[2017] WACC 1

JURISDICTION	**:**	CHILDREN'S COURT OF WESTERN AUSTRALIA IN CRIMINAL
LOCATION	**:**	PERTH
CITATION	**:**	THE STATE OF WESTERN AUSTRALIA -v- SLJ [2017] WACC 1
CORAM	**:**	JUDGE REYNOLDS
HEARD	**:**	22 FEBRUARY 2017
DELIVERED	**:**	22 FEBRUARY 2017
FILE NO/S	**:**	CC/KR 749 of 2016
BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Prosecution AND SLJ Accused

Catchwords:

President's review - Offender a 12 year old child - Offence of stealing a motor vehicle - Offence committed before young offender sentenced to a conditional release order imposed for other offences - Subsequent conditional release order manifestly excessive.

Legislation:

Children's Court of Western Australia Act 1988
The Criminal Procedure Act 2004
The Young Offenders Act 1994

Result:

Subsequent youth conditional release order substituted by a youth community based order for a term of 3 months with conditions of supervision and 30 hours community work.

Representation:

Counsel:

Prosecution	:	Office of the Director of Public Prosecutions
Accused	:	Aboriginal Legal Service of Western Australia

Solicitors:

Prosecution	:	Ms S V Jessup
Accused	:	Ms S M Cerqui

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

Nil

1 **JUDGE REYNOLDS**:

2 On 22 February 2017 I heard and determined this review. I gave reasons and spoke with SLJ about the substituted sentence imposed and about the need for him to work with officers of Youth Justice and the Department for Child Protection and Family Support. I also indicated that I considered it necessary to publish the reasons later. These are those reasons.

Introduction

3 Before me for determination is an application for review pursuant to section 40 of the Children's Court of Western Australia Act 1988 (the C Ct Act).

4 SLJ was born on 20 July 2004 and is 12 years and 7 months of age.

5 On 3 January 2017, the Children's Court at Kununurra, presided over by His Honour Magistrate Roberts, sentenced SLJ to a conditional release order for a term of three months with conditions of supervision and 30 hours community work for an offence of stealing a motor vehicle committed on 5 October 2016 at Kununurra (the Sentence).

6 On the hearing of the review, Counsel for SLJ submitted that the Sentence imposed by His Honour was manifestly excessive having regard to, first, the circumstances of the offence and of the young offender, and secondly, that it infringed the totality principle as it was not proportional to the totality of the criminal behaviour for the offence and other offences for which SLJ was sentenced on 28 October 2016 which included offences committed in October 2016.

The facts

7 At 12.30 am on Wednesday, 5 October 2016, a Toyota LandCruiser utility, valued at approximately $42,000, was stolen in a burglary at the premises of Kununurra Panel Beating Works on Poincettia Way in Kununurra. The vehicle was hidden at a location in Kununurra by several co-accused and they returned to it later on the night of 6 October 2016.

8 The prosecutor informed the Court that the accused and co-accused drove the stolen motor vehicle around Kununurra. The vehicle was then driven across the Western Australian border and towards Katherine in the Northern Territory. I should add that later in the sentencing hearing the

prosecutor took no issue with the statement made by counsel for SLJ that SLJ did not drive the vehicle at any time at all. At approximately 10 kilometres from Katherine, the vehicle ran out of fuel. SLJ and the multiple number of co-accused were confronted by members of the public from Kununurra and they agreed to hand over the keys of the vehicle.

9 SLJ and the co-accused left the vehicle in the possession of the members of the public. The vehicle was later given to the police at Katherine. It was not damaged. SLJ's DNA was later identified on a pair of earphones located in the vehicle.

10 On Monday, 17 October 2016, SLJ and all of the co-accused returned to Kununurra from Katherine on a bus. On Thursday, 20 October 2016, SLJ was arrested and conveyed to the police station in Kununurra where he participated in an interview. He made no admissions and denied any involvement. He was later summonsed on the charge.

Comment by the Youth Justice Court Officer and Submissions by Counsel for SLJ.

11 Before the facts of the offence were read out by the prosecutor and Counsel for SLJ made his submissions, the Youth Justice Court Officer appearing on the matter informed the Court that the offence pre-dated the most recent Court order made against SLJ, namely the conditional release order for a term of 3 months imposed on 28 October 2016. The Youth Justice Court Officer submitted that had the current offence been included with the other offences the subject of the sentencing on 28 October 2016, then it would have likely been included in the 3 month conditional release order. She added that the Court may be minded to impose a youth community based order with a community work condition to run concurrently with the conditional release order imposed on 28 October 2016.

12 The submissions by Counsel for SLJ included the following. SLJ was only 12 years of age. He was currently in residential care in a facility in Kununurra as arranged by the Department for Child Protection and Family Support. By reference to a report dated 7 October 2016 prepared by Youth Justice, and so before the sentencing on 28 October 2016, Counsel informed the Court that SLJ's school attendance had improved. That information was out of date.

13 In relation to the factual circumstances of the offence, Counsel for SLJ informed the Court that SLJ was not involved in the actual stealing of

the Toyota LandCruiser. He said that SLJ had joined up with and followed older boys involved in the offence sometime after the burglary had been committed. SLJ knew that none of the older boys owned the motor vehicle. He accepted that he got into the motor vehicle and was a passenger when it was being driven about. At no time did he drive the motor vehicle. No issue was taken by the prosecutor that SLJ was at all times only a passenger in the motor vehicle and did not drive it.

SLJ's Record

14 SLJ first appeared before the Court, at Kununurra, on 30 October 2015, for offences including stealing a motor vehicle and also burglary on a place, committed on 20 October 2015. His only offence before then was an offence of damage committed on 21 September 2015.

15 Thereafter, SLJ appeared before the Court, at Kununurra, on 14 December 2015, 29 January 2016, 1 April 2016, 20 May 2016, and 28 October 2016. In 2016 he committed a multiple number of offences of various kinds including burglary and stealing a motor vehicle. Of particular seriousness, was offending on 10 and 11 May 2016 which included offences of burglary, stealing a motor vehicle and reckless driving involving an escape from a pursuit by police.

16 On 29 January 2016 SLJ was placed on his first order by the Court, namely a youth community based order for a term of 7 months. He breached that by reoffending and was placed on an intensive youth supervision order for a term of 7 months on 1 April 2016. He breached that order by reoffending and on 20 May 2016 he was placed on a conditional release order for a term of 4 months. He breached that order by reoffending, including 2 offences of stealing a motor vehicle, and on 28 October 2016 he was ordered to serve another conditional release order and for a term of three months. That order applied to a large number of offences committed during 2016 because it included offences the subject of previous orders which had been breached.

The Magistrate's Reasons for the Sentence

17 Save and except for some comments made by the learned Magistrate about the Banksia Hill Detention Centre, which were no doubt designed to encourage SLJ not to reoffend and risk being sent there, he gave the following reasons for the Sentence:

> If you could stand up, thanks, SLJ. You're very, very fortunate that this offence arose prior to being sentenced in this Court in October. If this had have happened while you're on the current youth conditional release order you would be going to detention today, sent down to Perth. If that was the case, you would be starting a career and being locked up for considerable periods of time.
>
> …….
>
> You're only 12, for goodness sakes, and already you're accumulating a whole raft of steal motor vehicles.
>
> However, I will take into account you have pleaded guilty, and you perhaps were a lesser player in this. And other older boys may well have been responsible for taking that vehicle and you weren't driving it, although you did know it was stolen at the time. Given all of those factors, I'm going to place you on a youth conditional release order for three months from today, the same supervision.
>
> And now that you've attained the age of 12 you can do 30 hours of community service work. So 30 hours repaying the community for what you did wrong. And make sure you keep out of trouble because, as I say, the Court's options are Banksia Hill.
>
> ……

Material in reports provided for this review

18 I ordered the filing of an up to date pre-sentence report by Youth Justice and a report from the Department for Child Protection and Family Support for the purpose of determining this review. As mentioned, this review is a hearing de novo.

19 In addition to providing information that had already been previously provided to the Court, the updated reports also provided the following additional information:

20 From time to time since February 2016, SLJ had been making threats of suicide and self harm.

21 SLJ struggles with keeping on task and self regulation resulting in a chaotic lifestyle.

22 SLJ has been using cannabis on a daily basis in the community.

23 SLJ is in need of a Transitional High Needs (THN) placement to keep himself safe.

24 SLJ absconds from his residential home on a daily basis in search for cannabis and returns late at night or early morning.

25 None of SLJ's past carers are willing to offer any further placements for him.

26 Pursuant to expert advice, SLJ was placed in secure care at the Kath French secure care facility in Perth on 27 January 2017. On 17 February 2017, SLJ was placed in a THN placement with Safe Places in a suburb of Perth.

27 As at 22 February 2017, SLJ was still at and enjoying his placement, and had expressed his wish to remain in Perth.

28 Once SLJ's placement had stabilised, his education needs would be catered for.

The manner in which the plea was taken

29 The manner in which SLJ's plea was taken is not an issue in this review. Nevertheless, it requires some comment.

30 When the matter was called and SLJ appeared before the Court, counsel for SLJ said to the learned Magistrate, "There can be a plea of guilty entered through counsel". That was accepted by the learned Magistrate as SLJ's plea of guilty to the charge and the sentencing proceeded immediately thereafter. The charge was not actually read to SLJ or at all.

31 The charge or charges for which a young person is before the Court should be communicated to the young person before a plea is taken. When the Court is presided over by a Magistrate, that is usually done by the Magistrate reading the charge(s) to the young person. The Court should not seek from or expect counsel for a young person to enter a plea on behalf of the young person from the bar table. If counsel volunteers a plea on behalf of the young person, including in particular a plea of guilty, as happened in this case, then the Court should not accept it. The plea, including in particular a plea of guilty, should be made by the young person himself or herself after the charge has been read.

32 There are numerous provisions in the Criminal Procedure Act 2004 (the C P Act) which refer to an accused entering a plea to a charge. In my view, it is important to note that the only express reference in the C P Act to a legal practitioner entering a plea of guilty or not guilty on behalf of an accused is in the definition of a "written plea" in section 18. Pursuant to

section 48, a "written plea" only applies in a summary jurisdiction on a charge for a simple offence.

33 The specific option of a "written plea" sits within the various provisions in the C P Act which collectively apply to all prosecutions for all kinds of offences across all jurisdictions. A "written plea" cannot be made to a charge for an indictable offence.

34 Before I go any further, I should mention that the charge for which SLJ was before the Court, namely stealing a motor vehicle, is a charge for an indictable offence. It can be dealt with summarily.

35 Section 39 of the C P Act applies to indictable charges. It relevantly provides that "before requiring the accused to plead to the charge" the Court must be satisfied of and do certain things as set out in the section.

36 Section 41 applies to charges that are to be tried on indictment. Section 41(2) relevantly provides that the Court must (a) "tell the accused that he or she is not required to plead to the charge" and (b) "give the accused the opportunity to plead to the charge". Section 41(3) relevantly provides "if the accused pleads guilty to the charge".

37 Section 59 of the C P Act applies to either way charges that are to be tried summarily, and to charges for simple offences unless a written plea has been received. Section 59(2) relevantly provides that "before requiring the accused to plead to the charge" the Court must be satisfied of and do certain things as set out in the section. Section 59(3) relevantly provides that after the Court has complied with section 59(2), it must "require the accused to plead to the charge".

38 Other provisions in the C P Act also relevantly provide for "the accused" to plead to the charge. See Sections 91, 126 and 142.

39 Further to all of that, the C P Act also provides in section 39(b) for indictable offences, that before requiring the accused to plead, the Court must "be satisfied the accused understands the charge and the purpose of the proceedings". The same requirement is provided in section 59(2) for either way charges which are to be tried summarily. Section 129(2)(b) also makes similar provision for other offences when the accused is not represented by a legal practitioner.

40 The requirement for the accused to understand the charge, in sections 39(b) and 59(2) must be satisfied in all cases in which an indictable offence is alleged, even when the accused is represented by a legal

practitioner. While counsel may provide some assistance to the Court, the Court could never be properly satisfied of this requirement simply because it was the opinion of counsel.

41 In my view, the provisions of the C P Act give proper recognition to the significance of a plea, and particularly a plea of guilty to a charge for an indictable offence, as in this case. A plea of guilty is an admission to all the elements of the alleged offence. That is significant, and particularly so if the offence is an indictable offence, and no matter how the charge must be or can be tried. Such a plea may well put the liberty of the accused at risk.

42 For that reason alone, for the Court to properly consider whether or not it is satisfied of the requirement in section 39(b) or 59(2) of the C P Act that the accused understands the charge, the charge should be communicated to the accused by the presiding judicial officer, or the clerk of arraigns in the presence of the judicial officer, and then the accused, himself or herself should enter his or her own plea in the presence of the judicial officer.

43 Another reason why that must be so, is that applications for the withdrawal of a plea of guilty are undesirable and should be extremely rare. If they must be made, then it is highly undesirable for the conduct of a legal practitioner and/or a legal counsel to have to be placed under a microscope and potentially be the subject of adverse findings by the Court in order to determine them. When considering this reason, it should also be borne in mind that the accused bears the onus on such an application.

44 In conclusion, in my view the learned Magistrate should have both read the charge to the accused, SLJ, and also required SLJ to personally enter his own plea to the charge.

Ground 1 of the Application for Review

45 Ground 1 of the application for review is that the Sentence was manifestly excessive having regard to the circumstances of the offence and of the offender.

46 In my view, there is clearly merit to this ground. When considering the circumstances of the offence it is necessary to take into account SLJ's role in the commission of it. He was not involved at all in the actual stealing of the LandCruiser. Subsequent to that having happened, older peers, including an adult, invited SLJ, who was only 12 years of age, to get into the vehicle and go with them.

47 No issue was taken by the prosecutor that SLJ was at all times only a passenger in the vehicle. The sentencing proceeded on that basis. The LandCruiser was fortunately recovered undamaged.

48 In my view, while an offence of this sort is clearly serious, and in this particular case would have no doubt caused stress and inconvenience to the innocent victim, SLJ's role in the commission of it was at the lower end of seriousness.

49 Turning to SLJ's personal circumstances. He was only 12 years of age at the time of the offence. That is very young and is a very significant mitigating factor in this case. His father is from the Kununurra area and his mother is from the Northern Territory. He was taken into the care of the Chief Executive Officer of the Department for Child Protection and Family Support on 31 August 2010 and is the subject of a Protection Order until eighteen years. That Order was made on the basis of inappropriate discipline, family violence, substance abuse, neglect and lack of supervision by his parents.

50 At the time of the offence, SLJ was living in residential care in a hostel in Kununurra. That said, however, he was also moving about in Kununurra and staying with various family members from time to time. His mother was living in Kununurra. The whereabouts of his father was unknown.

51 In the report before the Court dated 7 October 2016, it was mentioned that SLJ's school attendance in 2016 could not be confirmed. School records showed that his attendance in 2015 was only at 17 per cent. That report also essentially provided that his accommodation was still problematic and that his family was still not an option for his care.

52 No updated pre-sentence report with an updated action plan was sought by the learned Magistrate before SLJ was sentenced on 3 January 2017. In my view an up to date report, written or oral, with a proposed action plan, should have been sought by the learned Magistrate for him to consider the proper sentence. I am not sure whether that could have been accommodated by standing the matter down until later in the day or whether an adjournment to another day would have been required. Either scenario, it should have been done.

53 Returning to SLJ's personal circumstances. Despite the issue concerning the plea of guilty, the sentencing by the learned Magistrate must be considered, and this review must be determined, on the basis that

SLJ pleaded guilty. That was clearly a significant mitigating factor in the context of the sentencing, and still is in the context of this review.

54 It is true that SLJ's record, despite his very young age, does not provide any mitigation. That said, I should of course add, that it is not an aggravating factor.

55 In relation to deterrence, while personal and general deterrence needed to be taken into account, the weight to be given to each and both of them in the overall consideration of SLJ's sentence was relatively small. That is because of his role in the commission of the offence and his personal circumstances, including his very young age and the other personal circumstances to which I have referred.

56 The objectives and principles to be applied when sentencing young persons include rehabilitation, the protection of the community and punishment. What weight should be given to each of those principles in the overall consideration of the proper sentence in a particular case will depend on the statutory maximum penalty for the offence, the nature and factual circumstances of the offence, and the circumstances of the particular young offender.

57 In addition to those objectives and principles, the principle that detention is the sentence of last resort must always be applied.

58 In my view, on an overall consideration of all of the circumstances in SLJ's case, significant weight needed to be given to SLJ's rehabilitation, and more so than to each and both of the protection of the community, in the sense of deterrence, and also punishment. Of course, the protection of the community will ultimately be best served by the rehabilitation of SLJ.

59 For all of these reasons, in my view, the proper sentence for SLJ was a youth community based order for a term of 3 months with conditions of supervision and that he perform 30 hours of community service work. Given that SLJ is only 12 years of age and that he is in the care of the State, I expect that the Department for Child Protection and Family Support and also Youth Justice will work collaboratively to provide the welfare supports necessary for SLJ.

60 The additional information provided to me in the reports filed for this review, provides further support for the sentence just mentioned without changing it as the proper sentencing outcome.

61 A youth conditional release order, as imposed by the learned Magistrate, is an order which consists of two component parts. One is detention and the other is an intensive youth supervision order. A youth conditional release order is not and should not be regarded as a sentence one short of detention. Detention is an integral part of a youth conditional release order. Any breach of a youth conditional release order exposes the young offender to be sentenced to a term of detention to be served immediately.

62 In my view, any sentence of or which included detention as a component, was way outside the range of a sound sentencing discretion in SLJ's case.

63 There is one further comment that I wish to make. In making it, I am not suggesting that it formed part of the learned Magistrate's thinking. When SLJ was sentenced on 3 January 2017, he was already the subject of a youth conditional release order for a term of 3 months imposed on 28 October 2016. As already mentioned, the offence for which SLJ had to be sentenced, was committed on 5 October 2016 and so before that youth conditional release order was imposed.

64 When a young person has to be sentenced by the Court after having been previously sentenced to a youth conditional release order, and no matter whether the new offence was committed before or after the order, it does not necessarily follow, and it should not be thought, that the sentencing option for the new offence should be at least the same or greater than that of the current or most recent order.

65 Accordingly, in SLJ's case, just because SLJ was subject to a youth conditional release order, did not mean that he had to be sentenced for the new offence of stealing a motor vehicle to at least a youth conditional release order. It is open to impose either of an intensive youth supervision order or a youth community based order, or indeed any other kind of order, when a young offender has previously been or still is the subject to a youth conditional release order. AS previously mentioned, the proper sentence in a particular case depends on the relevant statutory maximum penalty, and the particular circumstances of the offence and of the particular young offender. Further and importantly, the objectives and principles in the Young Offenders Act 1994 must be applied.

Ground 2 of the Application for Review

66 For the reasons given, this review does not fall to be determined on ground 2 of the application, namely that the sentence imposed by the

learned Magistrate breached the totality principle as it was not proportionate to the totality of the criminal behaviour taking into account the sentence imposed on 28 October 2016.

67 That said, I wish to make the following comments. If I thought that this review fell to be determined on this ground then I would have required both parties to have made submissions on the appropriateness or otherwise of the sentence of the youth conditional release order for a term of 3 months imposed on 28 October 2016.

68 In my view, while the offences for which that order was imposed were numerous and of serious kinds, the personal circumstances of SLJ, including in particular his very young age, would have required the appropriateness that order to have been fully considered in the context of the review and be found to have been proper before it was relied on in a consideration of ground 2 on totality.

69 I also wish to add that if the sentencing option of a youth conditional release order imposed on 28 October 2016 was found to be beyond the range of a sound sentencing discretion, then that would not be remedied, i.e. be brought within the range of a sound sentencing discretion, by reason of the term of the order being for a relatively short period of time.

Conclusion

70 For all of these reasons, I make the following order:

71 The Sentence imposed on 3 January 2017 is set aside and substituted by a youth community based order for a term of 3 months commencing on 22 February 2017, with conditions of supervision and 30 hours community service work, with there being 2 hours credit for work done by SLJ since the Sentence was made on 3 January 2017.