

IN THE CHILDREN'S COURT OF VICTORIA
CRIMINAL DIVISION

DIRECTOR OF PUBLIC PROSECUTIONS

v

KH¹

<u>JUDICIAL OFFICER:</u>	MAGISTRATE FLEMING
<u>DATE OF HEARING:</u>	6 AUGUST 2020
<u>DATE OF DECISION:</u>	20 AUGUST 2020
<u>CASE MAY BE CITED AS:</u>	DPP v KH [2020] VChC 5

REASONS FOR SENTENCE

Catchwords: Plea of guilty to aggravated carjacking (causing injury), attempted aggravated carjacking, false imprisonment, theft, assault emergency worker on duty (x 3), affray and other offences – offending occurred while on youth parole and then on remand – Aboriginal offender – personal circumstances including intellectual disability, developmental trauma and Child Protection involvement – prospects of rehabilitation – impact of COVID-19 restrictions – sentenced to concurrent Youth Justice Centre Orders – conditions including Youth Justice supervision and undertaking of treatment and rehabilitation.

<u>APPEARANCES:</u>	<u>Counsel</u>
For the DPP	Ms. Rutherford
For Victoria Police	Ms. Exner
For the Accused	Mr. Annear

¹ This decision has been anonymised.

HER HONOUR:

1. KH you have pleaded guilty to one charge of aggravated carjacking – causing injury, attempted aggravated carjacking – causing injury, false imprisonment, theft, drive whilst disqualified, obtain property by deception, theft from shop, enter building with intent to steal, theft of a motor vehicle, affray, three charges of assault emergency worker on duty, assault with attempt to rob. You elected to have your matters heard in the Children’s Koori Court. You have not been able to appear in that Court due to the COVID-19 restrictions and have requested that this Court deal with your matters.
2. You were aged 16 at the time of the offending and you fall to be sentenced as a child offender. At the time that you pleaded guilty you admitted previous convictions from the Children’s Court.² You also admitted a previous criminal history in Western Australia Children’s Court.³ You have priors for attempted robbery, affray and other offences of violence.
3. On the charge of attempted robbery, attempted burglary, aggravated burglary and other offences you were sentenced in the Children’s Court on 27 February 2019 to 15 months’ Youth Justice Centre detention. Prior to this sentence you had been sentenced to a Youth Supervision Order for 12 months on 27 August 2018, which you breached. Your prior criminal history is documented in the Police Criminal History Report.
4. The offending relating to the Cotter brief occurred on 25 June 2019. The offending in relation to the Antonelli brief occurred on 26 June 2019. You were at that time on youth parole. The Youth Parole Board released you on parole on 16 June 2019.
5. The offending in relation to the McSwain brief, 20 July 2019 and the Dillon brief, 13 January 2020 occurred when you were on remand at Malmsbury Youth

² LEAP Victoria Police Criminal History.

³ Western Australia Criminal History.

Justice Centre.

6. You have pleaded guilty to all of the charges and that is to your credit. By your plea of guilty you have saved the time and cost of a trial. By your plea of guilty you have accepted and admitted responsibility for your crimes and you have facilitated the administration of justice. Importantly, you have saved the complainants from being called to give evidence against you and being cross-examined by your counsel.
7. Your plea of guilty means that the law provides that you are entitled to a reduction in sentence and this will be reflected in the sentence that I will impose.
8. The circumstances of your offending are contained in a summary that was tendered in evidence and read in open court by a prosecutor. Your counsel accepted that the prosecution summary was accurate. It is not necessary to set out the detail of the summary however the sentencing remarks should be read with what is set out in more detail in the summary.
9. In relation to the Antonelli brief, I have heard that on 26 June 2019 in the late afternoon you were with the co-accused, who was also 16 years of age. You approached the victim who was collecting his grandson from piano lessons. During the course of the incident, you yelled aggressively at the victim and demanded his car keys. The victim did not speak English and was in fear for his grandson. The victim tried to protect his grandson. In an attempt to stop your co-accused from starting the car, the victim has tried to pull him away at which time you have kicked him three times in the back. Unable to start the car you and your co-accused have run off with the car keys. The victim has reported tenderness in his back and was visibly emotionally upset and crying as a result of your offending.
10. In relation to the second incident, I have heard a summary that later on 26 June

2019 at 11.30 pm you and the same co-accused approached the victim who was washing his friend's car at a car wash in [location removed]. You and your co-accused have asked him for a lift and he has refused. You have both walked away only to return and you have said to him "Do you want us to stab you? Do you want us to take the car or what or you want to give us a lift?" The victim has then driven you to [location removed] with you in the front passenger seat and your co-accused in the rear, from [location removed] he has done as you asked and returned you both to [location removed]. The victim observed you both to be passing something between each other and in fear he was about to be stabbed he has got out of the car. You attacked the victim and he was punched to the face numerous times until he hit the concrete road. You and your co-accused then kicked the victim to his face and body and demanded his keys. The victim was able to tear a necklace from your neck in the struggle. When the victim dropped his car keys one of you has picked them up and you have both driven away in the car. The victim's phone and wallet and other personal belongings were still in the car.

11. The victim sustained injuries including a fracture to his elbow, nasal fracture, swelling to his lower lip and right ear and superficial grazes to his lower chest, upper back and right knee. You used the victim's debit card to purchase items, namely soft drink and food and fuel. At the time that you were driving you were a disqualified driver.
12. I have heard the victim impact statement and note that the victim suffered injury. The statement of the victim shows that crimes of this kind have a lasting effect upon victims and this case is no exception. In passing sentence, I have taken the victim impact statement into account as I must.
13. In relation to the Cotter brief I have heard that at approximately 11 am on 25 June 2019 you entered residential premises and obtained car keys. You have then stolen the car belonging to the residents who were not at home. Your

fingerprints were found in the vehicle.

14. The offending in relation to the McSwain brief occurred on 20 July 2019 when you were on remand at Malmsbury Youth Justice Centre. You and another young person grabbed at a worker on duty to obtain her swipe card. Unable to remove the swipe card you and your co-accused wrestled the worker to the door to activate the swipe card to open the door, once through the door you have ran at the victim and have kicked and punched him, when he fell to the floor you have kicked and stomped on him multiple times. A second worker has attempted to stop you by laying on top of the victim, this worker was kicked to the back and struck to the left side with a knee strike. The first worker and the third worker have attempted to assist their colleague and push you back. You have wrestled them while all the time continuing your assault on your victim. I have been provided with a victim impact statement in relation to this offending.
15. The offending in relation to the Dillon brief occurred on 13 January 2020 when you were on remand at Malmsbury Youth Justice Centre. At 9.35 pm you threatened a worker at the Justice Centre with a broken mop handle and then struck him with it, the worker fell to the ground and you stomped on his head and body four times and punched him in the head, you then dragged him along the floor and tried to rip his keys from his belt.
16. You and your co-accused were arrested shortly after 10.30 am on 27 June 2019 and have been in custody since that date.
17. You are Aboriginal and have two brothers who reside interstate. You have two half siblings who reside in Victoria. As an infant you were exposed to significant abuse and witnessed physical abuse inflicted on your mother perpetrated by your father, which relationship your mother left. Your family experienced periods of homelessness and you were to move in with your grandparents. Your grandfather was a registered sex offender which led to disclosures that you had been the victim of sexual abuse which is believed to have commenced when

you were four years of age, the abuse was prolonged and there were multiple perpetrators. At seven years of age you were placed in foster care. Due to behavioural difficulties you had multiple placements. You were placed in residential care but due to issues, you have had multiple placements. Your offending interstate led to incarceration and you were transferred to Victoria where you were to reside in residential care. You were residing in residential care at the time of the offending for which Antonelli is the informant. While in custody you have not had visits from your family, but you have had telephone calls with your mother.

18. You have had your cognitive and intellectual functioning assessed on three occasions between 2011 and 2017. These assessments confirm that you have an intellectual disability. Your IQ has been assessed as 61 placing you within the extremely low range and functioning is reported as being that of a five or six year old. You have an active NDIS plan.
19. Dr. Lechner completed a *doli incapax* assessment of you on 16 August 2017⁴. Dr. Lechner reports that in 2013 you were diagnosed with Complex PTSD and severe Attachment Disorder, in addition to “extremely low” literacy and numeracy skills; “you barely attended school”. Your developmental history is characterised by exposure to severe abuse and neglect, inappropriate parenting and a high level of transience both interstate and within Victoria. Dr. Lechner report states that your psychometric testing indicates that your intelligence is in the ‘borderline’ range with verbal abstract reasoning akin to those of an average seven year old and that your problem solving skills commensurate with an average ten year old.⁵
20. Dr. Muscara completed a neuropsychological assessment in 2017. In his report⁶, Dr. Muscara reports of your traumatic family history. Dr. Muscara’s

⁴ Dr. Carla Lechner Report 16/8/2017.

⁵ Dr. Lechner Report p 10.

⁶ Dr. Frank Muscara Report 27/9/2017.

assessment is that your current level of cognitive function was at a level of an intellectual disability:

“He is functioning at a very low level across all areas and cognitive domains, including his verbal and visual skills and speed of processing of information. This indicates that he will be slower than his same aged peers to learn new information.”⁷

21. You have been diagnosed with depression, anxiety, Post Traumatic Stress Disorder, Attention Deficit Hyperactivity Disorder and Severe Attachment Disorder attributed to your developmental trauma. You have a history of suicide attempts and ongoing self-harming behaviour.
22. You have a history of polysubstance use. When in the community you have used cannabis and alcohol. You reported using GHB and methylamphetamine at the time of the offending for which you are charged by informant Antonelli.
23. You are in good physical health. You are described as an engaging young man. Your goal is to be in independent living, to complete your education, to continue with your sport [details removed], and engage with your family.
24. Your involvement with Juvenile Justice Team in Perth commenced in October 2016 when you were 14 years of age. Your offending quickly escalated. Your involvement with Youth Justice began in Victoria in 2018 when you were placed on a Youth Supervision Order for eight months. You breached this order and were given two further opportunities of community-based orders but were unable to complete them. Your first custodial disposition was imposed when you were 14 years of age.
25. You are described as a proud Aboriginal man⁸. I have no information about your mob. This information may be contained in a cultural plan held by the

⁷ Dr. Muscara report p 1.

⁸ PSR 5/8/2020.

Department of Health and Humans Services. If so, the plan should be provided to you.

26. Your mother resides in [location removed] with your youngest half sibling and will accommodate you upon your release. There is no Child Protection involvement in relation to your younger half sibling.
27. On 16 June 2019 you appeared before the Youth Parole Board and you were released from detention. The offending relating to the Antonelli brief occurred in the weeks following your release while you were on parole.
28. On 4 July 2019 your parole was cancelled and you were credited with seven successful days of parole. Your parole order expired on 10 February 2020. As a result, there is pre-sentence detention that can be applied to your sentence.
29. You have been involved in incidents of violence while in custody, one of your victims was a female emergency worker on duty. If you were an adult, I would have to apply the *Sentencing Act*. General deterrence would be a consideration for me, and I would have to take into account the new provisions that relate to assaulting an emergency worker while on duty. The new provisions were introduced by Parliament to reflect the attitude of the community to offences where an emergency worker such as a Youth Justice custodial worker is assaulted while on duty. It is a serious offence and attracts a strong penalty and a mandatory period of imprisonment for offenders who are 18 years or older. Section 413(3A) of the *Children, Youth and Families Act 2005* (CYFA) imposes an obligation of cumulation for assault on a Youth Justice custodial officer on duty if a period of detention is imposed unless the Court at the time of sentencing, states that the sentences are concurrent. You are soon to turn 18 and will be subject to the mandatory penalties if you assault an emergency worker on duty in the future.
30. Your offending has been described in the context of impulsivity and poor

decision-making and associating with like-minded peers. At the time of the offending relating to the Antonelli brief, you were residing in a residential placement being a client of Child Protection and on a Care by Secretary Order, which will expire on the eve of your 18th birthday. While in the residential placement, you were required to satisfy your parole conditions. You were spending an increased period of time with your co-accused, having been ordered to work together on a [detail removed] project. You report that four or five days after your release on parole you commenced using illicit substances, in particular methylamphetamine and you were using these substances on the night of your crime spree on 26 June 2019.

31. You are described in the pre-sentence report as having the ability to articulate remorse for the suffering you caused to the victims. You reportedly felt particularly bad about your actions when you heard the victim impact statement, which was read to you prior to this hearing. You reportedly did not understand the long-term impacts of your behaviour on your victims until now and you state that you are now aware that, as a result of your offending, the victims are afraid to complete regular tasks and activities in the community out of fear of being further assaulted. Your counsel stated that you want the victim to know that you did not target him and that you are genuinely sorry for the offending and the effect it has on your victims. You reportedly also “felt bad” for the workers at the Malmesbury Youth Justice Centre who were injured as a result of your actions.
32. As a young offender, the law provides that in sentencing you I must have full regard to your prospects for rehabilitation which I assess as being reasonable despite the fact that you committed some of these offences while subject to parole.
33. The sentencing regime in the Children’s Court is different to the sentencing of adults. The regime can and does lead to dispositions which would be regarded as entirely inappropriate in the case of older and presumably more mature

individuals. The regime is a welfare model in order to provide you with every opportunity to undertake programs to deal with your anti-social behaviour. I consider that I must impose a sentence that will assist you change your life so that you can have an offence-free future.

34. I note that pre-sentence report of Youth Justice and the recommendation that you be placed on a Youth Justice Centre Order.
35. While in custody you have been subject to COVID-19 restrictions which have made your detention more onerous. In *Brown v The Queen*⁹ Justices Weinberg and Priest were addressed on the COVID-19 considerations:

“With regard to the COVID-19 pandemic, and the submission put forward on behalf of the applicant in that regard, we readily acknowledge that this is a matter that is certain to come before this Court again in the immediate future. In the absence of any adequate material concerning the impact of the virus upon the Corrections system, as matters stand, and given that the situation is one that is rapidly evolving, we are hesitant to express a general statement of principle regarding how this Court (and others) should deal with this crisis as regards its effect upon relevant sentencing principles. We do accept, however, that the situation is causing additional stress and concern for prisoners and their families, as it is for every member of the community. The extent to which that may be taken into account, if at all, will be a matter to be resolved on the particular facts of any individual case.”

36. Your counsel has submitted that you have spent a considerable time in custody and that during the COVID-19 emergency that you have been in lockdown.
37. I am accepting of your counsel’s submissions. This sentence is not intended to be crushing. It is intended to assist you to turn your life around. I would expect

⁹ *Brown v The Queen* [2020] VSCA 60 at [48].

that you participate in counselling and other rehabilitation programs when they become available to you.

38. I take into consideration that but for the COVID-19 restrictions you would have been sentenced by the Children's Koori Court. As a result, you have missed the opportunity to have the contribution of the Elders of that Court. I have been told that you are a proud Aboriginal man and I consider that you would have benefitted from the collective wisdom of the Elders of that Court.
39. On the charges relating to the Antonelli brief I take into consideration the principle of parity, as I must and noting that I sentenced your co-accused.¹⁰
40. On the charge of attempted aggravated carjacking – causing injury (charge 4) I sentence you to 12 months' Youth Justice Centre detention.
41. On the charge of aggravated carjacking – causing injury (charge 8) which is a Category A serious youth offence as defined in the CYFA, I sentence you to 14 months' Youth Justice Centre detention. I take into consideration section 362(1)(g)(i) of the CYFA.
42. On the charge of false imprisonment (charge 9), driving whilst disqualified (charge 13), obtain property by deception (charge 14) and theft (charge 16) I sentence you to 3 months' Youth Justice Centre detention.
43. On the charge of enter building with intent to steal (charge 17), theft of motor vehicle (charge 18) I sentence you to 3 months' Youth Justice Centre detention.
44. On the charge of affray (charge 19), assault emergency worker on duty (charges 25, 26, 27) I sentence you to 6 months.
45. On the charge of assault with intent to rob (charge 30) I sentence you to 3 months.

¹⁰ *DPP v LZ* [2020] VChC 2.

46. All licences, permits and or authorities to drive are suspended for 6 months from the commission date of the offence to which charge 18 applies.
47. The sentences imposed on all charges will be served concurrently. The reason that I have made the charges of assault an emergency worker on duty concurrent is due to the material before me in mitigation of penalty. In particular that you have been exposed to longstanding sexual, emotional, environmental and physical abuse, exposure to violence, drug use and the sexual abuse of others, a dysfunctional and transient family environment and disrupted parental attachments including forced separation from family. Your prolonged exposure to trauma has affected every aspect of your development. You are an Aboriginal man of young age with good prospects of rehabilitation with the appropriate services to support you.
48. There are 199 days of pre-sentence detention to be taken into consideration as time served and deducted from this sentence.
49. For the purposes of the CYFA I state that had it not been for your plea of guilty I would have imposed a term of detention of 18 months.
50. There will be conditions that you undertake supervision from Youth Justice, that you undertake treatment and programs for rehabilitation.
51. Disposal orders are not sought.