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THE CHILDREN'S COURT OF

WESTERN AUSTRALIA

ES 21 of 2018
ES 93 of 2019
ES 104 of 2019
KA 123 of 2019
KA 124 of 2019
ES 163 of 2019
KA 193 of 2019
ES 21 of 2020
ES 23 of 2020

THE STATE OF WESTERN AUSTRALIA

and

SNW

JUDGE H. QUAIL

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON TUESDAY, 7 JULY 2020, AT 11.00 AM

MS S. MARKHAM represented the State of Western Australia.

MS N. ANDERSON appeared for Youth Justice Services.

MS K. HEATH appeared for the accused.

HIS HONOUR: All right. SNW, I'm going to deal with this application which you've brought before me now. I know you've appeared before magistrates lots of times before and I know they've spoken you and tried to explain to you exactly what they're doing. I'm going to do that, but I've got to take a little bit longer today than normal because this is not just a normal sentencing exercise, it's actually a review of what has happened previously as well.

So it's going to take me a little bit of time to go through everything. But I am going to speak to you as I go along the way, and I will speak to you at the end as well, all right? There are some bits you might not exactly follow because I've got to talk about the law a little bit as well. But you don't need to worry too much about that, I will make it simple for you at the end, okay?

So this is a section 40 review application which is brought on 15 June, so within time, to review SNW's sentence that was imposed in the Kalgoorlie Children's Court in relation to the following charges.

SNW pleaded guilty and was sentenced by the magistrate on 26 May to: Esperance 104 of '19, home burglary, for which he received a sentence of detention of six months; Esperance 93 of '19, a trespass charge for which he received a concurrent sentence of six months detention; Kalgoorlie charge 123 of '19, steal motor vehicle, six months detention; reckless driving, Kalgoorlie 124 of '19, immediate detention of six months concurrent; Kalgoorlie 193 of '19, home burglary, immediate detention of six months concurrent; Esperance 163, aggravated home burglary with intent, immediate detention of 12 months; Esperance 21 of '20, aggravated home burglary, immediate detention of 12 months; Esperance 23 of '20, home burglary, immediate detention of 12 months.

There were some other charges which were dealt with by section 11, though they are not before me for review. The total sentence that was imposed on SNW was 12 months immediate detention backdated to when he went into custody, 27 April 2020. And he has now been in custody since that date, serving the sentence that was imposed by her Honour.

An application before the President pursuant to section 40 of the Young Offenders Act is a hearing de novo, in English really a hearing afresh which means that I need to now look at all the materials before me and consider the sentencing discretion afresh.

It's not necessary to find any error on the part of the magistrate, although if there is an error that is, nonetheless, a relevant consideration and might explain why the magistrate did what she did. I have the materials that were before the magistrate but also additional materials that were prepared for the purposes of my exercising that sentencing discretion afresh. And, although I referred to those materials previously, because the section 40 transcripts are published I will go through it again and, of course, when they are published they will be redacted to preserve anonymity.

And insofar as it's necessary I will also edit these remarks. So I've got the transcript of proceedings before the magistrate from 26 May, a record of convictions updated at 24 June; the update Youth Justice report of 1 July 2020; an updated detention management report of 2 July 2020; the earlier detention management report of 22 May 2020; and a court report of 21 May 2020.

I've also had the letter that SNW wrote to the magistrate, and I've also had the advantage of the written submissions from both the prosecution and defence; and also the oral submissions today. And although they haven't been read out before me this morning there's no need for that because, as I say, I've reviewed the transcript. But it is necessary to summarise the facts in relation to SNW's offending which brought him before the magistrate.

No issue was taken with the facts which were admitted by his counsel on his behalf. And the offences were not minor. Esperance 21, at around 2.30 on 1 December 2019 SNW and a couple of others went to the victim's home in Crossland Street in Esperance, smashed a window, rummaged through the house and stole \$50 worth of coins. SNW was arrested. He didn't make any admissions but police found video of the offence on his phone which is troubling that SNW would do that.

Esperance 163, on 5 December 2019 SNW and - with others - was at Orr Street in Esperance, entered through an open door and the - the victim was inside the house, the person who lived there. On seeing that the offenders, including SNW, all ran away. He was arrested and he made no admissions and, again, a video of the offences were found on his phone. SNW, I'm worried about those offences you did in Esperance, all right?

I know you were bored and hanging around with your friends but taking video on the phone of what you were

doing, well, it suggests that it was some sort of trophy on your part, to show that you were doing these burglaries, and you could only have been doing that to show off to your friends. No, it wasn't that?

SNW, MR: No.

HIS HONOUR: Or was - it was to show off to your friends? It's the wrong thing to do, all right? I know you've got difficulties at your home where you're living with your mum and sometimes you've got to go away from home, but it's still your home, all right? You think, how would you feel if people came into your home in that way? You were just sitting inside and someone - strangers - came inside, going to do a burglary. That would be pretty scary, wouldn't it? Yes. It would be.

And that's the thing about burglaries, and that's why the penalties are so high, and that's why the third strike provisions exist. It's why, if you do burglaries in the future, you're just going to go to jail for 12 months, rubber stamp, okay? It's because when people are the victims of burglaries, it's just - no, it's not just about their stuff and the coins which go that you take, it's about the invasion of their home and that bothers them for a long time afterwards in exactly the same way as you would be bothered if people came breaking into your home.

Because it destroys your sense of security. And after that, it changes the way you live. These people won't leave their doors open anymore. All right? They will be worried that people are going to come in and break in all the time. So that's why burglaries are so serious. And these people don't know that you're just there to steal, they think you're going to come inside and do something to them. So it makes them scared. They don't sleep at night there. All right?

And that's why the one thing that you've got to know when you go away from here today - and I know Ms Heath has reinforced this with you - you do more burglaries you're just going to go to jail every single time. No Judge, no magistrate, going to be able to do anything else other than send you to jail, all right? Esperance 23 is the most serious of the burglaries. On 26 April 2020 you rang the doorbell of a house in Nulsen - and you were caught, actually, on the CCTV which is how the police identified you.

You forced open the rear door, you rummaged inside, you stole gold coins, about \$400 worth, and then opened a safe and found \$1000 worth of cash in there which you took. All of the money was never recovered. You also found in the safe the keys to the gun safe, opened the gun safe and removed four firearms. Now, I accept that that wasn't pre-planned by you but, nonetheless, you took those firearms and you hid three of them nearby at a house, put it underneath the house, and you took one away which was loaded and hid it in the bush.

Now, because of the CCTV at the house you were arrested very quickly and you told the police where the guns were and it's to your credit you cooperated in that way. The money was never recovered but the guns were and I can tell you now, if those guns had not been recovered and those guns were missing and out in the community, you would be going to jail for sure because that's how serious that offence is, all right? When I say "jail" I mean detention.

Now, when you committed those burglaries you were on a conditional release order at the time and, in fact, you breached it within six weeks. So on the one hand you had been given an opportunity of a conditional release order and you breached it straight away by committing serious offences. But, on the other hand, it was a conditional release order which hadn't had much time to actually work in relation to rehabilitation.

The offences which you were on a conditional release order for were Kalgoorlie 193, 22 April 2019, it was again a burglary in Balfour Street in Kalgoorlie. Around 3 am in the morning you entered the house, you rummaged around, you stole alcohol valued at about \$120. Your fingerprint was located, there was also some CCTV footage. You were arrested the next day. There's no record of interview done with you.

On 22 August 2019, which is charge 104, you were in Ocean Street in Sinclair, entered a house through the rear door, rummaged around, created quite a lot of mess inside. Took \$20 worth of coins and you were arrested the same day.

Now, the trespass was on 5 July 2019 where you got into the Esperance Port Authority area and you were walking towards an administration building. You were seen on the CCTV and you were approached by security and when you saw them you - you ran away and so you weren't apprehended then. But, again, you were identified from the CCTV.

Charges 123 and 124 of steal motor vehicle reckless charges which go to the - back to 23 January 2019 when you

stole a car in Foy Street that - which was unlocked and the keys had been left inside. You took it and you drove in a show off fashion, drifting, I don't know who you were showing off to. You didn't get very far but you crashed it into a fence and did extensive damage to the car and fence and that - the gate. You were arrested on that matter in March and you admitted that to police. So those are the facts of the matters that I have to deal with.

Now, I should say something about your record of offending when you came before the magistrate before I turn to what she did.

These are all the most serious - the ones that are before me are all the most serious offences that you have committed. The record goes back - the matter in 2015 which doesn't count - but in May 2018 in the Esperance Children's Court, there were various frauds. There was a human habitation burglary then, and all those charges were ultimately dealt with - there's a group of them - by way of section 67. Then in January 2019 there's again some relatively minor charges, attempted stealings, driving charges, that's dealt with by section 67, it seems you spent a little bit of time in custody then as well.

In March 2019, stealing and attempted stealing. Again, there's a little bit of time in custody. And then we get to June 2019 which is the first appearance of some of those charges I'm now dealing with again, when you were put on a youth community based order for those matters, and other charges were dismissed, section 67 time in custody, and that's the 42 days in custody which Ms Anderson told me about.

So you've relatively quickly gone from small offences to spending time in custody and then, June 2019, you've got that youth community based order which is quickly breached and then, October of 2019, onto a juvenile conditional release order without an intensive youth supervision order. And the reason that you got the juvenile conditional release order in October 2019 is because you (a) were on the steal motor vehicle reckless YCBO, but you then committed those serious offences which I referred to, in terms of home burglary.

So you were on the juvenile conditional release order and then, not long after it, committed those offences which the magistrate dealt with on 26 May 2020, as well as cancelling the conditional release order, which she cancelled as at the date of the first breaching offence being 1 December of 2019. Now, although - as I say - this

is a hearing afresh I've nonetheless carefully considered the magistrate's reasons. And she spent a fair amount of time carefully going through an application which was before her then, that she find that there were special circumstances for the purposes of section 189, subsection (3), and she was asked to make a finding which would alleviate the potential impact of the repeat offender provisions and alleviate the third strike which, otherwise, was a mandatory consideration for you.

Her Honour, as I say, went through that carefully, and found that there were - no special circumstances. Now, her Honour's decision in that regard is not reviewable by me, and not reviewable through the section 40 procedure. The authority for that is *DLD v Western Australia* [2018] WACC 4. Her Honour, having disposed of that then, understandably, concluded that SNW was caught by the repeat offender provisions, making him liable to a sentence of - a mandatory minimum sentence of 12 months detention for each of charges ES163, ES21 and ES23.

Now, it's apparent from her Honour's reasons that she believed that the only option available to her was to impose an immediate sentence of detention and that's clear from the following portions of the transcript in her Honour's reasons. And the prosecution this morning properly concede that her Honour, in coming to the conclusion that only an immediate sentence of detention is open to her, was in error. What her Honour said at page 15 of the transcript is as follows:

Mr Napper, just before you sit down, as I understand it, really the only way I could impose a penalty other than immediate detention as required by the repeat offender provisions would be if a make a declaration pursuant to section 189, subsection (3).

Now, counsel agreed with that proposition and, certainly at least, reinforced in her Honour's mind what - as it turns out - was an error, notwithstanding that he had, himself, earlier submitted that a conditional release order was open. Then at page 25 her Honour said:

As has been conceded by Mr Napper on behalf of SNW, SNW finds himself as a repeat offender prima facie. The only way that I can avoid having to give him a term of immediate detention or imprisonment under the Criminal Code provisions is if I make an order pursuant to section 189, subsection (3) of the Young Offenders Act.

Her Honour then said at page 34:

But in the end, unfortunately, you are subject to the repeat offender provisions of the Criminal Code which means that I have to give you immediate detention unless I could find that there were special circumstances. In this case, I haven't found that there are, so that's why I've given you that immediate term.

So it's clear from that, that her Honour felt that she had no alternative but to impose an immediate term of detention once she had disposed of the 189(3) application. Now, in that regard her Honour was in error. Under the Young Offenders Act a conditional release order has two components, firstly, detention and, secondly, an intensive youth supervision order. Thus a conditional release order is a sentence of detention and that's well established.

The authorities for that are *WA v SLJ* [2017] WACC 1, and again, *DLD v WA*, a decision of President Wager, [2018] WACC 4. So for the purposes of the burglary repeat offender provisions there are two possible outcomes when sentencing under the Young Offenders Act. One is to impose a conditional release order with a 12-month detention component and, secondly, to impose an immediate sentence of 12 months detention.

Now, in considering those two possible dispositions it's necessary, of course, to bear in mind the principles of juvenile justice and, perhaps the most fundamental sentencing principle of all, being that an immediate sentence of detention is a sentence of last resort. And it follows that before concluding that immediate detention is the only appropriate disposition it would be necessary to rule out a 12-month conditional release order.

The principles of juvenile justice are, of course, well settled and I bear them in mind in conducting this review. They place 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, with whom Buss and Mazza JJ agreed, refer to *WO (a child) v Western Australia* (2005) 153 ACR 352 of 362 and said:

As stated in that case, underlying the emphasis on rehabilitation was the long-established understanding that the community is best protected by determined efforts to effect the rehabilitation of young offenders. Although retribution and 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, Justice Mazza, with whom Buss and Newnes JJ agreed, summarised a number of sentencing propositions relevant to young offenders. I won't repeat them now I will simply incorporate those at paragraph 50 of that decision. I've been through facts already, it's also necessary to look at all of the material before me now in relation to SNW's present circumstances.

I've had the benefit of those reports before the magistrate and updated reports. SNW is now 17 years and five months old, as the second of three children born in Kalgoorlie to his parents. His parents separated not long after his birth. His mother was subject to considerable domestic violence and there was a lot of drug abuse by SNW's father which impacted heavily on the family.

SNW has had very little to do with his father or his father's family - during his childhood. After the separation, SNW's mother was often homeless, lived in a refuge, and the family lived a transient lifestyle. His mother then became involved in another relationship which is still ongoing, to which she has children. And that relationship, regrettably, has also been characterised by a level of domestic violence, dysfunction, and transience and, as is described in the reports, "A chaotic home life", to which SNW was subjected.

SNW is very close to his mother and has, at times, intervened to try and protect her from his stepfather. The reports do indicate - and as Ms Heath has said this morning - that in more recent times the relationship between his mother and stepfather has improved and the environment - the home environment - is safer now than it used to be. Nonetheless, as Ms Heath says, there still needs to be a backup plan in place and that SNW is able to go and see his uncle when he doesn't feel safe at home.

He has lived in Esperance for most of his life, mostly with his mother, but he has also lived with his grandmother when his mother has been unable to care for him. She died in October of 2019 and it's clear to me that has been a significant trauma to SNW and, indeed, it coincides really with his going off the rails in terms of serious offending which now brings him before me for sentencing.

SNW has been schooled to year 10 but, as Ms Heath says, he doesn't enjoy school and has difficulty, particularly with numeracy.

He was enrolled at School last year but didn't attend school in Esperance. He became depressed, from what I've read, was engaged with the child and adolescent mental health Service there, and didn't have any structure in his life and it's also during that time that he started to smoke and abuse cannabis. Now, as Ms Heath also says, the detention management report reflects that SNW is still lacking motivation.

He hasn't done well in school at Banksia but, again, that's explicable by reason of his difficulty with the numeracy and literacy which he has been asked to do. It is clear though that he does have capacity, and the teachers themselves say that and say that he is capable if he applies himself. And he has demonstrated that he has capability in other areas, specifically in relation to doing manual work with his hands.

There have been some incidents in terms of behaviour whilst he has been in detention. None of them are regarded as critical though and, have just resulted in him losing privileges whilst he has been at Banksia. He engaged in some programs while he's there which is positive, in terms of health and healthy relationships. And it's certainly not - I wouldn't go so far as to characterise the detention management report as a negative report in terms of his behaviour in custody. It just really shines through that there's a lack of motivation on SNW's part.

Now, there is a clear structured plan in place if he is to be released from detention, to go to live back with his mother whose circumstances, as I say, have improved. It's intended that he would be enrolled in a vocational program in Esperance. Now, he has had a previous stab at that program building furniture, and he didn't last very long in the program. He is also going to be subject to supervision and have a mentor, which is a necessary thing.

Now, SNW, I wanted to speak to you again, really, at this point. I don't know if you've been following what I've been saying. But there's a couple of things which I think are - which stand out to me, and I don't know if you've been thinking about them while you've been in detention, all right?

Last year was a pretty bad year for you.

You lost your grandma. And it was also the first year when no one was making you go to school. So you're just hanging around in Esperance, all right? And I know there's not a lot to do in Esperance. There's a few kids there just hanging around with each other and getting into trouble with each other. And that's really what was happening to you. Smoking some cannabis - and I've got no doubt that the death of your grandmother had a big impact on you, all right?

Now, because of all those things that were happening in your life, you weren't taking advantage of some of the things that were being offered to you like that Pallet Building program, all right? But I want you to think about something. It's what you told Ms Heath. When you did that Pallet Building program, even though they told you that you had to go and do it, you felt good when you made something, didn't you? Yes? You felt proud of yourself?

SNW, MR: Yes.

HIS HONOUR: Yes. Now, school is not for everybody, okay? I know you didn't like school. And I know that in Banksia, even though the teachers there are really good, it gives you a headache doing the maths and you don't like doing it. But there are things you can do. You can do stuff like building and furniture. And that's what makes you feel good, doesn't it?

SNW, MR: Yes.

HIS HONOUR: All right? When you're just running around with your mates in Esperance and when you're bored, you don't feel good about yourself. And that's partly why you were starting to get depressed last year. It wasn't only because of your grandma's death, I know that was probably the major thing. But when you've got no plan, you've got no idea of what you're going to do every morning when you get up, you don't feel good about yourself.

And you also start to worry about all the things that are around you, and they affect you more than they should. Like what's going on at home with your mum and your stepdad, okay? But when you're doing something positive like working, that makes you feel good. And when you feel good then you don't get into trouble. And when you feel good, you don't need to use drugs. And when you're working you haven't got time to get into trouble with other boys and go and do burglaries.

So I know you don't want to go back to school and I'm not saying to you, "Go back to school". I don't think that's a good thing for you. But you do - you do got to go and do this vocational program in Esperance. And you've got to build on that. You've got to do work. You can do work. You can build stuff. Now, it doesn't matter if it's building furniture or if it's going to get a job as a builder's labourer and mixing concrete, building houses.

Going to work every day, doing physical work, that will make you feel good about yourself. And then you will have money in your pocket and you won't have to go and burgle houses to get money. All right? And you can buy your mum something nice, or your girlfriend.

SNW, MR: Yes.

HIS HONOUR: So that's what you've got to do. Do you think you can do that?

SNW, MR: Yes, your Honour.

HIS HONOUR: Because your lack of motivation is the problem. The only person who can change that is you. So I am going to give you an opportunity of a conditional release order. The most important thing in terms of you coming now before me on this re-sentencing is not the mistake the magistrate made. It was well open to her to impose a detention sentence at that time, even though she made a mistake. It is that you've now been in custody for 72 days. And this is the very last chance we have as a society to help you as a young person. Because as Ms Heath has explained to you, this really is your last chance. Because once you turn 18 the rules are completely different. Once you turn 18 the community, everybody, says, "You're an adult now. We've tried, we've given you the chances that we give children, but adults are expected to go to work and not commit offences".

And so if you commit offences you go to jail. And if you're not working, or learning how to work, you will be getting into trouble, I'm sure of it. Okay? So you're going to get this one last chance. It's going to be on all of those charges that are before me. The original conditional release order is cancelled as at the date that the magistrate said. And there's going to be a 12-month conditional release order on all of those charges, because it only needs to be one order, okay?

I'm not going to backdate it as Ms Heath asked me to, because what I'm really taking into account is the additional time that you've done in detention, so it's going to be a 12-month conditional release order from today. And this conditional release order operates, really, like a sword hanging over your head. So you're going to get out. You're going to comply with those conditions which are in the agenda in the reports. You can go back to Esperance.

They're going to take you back down there tomorrow. You're going to do all those programs. If you don't do those programs then that will be a breach of the order and you come back for re-sentencing. If you commit any offences that will breach the order and what's going to happen?

SNW, MR: Go back to jail.

HIS HONOUR: Yes. Go back to detention.

SNW, MR: Banksia.

HIS HONOUR: Yes. And if you breach after you turn 18, what's going to happen?

SNW, MR: Hakea.

HIS HONOUR: You're going to go to Hakea, yes. And even a breach before you're 18 can still end up at Hakea when you're serving the sentence of detention that follows. So it's up to you. You can go back to Esperance and you can be unmotivated and go back to hanging out with your mates and smoking cannabis, and I guarantee you, you will end up in custody. Or you can go back to Esperance, and you can work with these people who are trying to work with you and help you, your mentor, and the program, the work program, and you can move on with your life. So it's your choice. Understand?

SNW, MR: Yes.

HIS HONOUR: All right. Any other orders that are required?

MARKHAM, MS: No, thank you, your Honour.

HEATH, MS: (indistinct) thank you - - -

HIS HONOUR: Nothing? Covered everything? Court will adjourn.

AT 11.56 AM THE MATTER WAS ADJOURNED ACCORDINGLY