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THE CHILDREN'S COURT OF

WESTERN AUSTRALIA

PE 55 of 2015
PE 334 of 2015
PE 624-626 of 2015
PE 672 of 2015
RO 885 of 2014
RO 907 of 2014
RO 935 of 2014

THE STATE OF WESTERN AUSTRALIA

and

OTR-S

JUDGE J. WAGER

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON TUESDAY, 21 APRIL 2015, AT 2.16 PM

MR M. WALTON represented the State of Western Australia.

MS M. MELVILLE-MAIN appeared for Youth Justice Services.

MR P. DIXON appeared for the accused.

THE CLERK OF ARRAIGNS: Matter of OTR-S.

HER HONOUR: All right. And you're OTR-S? Yes. And, Mr Dixon, you are appearing for OTR-S?

DIXON, MR: I appear, your Honour, yes.

HER HONOUR: Thank you. And, Mr Walton, you're representing the State?

WALTON, MR: May it please the court.

HER HONOUR: And, Ms Meville-Main, you are appearing on behalf of the Youth Justice?

MELVILLE-MAIN, MS: Yes, I am. Thank you.

HER HONOUR: Yes. Thank you. Well, Mr Dixon, I have received your application for review and your submissions and I have also received the State's submissions.

DIXON, MR: Thank you.

HER HONOUR: And just before we start, is there any difficulty, given that you filed one form of application and then another one, in terms of dates, or is the State happy that it's filed within the one month period because the first application was within time?

DIXON, MR: I've not raised that matter with my friend.

HER HONOUR: No. I just thought as a threshold - - -

DIXON, MR: I can indicate, at all times I was following the procedural advice by the registry when I filed that first form.

HER HONOUR: Okay. It would appear that it was quite obvious that you were seeking a review pursuant to section 40 in the first document that was filed.

DIXON, MR: Yes.

HER HONOUR: Mr Walton, do you have any view on that?

WALTON, MR: I have no issue, your Honour.

HER HONOUR: Okay. Good. I just wanted to get that over as a threshold one.

WALTON, MR: Thank you, your Honour.

HER HONOUR: Yes. Thanks.

DIXON, MR: If your Honour is ready I will proceed with the oral submissions I wish to make.

HER HONOUR: Yes. Thank you.

DIXON, MR: The State has, quite correctly in my submission, identified the nature of today's proceeding. It's not necessary to show actual error as per a Supreme Court appeal. The provisions that this application is brought under were intended to create a relatively fast and informal method by which decision by magistrates could be reviewed by your Honour sitting as the President and today's application, your Honour determines the application by way of it being a hearing de novo.

Before I move to the submissions I wish to make in support of the application, there are a couple of what I submit are factual errors in the State's written submissions that I might just like to address first.

HER HONOUR: Sure.

DIXON, MR: The first of those appears at numbered paragraph 1 of the State's submissions, at page 1 of the submissions.

HER HONOUR: Yes.

DIXON, MR: It refers to the first incident and the second incident occurring three days later. That's correct. The first incident referred to is a robbery which occurred on 9 January 2015. The second incident occurred on 12 January 2015. The submissions say that two days after that the applicant committed offences which form numbers 624 to 626. In fact, those offences were committed on 14 February, so the time gap is one month and two days rather than the two days as suggested in the State's submissions.

HER HONOUR: Yes.

DIXON, MR: Similarly, paragraph 2. It starts:

This all happened.

That should not be a reference to all of the criminal offences described in paragraph 1.

HER HONOUR: Right.

DIXON, MR: It was only those three offences committed on 14 February 2015 which occurred in time whilst she was subject to the youth community based order.

HER HONOUR: Yes.

DIXON, MR: And the final matter is a relatively minor matter. At paragraph number 13, it refers on a couple of occasions to the applicant being subject to an IYSO so it was, in fact, a youth community based order rather than an intensive youth supervision order.

WALTON, MR: Your Honour, the State and I accept responsibility, your Honour, as I am representing the State today. No difficulty at all, your Honour.

HER HONOUR: Good. Thanks for that.

DIXON, MR: Your Honour, there's some factors that really gave rise to the reasons why this application is made and the first of those factors is the applicant's youth at the time of offending. In terms of the matters before your Honour, they were either committed when she was towards the end of being a 14 year old, an old 14 year old, or having just turned 15. The other factor of some significance, in my submission, is a relatively narrow period of offending in her overall antecedence.

She has commenced offending, you will see from the record, on 4 October 2014, which was a charge of damage which was dismissed, which was her first appearance and there's a period of offending up until 14 February. So it's a period of some four to five months of criminality. I conceded at sentencing that certainly some of these offences are serious. I don't shy from that concession I made at sentencing, but the submission I am making is, we have a relatively short period of offending by somebody, in my submission in this jurisdiction, is quite youthful for this jurisdiction. An old 14 year old or a young 15 year old.

The other issue is – and this is conceded – largely to do with her continued offending, but there has been a limited opportunity for OTR-S to have intervention provided by way of a court order and assistance through Juvenile Justice to address her offending behaviour. The

reason I make that submission is, the only order she has been placed on was the youth community based order that she was placed on, on 22 January. She had about four weeks, roughly, on that order before she was remanded in custody, but that was due to her own re-offending.

She committed offences 624 to 626 on 14 February. So it's conceded that the reason she had such a short period of intervention was solely due to her re-offending, but I still make the submission she is somebody who, in terms of having supports to try and address her offending needs, she has only had the benefit of that for some three to four weeks. The position with the sentencing which occurred on 18 March before his Honour Magistrate Schwass, that is set out in my submissions, but she was placed on a sentence of six months immediate detention on charge 672, robbery. Six months detention cumulatively on charge 334, assault occasioning bodily harm.

In the sequence of events, her antecedence at the actual time of committing those two offences were that the only appearance she had had in the court was 3 November when she had that charge of criminal damage for which she was dismissed without any further punishment. The point I am making is, is by effectively imposing those two sentences of six months detention and making them cumulative his Honour has imposed the very maximum sentence he was permitted by law to impose on OTR-S, which is a total term of 12 months detention.

In a situation where she was an old 14 year old, young 15 year old at the time of sentencing and at the time of committing those offences had had a very limited criminal history. I accept there will always be cases where it would be appropriate for a magistrate to impose such a sentence, but in my respectful submission OTR-S is not at that stage when she was sentenced because a number of issues were identified and there were procedures and plans put in place in a pre-sentence report.

And in terms of the factors, sentencing offenders under the Young Offenders Act, some of which I have referred to in my submissions, my first submission is there was an option other than a term of immediate detention. Notably, a conditional release order to address things such as structural recreational activities, to provide her father with the assistance in terms of better parenting of OTR-S, for her to reengage in the education system and for her to undertake psychological counselling.

There was some reference to what may well be some of the issues underlying her violent offending in the pre-sentence report. There was a note in the pre-sentence report in relation to herself being a victim of childhood bullying. I have some further matters to put up about that. They were not raised at the actual sentencing, but in view of this being a hearing de novo I would submit I can submit those further instructions.

OTR-S's brief antecedence is that her natural mother was not in a position to raise her. She has been raised by her auntie and uncle. They're in the back of the court and all throughout her life she has always viewed those two people as being her parents. Approximately, well, in relatively recent times the family moved from New Zealand to Western Australia because her father secured work in Newman. I understand it was in the mining industry.

So OTR-S has come over from New Zealand to Newman. She has entered the local high school in Newman and was a victim of a group attack. Some three young girls assaulted her and thereafter that there were about two or three further incidents of assaults following that by the same group of people. Her father's worded it in ways such as, she has been a victim of violence. Regrettably she, in recent months, has dealt with that by herself becoming a bully and lashing out in a violent way which is reflected in the offences before your Honour.

But it would be hoped, in view of her youth, that psychological counselling may well be in a position to address that underlying issue with OTR-S's behaviour. The other submission, this was made at sentencing, it perhaps has more weight today, which was that the time she spent in custody has had a significant deterrent effect on her. She had had 21 days in custody at the time of sentencing. She has obviously been in detention ever since sentencing on 18 March.

I have addressed your Honour about the suitability in my submission of imposing a conditional release order. If I'm not successful in those submissions, my alternative submission is that in all of the circumstances 12 months detention is too much for OTR-S's case and there would be a situation, in my respectful submission, where a lesser term of detention than 12 months detention is the appropriate sentence in this case.

They're the additional oral submissions I wish to make on top of my written submissions. Unless there's anything

further your Honour has to ask of me, they're the issues I wish to raise today.

HER HONOUR: Thank you, Mr Dixon. And, Mr Walton, did you wish to speak to the State's submissions?

WALTON, MR: Your Honour, I will just make some brief oral submissions. The State refers to and relies upon the State's submissions that have already been provided and referred to. The State would submit that the two main offences, the two offences which attracted the cumulative sentences, were self evidently very serious and the State simply just refers to the facts which speak for themselves.

The State, and sensibly, acknowledged the applicant's age at the time of sentencing, but would also submit that her lack of an opportunity or the limited opportunity to be afforded an opportunity to be subject to an order and have intervention is not strictly determinative in this matter and it would be trite to say that there would be no imperative to automatically impose an order in a person's navigation through the criminal justice system automatically prior to a term of detention, depending upon the circumstances of the offending.

HER HONOUR: It is pretty unusual, isn't it, to have somebody so young who has actually served some time, who has only been on a youth community based order for such a short period of time, to get the full might of the magistrate's sentencing power?

WALTON, MR: I would be speaking from the Bar table, your Honour. Which I'm happy to do so.

HER HONOUR: Well, look, effectively that really has to happen, because I know there's mention in the State's submissions about lack of case law but, quite frankly, there is lack of case law.

WALTON, MR: I'm happy to do so, your Honour.

HER HONOUR: It is discretionary. Yes.

WALTON, MR: I'm happy to do so. And the issue, I think, is the Chan factor, about comparative sentences customarily imposed. Your Honour, I can say from my experience, it is unusual but – and you're probably expecting this submission – is that it's not so far out of the bounds of sentencing, exercising discretion in this jurisdiction, as far as I'm aware, that it would attract necessarily an appeal or a successful appeal.

HER HONOUR: Yes. But isn't that the difference, because I'm here as a section 40 review.

WALTON, MR: Yes, your Honour.

HER HONOUR: Not as an appeal.

WALTON, MR: Sorry, your Honour. As a review.

HER HONOUR: Yes. No. I fully accept that your submission was in respect of a review. But the test for me is a very different one from if it was an appeal.

WALTON, MR: Certainly, your Honour. And I accept that and that's what the State's submissions would say. Fundamentally, I would have thought that it was – my friend's submissions appear to be at one time a complaint about the total sentence being manifestly excessive and I'm going to – I apologise for using these terms, but I think I can apply those with the necessary changes being made or the adaptions.

HER HONOUR: Sure.

WALTON, MR: But also, it would seem to the State that it perhaps falls within the category of a failure to adhere to the totality principle rather than it being manifestly excessive. That, of course, attracts – applying to individual sentences. It would appear to the State that the individual sentences alone are not manifestly excessive, but it may well fall to be a misapplication of that totality principle.

In addressing that, one of my friend's submissions he made orally and also in his submissions which struck me, or the State, as having some initial attraction and weight was the fact that the magistrate imposed the 12 month sentence being at the very upper limit of his jurisdiction. That, I would submit, your Honour, is perhaps – and I don't use the word misleading against my learned friend – but perhaps it has a false attraction because jurisdictional limit is very different to a maximum penalty.

I have referred to the case – well, I haven't referred to the case, your Honour. It's Wiltshire v Maffey. I have a copy. I have provided it to my learned friend. I haven't provided it earlier, your Honour, because I only thought of it mid-morning from my previous experience. And it would appear to me that that's two very different things and you can't conflate those two principles to suggest, or to infer, that the magistrate by imposing the upper limit

that reflected somehow that the offending was treated as at the very highest end or at the highest end of any scale.

HER HONOUR: No. So basically, in this jurisdiction, the magistrate has reached a conclusion that his powers were sufficient to deal with it.

WALTON, MR: That's right.

HER HONOUR: And, of course, that there was a significant greater penalty that could have been imposed had the matter been referred to the President.

WALTON, MR: That's right, your Honour. I think there might be a danger in – well saying, well, this is the jurisdictional limit. That somehow reflects the magistrate treating these offences at the very highest end, which it appears he – well, the State would submit he hasn't and that would, perhaps, by describing these offending as the very highest end is clearly incorrect and he – but the learned magistrate hasn't fallen in to that error in the State's respectful submission.

In addressing the issue of totality. Your Honour, the State would say that, having a look at the overall sentence it appears that the learned magistrate has adopted and followed the totality principle in that the mix of sentences for the offences that he had to sentence, such that he has made some offences concurrent, he has treated some by virtue of section 67 of the Young Offenders Act with no further punishment.

So there has been an application of the magistrate's attention to that process by virtue of the structure of the sentence. So it couldn't be said, or the State's submission is that it couldn't be said, that the totality principle has been ignored but, rather, the State's submission is that, it has been followed and there has been careful consideration of the structure of the sentence and it's for that reason that the State would say that if it was to be – the review was to be to look at various traditional heads of fault, is that the totality principle has, in fact, been followed.

And I note that the two sentences which attracted the cumulation were committed on different dates, were different offences and different complainants, and I think the timeline of offending, that the offending which attracted the youth community based order, occurred on 22 October 2014, 19 December 2014 and 3 January 2015. The

new offences, or I describe them as the offences that came before the magistrate, after the YCBO, were committed on 9 January, 12 January and 14 February 2015 and I note all of the offending that I have referred to contained an element of violence and on 14 February there were two offences which involved aspects of violence.

So it's a continuation from, in effect, October of 2014 throughout that period. Now, my friend makes, and perhaps, with respect, a legitimate point about the opportunity for intervention and the State accepts that. But by virtue of the actual offending itself it appears there is an escalation which, again, may support my friend's submission, had there been intervention. But the State would say, well, there is also an intervening period or an intervening date and that was November – sorry, 22 January, where there was a youth community based order imposed, but after that date there was other offending of a violent nature.

Again, the State just simply refers to the serious assault. So in all, your Honour, the mix of offending before the magistrate on that date was relatively lengthy, over a relatively or a few months period of time. The totality principle, with respect, was applied and it appears that the individual sentences themselves were not manifestly excessive when taking in to account the maximum penalties available, the jurisdictional limit, which is just that, and the nature and continuation of the violence.

If your Honour is against me on that point, on those points, I note that the submissions filed with the court by the State at paragraph 13(e) talk about the time spent in custody may allow the court to reconsider as to whether a youth conditional release order is imposed. I would also offer an alternative, your Honour, by way of respectful submission, is that the court may look at the overall mix and say, well, the totality principle hasn't been misapplied and may consider that the two terms previously made cumulative may be, in fact, made concurrent as an alternative.

I don't wish to, of course, suggest a result, your Honour, but I just simply say it because of the submissions being made previously. Thank you, your Honour.

HER HONOUR: All right. Is there anything that you wanted to raise, Mr Dixon?

DIXON, MR: Just briefly in response. My friend's submissions about what are the grounds of the application,

is it an argument that sentence has been manifestly excessive or a misapplication of the totality principle. In my submission, the nature of these proceedings, it's a hearing de novo. It's a matter, with respect, for your Honour to consider the matter and come to a decision.

I am not bound in my submission in making this application to establish either that the sentences were manifestly excessive or there was a misapplication of the totality principle. What I will say further to that is, the authorities I understand the State has referred to in their submissions and to some extent in the oral submissions made today, it's an application of the sentencing principles as they exist in the adult jurisdiction.

This jurisdiction is statutorily different by virtue of the Young Offenders Act and a few express provisions of that Act that I have referred to in my submissions. That is, a period of detention should only be used as a last resort, although that's similar to the adult jurisdiction. There's also a statutory obligation if detention is required it is only to be for a shorter time as is necessary. So in my submission, that modifies both the usual principles, such as totality and what my friend referred to as whether or not the sentences are manifestly excessive.

The other express statutory difference is how young the offender is as a mitigating factor, which operates strongly in this jurisdiction, in my submission, and again I refer to OTR-S's ages at the time of the offending and also sentencing. Unless there is anything further, your Honour, they are my points in reply.

HER HONOUR: Thank you. All right. Well, I will deal with the matter now. Mr Dixon applies for review of the decision of his Honour Magistrate Schwass to sentence OTR-S to 12 months detention on 18 March 2015. The review is brought pursuant to section 14 of the Children's Court of Western Australia Act 1988 and I think it's important to refer to that. Section 41 states:

> Subject to this Act, where the Court, when constituted so as not to consist of or include a judge, makes a finding that a charge against a person is proved and makes an order against or in relation to the person in consequence of that finding, the Court when constituted by the President may, of its own motion or upon an application made under subsection (2), reconsider the

> order and confirm the order, or 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.

The section goes on in respect of subsection (2) to state that when the application is made by a person it must be made within one month after the date of the order, but it is conceded by all that, in fact, the sentence occurred on 18 March 2015 and the first notice was filed on 7 April 2015, so it was within time.

Because this is a review and it's not an appeal, it's not necessary to show actual error in section 40 review. A review is not an appeal to the Supreme Court and section 40 was intended to create a relatively fast and informal method by which decisions by magistrates could be reviewed by the President and there has been the relevant case law cited by the State. P v The Queen, which was a Full Court of the Supreme Court decision of 1 December 1995, a decision of Scott J at 14.

Further review of a sentence is a hearing de novo and there is reference there to M v The Queen. Once again a Full Court Supreme Court, 15 August 1994. And in that case the Full Bench agreed with the lead judgment of Zeeman J at page 6. It's conceded the court has jurisdiction to review the detention sentence imposed. However, the State submits that while there is no requirement to show an appealable error, given the discretionary character of section 41 indicated by the word "may", the presence of an error may assist the court in its decision.

The State submits that there is no express or implied error in his Honour's disposition. The applicant's ground for review is that in all the circumstances the appropriate sentence should have been a juvenile conditional release order or a sentence of less than 12 months detention. I now turn to the matters for which OTR-S was sentenced on 18 March 2015. She was sentenced to 672 of 2015 robbery, six months detention. 334 of '15 assault occasioning bodily harm, six months detention cumulative. 624 of '15 assault occasioning bodily harm, six months concurrent. 625 of '15 assault, six months concurrent. 626 of '15 stealing, three months concurrent. That was a person.

884 of '15 was dismissed, being a stealing for which imprisonment is not an option and no further punishment was imposed. 55 of '15 an assault, three months concurrent. 935 of '14 assault occasioning bodily harm, six months concurrent and 907 of '14 assault, being three months

concurrent. Prior to that there had been the imposition of the youth community based order and at the time when that order was imposed the only time that OTR-S had been before the court was in respect of a damage charge that had been the subject of dismissal.

So what that meant was that, on the date of sentencing, 18 March 2015, the only order that had been imposed against OTR-S at that time had been the youth community based order. Now that, of course, was breached and I will speak about that further. The head sentence imposed was backdated to 21 February 2015 to reflect the time that OTR-S had spent in custody. OTR-S was 15 years one month old at the date of sentence and she was first sentenced, as I have stated, to the youth community based order for three months on 22 January 2015.

So that first order was imposed when she was still 14 years old. That order related to three complaints that were, of course, then dealt with in respect of the subsequent sentence and I'm referring here to the statement of material facts and the Community and Justice report dated 22 January 2015. In respect of 885 of '15 OTR-S was with significantly older peers at the time that she stole from the person and violence was involved.

907 of '15, the assault occasioning bodily harm, OTR-S had punched the complainant MS twice in the face. 935 of 14, assault occasioning actual bodily harm, she punched the complainant PW several times in the head and kneed her in the face.

Now, in respect of that one, OTR-S said that she felt angry at the victim for gossiping about her and it was identified in the report of 22 January 2015 that a lack of emotional regulation was identified and needed to be dealt with. 55 of 15, assault occurred when OTR-S punched the complainant TW to the side of the head causing the complainant's glasses to smash. OTR-S said she was feeling upset and angry about an unrelated matter whilst in Perth City. She said the complainant had been staring at her.

The relevant report identified again a lack of emotional regulation skills. 3342 of 2014, assault occasioning actual bodily harm, was an offence that occurred after some of the charges that were dealt with but before the youth community based order was imposed because that one occurred on 12 January 2015 but was not dealt with until 21 February. It did not, therefore, breach the order

and it, therefore, occurred at a time when the only matter on the record that was relevant was a dismissal.

In that case the complainant was standing outside Hungry Jack's talking. OTR-S punched her to the left side of the head with such force that she was knocked to the ground and she hit the glass window frame. She was injured and a scuffle ensued and that was recorded on Facebook. The victim suffered swelling to the jaw and cheekbone and discomfort. And just three days prior, once again, an offence that had not breached the youth community based order, OTR-S committed the offence of robbery which was 672 of 15.

The complainant had gone to the public toilets at the corner of Murray Street at Forrest Chase. She was seated with a clutch bag on her lap and OTR-S took it from her lap and ran off. The complainant chased her and caught up and she said, "I want my stuff back", and OTR-S said, "Do you want a go?" and the complainant grabbed at the bag. OTR-S punched her with a right fist to the face and the complainant kept trying to grab the bag. OTR-S punched her two more times and continued to try and get the bag.

Now, the bag was never returned and so what was stolen from that young complainant was an iPhone 4 and $84 cash. The total value was $520 and no restitution was made, no doubt nor ordered because of the actions of the court. Now, after OTR-S was placed on the youth community based order on 22 January 2015, the remaining three offences occurred, all on 14 February 2015. So that was two days after she turned 15. 624, 25 and 26 of 15 occurred between 9 and 9.30 pm. OTR-S was in company with two others and they walked behind the complainant and her two girlfriends returning to their car.

OTR-S called out asking for money and when she was told "No" she continued to heckle them, and then the complainant felt something hard hit the back of her head causing her to fall on the rear bumper of the car. She felt swelling and bruising to her left shoulder and tenderness at the back of her head. One of her friends then felt someone grab her hair from behind and pull it hard, dragging her head to the road. She did not have visible injuries but experienced pain.

And the third girl was so traumatised, it would appear, that she went down the road and she threw her handbag at OTR-S hoping that it would stop her from attacking her. Now, police located the stolen MasterCard from that handbag with OTR-S, but they did not get

anything else back and so she lost the handbag, the keys and the cash. They were never recovered. OTR-S was then remanded in detention following that arrest on 23 February 2015.

That remand in custody was confirmed by the president. Now, I have listed these offences in a pool because they certainly are very serious charges and an order of detention is, effectively, conceded by all parties to be the only appropriate option despite OTR-S's young age and the short period of her offending. The reason for the review is that it is challenged on OTR-S's behalf that the form of detention and/or the length of the term imposed is appropriate. The community and youth justice reports dated 22 January and 18 March 2015 provide the following information.

OTR-S was born in New Zealand and because of domestic violence and problems at the time prior to her birth, her birth father has had no role in her life. Her mum arranged for her auntie and uncle, who she considers her mum and dad, to bring her up, and Ms AW and Mr GS, who are her birth uncle and aunt, have been her parents throughout her life, and they continue to be supportive of her in their parental role.

OTR-S has two siblings, who are the children of her uncle and aunt, and she alleges that there has been abuse with her brother of a physical and verbal kind. She has returned to New Zealand to visit her birth mother and she has got three biological siblings and four half-siblings and she is keen to see her mother again in the future. Mr S is a FIFO worker and Ms AW is a stay-at-home mum. They have repeated their support of OTR-S in each of the reports that has been prepared for the court.

When OTR-S was aged 12 to 13, the family moved to Newman and OTR-S was the victim of extensive physical and emotional bullying. This compounded with exposure to familial aggression from her brother and her link to much older negative peers has been seen by the author as leading to her being violent and not regulating her emotions appropriately. OTR-S said she would go to Year 10 at Warnbro senior high school.

She had been at Rockingham senior high school but had truanted and she said that she wanted to finish her court obligations and go to school in Australia and then maybe return to New Zealand. Her parents are very supportive of her going to school, living with them at home and getting involved in pro-social activities like touch rugby and

netball. They will support her to do psychological counselling and drug and alcohol counselling for the alcohol and cannabis use that she accepts occurred at a time relevant to some of the offending.

The offending after the imposition of the youth community based order happened only weeks into the school semester, but it seems that OTR-S was not attending school. She was still associating with negative peers and she lacked daytime structure. She was dismissive of the effects of her offending on the victims. She was not adhering to house rules, she was disrespectful to her parents and Mr S agreed to a referral to the parents support program.

OTR-S had not yet engaged with the departmental psychologist, she had not started to address the offending behaviour, emotional mismanagement or peer refusal skills. At the time of sentencing, the State said to the learned magistrate that his Honour could impose detention or a conditional release order. At that time OTR-S had spent 25 days remanded in custody and 17 days in respect of some earlier times.

All offences occurred when OTR-S stated she was fearful of the older peers and there was an alleged involvement with alcohol and/or cannabis. In sentencing a young offender, I need to consider the general principles of sentencing under the Young Offenders Act and these are set out in section 7. They are matters that have clearly been considered by his Honour, but there are some matters that I think need to be looked at in light of the order of things.

The first is section 7(8), detention should only be used as a last resort. I am mindful that OTR-S was aged 14 for the majority of the offending and just turned 15 in the month prior to the offences that occurred immediately prior to her detention. I am also well aware that there was only one youth community based order imposed and that no other orders of the court had been imposed. Section 7M recognises the importance of family for the young person and encourages sentencing that strengthens family.

OTR-S's family is very supportive. Her parents are present in court today and clearly they will do what they can do get her back on track and to keep her out of detention by encouraging her to follow whatever rules are required. So I am dealing with a young person aged 14 to 15 at the time of offending who has only ever been sentenced to a three-month youth community based order that

had only run for three weeks prior to the further offending at a time of year when it seems little would have started to lead to pro-social activities given it is the start of the school year, sports are not underway and there had not been formal referrals to psychologists and the like, and I am dealing with a young person who has family support.

I now have a look, then, at that sentence of 12 months immediate detention and, given the circumstances, I find that that sentence is not the appropriate order that should have been made. An immediate term of detention is a sentence of last resort and given that only one order had been attempted for a very short period of time, I do not consider that an immediate term had yet been reached. So I then turn to the second issue, which is a conditional release order and the appropriate length of time.

I accept what Mr Walton had said, that the presiding magistrate has discretion when it comes to sentence and that a 12-month limit is not a limit when it comes to these offences; it is simply a jurisdictional limit. So I take into account how very serious these offences have been and I do consider that a significant term of conditional release order is appropriate, even taking into account OTR-S's age and circumstances. I am well aware that she has now had significant time in custody and I consider that period should be deducted from any conditional release order that is imposed, and so on that calculation I think it would be a reduction of - - -

WALTON, MR: She had been in custody since 21 February.

HER HONOUR: She has been – and then there was the 17 days.

WALTON, MR: 17 days.

HER HONOUR: So there was the 21, 17 and then - - -

WALTON, MR: Yes.

DIXON, MR: I think it's 42 days, your Honour.

HER HONOUR: 42 days. All right. So I will deduct a period of two months, so that will be a 10-month conditional release order in total. Now, I will just then go through and reflect how that is imposed in the sentences. So I agree with what has been said by Mr Walton that the presiding magistrate clearly structured the

sentences taking into account the need for concurrency and cumulative sentences in some cases.

So the robbery will remain a six-month period. The 334 assault occasioning actual bodily harm will be reduced to four months. So that is how there will be a cumulative total of 10 months conditional release order. All of the other penalties will remain at the same length and with the same orders in respect of concurrency, but for each other than immediate detention, it is a conditional release order.

So I then come to the next issue, which is what happens now in relation to that order because, clearly, I do not have a report with an agenda. So how does that proceed?

MELVILLE-MAIN, MS: I'm more than happy to provide an agenda today, your Honour.

HER HONOUR: Good. Okay. All right. Well, perhaps, if the matter is stood down and then we can get an agenda. Okay. All right. OTR-S, I've been talking a lot, but it hasn't been to you, really. I've been talking because I've been looking at legal issues, but I will let you know exactly what I have done and why. OTR-S, you've committed some extremely serious offences. Your violence has been terrible and you've taken out violence on people who you didn't even know and they have ended up injured and, no doubt, they have ended up terrified and frightened.

You've also taken their property and you have absolutely no right to do that. It is for those reasons that it was quite appropriate for the presiding magistrate Schwass to sentence you to detention, but today I've had a look at it and, in my view, you shouldn't be doing immediate detention now. You should have a chance of doing the conditional release order and so as of today I'm going to give you an eight-month conditional release order, but I want you to be very, very clear on a few things.

Number one, you got your chance when you got that youth community based order and because you didn't do things right and you committed further offences, you've jumped up this level to detention because conditional release order is detention too. If you don't do what's set in the agenda, what do you think is going to happen?

OTR-S: I will go away (indistinct).

HER HONOUR: You will, exactly, and so it's going to be totally up to you. There's also all of the things that I read out that you weren't doing right. So you weren't going to school, you were hanging around with the older peers, you weren't doing the right thing by your parents. How do you feel now about following what's required in the order?

OTR-S: (indistinct)

HER HONOUR: Yes. Are you going to do it? Okay. All right. Well – sorry, I said eight months. It's 10 months that the order that I've just imposed on you. All right. Well, what has got to happen now is we're going to adjourn, so you're going to have to go downstairs again, and Ms Melville-Main is going to do up an agenda and that's going to be what you're actually going to agree to when it comes to your conditional release order; okay? So either Mr Dixon or Ms Melville-Main or both of them will go through that with you before we come back into court, and you've got to be very clear that you're going to agree to whatever is on that agenda because that is what you're going to have to do for the next 10 months; okay? Okay. Have you got any questions at this stage? No? Okay. Yes.

MELVILLE-MAIN, MS: Sorry, if I could just get an indication of some of the conditions you would like considered on the orders. Community work, psychological counselling?

HER HONOUR: Psychological counselling, the attendance at school, the assistance to do pro-social activities like the netball and touch rugby, the living at home and drug and alcohol counselling if appropriate, and then if there's anything else, of course, that's suggested as appropriate, then I'm very happy to consider that.

MELVILLE-MAIN, MS: Thank you.

HER HONOUR: All right. So we will now adjourn so that that can be prepared and then we will come back when that has been prepared and when everyone has had a chance to speak to you orally and then we will come back and I will make the order; okay?

OTR-S: Yes.

HER HONOUR: Okay. We will adjourn.

(Short adjournment)

HER HONOUR: Okay. So OTR-S, that was nice and quick, and so what it says, and this is what you're going to agree to, so I want to make sure that you're clear on it all, is that you understand and agree to the following conditions. That whilst you're on the intensive youth supervise order with detention, that you have to follow those conditions and you understand that if you fail to comply with the conditions, breach action may be taken and the matter returned to court. If the order is cancelled by the court following breach action, you understand that a period of detention may be ordered.

OTR-S: Yes.

HER HONOUR: So you know that's what you're agreeing to? Okay. And your general conditions are that you are not to commit another offence and you will be of good behaviour; okay?

OTR-S: Yes.

HER HONOUR: The next one is that you will comply with any reasonable direction given by your supervising officer; okay? The next one is you will not move to a different address without the prior approval of your supervising officer. Okay? All right. And, then, the other conditions are these, that you will attend substance misuse counselling as directed by your supervising officer, that you will attend psychological counselling as directed by your supervising officer and that you will do education and that you will do pro-social activities as directed by your officer. Okay? Do you understand what all of those things mean?

OTR-S: Yes.

HER HONOUR: Okay. All right. And I'm very clear that you understand that if you commit further offences or if you don't do what's required under your order, that you know what's likely to happen.

OTR-S: Yes.

HER HONOUR: Yes. Okay. All right. So that's the order that's made, yes. All right. And thank you, counsel, and thank you Ms Melville-Main.

AT 3.11 PM THE MATTER WAS ADJOURNED ACCORDINGLY

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