
JURISDICTION : CHILDREN'S COURT OF WESTERN AUSTRALIA
IN CRIMINAL

LOCATION : PERTH

CITATION : THE STATE OF WESTERN AUSTRALIA -v- JZ

CORAM : JUDGE REYNOLDS

HEARD : 16 JUNE 2016

DELIVERED : 22 JUNE 2016

FILE NO/S : CCFR 87 of 2016

MATTER : THE STATE OF WESTERN AUSTRALIA v JZ

BETWEEN : THE STATE OF WESTERN AUSTRALIA
Applicant

AND

JZ
Respondent

Catchwords:

Criminal - Child - Unlawful assault - Review of sentence imposed by a magistrate - Youth conditional release order imposed - Turns on own facts

Legislation:

Children's Court Act of Western Australia 1988

Criminal Code

Young Offenders Act 1994

Result:

Review dismissed and order confirmed

Representation:

Counsel:

Applicant : Mr S Stocks
Respondent : Ms C Rossi

Solicitors:

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

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

Nil

Introduction

1 This is an application by the State pursuant to section 40 of the
2 *Children's Court of Western Australia Act 1988* (the C Ct Act) for the
3 review of the sentence imposed by a Magistrate of this Court against the
4 respondent on 18 May 2016. The Magistrate imposed a sentence of a 4
5 month conditional release order with supervision and attendance
6 conditions for an offence of common assault pursuant to section 313(1)(b)
7 of the *Criminal Code*, committed on 2 January 2016 at Spearwood.

8 It has been submitted by counsel on behalf of the State that the
9 sentence imposed is manifestly inadequate having regard to the
10 seriousness of the offence, the need for personal deterrence and the need
11 for general deterrence. The application for review is opposed.

The Facts of the Offence

12 The respondent first appeared before the Court to be dealt with for
13 the offence on 25 February 2016. On that date the matter was adjourned
14 for the respondent to obtain legal advice and he was remanded to appear
15 back before the Court on 10 March 2016.

16 On 10 March 2016 the respondent appeared before the Court,
17 presided over by the same Magistrate who eventually sentenced him, and
18 pleaded guilty to the charge of the offence.

19 Following the respondent's plea of guilty, the following facts were
20 presented to the Court by the prosecutor on behalf of the State.

21 On Saturday 2 January 2016 at about 12.30am, the respondent was at
22 Hungry Jack's in Spearwood. He was in company with another young
23 male, and they both waited outside Hungry Jack's near a playground area
24 out of the view of customers and staff. The respondent remained at that
25 location for some time, and he had an intention of confronting the victim
26 over an incident that had occurred hours earlier. The victim was an
27 employee of Hungry Jack's at the time.

28 When the victim had completed his shift, he exited the premises with
29 four work colleagues. The other young male co-accused approached the
30 victim and began to assault him. The victim turned away to go back
31 inside the Hungry Jack's premises to seek refuge. Before the victim got

back inside the premises, the respondent approached him and hit him with a closed fist to his face which resulted in some pain and discomfort. The victim then went back inside the premises and the respondent left the area.

8 The respondent was interviewed by police on 3 February 2016 and made some partial admissions. The victim was 17 years of age at the time and 5 centimetres shorter than the respondent and of medium build. During the respondent's interview with police, he told them that he did not do anything and that he was just there to help his mate.

9 After the prosecutor outlined the facts as set out above, counsel for the respondent set out her instructions on the facts which expanded those as outlined by the prosecutor.

10 Counsel for the respondent, further informed the Magistrate as follows. The background to the incident is that the respondent was drinking alcohol with his co-offender at the co-offender's home and they both became quite intoxicated. It was fairly late. The co-offender's 13 year old brother came home and indicated that there had been an incident at Hungry Jack's and that he had been bullied or threatened by the victim at Hungry Jack's, who was an employee and working there at the time.

11 The respondent and the co-offender then went to Hungry Jack's and confronted the victim, who was working at the front counter at Hungry Jack's at the time. The victim denied that anything had happened. The respondent and the co-offender then both left Hungry Jack's and went back to the co-offender's home and continued drinking. The co-offender became drunk and enraged and decided to go back to Hungry Jack's to confront the victim for what he believed the victim had done to his brother. The respondent went with him. The respondent accepted that he punched the victim to the face after the co-offender had assaulted him. Counsel for the respondent further informed the Court that the respondent was intoxicated at the time.

12 It was conceded on behalf of the respondent that he was on a supervised release order at the time of the offence.

13 The factual circumstances as just set out, was the full extent of the factual circumstances conveyed to the Magistrate on 10 March 2016. Some further factual circumstances came to light later after the offender had engaged in the victim mediation process. I will refer to them later under the heading of Victim Mediation and Contents of the Victim Mediation Report. I do that to make these reasons accurately reflect how

the proceedings progressed and the consideration of how the sentence evolved over a number of listings before the Magistrate ultimately decided the sentence.

The Offender's Personal Antecedents and Criminal Record

14 The offender was born on 1 December 1998. He is now about 17 years and 6 months of age. He was 17 years and 1 month of age when he committed this offence of unlawful assault.

15 The offender was born in Sudan. He relocated with his family to Perth in 2004. He has three older brothers and a younger sister. The offender said that he has little recollection of his time in Sudan.

16 The offender's parents separated in 2010 and the offender's father returned to live in Sudan. In late 2012 the offender returned to Africa where he attended a boarding school in Uganda for 8 months. This was apparently done to address some behavioural issues of the offender. In August 2013, the offender returned to Australia and since then has continued to reside with his mother and siblings in the family home in a southern suburb of Perth. Following the offender's return to Perth, his mother has continued to struggle managing his behaviour. She engaged with the Department for Child Protection and Family Support to assist her in that regard. In recent times, the offender's relationship with his mother has improved

17 Generally, the offender has had a disrupted education. Following his return to Perth in 2013, he truanted from school and mixed with negative peers. He sought comfort and a sense of belonging through his peers and regrettably increasingly valued his peer linkages over those with his family.

18 The offender has a history of alcohol and cannabis abuse. At times he has also used amphetamines. In relation to mental health, the offender has at times suffered from a depressive mood/state and low sense of self-worth.

19 Despite all of the issues as just mentioned the offender's mother is still very supportive of him and wants him to continue living with her and in her care.

20 In 2012 and 2013, the offender appeared before the Court to be dealt with for a few road traffic offences for which he was dealt with by a juvenile justice team, and also a good behaviour bond. On 8 June 2014 he committed an aggravated dwelling burglary for which a Youth Community Based Order was imposed on 15 September 2014. The offender breached that order on 17 September 2014 by committing an offence of stealing. The Court dealt with that offence by making an order pursuant to section 67 of the *Young Offenders Act 1994* (the YO Act) because of time spent in custody and allowed the Youth Community Based Order to continue.

21 On 26 June 2015, the offender was sentenced to a total of one year and four months immediate detention for a multiple number of offences, most of which occurred on 5 April 2014 when the offender in company with a large number of other young offenders engaged in acts of personal violence and acts causing damage at a wedding held at the Point Walter Café in Bicton.

22 The offences arising from the incident at the wedding consisted of 5 offences of assault occasioning bodily harm and two offences of doing an act or omission causing bodily harm. The offender pleaded not guilty to the charges for those offences and was convicted after a trial. He was also convicted of an 8th offence arising from this incident on his plea of guilty prior to the trial to a charge of making threats to destroy, damage or harm property.

23 A total of nine offenders were charged and sentenced in relation to the incident on 5 April 2014 at the wedding. The assaults on wedding guests started after an associate of the offender was engaged in an incident with one of the guests. The five offences of assault occasioning bodily harm committed by the offender involved five other wedding guests who were assaulted and injured as a result of the physical altercation that took place between them and the accused and the other offenders. After hearing evidence in the trial I made findings that the offender became an active participant very early in the incident and that he provided encouragement to, and counselled other youths to engage in intimidating and personally violent behaviour towards guests at the wedding. I also made findings that the offender was directly involved by deliberately kicking a guest to the head/shoulder/neck region when he was lying motionless on the ground, that he deliberately threw a bottle towards the entrance to the café, and that he threw a stone and a brick towards the entrance of the café when guests were outside the front of the café entrance.

24 On 26 June 2015, the offender was also sentenced to immediate detention for the offence of aggravated dwelling burglary committed on 8 June 2014, by reason of his breach of the Youth Community Based Order, and a further offence of a dwelling burglary committed on 3 November 2014 at Palmyra.

25 In summary, it can be properly said that the offender's criminal record is relatively short but also very serious and highly relevant. I say highly relevant because it involves prior offences in which the offender in the company of another has engaged in personal violence against an innocent victim who has not behaved in a provocative way towards him at all.

Court Proceedings prior to the date of sentence

26 The sentence of one year and four months immediate detention imposed against the offender on 26 June 2015 was backdated to commence on 13 February 2015. The offender was released from detention on a supervised release order on 13 October 2015. His supervised release was suspended on 8 February 2016 and he was returned to custody on 15 February 2016. Accordingly, the offender was in custody when he appeared before the Court on 10 March 2016, with the remainder of his detention sentence still to be served. The custodial sentence was due to expire at the end of 12 June 2016.

27 After the Magistrate was informed of the factual circumstances as previously outlined and also that the offender had been returned to custody pursuant to the previous sentence of detention, he indicated that it was hard to see that there was any alternative but a sentence of cumulative detention on the new offence of unlawful assault. Without hearing any submission from the State on sentence, the Magistrate mentioned that he could understand the State seeking a further order of immediate detention to be served "on top" of the previous sentence because the offence of unlawful assault was committed when the offender was on a supervised release order for offences of personal violence. That said, the Magistrate then expressed concern that if he imposed an order of immediate detention to be served cumulatively, the offender would serve a lengthy time in custody with a limited period of supervision in the community thereafter.

28 It is obvious from reading the transcript, that his Honour was mindful that the offender was 17 years going on 18 years of age and that his

prospects of rehabilitation before becoming an adult would be enhanced if he received some relatively lengthy period of supervision in the community before he turned 18 years of age. It is also clear from reading the transcript that his Honour would not have been prepared to go down the path of imposing a sentence other than immediate detention if the victim of the assault had suffered bodily harm.

29 After the Magistrate had made comments to the effect as just mentioned, he indicated that he was minded to impose an intensive youth supervision order and order it to be served cumulative upon the detention sentence previously imposed. It seems that there was some uncertainty about what sentence could be imposed against an offender who at the time was already the subject of a sentence of immediate detention.

30 After the Magistrate had indicated that he was minded to impose an intensive youth supervision order, the prosecutor on behalf of the State submitted that an intensive youth supervision order would not reflect the seriousness of the unlawful assault, which was premeditated and involved the offender actually punching the victim once and being responsible as a party for the acts of the co-offender. The prosecutor then asked the Magistrate to consider bringing the matter back just shortly before or on the day that the offender was due for release in June and consider imposing a conditional release order.

31 Subsequent to that submission by the prosecutor, there was then some brief discussion on if or when the Supervised Release Review Board may release the offender on supervised release, and that unless the offender was granted bail on the charge of unlawful assault, he could not be immediately released from custody upon the Supervised Release Review Board granting supervised release. His Honour wanted to give a signal to the Supervised Release Review Board in advance of it considering whether or not it would grant supervised release, that he intended to impose a sentence other than immediate detention.

32 In the end, the Magistrate adjourned the sentencing to 17 March 2016 and granted the offender bail on the charge of unlawful assault to be supervised by the Metropolitan Youth Bail Service. The Magistrate made a particular point of asking the offender whether he had been listening to the discussion between and amongst himself and his counsel and counsel for the State to which the offender responded in the affirmative. His Honour confirmed with the offender that he intended to impose an order which he could serve in the community, but that he could not make it at that time without knowing what the Supervised Release

Review Board intended to do. His Honour told the offender that the unlawful assault was a serious offence and that he would receive a punishment on top of his current sentence.

33 The matter came back before the Court, constituted by the same Magistrate, on 17 March 2016. The prosecutor and counsel for the offender were also both the same. A pre-sentence report prepared by Youth Justice and dated 17 March 2016 was also before the Court. The pre-sentence report set out amongst other things that:

1. The offender's compliance with the supervised release order was good until it started to falter in mid-December 2015. He resumed associating with negative peers. He received warning letters on 22 December 2015 and 18 January 2016. The Supervised Release Review Board cancelled his supervised release order on 8 February 2016;
2. The offender had been allowed to live away from the family home and his mother. He went to live at the family home of a childhood friend. This accommodation arrangement had obviously broken down;
3. The offender's mother had indicated that she felt responsible for him and that he could return to live in her care at the family home;
4. The offender had sought work as a labourer within the same employer of his older brother;
5. Arrangements were in place for the offender to continue playing soccer, to attend substance abuse counselling and to undergo urinalysis testing and to engage in structured supervision sessions. A referral had been made for the offender and his family to commence therapeutic sessions with the Association for Services to Torture and Trauma Survivors (ASeTTS).

34 On 17 March, counsel for the offender informed the Magistrate that the Supervised Release Review Board had called for a report and put the offender's case in its list for 23 March 2016. The Magistrate again indicated that if the Supervised Release Review Board was prepared to grant the offender supervised release, that he was prepared to put him on a conditional release order.

35 When the offender appeared before the Court on 17 March he was still in custody. Although the Magistrate had previously granted the offender bail for the unlawful assault offence, his supervised release remained suspended until the Supervised Release Review Board

reconsidered his case and granted him another opportunity on supervised release. The Magistrate was told that if he granted bail again and the offender was granted supervised release on 23 March 2016, that the offender would be released on that day.

36 On 17 March, the Magistrate adjourned the matter to come back before him on 4 April 2016 and granted the offender supervised bail. He anticipated that on 4 April he would be informed of what the Supervised Release Review Board had decided on 23 March after it had been informed that he intended to impose a conditional release order.

37 The prosecutor did not raise any objection at all to the course proposed and ordered by the Magistrate during the proceedings on 17 March. That is not a criticism at all. It is simply a statement of fact. Indeed, that is not surprising given that the course pursued by the Magistrate was consistent with the suggestion made earlier by the prosecutor on 10 March.

38 When the matter came back before the same Magistrate on 4 April, the prosecutor and counsel for the offender were again both the same. A second pre-sentence report dated 4 April 2016 was also before the Court. The contents of it essentially duplicated what was in the first pre-sentence report dated 17 March 2016, save that it updated the offender's employment situation. It provided that the offender had gained full-time employment as a labourer with his older brother's employer. There was nothing adverse to the offender in this second pre-sentence report when its contents were compared with those in the first.

39 On 4 April, counsel for the offender sought a further adjournment to enable the offender to participate in victim mediation. The Magistrate was told that the mediation officer had spoken with the offender and was prepared to act on a referral. The prosecutor raised no objection at all to the matter being further adjourned for the purpose of the offender engaging in victim mediation. Again, that is not a criticism at all, but rather a statement of fact.

40 The prosecutor sought confirmation from the Magistrate that he was considering a conditional release order and not a community based order. The Magistrate gave the confirmation sought by the prosecutor.

41 As at 4 April, the offender was on supervised release and he was also on bail for the offence of unlawful assault. He was living back in the family home with his mother and siblings.

42 The Magistrate further adjourned the matter to 18 May 2016 and extended the offender's bail to enable him to engage in the victim mediation process.

Victim Mediation and Contents of the Victim Mediation Report

43 The mediation officer of the Victim Mediation Unit prepared a report for the Court dated 17 May 2016. In summary, the report provided that the offender had engaged positively in the victim mediation process. The offender admitted to the mediation officer that he had been at Hungry Jack's with the co-offender prior to the incident when the co-offender had engaged in an altercation with the victim. The offender also admitted to the mediation officer that he hit the victim several times with his fists. The statement of material facts initially read to the Court on 10 March referred to one punch only.

44 The victim informed the mediation officer that he knew both the offender and the co-offender prior to the incident. He said that when he left work he tried to explain to the offender and co-offender that there had been a misunderstanding, but he was still attacked. He described being struck in the face by the offender. He stated that the co-offender wielded a baseball bat at him and that his main concern was with the co-offender. He was unable to work for three days as a result of the assault.

45 The offender wrote a letter of apology to the victim. The mediation officer read it out to the victim. The victim responded by saying that the offender was genuine and that he accepted the apology.

46 The victim mediation officer expressed the view that the offender showed significant remorse and insight into his offending and its impact on the victim. A copy of the offender's apology was attached to the report.

The Court Proceedings on 18 May 2016

47 The matter came back before the same Magistrate on 18 May 2016 for the offender to be sentenced. The same counsel appeared for the offender. A different counsel appeared as prosecutor on behalf of the State.

48 Counsel for the offender properly reminded the Magistrate that he had previously indicated that if the offender was granted supervised release, that he would impose a conditional release order. She referred the Magistrate to the positive victim mediation report. She also informed

the Magistrate that the offender was continuing to live at home, was attending supervision with Youth Justice, had clear urinalysis results, and was currently working with his brother doing some bricklaying work. Counsel then invited the Magistrate to make a conditional release order.

49 When the Magistrate asked the prosecutor to respond, she submitted to him that the State sought an immediate term of detention. In support of that submission, the prosecutor referred to the offender being on a supervised release order relating to a lengthy term of detention imposed for a multiple number of offences of personal violence at the time of the current offence, that the current offence was another offence of personal violence, that it was committed in circumstances where the offender and co-offender laid in wait for the victim, that it was late at night, and that the offender knew that the co-offender was armed with a baseball bat and intended to use it.

50 The Magistrate acknowledged the change of view on sentence by the prosecutor on behalf of the State. Nevertheless, the Magistrate proceeded and imposed the sentencing option that he had previously indicated. He imposed a conditional release order for a term of four months with conditions. By operation of law, the order was effective forthwith. The Magistrate acknowledged that there was "a bit of overlap" between the conditional release order and the balance of the term of detention for which the offender was on supervised release. It was from 18 May to 12 June 2016 inclusive. That is 26 days. Therefore, if the offender satisfactorily served his supervised release, then he would continue to be on the conditional release order only for about a further 3 months and one week.

51 The Magistrate, after hearing the submission from the prosecutor for immediate detention, made sentencing remarks and had an exchange with the offender as follows:

M: Thank you. All right. Well, certainly, a term of detention is appropriate. But, as I said before, J – if you would stand up, thanks. As I said before, having taken account of everything that was put before me on previous occasions, and what is now before me, which is this mediation report which certainly shows that things have gone very well, as Ms Rossi said, I'm going to follow through on what I said would be the penalty, which is detention.

There will be a four month sentence, but you will be released immediately on what we call a conditional release order. You stick to the conditions of the order, and at the end of the order that's the end of this offence. Break any of the conditions, you are brought back to court to be re-sentenced on this. And there's really only two options: getting locked up for the four months, or some other time depending on other factors; or you start again if it's a very minor breach. Okay.

JZ: Yes.

M: Now, these are the conditions. Number one, don't commit any more offences.

JZ: Yes, your Honour.

M: Number two, you must report to your supervisor. It will be up to three times a week, but will probably be twice a week. And that will be organised between you and your supervisor. Number three, not allowed to change your address unless you have permission in advance. Okay.

JZ: Yes.

M: Number four, you've got to do what your supervisor tells you to. And number five, last one, you've got to do any counselling or programs that your supervisor tells you to. Now, this is something that has probably already been covered in your SRO, doing your counselling and urine analysis and what have you. Well, your supervisor might want to continue that on. Now the period of time is four months.

JZ: Yes.

M: Four months. So there is a bit of overlap. About a month overlap with your SRO. So what I'm really doing here with this four months is giving you another three month sentence on top of the present sentence you're doing, which you're now on supervised release for.

JZ: Yes, your Honour.

M: Do you have any questions about what I've explained, Jackson?

JZ: No, your Honour.

M: Okay. What will happen if you commit another assault while you're on this order?

JZ: I will go back to detention.

M: You will. For dead sure. Okay

Further Material Presented to the Court by Youth Justice on the Review

52 A review pursuant to section 40 of the C Ct Act is a hearing *de novo*. Accordingly, and properly, and indeed at my request, Youth Justice presented a further report to me by email dated 2 June 2016. It provided me with an update on how the offender had been performing on the orders.

53 This further report set out amongst other things that:

1. There had been visible improvement in the offender's behaviour, attitude and family relationships;
2. The offender had continued to regularly attend work since he was released from custody;
3. The offender's last two urinalysis results had been clear. The offender had indicated that he no longer used cannabis because if he used it he would not be allowed to work on a construction site; and
4. The offender was engaging with Youth Justice on more occasions than required and was often calling or texting his youth justice officer.

Submissions on Behalf of the State on the Review

54 On the hearing of the review, counsel for the State submitted that the State should not be held to the position initially taken on behalf of the State on 10 March 2016, because at that time:

1. On the statement of material facts provided by Police, the Director of Public Prosecutions did not know that the offender had been to Hungry

Jack's earlier, and that the offender had punched the victim more than once;

2. No reports had been prepared in relation to sentence; and

3. Further and anyway, the review is a hearing *de novo*.

55 Considering the sentence afresh, given the seriousness of the factual circumstances including the admissions made by the offender in the victim mediation process, the contents of the various reports, the need for personal and general deterrence, particularly bearing in mind the offender's prior offences of personal violence in a public place in company with others, and that the offence was committed when the offender was on a supervised release order, it is submitted on behalf of the State that the only appropriate sentence is a term of immediate detention.

Reasoning and Conclusion

56 The review is opposed. I do not consider it necessary to set out the various submissions made by counsel for the offender in opposition to the Magistrate's sentence being set aside and substituted by an order of immediate detention.

57 In my view I do not have to make a finding on whether or not the State should be bound by the position adopted by the prosecutor on 10 March 2016 in order to decide this review. Ultimately, of course, the decision on what is the proper sentence is a matter for the Court.

58 That said, I should add that I nevertheless think that the position expressed on behalf of the State on 10 March 2016 is a relevant consideration in determining this review. It clearly influenced the Magistrate in deciding to go down the path towards imposing a conditional release order. That in turn no doubt influenced the Supervised Release Review Board to grant supervised release. It also clearly played a part in the offender positively engaging in the victim mediation process and making admissions during the mediation which were not included in the statement of material facts presented to the Court by the prosecutor on 10 March 2016, namely that he had been at Hungry Jack's earlier and that he hit the victim several times, rather than once.

59 In my view, what use can be made of those admissions, must be considered against a background of there being a good basis for the

offender to reasonably believe that if he positively engaged in the mediation process and accepted full responsibility for his actions, then he would be given a sentence other than immediate detention.

60 Given all of that, in my view it would be unfair to use those two particular admissions against the offender to impose a sentence of immediate detention. Further and anyway, I do not think that both of those particular admissions, if factored into an overall consideration of everything relevant on sentence, would justify the imposition of a sentence of immediate detention, the sentence of last resort. Further and anyway again, any adverse weight for those admissions would at least be counter-balanced by favourable weight being given for the offender's positive engagement and acceptance of responsibility in the victim mediation process, both of which showed remorse by the offender.

61 Having said all of that, I also wish to say that in my view the position adopted by the prosecutor on behalf of the State on 10 March 2016 was both fair and proper.

62 The reason that I do not have to make a finding on whether or not the State should be bound by its earlier position on sentence, is that the Magistrate did not finally decide the sentence and make the order the subject of the review until after the prosecutor had made the submission for immediate detention on 18 May 2016. And he again considered everything before him.

63 In my view the reasons expressed by the Magistrate on 18 May 2016 for imposing a conditional release order and as set out earlier herein, clearly show that he did not impose the sentence simply because he had indicated it earlier. He expressly stated that he decided the sentence "having taken into account everything that was put before me on previous occasions, and what is now before me, which is this mediation report...". The victim mediation report referred to the two admissions made by the offender during the mediation process. It should be also noted that as on 18 May 2016, the material put before the Magistrate on previous occasions included the two pre-sentence reports dated 17 March 2016 and 4 April 2016.

64 All of that deals with paragraphs 1 and 2 of the submissions made on behalf of the State as set out earlier herein.

65 In my view the sentence of a conditional release order with conditions for a term of four months, as imposed by the Magistrate on 18 May 2016, was within the bounds of the exercise of a sound discretion

given everything that was before the Court and applying the objectives and principles of the YO Act.

66 The Magistrate properly regarded the offence as serious. That is clear from what he said. It is also clear from the sentence he imposed, which included detention as a component.

67 Considering everything that the Magistrate said over the whole of the proceedings, that is the four appearances, it is clear that his decision to impose a conditional release order rather than immediate detention was a close call. He did so having regard to the combination of the offender having served a considerable period of time in custody and that the prospects of success for his rehabilitation would likely be maximised if he received intensive supervision for an appreciable period of time in the community, that that was particularly important for the offender and the community because he was 17 years approaching 18 years of age, that while the unlawful assault was serious, the victim did not suffer bodily harm, that the offender had positively engaged in the victim mediation process, that the offender was positively engaging with Youth Justice in the community, that the offender was living at home and his relationship with his mother had improved, and that he was now employed.

68 I wish to make a comment on the offender's record of prior convictions and what use could be properly made of it. The offender was on a supervised release order at the time he committed the offence of unlawful assault for offences involving mob violence committed against wedding guests at a public place in Bicton. Much was made of that by the prosecution and properly so.

69 The point that I wish to make is that care needs to be exercised when considering that prior offending by the offender in the context of deciding the proper sentence for the unlawful assault. It cannot be used as an aggravating circumstance in deciding the proper sentence for the offence of unlawful assault. Rather, the existence of it results in the offender not receiving any discount for prior good behaviour and also no reduction being made to the weight given for personal deterrence in the overall consideration of sentence.

70 As mentioned, a review pursuant to s. 40 of the C Ct Act is a hearing *de novo*. The material before me to consider the proper sentence includes everything that was before the Magistrate and the further material presented to me by Youth Justice to which I have earlier referred. That further material is favourable to the offender.

71 The offence of unlawful assault was a substantial contributor to the offender serving an additional 38 days in custody on top of the minimum required to be served for the immediate detention imposed on 26 June 2015 and backdated to commence on 13 February 2015.

72 The offence of unlawful assault is serious. That said, the victim did not suffer bodily harm. While the offender is criminally responsible for the co-offender using a weapon, the baseball bat, the offender was not the one who actually used it. The victim was more concerned about the co-offender than the offender.

73 The offender pleaded guilty. He is remorseful. He has demonstrated that by positively engaging in the victim mediation process. He is back home, has an improved relationship with his mother, is not mixing with negative peers, is engaging positively with Youth Justice, and is gainfully employed having completed a Certificate in Construction.

74 In my view, given all of that in combination, it would be regressive and also prejudicial to the offender's rehabilitation for him to be required to now serve a period of immediate detention. In my view that would not be in the best interests of the community, particularly bearing in mind that the offender is now 17 years and approaching 18 years of age.

75 Finally in my view, a conditional release order provides the necessary weight for personal and general deterrence given the circumstances of the offence and the offender.

76 For all of these reasons the application for review is dismissed and the sentence imposed by the Magistrate on 18 May 2016 is confirmed.