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THE CHILDREN'S COURT OF

WESTERN AUSTRALIA

KR 36 of 2020

THE STATE OF WESTERN AUSTRALIA

and

SM

QUAIL DCJ

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON FRIDAY, 27 MARCH 2020, AT 11.30 AM

MS S. PURVIS represented the State of Western Australia.

MS L. HOHN appeared for Youth Justice Services.

MS A. WHITEHEAD appeared for the accused.

HIS HONOUR: All right. Thank you. SM, you can remain seated. I'm going to deal with this review now. And I've got to go through it in some detail and there's - it's going to sound a bit legalistic, probably not like magistrates and judges normally talk to you, but I will talk to you right at the end of it as well, okay? But because I'm reviewing the decision of another court, I've got to go through it in some detail.

So this matter has been brought before me as a section 40 review of the decision of the Magistrate sitting in the Children's Court in Kununurra. The application is brought by SM on the ground that the sentence imposed by the Kununurra Children's Court on 3 February 2020 was manifestly excessive. And the order that was imposed by the court was an intensive youth supervision order for six months, without detention, and it had supervision and attendance requirements and also a 40-hour community service work requirement for the offence of stealing a motor vehicle within the meaning of section 371 of the Criminal Code, which was a Holden Commodore sedan, the property of LM.

That offence happened on 22 January to 23 January 2020. So just after SM had completed her juvenile conditional release order. The history of the matter in the Children's Court in Kununurra is that after she was charged, SM was released to bail, though she did end up spending a night in custody. Then she pleaded guilty on her next court appearance before the magistrate, who received a verbal report from Youth Justice at that time and then, as I say, imposed the order. Now, the facts of the offending were as follows. On the night of 22 January, the victim was at home in Pindan Avenue in Kununurra and her grey Holden Commodore was parked in the driveway and she went to bed at 8 o'clock in the lounge room and put the keys under her pillow.

At about 1.30 on 23 January, the victim was woken by another person in the house who told her that the car had been stolen. She checked under her pillow and found that the keys had been stolen and her car was missing from the driveway. She obviously didn't give permission to anyone to take the car. Now, about 15 minutes later the car was seen by police on Victoria Highway and it was stopped near the intersection of Casuarina Way and Victoria Highway. Inside they found you with five other juvenile co-offenders. You were arrested and taken to the police station.

SM, MS: Yes.

HIS HONOUR: And as was said to the magistrate by your lawyer who represented you at sentencing, it was an early plea of guilty by you. And it was said by your lawyer and it wasn't disputed by police that your role in the offending was as a passenger in the car and you're to be sentenced on the basis that you weren't the person, obviously, who committed the burglary. Someone did that very brazenly, to sneak in and take the keys from under the victim's pillow which would have been a very frightening experience for her, even though she was asleep. Because she would have woken up and she would have worried about that for a long time afterwards, that someone snuck into her room. However, you're not guilty of that.

What you are guilty of is something that you've done many times before and, that is, getting into the car after it was stolen when your friends came driving past you. And as your lawyer said to the magistrate and as your counsel repeated today, you accept the facts and said that the reason that you did it was because you were bored.

You were out walking on the street, you had nothing to do and it was school holidays and usually you're not out late at night. And these friends of yours came driving by and you stupidly got in the car. The State Prosecutor says and I accept you would have known at that point that you were off the order because you are a smart young girl, and so you took that chance of getting in the car with them.

Now, this is a hearing de novo. I don't have to find that there was any manifest error by the magistrate. It's for me to consider all of the material which is now before me today on the review, including new material. And the new material that I have had regard to is an earlier psychological report which the magistrate did not have the benefit of at the time of his sentencing. That is a psychological report which is dated 19 July 2018 which was prepared in advance of the juvenile conditional release order matter.

I've also had the benefit this morning of hearing from your counsel and, also, a Youth Justice Officer who has told me about your compliance on the order that the Magistrate placed you on.

Now, in conducting the review I do, of course, bear in mind the principles that apply to sentencing young offenders in the Young Offenders Act. The Act places significant emphasis on rehabilitation and the reasons for this

priority were discussed in *JTP v The State of Western Australia* (2010) WASCA 191.

President McLure whom Buss and Mazza JJ agreed with referred to *WO, a child v Western Australia* (2005) 153 ACR 352 at 362:

As stated in that case, underlying the emphasis on rehabilitation is long established understanding that the community is best protected by determined efforts to effect the rehabilitation of young offenders. Although retribution, punishment and general deterrence are also relevant sentencing objectives under the Act, they are ordinarily given reduced weight, particularly when the offender is still a child.

In *DC v The State of Western Australia* [2014] WASCA 121 Mazza JA with whom Buss and Newnes JJ agreed summarised the sentencing propositions relevant to young offenders at paragraph 50. The following propositions may be drawn from the case law in relation to young offenders

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and it's not an exhaustive list:

Firstly, the ultimate aim in sentencing a young offender is the protection of the community by the imposition of a sentence proportionate to the gravity of the offence having regard to the circumstances of its commission and the circumstances personal to the offender.

And that comes from *AM, a child v R* (1996).

Secondly, youth is normally a powerful mitigating factor and the rehabilitation of a young offender is generally a dominant sentencing consideration -

See, *Ainsworth v Deere, a child* (1992) 7 WAR Reports 102:

Thirdly, a young offender must not be treated more severely than an adult for the same offence -

which is section 7, subsection (c)(m) and 118(1)(b) of the Young Offenders Act and it's a specific point of submission made by SM's counsel on her behalf.

Fourthly, deterrence, both personal and general, punishment, retribution and public protection are accommodated in the Young Offenders Act and are

relevant to the sentencing of young offenders, although their role will generally be tempered. However, when in a particular case the rehabilitation of an offender appears unlikely, the offending is serious and the character and personal circumstances of the offender justify it, these factors may become significant -

That's *JSA v The State of Western Australia* (2012) 42 WAR Reports 473.

The age and maturity of a young offender are relevant factors. A very young offender who is immature may be dealt with differently to an older child who, while still young, has a greater awareness and responsibility.

I turn then to consider SM's personal circumstances. As I say, I've had the benefit of more information than the magistrate had available to him and I've also looked closely at SM's record and the State Prosecutor has provided helpful summary information in relation to some of the background offending on that record.

SM is 15 now. She was 14 then. Born on 27 January 2005. She's the youngest of two and also has a number of step-siblings. Her parents separated when she was three years old and she had a childhood which is marked by serious dysfunction and she was exposed as a young child to alcoholism within the family and also domestic violence. And as a consequence of that and neglect, she was taken into the care of the department when she was five years old and, indeed, at that time her mother was in prison and unable to care for her which is why the department intervened.

She has for all of her life lived either or mostly in Kununurra, occasionally in Wyndham and Derby and also has connections to Kalumburu which is where she intends to return in the immediate future in order to protect herself from the COVID virus in relation to which Aboriginal people, we suspect, are going to be particularly susceptible. At the moment, she's living with her mother and she does have a good relationship with her mother and, indeed, although not present in the courtroom for those COVID reasons, her mother is present at court, along with her brother, and showing continuing support of her.

In the previous report which is an opinion which I accept - and, as I say, that report was not before the magistrate - SM's offending in the past is directly related to the trauma and distress of her childhood. And also a number of tragic losses that she has experienced during growing up of family members to violence and also in relation to a serious motor vehicle accident. Notwithstanding those

difficulties, she is, as the State Prosecutor has observed, a young girl with a lot of potential if she harnesses it.

She managed to complete her primary schooling and she has gone on to Kununurra District High School. There were problems there with her attendance and behaviour from year 8 and she went into a diversion program. But as I've been told this morning, in fact, now in year 10 she seems to have put a lot of those earlier difficulties behind her in year 8 and she's attending almost daily at school. She enjoys doing English and but for COVID-19 would be enrolled in school holiday programs in future which will divert her from the boredom which is the genesis of this present offence that I'm considering. Those holiday programs though now have been cancelled and instead she's going to be going to Kalumburu.

It's also the case, from what I've read, that when she was in Banksia Hill on remand she did well in schooling there. And perhaps that performance, coupled with her increased maturity, is what has led her to more recently in the community in Kununurra performing quite well.

Now, I'm not going to go through SM's record in any detail. The State Prosecutor has properly identified, as I say, and I accept to be the case that the offending that SM committed on this occasion in terms of being a passenger in a stolen car is very similar to many of the offences that she has committed in the past. And, indeed, steal motor vehicles that she had been - committed in the past have often been in almost identical circumstances. It's important also to note that, notwithstanding that she has a poor record and, of course, her record doesn't aggravate her position, she did perform very well while she was the subject of that juvenile conditional release order.

And until she committed this offence, she had, in fact, been out of trouble for 13 months. And it's also a consideration, as I mentioned a moment ago, that once she was put on this intensive youth supervision order by the magistrate, even though that was only a short time ago in February, she has already completed the full amount of the community hours which the magistrate imposed. And that does very much reinforce for me that the fact that she was out of trouble for 13 months, that she has gone back to school, doing well, and that she's committed to doing the hours that were imposed so quickly, it does indicate to me that there's not only been increased maturity on SM's part but that she's

genuine in her desire to stay out of trouble and that this was, in all likelihood, a one-off mistake by her, a glitch in her rehabilitation. Even though, as I say - and the State Prosecutor is right to observe that she doesn't think it's a coincidence that the offence happened the day after she came off the other order.

But as I say, there is real hope, in my view, for SM in terms of her rehabilitation and it's, again, very much to her credit that she had applied for a job at the resort in Kununurra and has prospects of employment. And, unfortunately, because of the present situation with the COVID virus, she's obviously not going to be able to pursue that until we all get over this present situation.

Now, the magistrate was right to observe that stealing a motor vehicle, even when joyriding, is a serious offence and I'm fully cognisant of the fact that burglaries and steal motor vehicles offences in Kununurra are particularly prevalent and so general deterrence and personal deterrence are both important considerations. Personal deterrence because SM has done this before, albeit that she had been out of trouble for 13 months. I appreciate the difficulties that are faced by magistrates in regional courts in relation to offences which are particularly prevalent in their local community. The State here say that the magistrate made no error in imposing an intensive youth supervision order and an intensive youth supervision order is required in order to properly protect the community in Kununurra.

However, I've had regard to all of the circumstances, including that material that was not before the magistrate, and, as I say, I'm particularly impressed that SM has now completed the 40 hours. It is also very much a consideration for me that, going forward, there's a great deal of uncertainty in relation to what services are going to be available across the State and in the - and in Kununurra in relation to supporting young children generally because of COVID-19.

So coming to my decision in relation to the section 40 review. It is my view that an appropriate disposition now on review is a youth community based order for a period of four months from today. That is going to have with it a supervision requirement only. I'm not going to impose any further community work, given that she has already done the community work. And I'm not going to require any other attendance condition, given that SM will be going to Kalumburu.

And, certainly, from my perspective, the supervision that is required can occur by telephone to Kalumburu or whatever other mechanisms Youth Justice are able to put in place. And so the intensive youth supervision order imposed by the learned magistrate will be cancelled. Now, SM, I just want to explain that to you. I have resentenced you. I think you're actually - well, I know you're a smart young girl and I'm sure you followed everything that I've said but I just want to make it clear in simple terms.

You're going to have a four-month youth community based order from today. Do you understand that? Right. And you're going to - - -

SM, MS: Yes.

HIS HONOUR: Good. And you're going to be on that order for four months and you're on it whether you're in Kalumburu or whether you're in Kununurra, and you've got to be supervised by your Youth Justice officer. Now, that can happen by telephone but if they want you to see them, you've got to see them. All right. Now, as you know, because you completed a conditional release order quite well, if you breach this order what's going to happen? If you breach this order by committing any more offences like jumping in stolen cars, what's going to happen?

SM, MS: I'm getting in trouble, in more trouble.

HIS HONOUR: Yes, you're dead right. You will be in more trouble. You will be back before the court. Now, I actually know, SM, that you can stay out of trouble. You proved it to me. And I reckon you've turned the corner and I reckon you're completely genuine about staying out of trouble going forward. All right. Because you managed to prove to me and to yourself, which is more important, that you can stay out of trouble for a whole 13 months which is a long time. Okay. So this was one mistake. But don't make a second mistake. Okay.

SM, MS: Okay.

HIS HONOUR: This is a one-off mistake. You stay out of trouble from now on and if people come past you in a stolen car, you don't get in it. Understood? All right.

SM, MS: Yes.

HIS HONOUR: When the paperwork is sent up there and signed, you will be free to go. Are there any other orders required, counsel?

COUNSEL: No, your Honour.

HIS HONOUR: All right. We will adjourn briefly to bring the next matter on. Thank you.

AT 12.08 PM THE MATTER WAS ADJOURNED ACCORDINGLY