JURISDICTION	**:**	CHILDREN'S COURT OF WESTERN AUSTRALIA IN CRIMINAL
LOCATION	**:**	PERTH
CITATION	**:**	THE STATE OF WESTERN AUSTRALIA -v- TWP [2015] WACC 10
CORAM	**:**	JUDGE REYNOLDS
HEARD	**:**	21 JULY 2015
DELIVERED	**:**	14 AUGUST 2015
FILE NO/S	**:**	BM 454 of 2014 BM 455 of 2014 BM 457 of 2014 BM 459 of 2014 BM 461 of 2014 BM 463 of 2014 BM 465 of 2014 BM 467 of 2014 BM 468 of 2014 BM 470 of 2014
BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Applicant AND TWP Respondent

Catchwords:

Criminal law - Reviews by President of the Children's Court - Multiple burglaries on dwellings - Repeat offender (third striker) - Totality of sentences of immediate detention - Young offender

Legislation:

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

Result:

Total sentence of 12 months immediate detention increased to 18 months immediate detention to commence on 20 February 2015

Category:

Representation:

Counsel:

Applicant	:	Mr S Stocks
Respondent	:	Mr R Owen

Solicitors:

Applicant	:	Office of the Director of Public Prosecutions
Respondent	:	Aboriginal Legal Service

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

LAP v The State of Western Australia [2012] WASCA 156
Roffey v State of Western Australia [2007] WASCA 246

1 **JUDGE REYNOLDS**:

Introduction

2 Before me for determination is an application made on 18 March 2015 by a prosecutor on behalf of the State, for the review of sentences pursuant to s 40 of the *Children's Court of Western Australia Act 1988* (WA) (the CCt Act).

3 On 26 February 2015, TWP was sentenced by his Honour Magistrate Sharrett in the Children's Court of Western Australia, at Broome, after pleading guilty, to 12 months immediate detention on each of 10 charges, to be served concurrently, resulting in a total effective sentence of 12 months immediate detention. The sentences were backdated to commence from 17 February 2015.

4 The 10 charges are as follows:

	Charge No.	**Date**	**Place**	**Kind of Offence**
1	CC BM 454/2014	01.12.2014	Cable Beach	Burglary with Intent in Dwelling
2	CC BM 455/2014	04.12.2014	Cable Beach	Burglary and Commit Offence in Dwelling
3	CC BM 457/2014	04.12.2014	Cable Beach	Burglary and Commit Offence in Dwelling
4	CC BM 459/2014	05.12.2014	Cable Beach	Burglary and Commit Offence in Dwelling
5	CC BM 461/2014	10.12.2014	Cable Beach	Burglary and Commit Offence in Dwelling
6	CC BM 463/2014	11.12.2014	Cable Beach	Burglary and Commit Offence in Dwelling
7	CC BM 465/2014	13.12.2014	Broome	Aggravated Burglary and Commit Offence in Dwelling
8	CC BM 467/2014	13.12.2014	Broome	Aggravated Burglary with Intent in Dwelling
9	CC BM 468/2014	13.12.2014	Broome	Aggravated Burglary and Commit Offence in Dwelling
10	CC BM 470/2014	13.12.2014	Broome	Aggravated Burglary and Commit Offence in Dwelling

5 The ground of the application is as follows:

> The learned sentencing Magistrate erred in law by imposing a sentence of 12 months immediate detention pursuant to section 118(1)(b) of the *Young*

offenders Act 1994 (WA)(YOA), which was so inadequate as to manifest error.

Particulars

(a) These charges make the offender a third striker for the second time pursuant to section 401(4)(b) of the *Criminal Code*;

(b) The court failed to give proper regard to section 124 and section 125 of the YOA;

(c) The sentence failed to have proper regard to the seriousness of the offences; and

(d) The sentence failed to adequately reflect the need for personal and general deterrence.

6 I should mention that charge number BM 454/2014 was not included in the application for review. That is probably because in the transcript of the proceedings on 26 February 2015, his Honour did not expressly refer to that number. He did, however, during the course of the proceedings refer to the fact that he had 18 matters before him. The relevant prosecution notice which carries all of the charges, actually has 18 charges in total and of those 18 charges, 10 are for the dwelling burglaries that I have set out above, including charge number BM 454/2014.

7 Further to all of that, his Honour has endorsed 12 months detention (concurrent) on the prosecution notice for charge number BM 454/2014. I will therefore include this charge in my considerations. Doing this does not change the ultimate outcome.

8 When preparing for the review and before filing the application for review, a prosecutor in the Office of the Director of Public Prosecutions formed the view that when TWP was sentenced on 8 August 2014 in the Children's Court of Western Australia, at Broome, by his Honour Magistrate Sharrett, for seven new aggravated dwelling burglaries, TWP was treated as a second striker pursuant to the relevant provisions in the *Criminal Code* and not as a third striker. He was sentenced to two months immediate detention on each of the seven aggravated dwelling burglaries, with each of those sentences ordered to be served concurrently, and as a whole, cumulative to six months immediate detention for the breach of a Conditional Release Oder (CRO) which totalled eight months immediate detention.

9 If TWP was a third striker, then such seven offences required a mandatory term of at least 12 months detention pursuant to s 401(4)(b) of the *Criminal Code*. The total term of eight months immediate detention was backdated to commence on 20 June 2014.

10 In addition to the application for review, on 18 March 2015 a prosecutor on behalf of the State also applied for a correction of the sentences imposed on 8 August 2014 pursuant to s 37 of the *Sentencing Act 1995* so that they complied with the mandatory minimum provisions in s 401(4)(b). The application for correction stated that "the Court did not impose a mandatory period of 12 months immediate detention or a 12 month youth conditional release order".

11 During the hearing of the two applications, legal issues arose between the parties, on which they were in dispute, in relation to the application to correct the sentences imposed on 8 August 2014. Without setting out those issues, to overcome the potential for argument on them unnecessarily taking up more time than arguing the review itself, and to ensure that the focus of the arguments was on the review itself, I suggested to the parties that the application for the correction of the sentences be withdrawn and that it be replaced by me reviewing the sentences imposed on 8 August 2014 pursuant to the provisions of s 40(1) of the CCt Act.

12 Section 40(1) essentially provides that the Court when constituted by the President may, of its own motion, reconsider the sentence(s). It can be noted that while s 40(2) provides for a time limit of one month after the date of the order, for a person (the young offender), and also the prosecutor, to make an application for review, no time limit at all applies to the Court when constituted by the President. Therefore, it is open to me, as the President constituting the Court, to review the sentences imposed on 8 August 2014 notwithstanding the passing of so much time.

13 I further suggested to the parties that if I heard and determined both reviews together, then I would be in the best possible position of being able to properly consider totality and do justice for both of the parties.

14 Counsel for both parties agreed to my suggestion and the hearing proceeded accordingly.

15 It was properly accepted by counsel for TWP, that when TWP was sentenced on 8 August 2014, he fell to be sentenced as a first time third striker. It was also properly accepted by counsel for TWP that when TWP

was sentenced on 26 February 2015, he fell to be sentenced as a third striker for the second time.

Method of analysis

16 Given that it is accepted that TWP was a third striker for the second time when sentenced on 26 February 2015, I propose to deal first with the sentencing on 26 February 2015 and then move on to the sentencing on 8 August 2014 and then bring both together to determine the final outcome. That said, whatever order I deal with each of the sentencings, the final outcome would be the same.

Principles applicable to review

17 Pursuant to s 40(1) of the CCt Act, the powers of the Court when constituted by the President, when reconsidering a sentence in a review includes the powers to:

(a) confirm the order; or

(b) discharge the order and substitute any other order that the Court, if it had been constituted by the President, could have made in relation to the offence.

18 In a review of a sentence by the President pursuant to s 40 of the CCt Act, it is not necessary to show actual error as per an appeal to the Supreme Court. The section was intended to create a relatively fast and informal method by which decisions by magistrates could be reviewed by the President. See *"P" (a Child) v the Queen* CCA 1 December 1995, 960053C, Scott J.

19 While a review pursuant to s 40(1) is a hearing de novo rather than an appeal, it would be accurate to say that earlier Presidents of the Court and myself, have not and do not change the sentence of a magistrate unless it clearly falls outside of the range of a sound sentencing discretion.

The offending and the sentences imposed on 26 February 2015

Background to the offending

20 As mentioned, on 8 August 2014 TWP was sentenced to a total of eight months immediate detention backdated to commence on 20 June 2014.

21 I wish to set out a summary of TWP's record to provide further background.

22 TWP first offended in March 2012. On 12 April 2012 he was referred to a Juvenile Justice Team for 10 offences including two aggravated burglaries on places, two aggravated burglaries on dwellings, an attempted aggravated burglary on a dwelling and stealing a motor vehicle. All of those charges were eventually dismissed on 22 October 2012 pursuant to s 33 of the *Young Offenders Act 1994* (WA) (the YO Act).

23 On 15 October 2012, TWP was placed on a Youth Community Based Order (YCBO) for a term of six months with conditions for offences including two offences of aggravated burglary and committing an offence in a dwelling. On 28 December 2012 he reoffended by committing two offences, one of aggravated burglary and committing an offence in a dwelling and another of wilful and unlawful damage. Those two offences breached the six months YCBO imposed on 15 October 2012. As a result of that reoffending, on 21 March 2013, TWP was placed on two YCBOs, one, a varied YCBO for the earlier offending, and also a new YCBO for the two new offences committed on 28 December 2012.

24 Because the two dwelling burglaries the subject of the YCBO imposed on 15 October 2012 were subsequently dealt with on 21 March 2013 by way of a variation of the initial YCBO, those two dwelling burglaries then became first strikes on 21 March 2013 and remain strikes until 20 September 2015 inclusive (see s 189(5) of the YO Act).

25 On 20 January 2014, TWP was placed on a new YCBO for a term of four months on conditions for eight new offences committed in July, August, October and November 2013. The new offences included five dwelling burglaries and one attempted dwelling burglary.

26 On 8 May 2014 TWP was placed on a CRO for a term of six months with supervision, attendance and community work conditions. The CRO incorporated the offences which were the subject of the four month YCBO imposed on 20 January 2014 which then made the five dwelling burglaries second strikes, and also fourteen new offences which included nine dwelling burglaries, two burglaries on a place and three attempted dwelling burglaries. Each of the nine new dwelling burglary offences also constituted second strikes.

27 On 8 August 2014, TWP was given immediate detention for a total term of eight months. That total term was made up by a term of six months immediate detention for the offences the subject of the six month

CRO imposed on 8 May 2014, which was breached by reoffending. He was also sentenced to two months immediate detention in relation to each of eight new offences which included one offence of burglary on a place committed in May 2014, and also seven dwelling burglaries committed between 5 June and 19 June 2014 inclusive.

28 As previously mentioned, each of the terms of two months detention was ordered to be served concurrently on each other and that total term of two months immediate detention was ordered to be served cumulatively to the six months immediate detention for the breach of the CRO, resulting in a total term of eight months immediate detention.

29 Each of those seven new aggravated dwelling burglaries constituted third strikes. They are the ones which were mistakenly dealt with as second strikes on 8 August 2014 and which I will review later.

30 As mentioned, the eight months immediate detention was backdated to commence on 20 June 2014. TWP was released on a Supervised Release Order (SRO) on 2 November 2014, which was due to expire on 19 February 2015. TWP's compliance with his obligations on the SRO were less than satisfactory and as a result a Warrant of Apprehension was issued to suspend the SRO on 12 December 2014.

The offending the subject of the sentences on 26 February 2015

31 On 15 December 2014 TWP appeared in the Court, at Broome, for the first time on the 10 new charges as set out earlier. The prosecution notice which carried the 10 charges also carried eight further charges of stealing which related to the eight dwelling burglary charges which also provided for the commission of an offence in the dwelling. The other two of the 10 charges only involved an intent to commit an offence. Each and every one of the eight stealing offences, was properly dealt with by his Honour pursuant to s 67 of the YO Act. Accordingly, none of the sentences on any of the stealing offences form part of the application for a review made on behalf of the State.

32 On 15 December 2014, the 18 charges, including the 10 charges under review, were adjourned to 15 January 2015 and TWP was remanded in custody. The Supervised Release Review Board (SRRB) suspended TWP's SRO with effect from 17 December 2014, with the original detention sentences expiring on 19 February 2015.

33 On 12 February 2015 TWP pleaded guilty to all 18 charges on the prosecution notice, including the 10 dwelling burglaries, and all charges

were adjourned for sentence to 26 February 2015 and a pre-sentence report was ordered.

34 Pursuant to s 401(1)(b) of the *Criminal Code*, the statutory maximum penalty for a burglary with intent in a dwelling (charge number CC BM 454/2014) is 18 years imprisonment.

35 Pursuant to s 401(1)(a) of the *Criminal Code*, the statutory maximum penalty for the offence of aggravated burglary with intent in a dwelling (charge number CC BM 467/2014) is a maximum of 20 years imprisonment.

36 Pursuant to s 401(2)(b) of the *Criminal Code*, the statutory maximum penalty for the offence of burglary and committing an offence in a dwelling (charge numbers CC BM 455, 457, 459, 461 and 463/2014 inclusive) is 18 years imprisonment.

37 Pursuant to s 401(2)(a) of the *Criminal Code*, the statutory maximum penalty for the offence of aggravated burglary and committing an offence in a dwelling (charge numbers CC BM 465, 468 and 470/2014 inclusive) is 20 years imprisonment.

38 Pursuant to s 118(1)(b) of the YO Act, the reference to imprisonment in the penalty provisions of the *Criminal Code* can be read to be a reference to a term of detention.

39 The facts on the 10 new offences of dwelling burglary can be adequately summarised as follows. Where the dwelling burglary is aggravated, the circumstance of aggravation is that TWP committed the offence in the company of a co-accused. That applies to all of the four offences committed in Broome.

40 In relation to the offences of dwelling burglary which involved the commission of the offence of stealing, three offences involved taking money of $50 or less, one offence involved taking some bottles of whiskey and $50 cash to a total value of about $250, one involved taking an iPhone and an iPad worth about $680, one involved taking headphones valued at about $260, one involved taking a Bluetooth speaker and $70 cash to a total of a value of about $270, and one involved taking $580 in cash.

41 For completeness and in fairness to TWP, when he was apprehended he voluntarily participated in an electronically recorded interview with police in which he made full admissions of his role, and also that of the

co-accused when one was involved. The police showed TWP a map of Broome with dwellings on it and he indicated to the police dwellings that he had burgled and dwellings that he had not burgled. I should add that he did this without knowing the State case against him in relation to burglaries.

42 TWP committed all of the dwelling burglary offences for the purpose of obtaining, or seeking to obtain, money and relatively small items of property to purchase cannabis.

TWP's personal circumstances

43 TWP was born on 7 August 1998. He is now 17 years of age. When he was sentenced on 26 February 2015 he was 16 years and six months of age. When he committed this spree of 10 offences of dwelling burglaries he was about 16 years and four months of age. When he was sentenced on 8 August 2014, he had only the day before turned 16 years of age.

44 TWP has two siblings, an older brother aged 20 years and an older sister aged 18 years. His parents separated in 2003 after a long history of aggression in their relationship. TWP disclosed that he had been the witness to and the victim of violence during his childhood years and had witnessed his mother being violently assaulted by his father, resulting in her being covered in blood and the police usually being called. TWP indicated that if he and his siblings attempted to assist his mother, then they would get a "hiding" from his father.

45 In February 2014, TWP left living with his mother and went to reside with his paternal grandfather. This followed arguments between himself and his mother which seemed to have been based around TWP not wanting to comply with some house rules. Subsequent to TWP returning about a week later to live with his mother, the Department for Child Protection and Family Support sought to assist his mother in developing some parenting skills and how best to manage TWP's behaviour. Prior to being taken into custody in December last year, TWP resided with his mother and older brother in a house in Broome.

46 Prior to being remanded in custody on 15 December 2014, TWP was enrolled to attend the PCYC Alternative Learning Centre. His engagement became minimal. This was attributed to his identified escalating cannabis use, late nights and an unwillingness to get up and be ready for pickup by PCYC staff.

47 TWP started smoking cannabis and drinking alcohol from 13 years of age. It is fair to say that he was very honest to the author of the pre-sentence report. He admitted to smoking and enjoying cannabis on a daily basis and that he has the urge for cannabis all the time. He accepted that he had a problem with cannabis, but advised the Youth Justice officer that he was not interested in engaging in any substance misuse counselling and had no desire to refrain from cannabis use in the future. The SRO granted on 2 November 2014 required him to engage in substance misuse counselling, but his engagement was minimal prior to his arrest. If any of TWP's extended family use cannabis, then there will need to be an intensive effort to educate and support him to not use it.

48 During TWP's current term in detention, he has participated in workshop skills programs and shown excellent levels of application and skill, including excellent welding skills.

Submissions and reasons for decision – sentences imposed on 26 February 2015

49 I wish to set out and comment on some of the submissions made to his Honour during the course of sentencing.

50 During the course of submissions, counsel for TWP made the following submissions:

> Well, your Honour, what I would say first of all is that the proportionality, totality, one transaction, should be broadly applied. Clearly, these are separate incidents, but they occur within the context, if you like, for want of a better word, a spree over a fairly short period of time.

and

> [TWP] is in the middle of an entrenched addiction to cannabis, and that his offending is directly related to his addiction to cannabis. And as a young person in the grips of an addiction to cannabis, it's my submission, your Honour, that a 12 month sentence is enough to deal with the criminality of the offending which must, in my respectful submission, be somewhat lowered by the fact that it's brought about by an addiction to a substance, and he is only 16.

51 While the submission that the offending involved "one transaction" was put in its proper context, and while it is a proper consideration when sentencing, there is always a need when such a submission is made to be careful not to let the fact that each offence was committed within a single and relatively short timeframe, overwhelm the consideration of the actual number of offences, the discrete dates on which they were committed, the

seriousness of the nature and factual circumstances of each offence, and the relevant statutory maximum penalties, which in combination, form the basis of the assessment of the totality of the offender's criminal culpability.

52 With respect, TWP's addiction to cannabis does not lower his level of criminality in relation to his offending. It is often said that substance abuse may explain offending but that it does not excuse it.

53 When the police prosecutor was asked by his Honour to tell him why he should impose a sentence of greater than 12 months immediate detention, the police prosecutor said amongst other things:

> First of all, the mitigation and rehabilitation is really put aside by the fact that he's in that s 124 position where he's a repeat offender, having served a – been sentenced with a sentence that involves imprisonment, breached that, been sentenced with detention, and now he's looking at - committed another offence in relation to that section, and as your Honour would be aware, that says the primary factor for your Honour to give weight to is protection of the community above all other factors…

54 With respect, that submission needs to be clarified.

55 Sections 124(1) and (2) of the YO Act provide as follows:

> **124. When this Division applies**
>
> (1) This Division applies to the sentencing of the offender for a serious offence (the ***current offence***) if -
>
> (a) the offender is a person who has committed and been found guilty of an offence for which a custodial sentence (***sentence 1***) was imposed; and
>
> (b) after being released from custody having served a portion or the whole of sentence 1, the offender committed and was found guilty of another offence for which another custodial sentence (***sentence 2***) was imposed; and
>
> (c) after being released from custody having served a portion or the whole of sentence 2, the offender committed the current offence; and
>
> (d) the court, after taking into account the offender's history of re-offending after release from custody, is satisfied that there is a high probability that the offender would commit further offences of a kind for which custodial sentences could be imposed.

> (2) Where the sequence referred to in subsection (1)(b) of release, re-offending and imposition of another custodial sentence has occurred more than once, the reference to sentence 2 in subsection (1)(c) is a reference to the custodial sentence most recently imposed.

56 Section 125 of the YO Act provides as follows:

> **125. Protection of the community paramount**
>
> If this Division applies to the offender the court, in disposing of the matter, is to give primary consideration to the protection of the community ahead of all the other principles and matters referred to in section 46.

57 If an offender falls into the operation of s 124 as a repeat offender for a serious offence, then the provisions in s 125 apply so that when sentencing the offender, primary consideration is to be given to the protection of the community ahead of all the other principles and matters referred to in s 46.

58 In my view, TWP did not fall within the operation of s 124 of the YO Act. Section 124(1) uses the words "custodial sentence" and "after being released from custody". Accordingly, s 124 of the YO Act only operates in relation to sentences of immediate detention or immediate imprisonment. A CRO under the YO Act, which is the statutory name of the order given for the combination of an order of detention and an Intensive Youth Supervision Order, it does not come within the operation of s 124 of the YO Act.

59 It seems that the prosecuting sergeant was referring to the CRO imposed against TWP on 8 May 2014 when he made his submission that s 124 applied. For the reasons just given, that was not the case.

60 Further and anyway, in cases where the provisions in s 124 of the YO Act are satisfied and the provisions in s 125 apply, rehabilitation is not put aside. Section 125 of the YO Act does not provide that exclusive consideration should be given to the protection of the community. Rather, it provides that primary consideration be given to the protection of the community ahead of all the other principles and matter referred to s 46. Accordingly, s 125 requires an emphasis on the protection of the community. The rehabilitation of the offender remains a relevant consideration and is not put aside.

61 All of that said, it is appropriate in a case such as this for TWP, that the protection of the community be given significant weight.

62 Other factors relied on by the police prosecutor in support of his submission that a total term of in excess of 12 months immediate detention should be imposed were that, while TWP was young, only 16, it is not as if he was only 13 or 14 years of age. He also pointed to the fact that TWP was on a SRO when he committed the 10 new offences.

63 His Honour made the following points when sentencing TWP to 12 months immediate detention on every one of the 10 dwelling burglary offences and ordering that all of the sentences be served concurrently.

64 His Honour noted that TWP reoffended when on the SRO. He connected TWP's previous offending with his new offending and concluded that together they showed a pattern of offending to commit burglaries to get money to purchase cannabis.

65 His Honour referred to TWP being only 16 years of age. He also referred to the fact that TWP had only been offending for about the previous two years. He stated that TWP had reached his current position in relation to his offending "in a bit of a rush".

66 His Honour was rightly impressed with TWP's honesty in relation to his cannabis use, and his open admissions that he liked cannabis and also that he committed burglaries to fund its use.

67 In the course of his reasons his Honour said:

> I think that even at the age of 16 there is no sliding scale of juvenility as far as the Act is concerned. I am to consider the same principles right up until he is full grown.

68 It is true that there is no sliding scale for the weight to be attached to the factor of age/youth in the YO Act. That is not surprising because a young person's biological age may not of itself necessarily give a true indication of his or her maturity, intellectual capacity and capacity to know right and wrong.

69 Youth is always required to be taken into account when dealing with a young person under the YO Act. It is not whether or not youth is taken into account, but rather what weight it should be given in the case of the particular offender.

70 The YO Act applies to all young persons between 10 years of age and less than 18 years of age. Generally, unless there is a good reason for not doing so, and all things being equal, the weight to be attached to youth

will be greater for a young person at about the bottom of that age range compared to a young person at about the top of it.

71 His Honour was of the view that a sentence of 12 months immediate detention would be the first time that TWP would be required to serve a lengthy term of detention. He was clearly of the view that at least six months in detention before being eligible for a SRO would satisfy the need for TWP to be personally deterred from committing dwelling burglaries. Having essentially made that point, his Honour stated:

> But if he is so relentless a burglar upon his release that they give him supervised release, he starts doing a whole lot of burglaries, I will definitely be open, because then I will know this guy can't learn and my whole focus will be instead of stopping him from offending, stopping him from doing burglaries. But I've got to give him a chance yet. So 12 months minimum penalty is what I give him on each of these 12 months detention concurrent with each other. I'm not going to give him any more. He is young. He can learn from a six month stretch and a six month supervised release.

72 In the course of submissions before me, the prosecutor referred to the authority of *LAP v The State of Western Australia* [2012] WASCA 156 in support of the ground that the sentence of 12 months immediate detention imposed by his Honour was so inadequate as to manifest error.

73 On 2 May 2011, LAP was sentenced to a total period of 18 months detention for offences which included aggravated burglary. He became eligible for release on a SRO and on 8 February 2012 he was released from detention pursuant to a SRO.

74 While subject to the SRO, and only a day after his release, he committed the first of the burglaries the subject of the appeal. He then committed further offences on 11 and 12 February 2012, and then two further offences on 16 February 2012. The appellant went to houses in which the occupants were absent. He forced entry and stole various items including jewellery, mobile phones, watches and portable computers. On 16 February 2012, he was apprehended by police with various stolen items. Forensic evidence also linked him with the offences.

75 On 18 April 2012, LAP was sentenced by the Acting President of this Court to 22 months detention on each of the five charges of aggravated burglary on a dwelling, to be served concurrently, resulting in a total effective sentence of 22 months detention. The appeal against the sentence was dismissed.

76 There are some similarities between the facts in LAP and the facts in this case for TWP. LAP was a third striker. He was 16 years and 1 month old when he committed the five new aggravated dwelling burglary offences soon after his release on the SRO. The five new offences were committed within the relatively short time period of a week. LAP, like TWP, had a difficult childhood in which he was exposed to ongoing domestic violence and substance abuse. He largely lived an unstructured and erratic lifestyle and missed lengthy periods of school and struggled academically. He commenced using drugs at a very young age. He abused substances daily and did not see any negative impact in drug and alcohol abuse.

77 There are also some material differences between the facts in LAP and the facts in this case for TWP. LAP had a lengthy criminal record commencing from when he was about 11 years of age. TWP's record commences from just before he turned 14 years of age. The number of offences for sentence for TWP exceeds the number of offences for LAP. However, in the case of LAP there was forensic evidence to connect him to the offending. In the case of TWP, he freely admitted his involvement in a multiple number of burglaries. Further, the property stolen in the course of the dwelling burglaries, was in an overall sense, greater in relation to the offences committed by LAP than the offences committed by TWP.

78 In paragraph 19 of his judgment, his Honour Mazza J stated:

> Of course, in the end, each case must be decided on its own facts.

79 At paragraph 22 his Honour stated:

> I accept that, for a young offender, a term of 22 months' imprisonment is a high sentence, but in all the circumstances of this case I do not think that the individual sentences can be said to be unreasonable or plainly unjust.

80 At paragraph 23, his Honour stated:

> I have not been persuaded that the total effective sentence breached the first limb of the totality principle.

81 It is generally accepted that the totality principle, which applies when sentencing for multiple offences, comprises of two "limbs", namely:

(a) The total effective sentence must bear a proper relationship to the overall criminality involved in all offences, viewed in their entirety

and having regard to the circumstances of the case, including those referable to the offender personally; and

(b) The Court should not impose a "crushing" sentence. The word crushing in this context connotes the destruction of any reasonable expectation of a useful life after release. An aggregate sentence may be inappropriately long under the first limb even if it cannot be described as crushing. See *Roffey v State of Western Australia* [2007] WASCA 246.

82 In fairness to the learned prosecutor, the reference to the authority of LAP was not made on the basis that it set the standard. It is accepted that in LAP the respondent/offender carried the onus to prove that the sentence was manifestly excessive. In the end, the Court of Appeal was simply, but importantly, not satisfied that the sentence was manifestly excessive. I repeat the passages that I set out earlier from the judgment of his Honour Mazza J.

83 It was submitted on behalf of the State that the sentence of 12 months immediate detention imposed by his Honour Magistrate Sharrett was manifestly inadequate because the new dwelling burglary offences were committed when TWP was on a SRO for offences of the same nature, and so weight needed to be given to personal deterrence in addition to general deterrence, that TWP was a third striker for the second time, that the new offending was repetitive and carried the risk of confrontation with occupants in dwellings, that the only thing that stopped TWP offending was his apprehension and detention, and that totality required a total term of immediate detention in excess of 12 months.

84 Counsel for TWP has argued that the total sentence is not manifestly inadequate when regard is had to the combination of TWP's early pleas of guilty, his high level of co-operation with the police including making full admissions, volunteering his involvement in dwelling burglaries for which he was only a person of interest and giving information in relation to co-offenders, that TWP was only a young boy of 16 years of age at the time, that in addition to being very honest with the police, TWP was also very honest with the Court, his continued chronic addiction to cannabis and the difficulty for him to stop using it given its use by relatives and others in his immediate environment, his difficult personal circumstances throughout his childhood, including exposure to and being the victim of domestic violence and not having a positive male role model in his life, that all of the new offences were committed within a single and relatively short time period, that all of the new offences only involved intent or

where property was stolen, a small amount of money or property, that none of the dwelling burglaries involved any offence of personal violence, that while serving his current term of detention he has positively engaged in workshop programs, that immediate detention for TWP meant that he would be in Perth and a long way from family and country, that the point has not been reached where all hope is lost for TWP, and that the community would be best served by rehabilitation within the community.

Comments and conclusions on the sentences imposed on 26 February 2015

85 At the outset I wish to comment on magistrates seeking extended powers from the President of the Court pursuant to s 22 of the CCt Act to impose sentences beyond their usual powers. In this case, because TWP was a third striker, a minimum mandatory sentence of 12 months detention had to be imposed. In the circumstances of this case, the detention had to be immediate and not part of a CRO. In the usual course, a magistrate cannot impose a sentence of detention longer than 12 months without extended powers (see s 21 of the CCt Act).

86 Given all of that, once his Honour embarked on the sentencing hearing and heard submissions from the parties, he could not have imposed a sentence more than the statutory mandatory minimum.

87 Without extended powers, the submission by the police prosecutor for a total sentence of detention in excess of the 12 month minimum could not have actually been considered by his Honour unless at some stage during the sentencing hearing his Honour decided to stand the matters down or adjourn them and seek and obtain an extension of powers.

88 In this particular case, the police prosecutor asked his Honour at the outset of the sentencing hearing whether he required an extension of powers to consider imposing a sentence of more than 12 months detention. His Honour replied to the police prosecutor that he would have to persuade him to get to that stage.

89 With respect, in cases such as this where a young offender is a third striker, and particularly if so for the second time, and where the young offender is to be sentenced on a relatively large number of dwelling burglaries, it is highly desirable for the sentencing magistrate to seek an extension of powers from the President of the Court before the commencement of the sentencing hearing.

90 Having said all that, I wish to add that obtaining an extension of powers from the President does not necessarily mean that a sentence requiring the extension should or must be made.

91 Whether or not the extension is utilised, having an extension in place enables the parties to make or respond to submissions on an unlimited range of sentencing options. It also avoids sentencing hearings from having to be adjourned for an extension to be sought, which can cause a great deal of cost, inconvenience and anxiety for the parties involved and also to family and friends.

92 Finally, and importantly, having an extension in place would eliminate the possibility of the magistrate ever actually feeling any pressure to proceed to sentence within the usual sentencing powers for magistrates when the proper sentence would require an extension. It would also eliminate the potential for any perception that the magistrate had acted in that way.

93 There is no issue between the parties that immediate detention was the proper sentencing outcome in this case. Because of the operation of the statutory mandatory minimum provisions for dwelling burglaries in the *Criminal Code*, any immediate detention had to be for a fixed term of at least 12months on each charge. The real issue between the parties in this case, is not so much the length of the fixed term on each charge, which of course of itself must be proper, but more so, to what extent, if any, any fixed term should be cumulative upon any other or others.

94 Counsel on behalf of the State has submitted that a total term of 12 months detention is manifestly inadequately. Counsel for TWP has submitted that the State has not established that the sentence imposed by his Honour is manifestly inadequate. As I have mentioned earlier, this is an application for a review, which is a hearing de novo and not an appeal. If I am of the view that the sentence imposed by his Honour is within a sound sentencing discretion, then I would not change it.

95 In my respectful view, the total term of 12 months immediate detention imposed by his Honour is manifestly inadequate. It falls outside of a sound sentencing discretion.

96 In my respectful view, his Honour fell into error because of a number of reasons. He mistakenly thought that TWP came to be sentenced on the basis that he was a third striker for the first time, when in fact he was a third striker for the second time. Anyway, the extremely high number of prior offences for dwelling burglaries over a period of about two years or

so meant that TWP had no mitigation at all by reference to his prior record.

97 In my view, his Honour did not give proper weight to both personal deterrence and general deterrence. The 12 months immediate detention imposed by his Honour was not actually going to be the first time that TWP had to serve a lengthy term of detention. He had just served about four and a half months in detention before being released on the SRO on 2 November 2014 before he then committed the first of the 10 new dwelling burglary offences on 1 December 2014. That is a relatively lengthy period of time having regard to a young person's sense of time. Despite that length of time in detention, TWP was back within a month of release into the Broome community on the SRO committing more dwelling burglaries.

98 In addition to all of that, in the context of totality, TWP committed 10 dwelling burglaries on six different days over the period of about two weeks commencing only about one month after his release.

99 The first six of the 10 dwelling burglary offences were committed in houses in Cable Beach. Those offences each carry the statutory maximum penalty of 18 years imprisonment. While I am mindful and bear in mind that not much property was stolen in the five of those six offences which involved the commission of the offence of stealing in the dwelling, it is nevertheless necessary to bear in mind that in all of those offences the houses were searched for property and the victims were likely left with a sense of distress because someone had intruded the private space of their own home.

100 The last four of the 10 dwelling burglary offences were committed in houses in Broome. Those four offences are all aggravated because they were committed in company. They each carry the statutory maximum penalty of 20 years imprisonment. All of those four aggravated dwelling burglaries involved a forced entry, one through a bedroom window, two through the front door and one through the rear door. One of those four offences involved unwrapping Christmas presents to look for something to steal. When that was raised with TWP he demonstrated no empathy or remorse.

101 TWP was back committing those 10 new dwelling burglary offences to get money and property to buy cannabis. Over a long period of time before committing those offences, TWP had shown no interest at all in

addressing his cannabis habit, to in turn, remove the need for him to commit dwelling burglaries to support its use.

102 Given all of that, it was necessary to give significant weight to personal deterrence, general deterrence and the protection of the community in the overall consideration of the proper total sentence.

103 I wish to make one further point which relates to both personal deterrence and general deterrence. In my view, it is very important for TWP and all young persons to have a clear understanding that if they decide to engage in a spree of dwelling burglaries, then the more dwelling burglaries they commit, the worse their position will likely be when it comes to sentence.

104 The community would not be protected if a young person decided to go on a spree of dwelling burglaries with a justified sense that he could keep on committing dwelling burglaries until he got caught and that when it came to be sentenced that he would get no more for a large number than he would get for one, and no matter what the circumstances.

105 Clearly when considering the proper sentence on each charge and then the proper total sentence, in addition to everything that I have mentioned, the overall consideration also needs to take into account everything that counsel for TWP has mentioned as set out earlier by me in these reasons.

106 His Honour referred to TWP's pleas of guilty. I would give him the maximum discount of 25% for them. TWP was also very co-operative and honest with the police and the Court. His Honour was also rightly very mindful of TWP's young age and the need for his rehabilitation, including in particular him ceasing to abuse cannabis. His Honour was also rightly concerned that time in detention goes slowly for a young person and that that was a factor in fixing the length of time on the sentences of detention and particularly the total sentence. In addition to all of that, and again bearing in mind everything that counsel for TWP has mentioned, I also wish to mention that detention for TWP means that he will be at Banksia Hill Detention Centre in Perth, and so away from his family and country. That is relevant because it makes his time in custody very hard.

107 His Honour set the commencement date of 17 February 2015 for the sentences he imposed on 26 February 2015. That was obviously a slip because at the beginning of the sentencing proceedings, his Honour mentioned that the commencement date for any term of immediate

detention should be 19 February 2015 because that was the date on which the SRO expired. Perhaps he was thinking of 17 February because the SRRB suspended the SRO on 17 December 2014. Anyway, it is a small point, but given that the sentences imposed on 8 August 2014 expired on and including 19 February 2015, the date of the sentences for the 10 new dwelling burglaries should commence from and including 20 February 2015.

108 For all these reasons, I make the following orders in relation to the sentences imposed on 26 February 2015:

1. The sentences of 12 months immediate detention on each of the charges numbered 1 to 6 as set out at the beginning of these reasons, ie the dwelling burglaries committed at Cable Beach, are confirmed, and

2. The sentences of 12 months immediate detention on each of the charges numbered 7 to 10 as set out at the beginning of these reasons, ie the aggravated dwelling burglaries committed in Broome, are discharged and substituted by sentences of 14 months immediate detention, and

3. The order of his Honour that all of the sentences are to be served concurrently is discharged and substituted by the following orders, and

4. All of the sentences referred to in paragraph 1 hereof of 12 months immediate detention are to be served concurrently, and

5. All of the substituted sentences referred to in paragraph 2 hereof of 14 months immediate detention are to be served concurrently, and

6. The total of the sentences referred in paragraph 5 hereof of 14 months immediate detention is to commence after the expiration of the first four months of the total of the sentences referred to in paragraph 4 hereof of 12 months immediate detention, which results in a total term of immediate detention of 18 months, and

7. The total term of immediate detention of 18 months commences on 20 February 2015, and

8. TWP is to serve half of the total term of immediate detention of 18 months before being eligible for supervised release.

The review of the sentences imposed on 8 August 2014

109 When TWP was sentenced on 8 August 2014, he should have been sentenced as a third striker on each of the seven new aggravated dwelling burglary offences.

110 During the sentencing hearing on 8 August 2014, his Honour asked the police prosecutor if TWP was a third striker. The police prosecutor initially indicated that he was uncertain about that and later indicated that he thought that TWP was not a third striker. Counsel for TWP was not asked and made no comment on the point. On the strength of that, his Honour proceeded to sentence TWP on the basis that he was not a third striker.

111 As I have mentioned, the fact that TWP was not properly sentenced as a third striker on 8 August 2014 did not come to light until after a prosecutor in the Office of the Director Prosecutions came to prepare the review for the sentences imposed by his Honour on 26 February 2015. Before then, there was no appeal, no review and no correction of sentence sought in relation to the sentences imposed on 8 August 2014.

112 The relevant facts on the seven aggravated dwelling burglaries can be adequately summarised as follows. One offence was committed on each of 5, 9, 16, 17 and 18 June 2014. Two of the offences were committed on 19 June 2014. Four of the offences were committed in Cable Beach and the other three were committed in Broome. The offences included forced entries and rummaging through rooms. None of the offences involved much property being taken. The aggravated dwelling burglary committed on 17 June 2014 in Broome was committed when occupants were inside the dwelling.

113 TWP pleaded guilty to all of the charges. He also co-operated with the police and made full admissions. Indeed, in relation to five of the seven offences, he made full admissions when at the time of his admissions he was only a person of interest.

114 On review, I discharge the sentences of two months immediate detention on each and every one of the aggravated dwelling burglary offences and substitute them by sentences of 12 months immediate detention. I also order that each and every one of those seven sentences be served concurrently. That results in a total sentence of 12 months immediate detention for the seven offences of aggravated dwelling burglary.

115 All of the other sentences imposed by his Honour on 8 August 2014 remain as ordered by him.

116 The question now, is what do I do with those substituted sentences and the total sentence of 12 months immediate detention. It is submitted on behalf of the State that I should make at least some part of it cumulative to the sentences imposed after the review of the sentences imposed on 26 February 2015. Counsel for TWP has submitted that I should not increase the sentences imposed on 8 August 2014 at all, but that if I did, then no amount of any of the substituted term of immediate detention for the seven aggravated dwelling burglaries should be made cumulative on any of the other sentences.

117 Having conducted both reviews, in my view, I am now in the best possible position to properly consider what total sentence should be imposed overall.

118 In my view, no amount of each of the substituted terms and the total term of 12 months immediate detention for the seven aggravated dwelling burglaries initially dealt with on 8 August 2014 should be made cumulative to the substituted total sentence of 18 months immediate detention imposed by me on the review of the sentences initially imposed on 26 February 2015.

119 I have reached this decision for the following reasons.

120 First, that his Honour was misled by the prosecution during the sentencing hearing on 8 August 2014 that TWP was not a third striker.

121 Secondly, the exceptionally long delay in the State seeking to do anything about it.

122 Thirdly, that by the time the State sought to do something about it, TWP had already served the total of the full term of the sentences imposed on 8 August 2014.

123 Fourthly, that the community is now adequately protected by the substituted total sentence of 18 months immediate detention imposed by me in relation to the 10 most recent offences of dwelling burglary.

124 Fifthly, in my view, any further cumulative period of time would breach the second limb of the totality principle given all of the factual circumstances of all of the offences and of TWP and when applying the

principle that a young person such as TWP's sense of time should be taken into account.

125 For all these reasons each of the substituted sentences and the total sentence of 12 months immediate detention for the seven aggravated burglaries initially dealt with on 8 August 2014 can be noted on TWP's record on 8 August 2014 and with the further note that they commenced on 20 June 2014.

126 The net result of all of these reasons is that currently, TWP is still required to serve a total sentence of 18 months immediate detention, which commenced on 20 February 2015, for the 10 most recent offences of dwelling burglary which were dealt with by his Honour on 26 February 2015.