SUPREME COURT OF QUEENSLAND

CITATION:	*R v Coker* [2013] QCA 315
PARTIES:	**R** **v** **COKER, Mohamed** (appellant/applicant)
FILE NO/S:	CA No 285 of 2012 DC No 678 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2013
JUDGES:	Holmes JA and Atkinson and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – GENERAL PRINCIPLES – where the appellant pleaded guilty to one count of grievous bodily harm – where he appeals his conviction on the basis that the plea of guilty was not entered in the exercise of a free choice, contending that he did not understand the nature of the plea or the charge and did not intend to admit that he was guilty – where the appellant asserted that his former counsel refused to request an interpreter for him, pressured him to plead guilty and did not explain to him the document recording his instructions to plead guilty – where on appeal both the appellant and his former counsel gave evidence, the appellant conceding that he had pleaded guilty to avoid a more severe sentence – whether the appellant was aware of the charge – whether any improper pressure was applied to the appellant – whether the appellant pleaded guilty in the exercise of a free choice – where the appellant had given inconsistent accounts of his possession and use of a knife in the altercation and had not given his former counsel any instructions to suggest he had used the knife in self-defence – whether there was

a viable excuse of self-defence – whether a miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of grievous bodily harm and was sentenced to four years and three months imprisonment, with a parole eligibility date set after 21 months – where the applicant went to a pre-arranged fight armed with a knife and used it – where the complainant was 13 years old and suffered a life-threatening injury – where the sentencing judge recognised the applicant's youth, lack of prior convictions, traumatic background and that he and his partner were expecting their first child – where the applicant had shown no remorse, and entered a late plea on the first day set for the trial – whether the sentence was manifestly excessive

Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited
R v Baker [2012] QCA 237, cited
R v Brand [2006] QCA 525, cited
R v Laing [2003] QCA 477, cited
R v Neilson [2011] QCA 369, cited
R v Wade [2012] 2 Qd R 31; [2011] QCA 289, cited

COUNSEL: S G Bain, with A C Freeman, for the appellant/applicant (pro bono)
P J McCarthy for the respondent

SOLICITORS: No appearance for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA**: The appellant pleaded guilty to one count of grievous bodily harm and was sentenced to four years and three months imprisonment, with a parole eligibility date set after 21 months. He appeals his conviction, notwithstanding his plea of guilty, on the basis that it constitutes a miscarriage of justice because the plea of guilty was not entered in the exercise of a free choice, he did not understand the nature of the plea or of the charge and he did not intend to admit that he was guilty. He seeks leave to appeal against the sentence imposed on the ground that it is manifestly excessive.

The change of plea

[2] An indictment was presented against the appellant on 24 February 2012. The evidence of two witnesses was pre-recorded in July 2012, and the trial proper was set down for 2 October 2012. It was common ground that until October 2012, the appellant had maintained his innocence and had consistently told his solicitors that he wanted to plead not guilty. On 2 October, however, the appellant's counsel, Mr Wilson, advised the court that the matter was likely to resolve but that further

time was needed for him to confer with his client and his client's mother. That time was granted; the court adjourned at 11.28 am and resumed at 2.15 pm.

[3] In the interim, the appellant signed a document headed "Plea Instructions", the material parts of which are as follows:

> "1. I fully understand the serious nature of the charge against me and the maximum penalties provided by law.
>
> 2. I understand that I am presumed innocent and that I have the right to plead Not Guilty to any charge.
>
> 3. I understand that I have a right to a trial conducted on my behalf and that no-one has taken or can take from me my right to plead not guilty and go to trial and have the Crown attempt to prove its case.
>
> 4. I have had the benefit of advice from my Legal Representatives and fully understand the charges, the Crowns [sic] evidence against me, and that the evidence supports the charges.
>
> I understand I have been charged with the following offences:
>
> 1 count of Grievous Bodily Harm.
>
> 5. *I instruct that I want to plead GUILTY/~~NOT GUILTY~~ to the offences stated above.
>
> 6. By pleading guilty I understand and accept that I will be sentenced by the Court on the basis of the facts presented to the Court by the Crown, and any mitigating factors accepted by the Court. I have had these facts explained to me.
>
> 7. I fully understand that although I may have been given advice of an expected penalty range by my Legal Representative, the Sentencing Court is not bound by, nor obliged to follow or accept, any penalty submitted by my Legal Representatives or the Crown.
>
> 8. *I give the instructions to plead GUILTY/~~NOT GUILTY~~ of my own free will and no threat, promise or inducement has been held out to me by any person to give these instructions.
>
> 9. I confirm that I have fully considered the matter and do not need further advice before I give these instructions."

[4] When the court resumed, the appellant was arraigned and pleaded guilty. Asked if he had anything to say as to why sentence should not be passed on him, he did not respond.

The factual basis for the plea

[5] An agreed schedule of facts was tendered at sentence. According to it, some animosity between African and Asian students at a high school had led to the arranging of a fight at a railway station. Teenagers from each group, with some of

their friends, met for the purposes of the fight. The appellant, who is from Sierra Leone, approached a young man of Islander descent who was supporting the Asian group and they agreed to fight one on one. Before the fight started, however, the appellant punched the other man to the side of the face while holding a knife in his hand; that led to a more general fight.

[6] The 13 year old complainant ran into the group to assist his friends. The appellant punched him in the head. When the complainant tried to retaliate with a punch, the appellant stabbed him in the upper back. The complainant said that he saw the appellant wipe a pocket knife on his shirt. The appellant was heard yelling that he had stabbed the complainant, and apologising to him, before running away with a group of Islander males in pursuit. They punched and kicked him until he was able to take shelter in a local store, where he remained until police arrived.

[7] The stabbing cut an artery in the complainant's chest. Without surgery, he would have bled to death. The appellant had cut himself on the hand with the knife during the incident. A knife with his DNA on its handle was found two days later in a car park, about 50 metres away from where the fight had taken place.

Demonstrating a miscarriage of justice

[8] In *R v Wade*,[1] Muir JA succinctly summarised the circumstances in which a conviction might amount to a miscarriage of justice notwithstanding a plea of guilty:

> "[B]efore a court will go behind a guilty plea and entertain an appeal against conviction it must be satisfied that a miscarriage of justice has occurred. A miscarriage of justice may be established in circumstances in which for example: in pleading guilty, the accused did not appreciate the nature of the charges or did not intend to admit guilt; on the admitted facts, the accused would not, in law, have been liable to conviction of the subject offences; the plea was not made freely and voluntarily, such as where it was obtained by an improper inducement or threat or it is shown that the plea was "not really attributable to a genuine consciousness of guilt". And, of course, it will normally be impossible to show a miscarriage of justice unless an arguable case or triable issue is also established."[2] (Citations omitted.)

The evidence as to how the appellant came to plead guilty

[9] The appellant's first account, for the purposes of this appeal, of how he came to plead guilty came from two documents exhibited to an affidavit sworn by a lawyer employed by Legal Aid Queensland and filed on his behalf. The first was a file note recording a conversation on 13 December 2012 between the appellant and another Legal Aid lawyer, with some assistance from an interpreter, and the second was a more formal document headed "Instructions of Mohammed Coker".

[10] The appellant's account as contained in those documents was that on 2 October 2012, his then counsel, Mr Wilson, told him that a video showed him with a knife and that he would go to gaol for four to five months if he pleaded guilty.

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1 [2012] 2 Qd R 31.

2 At [51].

Mr Wilson told him that he had to plead guilty, and said that he was "not going to say much" for him if he did not do so. He had told his counsel that he had witnesses: his brother (who had already given pre-recorded evidence in the Crown case) would do so, and so would another person named T. Mr Wilson had said that he did not need T, and told the appellant that he was not allowed to give evidence at his trial. (The affidavit of the Legal Aid solicitor exhibited notes from the file of the appellant's former solicitors including one which noted that T had already given a s 93A statement implicating the appellant.)

[11] According to the appellant, he was told he would be pleading guilty to having a knife and going armed, not that he was pleading guilty to stabbing someone. His lawyer had informed his mother of the same thing and she had advised him to plead guilty. He had signed the "Plea Instructions" but he had not read them and they had not been read to him; he was just told to sign the form. The appellant felt disadvantaged, he said, because his solicitors did not have an interpreter for conferences with him. He had wanted to ask the judge for an interpreter, but his lawyer had said that that was not allowed. He had said "guilty" when arraigned because Mr Wilson said that if he pleaded guilty he would get a small sentence, but that if he pleaded not guilty, he would get a much greater sentence: the appellant's recall varied as to whether he was told he would receive 10 to 15 years gaol or 10 to 20 years gaol. He thought he was merely pleading guilty to having a knife, and did not know that he had pleaded guilty to grievous bodily harm until he was in gaol.

[12] The appellant gave evidence and was cross-examined for the purposes of the appeal. An interpreter in Krio, a language spoken in Sierra Leone, was available to the appellant. It became apparent, however, that the appellant had a good command of the English language and did not, in the main, require the interpreter's assistance. The appellant said initially that his counsel had not explained the charge to him and that he had no idea what he was pleading guilty to. However, he conceded in cross-examination that he knew he was pleading guilty to stabbing and seriously hurting the complainant.

[13] The appellant said, repeatedly, that his counsel had told him that if he pleaded guilty he would serve less time on his sentence. Convicted after a trial he would be sentenced to between seven and 10 years, but on a plea, to three years with nine to 12 months in actual custody. He reiterated the claim that Mr Wilson told him that if he pleaded not guilty he was "not going to do much. He's not going to talk for me that much." The appellant agreed that his counsel had shown him video footage of him in the store to which he ran after the fight and that he could be seen holding a knife. Under cross-examination, he agreed that he pleaded guilty because he "didn't want to do so much gaol time".

[14] The appellant's former counsel, Mr Wilson, gave evidence by affidavit and in person. He did not observe that the appellant had any difficulty in understanding English. He had no difficulty in communicating with the appellant who understood what he said and communicated fluently, albeit with an accent. Mr Wilson said that the nature of the offence and the legal consequences of a plea of guilty charge were explained to the appellant in conference on a number of occasions. At no stage was there any possibility raised of a plea of guilty to possession of a knife.

[15] Mr Wilson deposed that he first met the appellant on 10 July 2012, when the evidence of witnesses was to be pre-recorded for the trial. He advised him of the

nature of the charge, what the Crown was alleging, the difference in sentences should he plead guilty as opposed to being found guilty after a trial, the strength of the case against him and of the fact that he would do his best to try to have the appellant acquitted, notwithstanding the strength of the Crown case. His evidence was that he had not told the appellant that there was little he could or would say on his behalf, although he did say that he had limited prospects of success. The appellant had said that there were witnesses who could support his account, but he could give little detail of them. Mr Wilson's instructing solicitor spoke to some whom the appellant identified, but none could give evidence which would assist.

[16] On 28 September 2012, there was a conference between Mr Wilson, his instructing solicitor, the appellant and his girlfriend at which the evidence to be led by the Crown was explained to the appellant, as well as the procedure of the trial. On 1 October 2012, at yet another conference, Mr Wilson explained to the appellant the difficulty that he was facing in the evidence of eye-witnesses who saw him holding a knife in the fight and when he ran away. The appellant was insistent that he did not have a knife and that video surveillance from the store that he ran through in his escape would exonerate him. Mr Wilson told the appellant that he had watched the video surveillance tape frame by frame and that the appellant could be seen in it with a knife in his hand.

[17] Given the appellant's youth, Mr Wilson arranged for his mother to come to court on 2 October 2012 and a further conference was held, with her present, at which he explained the nature of the charge, the facts and the evidence - from eye-witnesses and in the form of video surveillance footage - which contradicted the appellant's claims that he did not have a knife with him during the fight. The surveillance tape was played to the appellant and his mother. Once shown the footage, the appellant appeared to accept that he was, in fact, holding a knife. He no longer raised any claim of self-defence.

[18] Mr Wilson explained to the appellant and his mother that if the appellant were convicted after a trial, the Crown would seek a sentence of seven to eight years imprisonment and that he was likely to receive a sentence of seven years, to serve half, or possibly 80 per cent in the event of a serious violent offence declaration's being made. (In giving evidence, Mr Wilson denied ever telling the appellant that after a trial he could receive a sentence in the order of 10 years.) He advised them that if the appellant decided to plead guilty he might receive a sentence of between four and five years imprisonment with a parole eligibility date or suspension after part. He said that he thought the appellant might actually have to serve between 12 and 20 months, but that was a matter for the judge.

[19] Mr Wilson maintained his willingness to represent the appellant at trial if he were so instructed. The appellant said, however, that he would enter a plea of guilty. Mr Wilson's instructing clerk explained the content of the instructions to plead guilty to the appellant and his mother, and the appellant duly signed them.

The possible defence case

[20] The appellant's counsel[3] argued that self-defence was open. As to that, it is worth setting out the variations in the appellant's accounts of the altercation. In his

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[3] Counsel for the appellant assisted the court greatly by appearing pro bono and clarifying the issues. They argued valiantly in a case which became increasingly unpromising as their client's evidence unfolded.

original record of interview, the appellant denied stabbing the complainant. He said that he had met some friends at the railway station, intending to go and play soccer with them. While there, he found a broken knife which he had used to clean his nails. He and his friends were heading to a nearby take-away food shop when the complainant's group began to pursue him. He threw the knife away; the last and only time he saw it was when he was playing with it before he threw it down. He did not have it when he got into a physical fight with a male who punched him. He hit back, then sought to walk away, but when he was pursued he began to run and took refuge in a store. If he had had a knife, it would have been visible on camera in the store, but he did not have one. He said that the injury to his hand was caused by someone unknown stabbing him.

[21] The first of the file notes from the file of the appellant's former solicitors, dated 28 April 2011, records that the appellant denied the stabbing. He had previously had a knife, but disposed of it before the fight. A further note, for a date which cannot be read, says that the appellant stands by his record of interview version; he threw the knife away before any incident took place and he tried to walk away, but got hit from behind; a lot of people jumped in; he was stabbed in his hand, as was his friend.

[22] In the document headed "Instructions of Mohamed Coker", the appellant said of that file note that he accepted he had informed his solicitor that he stood by his version of events in the police interview, but he now wished to say something different. He had told the police that he found a knife and had used it to clean his nails before throwing it away; but he now said that he had found nail cutters and was swinging them around in the fight and blocking his face while holding them. He did not know if he had hit anyone. He threw the nail cutters away after the fight.

[23] Another document annexed to the Legal Aid lawyer's affidavit is headed "Statement of Mohamed Coker". In it, the appellant says that he was set upon by gang members punching and kicking him. During that attack, he saw someone coming at him with a knife in his hand, lunging at him to stab him in the stomach area. He put his hands up to block the knife and was stabbed in the hand twice before his assailant dropped the knife on the ground. He dropped to his knees and picked up the knife, which he began swinging to defend himself. He did not remember if he had stabbed anyone. He had not taken a knife with him, nor did he at any time carry a knife on his person.

[24] In giving evidence, the appellant said that the document titled "Statement of Mohamed Coker" was handwritten by a friend and typed by a Corrective Services employee. They had wrongly recorded the reference to his having picked up a knife dropped by his assailant. What had really happened was that he had found a knife at the railway station, taken it with him to the takeaway food shop, but dropped it there and then picked it up again before the fight commenced. The appellant said that he had told the police he did not have a knife in the fight because in Sierra Leone what Australians would call a "pocket-knife" was referred to as a "key holder".

[25] Mr Wilson, when cross-examined, agreed that the appellant had given a version that he did not stab the complainant and asserted that the video surveillance in the store would exonerate him. But at no stage did the appellant give instructions to suggest that he might have used a knife in self-defence; his instructions were consistently that he did not have a knife at the relevant time.

Findings

[26] It was evident from observation of the appellant in giving evidence that he spoke more than adequate English to understand advice given to him and what was happening in court when he was sentenced. He was not a credible witness. His version of what had happened in the fight changed opportunistically. His assertion in cross-examination that he told the police he did not have a knife because it was to him a "key-holder" is an obvious example. It is plain from the police interview that throughout it he was talking about a single object which he claimed to have found at the railway station, whatever its nomenclature – knife, pocket knife, key-holder or nail-cutter - but, falsely, maintaining that he had disposed of it before the fight. That initial claim to have dropped the knife was clearly given the lie by the video footage; hence, one infers, the change in account. Even that alteration was not consistent: the claim in the "Statement of Mohammed Coker" that he had picked up the knife in the course of the fight was abandoned and replaced by the version in oral evidence that he had picked it up from where he had earlier thrown it down.

[27] In particular, I reject the appellant's claims that he was told: that on conviction after a trial he faced a sentence of up to 10 years (or for that matter, 15 or 20 years, as originally claimed); that Mr Wilson would not say much for him if he went to trial; that he could not give evidence; or that he was pleading guilty to going armed. Similarly, I reject his evidence that the document recording his instructions that he wished to plead guilty was not explained to him. I accept Mr Wilson's evidence as to the advice he gave as to the appellant's prospects and the respective consequences of pleas of guilty and not guilty. I find, too, that the appellant's solicitors interviewed the witnesses suggested by him and rightly concluded they would not assist.

Conclusions

[28] The appellant's oral evidence did not diverge from Mr Wilson's as substantially as the material filed on his behalf suggested. He admitted in cross-examination that he did understand the charges against him, so it is unnecessary to dwell on his original claims in that regard. His counsel argued simply that, unused to the Australian justice system, he perceived that he was being forced to plead guilty.

[29] A significant difference between the appellant's evidence and Mr Wilson's was that Mr Wilson perceived the appellant's having seen the footage of himself with a knife in his hand as pivotal in his decision to abandon the claim of self-defence, whereas the appellant said that he pleaded guilty to avoid a more severe sentence. I regard the former as more probable: the appellant pleaded guilty, knowing that he would almost certainly be found guilty, having seen the footage. But even if one were to accept the appellant on the point, the mere fact that someone pleads guilty to avoid a more severe sentence does not mean that a miscarriage of justice has occurred.

[30] In *Meissner v The Queen*,[4] the High Court majority (Brennan, Toohey and McHugh JJ) said this:

> "A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no

[4] (1995) 184 CLR 132 at 141.

> miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence."[5]

[31] Dawson J observed in the same case:

> "It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred."[6]

[32] The advice Mr Wilson gave as to the appellant's prospects and the advantages of a plea of guilty was entirely proper. I conclude that the appellant was not subject to any improper pressure to plead guilty; that he was aware of the charge to which he pleaded guilty; and that he understood what he was doing when he entered the plea. He pleaded guilty in the exercise of a free choice.

[33] As to the submission that there was a viable excuse of self-defence, it is apparent that the prospect of a jury's acting on any version given by the appellant, after the change of account from having no knife in the fight to having one in his hand, would be dim indeed. The plea of guilty was a proper and prudent one, in the face of an overwhelming Crown case. There has been no miscarriage of justice in the appellant's conviction.

The sentence hearing

[34] The content of the schedule of facts relied on at sentence has already been set out. The appellant was 19 when the offence was committed and 21 when he came to sentence. It was said on his behalf that he, his mother and younger brother were all refugees from Sierra Leone. A letter from his mother was tendered, explaining his background. His father had been murdered in the civil war in Sierra Leone when he was three years old. His mother and brother having already fled the country, he had been raised by his grandfather in a refugee camp, where he had suffered some brutality, and he had never attended school. He had sustained a head injury when a car hit him and had continuing bad headaches as a result.

[35] At the time of sentence, the appellant was in a de facto relationship with a young woman who was pregnant to him. She provided a letter saying that he was a caring partner. He was not employed, but was working three days a week as a volunteer in a community childcare centre.

[36] The prosecutor made it clear that the Crown did not accept the appellant's account given in his record of interview. The video footage showed that he did, in fact, have a knife in his hand when he ran into the store after the complainant was stabbed. The plea of guilty was made on the first day the trial was to commence before the jury, after the evidence of two juveniles (the complainant and the appellant's

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5 At 141.
6 At 157.

younger brother) had already been recorded. In the context of a relatively strong Crown case, it could not be considered an indication of real remorse, but it had avoided the cost of a five to six day trial. The prosecutor raised as aggravating circumstances the facts that the appellant had gone to the area where the fight occurred carrying a knife, and had used it; had produced the knife first and was the only person armed; and had caused life threatening injuries to a complainant who was only 13 years old.

[37] The learned sentencing judge acknowledged the appellant's youth, his difficult childhood, his position as a refugee, his lack of any prior criminal history, and his de facto relationship, with his partner expecting their first child. The offence, his Honour observed, arose out of a plan that groups of different races would fight, in what he described as a disgraceful display of group animosity and violence. It was intolerable that the appellant had taken a knife to a fist-fight and used it. His Honour noted the severity of the complainant's injury.

[38] The appellant had, the learned judge observed, given a self-serving and dishonest version when interviewed; the matter had been set for trial and the complainant had been forced to give evidence; it was a late plea of guilty, as the prosecutor said, in the context of a relatively strong Crown case; there had been no expression of remorse; and the appellant's behaviour did not suggest remorse. The plea of guilty had, however, saved the State time and money. Both general and personal deterrence were important factors in the determination of penalty. His Honour imposed the sentence already referred to, of four years and three months, with parole eligibility after 21 months.

The appellant's submissions on the application for leave to appeal against sentence

[39] It was argued for the appellant that the sentencing judge wrongly placed weight on a misapprehension that the appellant had brought a knife to a pre-arranged fist-fight, implying a level of premeditation and calculation to his actions. That view overlooked the appellant's statement in his interview, that he had found the knife at the scene.

[40] Reliance was also placed on observations of Williams JA in *R v Brand*:[7]

> "[T]he appropriate sentence for the offence of grievous bodily harm will vary significantly and that relevant factors will include the nature of the injuries sustained, the age of the offender, the criminal history of the offender, whether or not a weapon was used, whether the offence was established by one blow or whether there was a sustained attack on the complainant."

The sentencing judge, it was submitted, had not properly taken into account: the fact that the complainant had suffered no permanent disability; that the injury was caused by a single blow after the complainant had voluntarily entered the fray and thrown a punch at the appellant; and that the appellant had sustained some extra-curial punishment when he was chased by others and sustained a number of blows. Other features of the case given insufficient attention were, the appellant's youth, lack of prior convictions, traumatic background, plea of guilty and immediate apology to the complainant.

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7 [2006] QCA 525 at [15].

[41] The appellant's counsel contended that a proper sentence would have been one of three and a half to four years imprisonment, with suspension after 12 to 16 months to reflect the appellant's youth and lack of any previous criminal history. Counsel adverted to *R v Baker*,[8] *R v Laing*[9] and *R v Neilson*[10] as supporting that range.

Discussion and conclusions

[42] The argument that the sentencing judge should have taken extra-curial punishment into account, can be set aside immediately. There was no submission made to him to that effect, and no evidence before him – or indeed, before this court – that the appellant had suffered any injury at the hands of those who pursued him of such significance that it would warrant a reduction in sentence. Nor is there anything in the point that the sentencing judge was wrong in proceeding on the basis that the appellant had taken the knife with him. His Honour was not obliged to accept the appellant's claim that he had just found the knife; and indeed, in hindsight, given the appellant's many and various versions of events, one would be rash to rely on any of them. More to the point, what his Honour said was that the appellant had gone to the incident armed with a knife and used it. That was correct, even accepting the appellant's account that he had found the knife at the railway station. The point was that he had retained it and embarked on a fist-fight with it in his possession.

[43] As counsel for the respondent pointed out, the apology that the appellant was heard to utter before running away was worth very little, given the lack of remorse exhibited by his subsequent denials. The sentencing judge recognised the mitigating factors: the appellant's youth, lack of prior convictions and traumatic background; and was well apprised of the actual circumstances of the assault as entailing only one blow. Against that, it was a life-threatening injury to a 13 year old. The submission that the appellant stabbed the complainant only after the latter had punched him is dubious: the accepted statement of facts recorded that the appellant had first punched the complainant in the head, and it was on a mere attempt by the complainant to retaliate with a punch that the appellant stabbed him in the upper back.

[44] *R v Laing*, referred to by the appellant's counsel, concerned a sentence of three and a half years imposed on a count of grievous bodily harm: the female applicant had slashed another woman's face with a knife after a drug deal turned sour. The injury inflicted was disfiguring, but not life-threatening. The applicant suffered from drug addiction and had a history of abuse by her former husband. At the time of the sentence for the grievous bodily harm, she was also being sentenced for offences of dangerous operation of a motor vehicle and unlawful use of a motor vehicle. The sentencing judge took into account 124 days spent in pre-sentence custody in ordering eligibility for parole after 14 months. However, the pre-sentence custody period should have been declared; this court adjusted the sentence by doing so. The result was a relatively lenient sentence in that case; but it does not follow from it that the sentence imposed on the appellant was beyond an acceptable range.

[45] In *R v Baker*, the second of the authorities cited by the appellant, leave was refused to appeal against a sentence of four years imprisonment with parole eligibility after

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8 [2012] QCA 237.
9 [2003] QCA 477.
10 [2011] QCA 369.

10 months imposed on an applicant who had stabbed his brother causing a wound of similar severity to that in the present case. It is noteworthy that in that case the complainant had said that he did not want the charge to proceed, describing it as a family matter which had got out of hand. The applicant had a significant history of violence including two offences involving the use of a knife. The sentence imposed was described on appeal as moderate. The fact that the court did not regard it as manifestly excessive is unsurprising, but again, it says little about whether the sentence in the present case was within an appropriate range.

[46] The third of the cases cited by the appellant, *Neilson,* was also referred to by the respondent. The applicant there was younger than the present appellant; he was 17 years old. He was convicted, after a trial, of grievous bodily harm and armed robbery in company with personal violence. He and some others set upon a group of young people, grabbing at the bags of the girls among them. Members of the group began to defend themselves. The applicant struck one of them with a metal pole from a shopping trolley, causing him multiple facial fractures which required the insertion of 10 titanium plates in his skull. He hit another young man on the collar bone and hand with the same pole and managed, briefly, to grab his wallet and phone before his victim was able to snatch them back.

[47] The applicant in *Neilson* had breached the bail on which he was placed as a result of the charges, but otherwise had no relevant criminal history. He was sentenced to four years imprisonment on each offence to be served cumulatively, with a parole eligibility date set after four years. Not surprisingly, this court set the sentence aside as manifestly excessive. It was not supported by any authority and did not make any allowance for the applicant's youth and lack of criminal history. Concurrent sentences of four years imprisonment were substituted: the offences were committed in the same incident and an effective head sentence of four years was appropriate for the type of offences, taking into account the applicant's youth and the community's interest in his rehabilitation. The parole eligibility date was fixed at halfway.

[48] The appellant here submitted that, given his offence involved a single blow and that he had pleaded guilty, he should have been treated more leniently than that applicant, whose sentence was imposed after a trial, and whose offences involved two complainants, for one of whom there were continuing physical consequences. I do not, with respect, find that submission compelling. The use of a knife in an attack which could well have proved lethal gave this offence a seriousness which was at least equal to that in *Neilson*; in light of its gravity, a head sentence of four years was properly imposed.

[49] Parole eligibility might have been set earlier given the appellant's youth and lack of criminal history, but the view his Honour took, that a longer time should be served before eligibility, was entirely open to him. The benefit properly ascribed to the appellant's guilty plea had perforce to be limited because it came so late: after two witnesses, including the complainant, had already had to undergo examination and cross-examination, and at a stage where the trial must largely have been organised. And given the appellant's background and the nature of the offence, it is not surprising that his Honour regarded parole eligibility as a better option, for both rehabilitation and community safety, than the use of a suspended sentence. The sentence was not manifestly excessive.

Orders

[50] The appeal against conviction should be dismissed and the application for leave to appeal against sentence refused.

[51] **ATKINSON J:** I agree with the reasons for judgment of Holmes JA and the orders proposed by her Honour.

[52] **NORTH J:** I have read the reasons for judgment of Holmes JA. Her Honour's recitation of the facts of the offending, the circumstances of the plea and the evidence before this court at the hearing of the appeal make it unnecessary for me to repeat that exercise. But because this appeal was, in part, a contested trial of facts involving a contest of credit it is necessary that I state my findings and give reasons for them.

[53] Following the hearing and a consideration of the evidence, my own assessment of the witnesses (the appellant and counsel who appeared for him in the District Court) was that the appellant was not a credible witness but that his counsel was both credible in his evidence and accurate in his recollection. Consequently I accept the evidence of Mr Wilson and reject that of the appellant where it conflicts. The basis for my assessment is substantially the same as explained by Holmes JA in her findings upon this issue. In particular I was struck by the demonstration by the appellant in evidence at the hearing of the appeal of his capacity to understand and communicate in English and also the "opportunistic" changes in the versions given by him at different times. Counsel's evidence was given in an apparently frank way[11] and importantly, consistently with the record of the court proceedings below and the documentary and other evidence of the dealings between counsel and client. Further, and this is significant, the evidence counsel gave of his dealings with his client and of advice given to him was consistent with what might be expected from competent counsel in the circumstances of this particular retainer.

[54] In the circumstances of my findings on the issue of credit for the reasons given by Holmes JA, I agree that the appeal should be dismissed. I agree, for the reasons given by her Honour, that the application for leave to appeal against sentence should be refused.

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[11] I acknowledge at once that perhaps this is an unexceptional fact in the circumstance of experienced counsel.