SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gordon* [2011] QCA 326
PARTIES:	**R** **v** **GORDON, Alister Pentana** (applicant)
FILE NO/S:	CA No 114 of 2011 DC No 39 of 2011 DC No 142 of 2011 DC No 152 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	18 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2011
JUDGES:	Margaret McMurdo P and Fryberg and McMeekin JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal allowed.** **3. Set aside the sentence of five years imprisonment imposed on each count of armed robbery and the parole eligibility date set at 12 May 2012. Instead, substitute on each count of armed robbery a sentence of four years imprisonment and set the parole eligibility at 18 November 2011.** **4. The sentence is otherwise confirmed.**
CATCHWORDS:	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 robbery in company with personal violence, two counts of armed robbery and further summary offences – where the applicant was sentenced to five years imprisonment for each count of armed robbery with lesser terms of imprisonment to be served concurrently for the remaining offences – where the applicant was 17 when he committed the offences and at sentence – where the applicant argued that the sentencing judge erred in not

sufficiently taking into account mitigating factors and in wrongly considering there was an increasing prevalence of armed robbery in the Gold Coast area – whether the sentencing judge sentenced the applicant on the basis of an increasing prevalence of armed robbery in the Gold Coast area – whether the sentencing judge erred – whether the sentence was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 9(2)(a), s 9(3), s 9(4)

R v Abraham, unreported, District Court at Southport, Wall DCJ, 29 April 2011, considered
R v Bird and Schipper (2000) 110 A Crim R 394; [2000] QCA 94, cited
R v Kynaston [2005] QCA 322, cited
R v Lawley [2007] QCA 243, cited
R v Lovell [1999] 2 Qd R 79; [1998] QCA 36, considered
R v Loveridge [2011] QCA 32, cited
R v Lui [2009] QCA 366, distinguished
R v Moss [1999] QCA 426, affirmed
R v Mules [2007] QCA 47, considered
R v Parker [1993] QCA 116, cited
R v Sharkey; ex parte A-G (Qld) (2009) 195 A Crim R 237; [2009] QCA 118, cited
R v Tuki [2004] QCA 482, cited

COUNSEL: C F C Wilson for the applicant
R G Martin SC for the respondent

SOLICITORS: Buckland Allen Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicant, Alister Pentana Gordon, pleaded guilty on 12 May 2011 to one indictment containing a count of robbery in company with personal violence on 2 August 2010 and a second indictment containing two counts of armed robbery committed on 3 December 2010 and 4 January 2011. He also pleaded guilty to five summary offences: unlawful possession of property suspected of being stolen; two counts of unlawful possession of cannabis on 3 August 2010 and 7 January 2011; possession of tainted property; and unlawful possession of weapons, namely, a taser and mace. He was sentenced to 12 months imprisonment for the offence contained in the single count indictment and five years imprisonment for each count of armed robbery on the two count indictment. For each summary offence he was sentenced to three months imprisonment. Time spent in pre-sentence custody between 7 January 2011 and 12 May 2011 (125 days) was declared to be time served under the sentence. The parole eligibility date was set at 12 May 2012, that is, after about 16 months. The applicant contends the sentence was manifestly excessive and that the judge erred in not sufficiently taking into account the mitigating features and in wrongly considering that there was an increasing prevalence of the offence of robbery in the Gold Coast area.

[2] The applicant was 17 years old at the time of his offending and at sentence. He had no prior criminal history either as a 17 year old or as a juvenile.

[3] The facts of his offending were set out in tendered schedules. The robbery in company with personal violence in the single count indictment occurred in this way.

[4] At around 8.00 am on Monday, 2 August 2010 the 13 year old complainant and three of his school friends were walking from the train station to their high school. The complainant was listening to his iPod which was in his shorts pocket. The applicant had been on the same train and was walking along the street in the same direction towards the Construction Skills Training Centre (CSTC) which he was attending. The applicant and his friend asked to see the complainant's iPod. He declined. The complainant and his friends turned and walked back towards the train station. The applicant again asked to see the iPod and again the complainant refused. The applicant then snatched it and walked off in the other direction. The complainant followed, asked for it back and unsuccessfully attempted to reclaim it. The applicant used his right hand to shove the complainant in the chest area, almost pushing him over. The applicant pushed the complainant at least twice and perhaps as many as four times. The complainant continued to ask for the return of his iPod. The applicant's friend pushed the complainant to the shoulder causing him to move sideways. One of the complainant's friends offered the applicant $20 to return the iPod. The applicant's friend winded another of the complainant's friends by punching him in the stomach with his clenched right fist. The applicant's friend tried to snatch the $20 but was unsuccessful. After some discussion, the applicant took the $20 in exchange for the iPod. The applicant and his friend walked away.

[5] The complainant and his friends reported the matter at school. The next day the complainant and his friend attended a classroom at the CSTC where they identified the applicant as the person who had taken the iPod. The applicant denied any knowledge of the offence to police. He was found in possession of a small quantity of cannabis and some personal cards belonging to others.

[6] Count 1 on the second indictment occurred in this way. At about 8.05 pm on 3 December 2010 two employees at the IGA supermarket at Upper Coomera saw the applicant enter the shop wearing a black hooded jumper with a dark blue scarf covering the top and lower part of his face, leaving only his nose and eyes visible. He pointed a taser at shoulder height 60 cm away from one employee. The applicant said, "I have a taser and I've got mace. Empty the tills." The employee noticed a small can in the applicant's other hand. The applicant activated the taser causing a blue electric current to pass between its two prongs. The employees filled plastic shopping bags with money from the two registers. The applicant said, "I want the money under the till, and the coins under the till as well." He also told them to fill the bags with cigarettes. He continued to activate the taser every now and then. Once the bags were filled with money and cigarettes, the employees handed them to the applicant who ran off.

[7] Count 2 on the second indictment occurred in this way. At about 10.00 pm on 4 January 2011, the store manager of the Kentucky Fried Chicken (KFC) outlet at Helensvale was closing for the day. The applicant knocked on the door and asked to buy some of the remaining food. The manager allowed the applicant to enter the store. The applicant zipped up his white hooded jumper so that it covered his face but for two eye holes. He activated a taser with his right hand, causing a bright blue spark and a loud cracking sound saying, "Don't fuck around. Give me all of your

money." He followed the manager to the cash register. He continued to activate the taser about every 10 seconds and demanded all the money. The manager and other employees filled plastic bags with notes and coins from the drive-through register. The applicant displayed a black bottle saying, "I've got this mace, and I'm not afraid to use it either." He told them to "hurry up" and demanded the "hidden money", referring to the drop box where $50 and $100 notes were stored. The manager opened the drop box and put that money into the plastic bag. The applicant told staff members to stay off their mobile telephones. He then told the manager to open all the front tills immediately and to hurry up. The manager complied. The applicant again activated the taser. Once all registers had been emptied, he ran through the car park towards neighbouring stores. The incident was captured on CCTV footage.

[8] On 5 January 2011, police officers attended a unit in Helensvale where they saw the distinctive hooded jumper which matched the description given by witnesses to the KFC robbery. The occupant of the unit told police that the applicant had left it earlier that night. On 6 January 2011, the police viewed the CCTV footage and confirmed the jumper was similar to that worn by the offender. They returned to the unit and took possession of the jumper. They found receipts from the Helensvale KFC dated 4 January 2011 in the jumper pockets. They executed a search warrant on the applicant's bail address. His stepfather advised them of his whereabouts. At 3.25 am police apprehended the applicant leaving the address provided by the stepfather. They found $275 cash in his wallet; $480 cash in $20 notes; four buds of cannabis; a mobile telephone; a taser; a plastic shopping bag containing 5 and 10 cent pieces. They also found property including three DVDs; three pairs of men's shorts; a silver earring; a new mobile phone; toiletries and an empty taser box.

[9] The applicant participated in an electronically recorded interview in the presence of his stepfather. He admitted to the armed robbery at KFC on 4 January 2011. He said he was intoxicated. The taser was the second one he had obtained after he lost the first. He used the money from KFC to buy some of the items found in the garage. He denied any involvement in the armed robbery of the IGA supermarket. He was charged with both armed robberies and was remanded in custody.

[10] He was on bail in respect of the robbery in company with personal violence in the single count indictment at the time he committed the two armed robberies in the two count indictment. The total property taken from the IGA and KFC was $5,469.90. The amount of $969.25 was recovered.

[11] The prosecutor submitted that, despite the applicant's youth and lack of previous criminal history, the offences were so serious that a prison sentence was warranted. The range was between 18 months to three years imprisonment. At this point the judge interrupted the prosecutor and said:

> "Well, I give up. We might as well swap places. You can do the sentencing. I mean – I mean, it's just too low in my view. But I mean, you might as well appeal too, if I sentence more than that. You can go to the Court of Appeal and not oppose the [applicant's] appeal.
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> … Well, I mean, when are we going to stop these offences? I mean, sentences have to be imposed, don't they, that have a general deterrent effect? The present range doesn't – isn't having that effect.
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> …

> What – how many have there been in – on the Gold Coast this year so far? Be nearly, to date, 35 or something like that.
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> PROSECUTOR: Yes, your Honour. There's been significant amount of robberies on the Gold Coast-----
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> HIS HONOUR: Yes.
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> PROSECUTOR: -----in particular this year.
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> …
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> HIS HONOUR: Well, I mean, the offences seem to have become much more frequent since these decisions were given - seems to be more of them being committed.
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> PROSECUTOR: Yes, your Honour.
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> HIS HONOUR: Certainly on the Gold Coast. Yes.
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> PROSECUTOR: Your Honour-----
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> HIS HONOUR: And the sentences which the Court of Appeal have been imposing don't seem to have been acting as any deterrent at all, with respect to the Court of Appeal. That's-----
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> PROSECUTOR: Yes.
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> HIS HONOUR: That's if the present rate of robberies is any indication." (errors as in the original)

[12] The prosecutor submitted that although the applicant had spent 125 days in pre-sentence custody, the judge could sentence him to a further six months in actual custody. The judge indicated he did not accept that submission and told the prosecutor she could "repeat it in the Court of Appeal".

[13] The mother of the 13 year old complainant provided a victim impact statement as to the effect of the robbery on the complainant. He was greatly shaken and shocked and spent most of the day following the offence with the school counsellor. For a time, he was too frightened to travel by train and did not attend school for some days.

[14] Defence counsel made the following submissions. The applicant completed years nine and 10 at school in New Zealand. He moved with his parents to Australia in 2008 where he had a large extended family. On his release from prison, he would again reside with his parents. He had been a good young man until he came to Australia where he fell in with bad associates and began drinking alcohol and using drugs. He left school at the end of grade 11 and with the support of his parents attended the CSTC where he completed a certificate 1 in construction. Whilst in custody he successfully completed a number of TAFE courses and the certificates he received were tendered.

[15] Defence counsel tendered letters from members of the applicant's family. His mother explained the family migrated to Australia to give the applicant a better future. He had been doing well in New Zealand where he was chosen to play in the junior squash national tournament. The move to south east Queensland initially went well. He had part-time employment after school and was coping with his

school subjects, but after a time his attitude changed and he became withdrawn and unresponsive. He obtained his certificate 1 in construction at CSTC but he began to associate with people outside the CSTC who introduced him to drugs, alcohol and crime. Since his incarceration, she had noticed a huge change in his attitude. He was now applying himself to courses available within prison and had been accepted for kitchen duty which he was enjoying. He had realised the enormity of his criminal actions and was very remorseful. On his release from custody, he would live with her husband and her and pursue a career as an apprentice plumber. A letter from an aunt and another from an uncle confirmed that the applicant came from a supportive family; that the offences were out of character; and that he was remorseful for his actions and regretted the hurt he had caused.

[16] Defence counsel emphasised that the applicant's parents refused to tolerate his unacceptable behaviour and as a result he moved out of home in November 2010, shortly before the offences in the two count indictment. His parents could not reason with him because of his abuse of drugs and alcohol. They told him he would be welcome to return when he got his life in order. He then lived in parks and stayed at friends' houses. At a party one night someone demonstrated a taser. The applicant borrowed it for $50 and committed the robbery at the IGA. He hid the cash in the park where he was living and returned the taser. He saw the same person again at another party in January and again borrowed the taser to commit the KFC robbery. He spent the money on drugs, alcohol and necessities.

[17] Defence counsel emphasised that the applicant had only just turned 17 when he committed the first robbery in company with personal violence. He was less than 17 and a half when he committed the two armed robberies. He was still 17 at sentence. His extreme youth made rehabilitation a more important factor than deterrence. Counsel referred the judge to another of the judge's sentence, *R v Abraham*,[1] in which counsel had appeared the previous week. In *Abraham*, the judge referred to a Gold Coast Bulletin report that there had been "something like 43 armed hold ups on the Gold Coast this year"[2], indicated that he would have been inclined to go higher than the present sentencing range, and "would have emphasised to the Court of Appeal that it's about time that they recognised the discrete geographic area here for deterrent sentencing purposes".[3] Counsel stated that subsequently, a senior police officer had indicated on ABC radio that the 43 robberies reported this year were 25 less than for the same period the previous year. The judge expressed some scepticism about that and stated that, in any case, armed robberies were "a very, very prevalent offence … here on the Gold Coast …And it seems to me to becoming more frequent."

[18] Counsel urged the judge to impose a sentence which immediately released the applicant on parole. He had served four months in prison and this had been a salutary lesson. He was now motivated to obtain employment, cease contact with his former peers and stay out of trouble.

[19] In sentencing, the judge made the following observations. The commission of the two armed robberies whilst on bail for the first robbery was an aggravating circumstance. The second and third robberies were serious and would have been traumatic for the employees. The judge quoted from the victim impact statement in

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1 Wall DCJ, 29 April 2011, District Court at Southport.

2 Above, Transcript of proceedings, Wall DCJ, 29 April 2011, 1-13.

3 Above.

the first robbery. His Honour noted the applicant's youth, his limited cooperation and the steps he had taken towards rehabilitation since incarceration. The judge referred to the letters from family members which explained that the applicant had been a good young man who had gone off the rails when he entered the drug scene. His Honour accepted that since his incarceration the applicant had realised the enormity of his actions and was remorseful.

[20] His Honour referred to the Court of Appeal's statement in *R Mules*[4] that:

> "youthful offenders with limited criminal histories and promising prospects of rehabilitation who have pleaded guilty and cooperated with the administration of justice, even where they have committed serious offences like these, should receive more leniency from courts than would otherwise be appropriate. That is because rehabilitation of young offenders is in the community interest."

[21] The judge noted, however, that as the Court of Appeal also said in *Mules*: "Deterrence is an unquestionably important factor in sentencing offenders who commit robberies of vulnerable small businesses." The Court of Appeal further noted that: "despite the mitigating factors, both offenders had to serve a significant term of actual custody." His Honour also referred to *R v Kynaston*[5] and the potential psychological harm suffered by victims of armed robberies. The applicant actually used the taser to threaten staff. He stole in total almost $5,500 of which a little under $1,000 was recovered. The applicant had no capacity to repay the outstanding amount. After balancing the competing exacerbating and mitigating features, the judge determined that sentences of five years imprisonment with parole eligibility effectively after serving a little over 16 months was appropriate on the offences of armed robbery, with lesser concurrent sentences on the remaining counts.

Conclusion

[22] Despite some infelicitous statements during counsel's submissions, I am not persuaded that the judge sentenced the applicant on the basis of an increasing prevalence of the offence of robbery in the Gold Coast area. His Honour made no mention of doing so in his sentencing remarks or in his report to this Court (cf *R v Lui*[6]). The absence of any reference to prevalence in the sentencing remarks suggests that, fortunately, his Honour's views expressed during counsel's submissions were tempered by defence counsel's report of a radio interview to the effect that armed robberies had fallen in number over the previous 12 months. It seems likely that his Honour remembered *R v Moss*[7] where this Court rightly noted that statistics and the prevalence of a particular offence can be relevant to the exercising of the sentencing discretion, but only where the statistics are established to be reliable.

[23] The real issue in this case is whether the sentence imposed was manifestly excessive in light of the many and varied mitigating and exacerbating features. The judge made very clear to counsel throughout their submissions that he did not accept the range put forward by the prosecutor. His Honour had some justification for that

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4 [2007] QCA 47, [21].
5 [2005] QCA 322.
6 [2009] QCA 366.
7 [1999] QCA 426.

view. His Honour's careful and measured sentencing remarks do not overtly suggest that he was attempting to single-handedly increase the sentencing range for offences of robbery. No doubt his Honour was seeking to avoid committing the error made in *Moss,* where this Court observed that nothing is more likely to lead to inconsistency and community dissatisfaction with the criminal justice system than different District Court judges setting different ranges for particular kinds of offences. As his Honour must have appreciated, when the range of sentencing for a category of offence is to be changed, our system of criminal justice requires that this be done by the Court of Appeal. If individual judges of the District Court attempt to establish sentencing ranges inconsistent with those established by the Court of Appeal, public confidence in the criminal justice system will be undermined.

[24] The real issue for the applicant in this case is whether his sentence was, as he claimed in his grounds of appeal, manifestly excessive. The respondent relies on *Moss*; *R v Parker*;[8] *R v Tuki*;[9] *Kynaston*; *Mules*; *R v Lawley*[10] and schedules of sentences for robbery offences to support the applicant's sentence.

[25] Although the applicant's three robbery offences each carry a maximum penalty of life imprisonment, the cases to which the respondent has referred us support this Court's general statement in *Moss* that the range for a first offender committing robberies of this kind is ordinarily between about three and five years. The respondent's schedules also support that general proposition. In none of the cases to which the respondent has referred us, nor in the cases contained in the schedules, is there one instance where a 17 year old with no criminal history has been sentenced to a penalty as high as five years imprisonment. Serious as were these offences, there was nothing about them to warrant a five year sentence for a 17 year old without prior criminal history. The sentence imposed here is outside the well-established range for offences of this kind and is therefore manifestly excessive. It follows that the application for leave to appeal must be granted, the appeal allowed and this Court must resentence the applicant.

[26] The two counts of armed robbery were, as the sentencing judge identified, most concerning. They would have been terrifying for store employees who may suffer lasting psychological consequences. Almost $5,500 was taken and all but about $1,000 was dissipated and cannot be repaid. The applicant was on bail for the robbery in the single count indictment when he committed these offences. As the primary judge recognised, deterrence was an important consideration, both of the applicant and of other young people who would resort to armed robberies to finance lifestyles based around substance abuse. On the other hand, there were many features in mitigation. All the offending occurred whilst he was 17, an age when, in every Australian jurisdiction other than Queensland, he would have been sentenced as a child. The circumstances placed before the sentencing court do not suggest his maturity levels were those of an adult when he was sentenced as a 17 year old. He has now celebrated his 18th coming of age in prison, after serving over four months as a 17 year old in an adult prison, in contravention of the United Nations Convention on the Rights of the Child which Australia signed and ratified in 1990.[11] Although the applicant now has a dreadful criminal record, he came before the

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8 [1993] QCA 116.
9 [2004] QCA 482.
10 [2007] QCA 243.
11 See *R v Loveridge* [2011] QCA 32, [5]-[7].

sentencing court with no criminal history, even as a juvenile. This and the other material placed before the primary judge supported his counsel's contention that the applicant had been a promising young man of good character until he began to abuse drugs and alcohol as an errant teenager. His parents, in an understandable effort to make him turn his life around, excluded him from the family home until he changed his ways. He then lived an itinerant drug and alcohol fuelled lifestyle, living in parks when unable to bunk down with friends or attend parties. Jail has now provided a timely circuit-breaker and fast-tracked his maturation. He has completed educational courses and obtained a position as a kitchen hand. His parents are supportive and he will live with them when released. He plans to become an apprentice plumber. He pleaded guilty at an early stage and expressed remorse for and insight into his offending and its consequences for the victims. His prospects of rehabilitation seem promising.

[27] Weighing up the need for general and personal deterrence against the community's interest in the applicant's rehabilitation and after considering the comparable cases, I consider that a four year head sentence is warranted to reflect the serious nature of the armed robbery offences and that they were committed whilst on bail for an offence of robbery in company with violence. To reflect the applicant's prior good history, youth, early plea of guilty, remorse and promising prospects of rehabilitation, I would set his parole eligibility date after he has served 10 months imprisonment, that is, on 18 November 2011. Let there be no doubt that this is a firm deterrent sentence to impose on a 17 year old. The mitigating features are recognised in the very early parole eligibility date. If he is released on parole at this time, he will become subject to the stringent conditions and supervision of a parole order in the community for another three years and two months. If the result is his rehabilitation, this will be in the community's interest. If he fails in his rehabilitation and turns again to a life of substance abuse and crime, he will be returned to prison to serve out his four year sentence.

[28] I propose the following orders:

1. Application for leave to appeal against sentence granted.

2. Appeal allowed.

3. Set aside the sentence of five years imprisonment imposed on each count of armed robbery and the parole eligibility date set at 12 May 2012. Instead, substitute on each count of armed robbery a sentence of four years imprisonment and set the parole eligibility at 18 November 2011.

4. The sentence is otherwise confirmed.

[29] **FRYBERG J:** The applicant submitted that Wall DCJ wrongly took into account a perceived but unproven increase in the prevalence of robberies on the Gold Coast. The submission was based on some vigorously expressed remarks made by his Honour in the course of the parties' submissions. I do not regard his Honour's remarks as infelicitous in that context. He was entitled to test the submissions which were being made to him and was not required to be mealy-mouthed about it. After all, both sides might have agreed that the prevalence of robberies was increasing. On this point, the applicant's argument in this court was misconceived. Reliance on what a sentencing judge says in the course of argument to found a ground of appeal should be discouraged. That is particularly so in the present

case, for no such ground was included in the application and no leave to amend was sought.

[30] In his sentencing remarks, the judge expressly recorded his obligation to take into account the prevalence of the offences (armed robberies). He was right to take that factor into account. Defence counsel had not accepted the suggestion that the prevalence of robberies was increasing; quite the contrary – he suggested it was decreasing. No evidence had been placed before the court on the question. His Honour did not suggest in his remarks that the prevalence was increasing, nor that it was any greater on the Gold Coast than elsewhere in Queensland. There is no reason to doubt that he fully and accurately recorded his reasons for the sentences which he imposed.

[31] This submission should be rejected.

[32] In the court below the prosecutor submitted that a sentence of three years imprisonment ought to be imposed. In this court counsel for the respondent submitted that the range for offences such as this was 3 to 5 years imprisonment. On that basis, the sentence imposed below was at the top of the range.

[33] Nothing in the sentencing remarks indicates why this is so. Nothing suggests that the range was not applicable in respect of offences committed on the Gold Coast. The extreme youth of the applicant and his unusually sound prospects for rehabilitation strongly suggest that this was not a case at the top of the range. The aggravating circumstances, which have been described by the President, do not carry enough weight to counter that suggestion. In the absence of evidence that offenders of relatively tender years were regularly involved in robberies, this was not a particularly suitable case for setting an example for the purpose of general deterrence.

[34] I agree with my colleagues that the two five-year sentences were manifestly excessive and that sentences of imprisonment for four years should be imposed. For myself I would have been inclined to require the applicant to serve a quarter of that time before being eligible for parole, but that inclination is not sufficient to warrant my dissenting from the orders which they propose.

[35] **McMEEKIN J:** The President has fully set out the relevant factual background to this application. The learned sentencing judge was faced with a difficult balancing exercise. The point involved is how the Court ought to take into account the extreme youth of an offender before the Court for the first time.

[36] Here violence was used or threatened in each of the three offences. That is a worrying feature. It has the effect of removing the legislative injunction of using imprisonment as a last resort and requiring that the Court have regard "primarily" to the matters mentioned in ss 9(4) of the *Penalties and Sentences Act* 1992 with their emphasis on the protection of the community. Subsections 9(2)(a) and 9(3) and (4) *Penalties and Sentences Act* 1992 provide:

> "(2) In sentencing an offender, a court must have regard to—
>
> (a) principles that—
>
> (i) a sentence of imprisonment should only be imposed as a last resort; and
>
> (ii) a sentence that allows the offender to stay in the community is preferable;

….

(3) However, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence—

(a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or

(b) that resulted in physical harm to another person.

(4) In sentencing an offender to whom subsection (3) applies, the court must have regard primarily to the following—

(a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;

(b) the need to protect any members of the community from that risk;

(c) the personal circumstances of any victim of the offence;

(d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;

(e) the nature or extent of the violence used, or intended to be used, in the commission of the offence;

(f) any disregard by the offender for the interests of public safety;

(g) the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;

(h) the antecedents, age and character of the offender;

(i) any remorse or lack of remorse of the offender;

(j) any medical, psychiatric, prison or other relevant report in relation to the offender;

(k) anything else about the safety of members of the community that the sentencing court considers relevant.

[37] Byrne J said in *R v Lovell*[12] of these subsections, newly introduced in 1997**:**

> "The 1997 amendments reflect a legislative conviction that less hesitation by the courts in requiring a violent offender to undergo the rigours of imprisonment conduces to the protection of the community from the offender and from others who might be tempted to commit similar offences. Nonetheless youth remains a material consideration; for the rehabilitation of youthful, even violent, offenders, especially those without prior, relevant convictions, also serves to protect the community. And among the matters to which the Court is required by s. 9(4) to pay primary regard are 'the past record of the offender, including any attempt at rehabilitation and the number of previous offences of any type committed' (g), and 'the antecedents, age and character of the offender' (h)."

[38] The emphasis on protection of the public from crimes of violence is evident given the express references in paragraphs (a), (b) (f) and (k) and the references to the Court taking cognisance of the degree of violence and harm caused as required by paragraphs (c), (d) and (e).

[39] Hence the sentencing judge was plainly right to impose a lengthy sentence of imprisonment and to require that the applicant serve a reasonably significant part of it before becoming eligible for parole.

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12 [1999] 2 Qd R 79 at 83 per Byrne J with whom Pincus and Thomas JJA agreed.

[40] Nonetheless the more youthful the offender, the better the past record and the more that remorse can be gleaned from the evidence the more the focus is permitted to shift to rehabilitation, because as Byrne J said in *Lovell* that too protects the community. And if there is some good reason for thinking that the prospects of rehabilitation are encouraging then the more emphasis can be given to that consideration. That has been the consistent view of this Court over the years: see for example *R v Bird and Schipper*[13]; *R v Sharkey; ex parte A-G (Qld)*[14].

[41] Here there is good reason to think that the prospects are encouraging. The applicant is from a good home, his parents are prepared to take him in and guide him, he has job prospects, he has complied in every way with the justice system, and, until he apparently became exposed to a culture of substance abuse, he had been of good character.

[42] When one turns then to the sentencing approach adopted below it is not only that no case can be found where a 17 year old first offender has been so severely dealt with but the allowance apparently made for this aspect of an emphasis on rehabilitation in these circumstances seems to have been largely overlooked. A mature man on these charges with no previous convictions might well have received a similar head sentence and, in the usual case, to reflect the plea, a non parole period of about one-third, at 20 months. The reference that the sentencing judge made to the prevalence of the offence and the need to deter others and his evident frustration that sentences are not deterring criminals in the area where he customarily presides might well have justified that approach. The sentence was in the range of comparable cases for mature offenders as the President has pointed out.

[43] But here the applicant was not yet of age. And he was required to serve 16 months imprisonment. While some discount was evidently applied to what would otherwise be the norm that, with respect, gives scant regard to the legislative requirement that the Court have regard to "the antecedents, age and character of the offender": s 9(4)(h) *Penalties and Sentences Act* 1992.

[44] While minds might well differ as to the period of imprisonment that will strike the necessary balance I am in agreement with the President that a four year head sentence and a non parole period of 10 months does so. As the President observes it is then up to the applicant to see if he is truly rehabilitated or not.

[45] I agree with the orders that the President has proposed.

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13 (2000) 110 A Crim R 394 at [33].

14 [2009] QCA 118 at [12].