) of the *Criminal Code*, not only are the factual circumstances of the assault relevant to the overall consideration but so also is the fact that the officer suffered bodily harm and the nature and extent of it. I should add that there has not been any issue raised by the defence on the fact that bodily harm was caused and the nature and extent of it. Anyway, on all of the material presented to the Court there is simply no room for any doubt about any of that.

69 In my view, the factual circumstances of this particular offence are very serious and there is nothing about them which provides any mitigation for the offender. The police officer was lawfully going to the aid of his colleagues. When he was in a vulnerable position on the ground and not looking at the offender, the offender punched him to the left side of his face. This was an unprovoked, unnecessary and cowardly act by the offender. The police officer had no knowledge that he was about to be punched and so he had no opportunity to defend himself or take any evasive action. The punch was to the head. Given the immediate effect that the punch had on the police officer and the nature and extent of his injuries, the punch was clearly a very forceful blow.

70 There are two other circumstances of the offence which in my view aggravate it and support the need for substantial weight to be given to general deterrence. First, when a police officer is assaulted and injured when at a scene trying to disperse a large number of intoxicated youths and restore peace and good order, other police officers at the scene will likely be drawn to the injured officer to assist him or her. That in turn will

render them and other officers more vulnerable. It will also make their job more difficult.

71 Secondly, an assault of this sort committed in circumstances where it was in the view of a large number of intoxicated youths approaching police, has the real potential to inflame what is already a very volatile situation. That would also make the police officers more vulnerable and their job more difficult.

72 The nature and the factual circumstances of this offence including the fact that the police officer suffered injuries which amount to serious bodily harm make this a very serious offence and requires substantial weight to be given to general deterrence. Weight also needs to be given to personal deterrence although to a much lesser extent given that the offender has no record for an offence of this kind.

73 I repeat my previous comment that the facts of the offence provide no mitigation for the offender.

74 The offender's plea of guilty must be given favourable weight. However the amount of weight to be attached to it falls a long way short of what it would have been if he had pleaded guilty at the earliest reasonable opportunity and admitted the material facts. As mentioned, he initially pleaded not guilty and then later when he pleaded guilty he disputed material facts. That necessitated a hearing after which the material facts alleged by the prosecution were found proved.

75 A plea of guilty is taken as an indication of an offender's remorse. In my view the offender's version of the incident which was rejected by the magistrate shows that he actually has very little remorse. This is not a case of an offender having a hazy recollection of what happened because he was intoxicated at the time. This is a case of the offender positively asserting that he committed the offence in highly mitigating circumstances. The offender in this case clearly sought to minimise his responsibility for his assault on the police officer.

76 In my view the offender still fails to fully appreciate the level of seriousness of his behaviour in committing this offence.

77 I repeat my earlier comment that given that this is the offender's first offence of assaulting a police officer his record provides him with some mitigation. However, even factoring that in, his record taken as a whole provides little mitigation.

78 Those people who wrote references on the offender's character which were provided to the Court must have been unaware of his anti-social behaviour or chose to ignore it or have seriously minimised it.

79 Youth is a factor mentioned in the objectives and principles in the *Young Offenders Act 1994* (WA) (the YO Act) and so it must be weighed in favour of the offender. That said, I should add that what weight is given for youth will depend on the particular age and associated factors of the particular child offender in the particular case. The Court has jurisdiction to deal with children aged between 10 and less than 18 years of age, the age of criminal responsibility being 10 years of age. That is a wide range of ages. The levels of maturity, personal development and also what can be reasonably expected of a child of 10 years of age will be substantially different to that for a child who is just less than 18 years of age.

80 The provisions of s 29(2) of the *Criminal Code* which provide that a child under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do or make the omission, is consistent with and supportive of that proposition.

81 At the age of about 17 and a half years, the age of the offender at the time of the offence, he was old enough to clearly know what kind of behaviours were acceptable and what were not. In particular I have no doubt at all that the offender was very capable of knowing and knew that unlawfully assaulting a police officer was not just wrong and unacceptable but seriously wrong and unacceptable. Indeed children much younger are very well aware of that. In my view it is essential that a clear appreciation of that fact is maintained.

82 While commenting on this factor of youth I wish to add that I consider it fair to say that young people about the offender's age are highly represented within the group of people who are capable of knowing and behaving better and who need to be deterred from engaging in the very kind of anti-social behaviour that was involved in the lead up to and in the commission of this offence. Regrettably even younger children are also highly represented.

83 The main ground relied on by the offender in support of this application is that immediate detention will jeopardise his employment. In combination with that it is submitted that the offender has matured a lot since he committed the offence. I propose to deal with that in the context of rehabilitation.

84 The best interests of an offender and the community will be achieved by the rehabilitation of the offender. Some factors which maximise the prospects of rehabilitation, in no particular order or priority, are family support, stable accommodation, education and employment.

85 The offender has family support and stable accommodation. Notwithstanding those protective factors the offender still engaged in anti-social behaviour for a lengthy period of time before this offence and for a relatively short time thereafter. I note that he breached the curfew condition on his bail shortly before 13 September 2012 when he was sentenced by the magistrate. That said, I also note that since the offender was released on bail pending the hearing of this application he has applied himself at work. That is of course consistent with added maturity. Those things in combination must be weighed in his favour.

86 Given the importance of rehabilitation and in turn the importance of employment in the rehabilitation of an offender, this Court is always very mindful, as it should be, of any bail conditions or sentences which would operate to prevent a young offender from seeking or taking up employment or continuing in employment.

87 While this Court always gives substantial weight for rehabilitation, including employment as a key component of rehabilitation, employment must always be weighed with all of the other relevant factors of the particular case, including but not limited to the nature and factual circumstances of the particular offence. Of course all of the objectives and principles of the YO Act must be applied in that overall consideration.

88 When approaching sentencing in that way, in some cases employment by itself or in combination with other factors may in an overall consideration of everything lead the Court to conclude that a sentence short of the sentence of last resort is the proper sentence. However in some cases it may not and the Court may decide that the sentence of last resort, immediate detention, is the only proper sentence.

89 Of course if the Court decides that immediate detention is the only proper sentence, then employment or the availability of immediate employment should also be taken into account again in another overall consideration of everything and when also applying the principle that detention should only be for the shortest necessary time, to decide what the length of that term of immediate detention should be.

90 Those cases where a child is employed or has immediate employment available at the time of sentence, but is sentenced to

immediate detention, are usually cases where the Court is of the view that the combination of the seriousness of the nature and the factual circumstances of the particular offence and the need for deterrence substantially outweighs everything else in combination including employment. In my view this is one of those cases. This is an extremely serious offence of its kind.

Conclusion

91 In summary, this is a case of an assault which involves a serious act of gratuitous violence against a police officer when he was carrying out his duty to restore peace and good order in the community and when he was in a vulnerable position on the ground. The assault was a very forceful punch to the side of the face. It resulted in the police officer suffering serious bodily harm. When the Court sentences young offenders for offences of this kind, and particularly for extremely serious offences of this kind such as this one, it should and will attach substantial weight to general deterrence. Rehabilitation of young offenders is always a very significant consideration but in cases of this kind and as serious as this there also needs to be a strong message to young people who are inclined to behave in this way that such behaviour is totally unacceptable and may result in a sentence of immediate detention and for a lengthy term. That message needs to reverberate through the cohort of young people who choose to drink to excess and create serious public disturbances which inevitably require the police to be called to attend.

92 In this particular case on a consideration of everything and when applying the objectives and principles for sentencing children in the YO Act the combined weight for the seriousness of the nature and factual circumstances of the offence and the bodily harm suffered by the police officer and the need for deterrence substantially outweighs the combined weight for the offender's plea of guilty, youth, record and personal circumstances (including the fact that he is working) such that immediate detention, the sentence of last resort, is the only proper sentence and it should necessarily be for a lengthy term.

93 In my view the sentence imposed by the magistrate was manifestly inadequate.

94 For all these reasons I am of the view that an order of detention coupled with an intensive youth supervision order, no matter what its conditions (known as a conditional release order), is not a proper sentence in this case.

95 Finally, for all these reasons I discharge the sentence of a term of three months immediate detention ordered by the magistrate and substitute it with a sentence of a term of immediate detention of eight months.

96 I will not disturb any of the orders on any of the other matters dealt with by the magistrate.