SUPREME COURT OF QUEENSLAND

CITATION:	*R v Loveridge* [2011] QCA 32
PARTIES:	**R** **v** **LOVERIDGE, Zane James** (applicant)
FILE NO/S:	CA No 228 of 2010 DC No 39 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gympie
DELIVERED ON:	4 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2011
JUDGES:	Margaret McMurdo P, Chesterman and White JJA Separate reasons for judgment of each member of the Court, Chesterman and White JJA concurring as to the order made, Margaret McMurdo P dissenting
ORDER:	**Application is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to three years imprisonment with parole fixed after eight months for committing armed robbery – where the applicant was 17 – where the applicant had a juvenile criminal history – where the applicant was on probation at the time of the offence – whether the trial judge gave adequate recognition to mitigating factors including the applicant's youth, guilty plea, cooperation with police and prospects of rehabilitation – whether the sentence was manifestly excessive *Acts Interpretation Act* 1954 (Qld), s 36 *Children and Young People Act* 2008 (ACT), pt 1.3, s 11, s 12 *Children (Criminal Proceedings) Act* 1987 (NSW), s 3 *Children, Youth and Families Act* 2005 (Vic), s 3 *Legislation Act* 2001 (ACT), pt 1 *Penalties and Sentences Act* 1992 (Qld), s 9 *United Nations Convention on the Rights of the Child* [1991] ATS 4, art 1, art 3, art 37(c)

Young Offenders Act 1993 (SA), s 4
Young Offenders Act 1994 (WA), s 3
Youth Justice Act 1992 (Qld), sch 4
Youth Justice Act 1997 (Tas), s 3
Youth Justice Act 2005 (NT), s 6

AB v The Queen (1999) 198 CLR 111; (1999) 165 ALR 298; [1999] HCA 46, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
R v Bainbridge & Ors (1993) 74 A Crim R 265; [1993] QCA 428, cited
R v Cay, Gersch, Schell; ex parte A-G (Qld) (2005) 158 A Crim R 488; [2005] QCA 467, considered
R v Dullroy & Yates; ex parte A-G (Qld) [2005] QCA 219, cited
R v Frame [2009] QCA 9, cited
R v Lawley [2007] QCA 243, considered
R v Lovell [1999] 2 Qd R 79; [1998] QCA 36, cited
R v Moss [1999] QCA 426, considered
R v Sherman [2007] QCA 322, considered
R v Taylor & Napatali; Ex parte Attorney-General of Queensland (1999) 106 A Crim R 578; [1999] QCA 323, cited
R v Turner [2009] QCA 15, considered

COUNSEL: H Fong for the applicant
B J Power for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P**: This appeal highlights the difficulty facing Queensland judges when sentencing 17 year olds for serious criminal offences.

[2] The applicant, pleaded guilty at the Gympie District Court on 22 September 2010 to robbing a 58 year old shop assistant at a fruit and vegetable convenience store on 15 September 2010, just eight days earlier. He committed the offence a few weeks after his 17th birthday. The judge sentenced him under the *Penalties and Sentences Act* 1992 (Qld) to three years imprisonment and fixed his release on parole at 16 May 2011, that is, after he had served eight months in custody. Six days of pre-sentence custody was declared as time served under the sentence. He has applied for leave to appeal against his sentence, contending that it was excessive.

[3] White JA has set out in her reasons the facts of the offence. The victim impact statement eloquently explained the dreadful effect of the offending on the complainant. It can only be hoped that the raw emotional impact on the complainant of the applicant's offending on her a few days after the incident settles with time.

[4] Despite the obvious serious aspects of the offence, there were significant mitigating features. The applicant pleaded guilty at the very first opportunity to an *ex officio*

indictment. He cooperated with police by making full and detailed admissions. It is unclear whether he could have been charged with this offence but for those admissions. The other significant mitigating feature was that the applicant was but 17 years old.

[5] At 17, under the United Nations Convention on the Rights of the Child ("the Convention") he is a child.[1] Australia signed the Convention on 22 August 1990 and ratified it on 17 December 1990. Under the Convention, the best interests of the child must be a primary consideration in all actions taken concerning the child, including when dealing with a child for criminal offences.[2] Further, every child deprived of liberty is to be separated from adults unless it is considered in the child's best interests not to do so.[3]

[6] These principles are given effect in general terms in the *Youth Justice Act* 1992 (Qld),[4] but they apply only to the sentencing of a "child" as defined in that Act, that is, "a person who has not turned 17 years".[5] This definition of "child" contrasts with that under most other Queensland legislation where a child is "an individual who is under 18".[6] Queensland is now the only Australian jurisdiction where 17 year old offenders are dealt with, contrary to the Convention, in the adult criminal justice system and so can be sent to adult correctional facilities. In all other Australian States and Territories, offenders under the age of 18 are sentenced within the youth justice system and are placed in youth detention centres.[7] This Queensland anomaly has been criticised by commentators who argue that Queensland is in breach of its obligations under the Convention.[8]

[7] The Committee on the Rights of the Child has also expressed concerns about this anomaly in the Queensland criminal justice system.[9] It has recommended that 17 year olds should be removed from the Queensland adult criminal justice system and that Queensland should bring its system of juvenile criminal justice into line with the Convention and other related United Nations standards.[10] The Committee

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1 [1991] ATS 4, art 1.

2 Above, art 3.

3 Above, art 37(c).

4 See s 3 and sch I, Charter of Youth Justice Principles.

5 *Youth Justice Act*, sch 4, "child" (a).

6 See *Acts Interpretation Act* 1954 (Qld), s 36, definition of "child".

7 *Children (Criminal Proceedings) Act* 1987 (NSW), s 3, "child"; *Children, Youth and Families Act* 2005 (Vic), s 3, "child" (a); *Young Offenders Act* 1993 (SA), s 4, "youth"; *Young Offenders Act* 1994 (WA), s 3, "young person"; *Children and Young People Act* 2008 (ACT), pt 1.3, s 11, s 12 and *Legislation Act* 2001 (ACT), dictionary, pt 1, "adult"; *Youth Justice Act* 2005 (NT), s 6; *Youth Justice Act* 1997 (Tas), s 3, "youth".

8 See, for example, T. Hutchinson, "Being Seventeen in Queensland: a human rights perspective on sentencing in Queensland" (2007) 32(2) *Alternative Law Journal* 81; Commission for Children and Young People and Child Guardian, "Removing 17 year olds from Queensland prisons and including them in the Youth Justice System", Policy Position Paper, 15 November 2010; C. Moynihan, "Justice for all… unless you're a 17-year-old Queenslander" (2007) 61 *Legal Aid Queensland Head Note* 20.

9 Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties under Article 44 of the Convention – Concluding Observations: Australia*, 20 October 2005, 40th Session (UN Doc CRC/C/15/Add.268).

10 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, UN GAOR, A/RES/40/33, 96th plen mtg, 29 November 1985 ("the Beijing Rules"), the *United Nations Guidelines for the Prevention of Juvenile Delinquency*, UN GAOR, A/RES/45/112, 68th plen mtg, 14 December 1990 ("the Riyadh Guidelines"), the *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN GAOR, A/RES/45/113, 68th plen mtg, 14 December 1990 and the *Vienna Guidelines for Action on Children in the Criminal Justice System*, recommended by Economic and Social Council resolution 1997/30 of 21 July 1997.

has provided further guidance on children and the juvenile justice system in its General Comments. These include a reminder to State parties that every person under 18 should be dealt with in the juvenile criminal justice system and a recommendation that States should change laws to ensure the application of the rules of juvenile criminal justice to individuals under the age of 18.[11]

[8] The prosecutor at sentence submitted that the applicant should serve a term of about three years imprisonment, with parole fixed after 12 months. He emphasised the applicant's criminal history. The applicant was convicted in the Gympie Childrens Court on 14 January 2010 of offences of assault occasioning bodily harm, entering premises and committing an indictable offence and public nuisance. He was placed on 12 months probation and ordered to complete 100 hours community service. Two months later on 11 March 2010, he was convicted of common assault and committing a public nuisance and ordered to complete a further 12 months probation and a further 20 hours community service. The prosecutor informed the judge that the authorities considered the applicant was doing well on probation and he had satisfactorily completed almost all of the combined 120 hours of community service.

[9] Defence counsel at sentence urged the judge to impose a sentence that did not involve a component of actual custody. His criminal history was relatively minor; he was young and remorseful and had real prospects of rehabilitation. He committed the present offence at a period in his life when he had been drinking excessively. He wanted to obtain fulltime employment, stay out of trouble and move on with his life. His mother, who was present in court, was supportive and prepared to offer him a home in which substance abuse was not tolerated. Having had the victim impact statement read to him, he told his barrister that he empathised with the victim; wished he had not committed the offence; and wanted to apologise to her through the prosecutor and police. Arrangements were being made for him to make that apology after the hearing. Upon his release from custody, he had fulltime work available with his uncle in a fast food outlet in a town away from Gympie. He wanted to have counselling to help him deal with his problems.

[10] The primary judge's sentencing remarks demonstrate the care the judge took in determining the appropriate sentence in this difficult case. He carefully weighed the exacerbating and mitigating factors. The judge referred to the Court's reluctance to sentence young offenders to actual imprisonment. Ultimately, the judge concluded that the applicant's prior criminal history, and the fact that this offence was committed whilst on probation, placed this case outside those where no actual period of imprisonment must be served. The judge expressed his concern about the applicant's real desire to rehabilitate because of his previous criminal history. This concern was instrumental in the judge's decision to impose a significant period of actual imprisonment on this 17 year old offender.

[11] Unlike my colleagues, it is my view that the judge erred in finding that the applicant's rehabilitative prospects were not promising. The applicant committed this offence just a few weeks after his 17th birthday. True it is that he was on probation under the *Youth Justice Act* at that time and he had some prior juvenile criminal history when he was 16. But the prosecutor noted that he was doing well

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[11] General Comment Number 10: *Children's rights in juvenile justice*, 25 April 2007, 44th sess (CRC/C/GC/10), paras 37 and 38.

on youth probation and had almost completed the 120 hours of community service. As to this offence, he had cooperated with the police, making frank, comprehensive and damning admissions. It may even be that he could not have been convicted but for those admissions. He pleaded guilty by *ex officio* indictment in the District Court a week after he committed the offence. He indicated remorse; expressed insight into the impact of his offence on the victim; and offered to apologise personally to her. He had a supportive mother and an uncle who had offered him fulltime employment away from Gympie. In my view, his prospects of rehabilitation were promising, despite his recent chequered criminal history.

[12] In light of that error, I consider that this Court should now resentence the applicant. This 17 year old youth has now spent over five months in an adult correctional centre. No doubt this has been a salutary lesson and a wake-up call to him. A sentence entailing lengthy probation and community service orders with a conviction recorded and conditions as to treatment for substance abuse would have been open at his sentence in September. But as he has now served a significant period in custody, it is appropriate to let the three year head sentence stand and to set his parole release date at 4 March 2011.

[13] For my part, I would grant the application for leave to appeal, allow the appeal, set aside that part of the sentence fixing the applicant's release on parole at 16 May 2011 and instead fix his parole release date at 4 March 2011.

[14] **CHESTERMAN JA**: I agree with White JA that the application for leave to appeal against sentence should be refused for the reasons given by her Honour.

[15] **WHITE JA:** On 22 September 2010 the applicant pleaded guilty on ex officio indictment that on 15 September 2010, one week earlier, he committed armed robbery. He was sentenced in the District Court at Gympie to be imprisoned for three years with a parole release date fixed for 22 May 2011, that is, after eight months. Six days in pre-sentence custody were declared as time served.

[16] The applicant has applied for leave to appeal against sentence on the ground that the sentence imposed was manifestly excessive. Mr Fong, who appeared for the applicant, submitted that the sentence which ought to have been imposed was one of 18 months to two years imprisonment with early release or immediate release on parole. Mr Fong was somewhat hampered[12] in this submission as counsel below had sought a head sentence of "two years or up to three years" with an early parole release date with up to six months in actual custody.

[17] The principal factors in favour of the more moderate sentence for which Mr Fong contended that are said to have been insufficiently recognised were the applicant's youth – he was born on 21 August 1993 and was 17 when he offended and when sentenced; he pleaded guilty on ex officio indictment one week after offending; he fully confessed to police when they had little actual evidence implicating him in the crime; and, to a limited extent, he had prospects of rehabilitation.

Circumstances of the offence

[18] At about 7.00pm on 15 September 2010 a 58 year old woman was working alone in a fruit and vegetable shop in Gympie. She was preparing to close the shop when

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12 *R v Frame* [2009] QCA 9 at [5].

approached from behind. She turned to face the intruder who was wearing a dark covering over his head with two holes for his eyes. Her attacker was carrying a knife about 20 centimetres in length which he held to her throat and demanded the money from the till. It was described as a filleting knife. The complainant grabbed the hand holding the knife and said she would not give him money. However, her assailant persisted and repeated his demands for money so she put both her hands up and agreed. The offender walked behind the complainant as she moved towards the till and unlocked it. He stood at the till with the knife in one hand and emptied the contents with the other. An amount of $600 in cash was taken from the till as well as a number of EFTPOS receipts of no value to the offender. He then fled. The complainant telephoned police from a nearby store. She was unable to provide a description which would positively identify her assailant because of his disguise.

[19] Acting on information the police went to the applicant's house and confronted him about the robbery. He made full admissions to having committed the offence. He told police that he had gone to a store on the day of the robbery, had stolen a knife and had hidden a set of clothes on the river bank which he planned to swim after the robbery. His account of the robbery was consistent with that of the complainant. He told police that after leaving the shop he ran off; threw the knife away in bushland; swam the river to his stash of clothing; built a fire and burnt the clothes in which he had committed the robbery and changed into the new set of clothes. Some of the money from the robbery was lost while swimming the river, some he had spent on pizza and alcohol with his friends and the balance he threw away to avoid being caught with it. The applicant was remanded in custody and the sentence proceeded on ex officio indictment six days after the commission of the offence.

[20] Not surprisingly the complainant was very distressed as a consequence of the robbery, she had lost confidence and felt unable to work alone at night as she had previously. In the future her employer planned to have more than one employee present working in the shop in the evening.

The applicant's history

[21] The applicant had a juvenile criminal history for which convictions were recorded including an assault occasioning bodily harm on 14 October 2009; entering premises and committing an indictable offence on 22 November 2009; a second offence that day of breaking and entering; and six public nuisance offences on 28 November 2009. The applicant was ordered to undergo 12 months probation and perform 100 hours of community service. On 11 March 2010 he was dealt with in the Gympie Childrens Court for common assault on 25 February 2010 and six public nuisance offences on 30 January 2010. The probation order was amended and an additional 20 hours of community service were imposed. He was thus in breach of his probation order when he committed the robbery.

[22] The assault occasioning bodily harm occurred when the applicant accused a fellow student of raping his girlfriend. The complainant was pushed into a pole causing him to fall to the ground and then was struck a number of times in the head and body. The applicant continued to kick at the complainant as he was being dragged away by a teacher and another person, striking him in the chest. The complainant attended a medical practitioner complaining of soreness and bruising to his head, neck and chest. The break and enter offences involved local shops. The public

nuisance offences which were dealt with at the same time, arose from the applicant being intoxicated in the main streets of Gympie shortly after midnight, jumping on the boot of a car which had stopped at a stop sign and swearing profusely. The common assault offence in 2010 involved a fellow student at the school. As the applicant and the complainant approached each other the applicant "shoulder barged" him, hitting him with his dropped right shoulder striking the complainant in his upper body and shoulder area. They then had a fight and had to be separated by teachers. The final public nuisance offence was at the Gympie swimming pool where the applicant screamed and shouted obscenities at a car in the area involving one of his brothers. Both were heavily intoxicated.

[23] An oral report which departmental officers gave to the prosecutor below was to the effect that the applicant's performance on the probation order had been "very good" and that he had completed all but 10 hours of the 120 hours community service in six months. They were surprised at the current offence.

[24] The applicant's counsel said that when his client was read the complainant's victim impact statement he expressed remorse. He wished to offer an apology to her. His counsel also informed the court that on his release from prison the applicant would reside with his uncle who managed a fast food restaurant and with whom he had the offer of a full-time position. Through his counsel the applicant indicated that he would obtain counselling in the future to deal with his problems which would largely appear to be concerned with the excessive consumption of alcohol. The learned sentencing judge expressed some reservation about the applicant's rehabilitation prospects. His Honour was referred to a number of comparable sentences and taken carefully through them by both the prosecutor and defence counsel. Those were the cases referred to by counsel on this hearing.

Comparable cases

[25] Mr Power for the respondent relied on *R v Moss*[13] as being relatively comparable. The applicant had entered a video store at about 11.00pm at night where the complainant, a 19 year old university student, was working alone. The applicant chose a video and came to the front counter. After a brief conversation the applicant turned away and then turned back again to face the complainant. He produced a knife from his clothing where it had been concealed and pointed it at the complainant. The knife was about 20 centimetres long with a black handle and a serrated blade. He demanded the money in the till. The complainant backed away and the applicant made as if to climb over the counter. The complainant then put his hands in the air and moved to the cash drawer. When he began removing money from the till the applicant took his foot off the counter. Two customers entered the store and the applicant hid his knife. He told the complainant to hurry up and reached over the counter and removed the money from the till before leaving, taking about $450.

[26] The robbery was recorded on CCTV. The applicant wore no disguise and was recognised by a member of the public after police made a media release. His fingerprints were located on the front counter of the shop. The applicant was extradited from Western Australia and pleaded guilty on ex officio indictment. The offence was precipitated by the use of alcohol and cannabis. The applicant in

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13 [1999] QCA 426.

Moss was in good remunerative employment. While in custody he had undertaken a program to assist him in his abuse of illegal substances. He had a prior criminal history including three counts of aggravated assault in Darwin, two of which involved four months imprisonment. A year later he was convicted of unlawful entry and one aggravated assault and a common assault and dishonesty offences. He was sentenced to imprisonment for six months. He was convicted of an assault occasioning bodily harm and stealing some 18 months later. He was said to have had an unfortunate background. He was sentenced to six years imprisonment with a recommendation for parole after two years. On appeal the sentence was varied to imprisonment for five years with parole release undisturbed after two years. Although Moss' previous criminal history was far worse than this applicant's, the facts of the subject defence were similar and the higher head sentence of five years accommodated that prior criminality and justified the three years here.

[27] Mr Power also relied on the decision in *R v Lawley*.[14] The offender pleaded guilty to one count of armed robbery and was sentenced to three years imprisonment with a parole release date after serving nine months. The offender was 19 at the time of the offence. He had a history of learning difficulties and had been diagnosed with ADHD and bipolar disorder. He was abusing alcohol and cannabis at the time of the offence and had failed to take his prescribed medication. He robbed a convenience store at the Sunshine Coast at 11.00pm disguised in much the same way as the applicant here, wearing a jumper with a hood pulled over his head clasped at the front to conceal his face. He was holding a 30 centimetre long knife in his hand. He walked to the counter, raised the knife and pointed it at the complainant telling her to empty the till. The complainant complied and the applicant left the store with $565. The incident was recorded on CCTV. The following day the applicant spoke to a friend about the incident who informed police. Independently police were contacted by the applicant about the robbery; he made full admissions and pleaded guilty on ex officio indictment. He refunded the balance of the robbery proceeds remaining in his possession. That applicant had been out of work for 12 months with an injury and was struggling financially. He was heavily in debt. At the time of sentence he had been in steady employment for six weeks and was under the care of a psychiatrist. He had a minor previous history for two offences of wilful damage for which he was placed on probation and the robbery was committed whilst on that probation.

[28] Keane JA, with whom Williams JA and Mullins J agreed, observed of the submission that the sentence imposed was manifestly excessive:

> "When one reflects that the maximum sentence for armed robbery is life imprisonment, and that the applicant was on probation at the time the offence was committed, it becomes apparent that this is a difficult submission to sustain, even if full regard is paid to the applicant's co-operation with the authorities and the other circumstances of mitigation including his prospects of rehabilitation."[15]

His Honour concluded:

> "The sentence was, in truth, a fair and moderate attempt to recognise the claims of deterrence, both personal and general, and to ensure that the applicant receives ongoing supervision in his own interests and the interests of society, while at the same time recognising the

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14 [2007] QCA 243.

15 At [17].

> mitigating features personal to the applicant which substantially reduce his culpability for what must be understood to be a very serious offence."[16]

When consideration is given to this applicant's more serious criminal history and Lawley's personal circumstances, this applicant, although two years younger, received a sentence well within range.

[29] Mr Power also referred to *R v Sherman.*[17] That applicant pleaded guilty to one count of armed robbery. She was sentenced to two years imprisonment with parole after serving approximately three months in prison. She agreed to assist her drug addicted partner (having failed to persuade him not to do so) to rob a liquor store. He had no prior convictions. She drove him to the store where she had previously worked and had told him that the takings would be counted at about 8.00pm. He entered, armed with a wooden bat to the knowledge of the applicant and demanded money. One of the employees threw a pencil case containing the day's takings of approximately $1,800 to him. He was driven away by the applicant. She received none of the proceeds of the robbery. She had a minor criminal history relating to drugs and was on a four month good behaviour bond for drug possession at the time. She had a good work history and at sentence had a five year old child and was pregnant with her second child. By then she had moved to Toowoomba to live near her mother and had stopped using drugs and alcohol. The co-offender had been sentenced to three years imprisonment with parole after serving six months. The applicant's remorse was said to be genuine and her family would support her in her rehabilitation.

[30] Keane JA, with whom Jerrard JA and Jones J agreed, said:

> "It must be said immediately that an applicant who seeks to argue that the inclusion of a component of actual custody in a sentence for armed robbery renders the sentence manifestly excessive for that reason, assumes a heavy persuasive burden, even in the case of a young offender with no previous convictions."[18]

Having referred to *R v Taylor & Napatali; Ex parte Attorney-General of Qld*[19] and *R v Dullroy & Yates; ex parte A-G (Qld)*[20] which demonstrated that a non-custodial sentence may be within the bounds of a proper exercise of the sentencing discretion in some cases of young offenders with no or minor criminal history, and that the rehabilitation of young offenders was important[21], his Honour observed:

> "[I]t must also be recognised that a custodial sentence is usually within, and, indeed, should be expected to be part of, the sound exercise of the sentencing discretion for an offence as serious as armed robbery."[22]

The sentence of the applicant in *Sherman* and that of her co-offender support the sentence imposed on this applicant.

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16 At [27].
17 [2007] QCA 322.
18 At p 5.
19 (1999) 106 A Crim R 578.
20 [2005] QCA 219.
21 *R v Bainbridge & Ors* (1993) 74 A Crim R 265; *R v Lovell* [1999] 2 Qd R 79.
22 At pp 5-6.

[31] Mr Fong referred to *AB v The Queen*[23] as indicating that an offender who confesses to a crime is generally to be treated more leniently than the offender who does not. That may readily be accepted. It is required to be taken into account by virtue of s 9 of the *Penalties and Sentences Act* 1992. The learned sentencing judge gave due recognition to the applicant's co-operation, particularly in telling police about the details of his offending which they did not know.

[32] Mr Fong referred to *R v Cay, Gersch, Schell; ex parte A-G (Qld)*[24] to support his submission that a sentence which did not require actual custody to be served ought to have been imposed. The principal offender entered a service station shop at about 8.30pm in the evening. He was noted by the complainant employee to be wearing a surgical glove on his hand and a green bandana which covered his face. He purchased sweets and then left the shop. The complainant contacted the police. Ten minutes later the same man entered the shop, approached the counter and asked for cigarettes. He then asked for all the money in the till and produced a knife from his pocket. He held the knife in front of him towards the complainant who removed $600 in notes and gave them to the offender. He left the shop, pushing past other customers and escaped in a waiting car which was intercepted by police. The offender was 18 at the time of the offence. He had a minor criminal history involving drugs. He had continuing problems with depression and was on medication and undergoing counselling. He had been in custody for 69 days before he was sentenced to two years probation. He pleaded guilty on ex officio indictment and co-operated with police. The Attorney-General appealed the decision by the sentencing judge to record no conviction rather than the sentence itself so it is of very limited value here.

[33] Mr Fong also referred to *R v Turner*[25] where a 17 year old applicant with no prior criminal history was sentenced to six months imprisonment and three years probation after pleading guilty to four counts of robbery in company with personal violence. On appeal the period of probation was reduced to 18 months. No weapon was involved in that offending. The applicant and his associates engaged in four robberies committed in company on the street menacing strangers, occasionally wearing disguise, stealing wallets and phones. The mitigating features were the applicant's age, no previous criminal history and co-operation with police by giving a full and frank statement. The applicant was not the main offender and none were armed. The court accepted that the applicant had undergone genuine and complete rehabilitation. In an extensive judgment the court considered the sentencing of young first offenders. That is not this case.

Conclusion

[34] Full recognition was given by his Honour below to the mitigating factors. He also recognised the serious nature of the offence which involved the use of a dangerous weapon with which the complainant was threatened into submission after her first resistance. There was some planning involved and, more importantly, this applicant came to be sentenced with a past criminal history for violent offending, even though the offending was against students in his own cohort and involved fist fighting and not with a weapon. He was, furthermore, on probation for those offences. He had

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23 (1999) 198 CLR 111.
24 [2005] QCA 467.
25 [2009] QCA 15.

clearly obtained no or little benefit from that probation because of the serious escalation in his criminal behaviour. Notwithstanding his youth, the comparable sentences of *Moss* and *Lawley* to which the learned sentencing judge had regard, clearly justified the sentence imposed. Mr Fong submitted that it was "open" to the learned sentencing judge to have imposed a different, less severe sentence. Doubtless that was so, but what must be shown is that the sentencing court fell into error of the kind identified in *House v The King*[26] in the exercise of its discretion. The applicant has been unable to point to any discernable error in the sentence. The application should be refused.

[26] (1936) 55 CLR 499 at 504-5.