SUPREME COURT OF QUEENSLAND

CITATION:	*R v Davis* [2012] QCA 97
PARTIES:	**R** **v** **DAVIS, Aaron Steven** (applicant)
FILE NO/S:	CA No 268 of 2011 SC No 712 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence & Conviction)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2011
JUDGES:	White JA, Margaret Wilson AJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for extension of time in which to appeal against conviction of attempted murder and to seek leave to appeal against sentence refused.** **2. Application for bail refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – GENERAL PRINCIPLES – where the applicant was convicted on his own pleas of guilty to attempted murder and numerous other charges, including two counts of attempted armed robbery in company with wounding – where the applicant was sentenced to 12 years imprisonment – where the head sentence imposed was for the attempted murder and shorter concurrent sentences were imposed for the other offences – where the applicant wished to appeal on grounds of miscarriage of justice, error of law or mixed law and fact, insufficiency of evidence and abuse of process – whether the applicant could establish that he pleaded guilty after being unlawfully induced, threatened or intimidated APPEAL AND NEW TRIAL – NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS – IN GENERAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE – where applicant alleged that he was not afforded the

opportunity of sighting the Crown's evidence against him – where the applicant alleged that the Crown's evidence was entirely circumstantial and insufficient to support a finding of guilt – where the court cannot go behind a plea of guilty unless it is persuaded that there was a miscarriage of justice – where the complainant could not identify the applicant as the person who shot him – where, had the matter gone to trial, it would have been for the jury to decide to the requisite standard that the applicant actually formed the intention to kill – whether the court was persuaded there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to very serious offences, especially the attempted murder – where the applicant was sentenced to 12 years imprisonment – where the complainant was shot four times, receiving multiple serious physical injuries – where the complainant spent two weeks in hospital – where the complainant was diagnosed as suffering post-traumatic stress disorder and a major depressive disorder as a result of what happened – where the applicant was on bail when he committed most of the offences – where the sentencing judge took account of mitigating factors in reducing the head sentence – whether the sentence was manifestly excessive in all the circumstances

Criminal Code 1899 (Qld), s 27, s 28(3)
Penalties and Sentences Act 1992 (Qld), s 13

Borsa v The Queen [2003] WASCA 254, cited
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited
Pilkington v The Queen [1955] Tas SR 144, cited
R v Barnes (1970) 55 Cr App R 100, cited
R v Carkeet [2009] 1 Qd R 190; [2008] QCA 143, cited
R v Chiron [1980] 1 NSWLR 218, cited
R v Ferrer-Esis (1991) 55 A Crim R 231, cited
R v Forde [1923] 2 KB 400, cited
R v Gadaloff [1999] QCA 286, cited
R v Inns (1974) 60 Cr App R 231, cited
R v Liberti (1991) 55 A Crim R 120, cited
R v Mundraby [2004] QCA 493, cited
R v Murphy [1965] VR 187; [1965] VicRp 26, cited
R v Nerbas [2011] QSC 41, cited
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, cited
R v Wade [2011] QCA 289, cited

COUNSEL: The applicant appeared on his own behalf
V Loury for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **WHITE JA:** I have read the reasons for judgment of Margaret Wilson AJA and agree with her Honour for those reasons that the application for an extension of time and the application for bail should be refused.

[2] **MARGARET WILSON AJA**: The applicant, who appeared before this court self-represented, seeks an extension of time in which to appeal against his conviction of attempted murder and to seek leave to appeal against his sentence for that offence. He also seeks bail pending the appeal.

[3] To succeed in the application for an extension of time the applicant needs to provide a sound reason for the lengthy delay and to demonstrate that he has a viable prospect of success.[1]

Overview

[4] On 29 September 2006 the applicant pleaded guilty to attempted murder and numerous other charges, including two counts of attempted armed robbery in company with wounding.

[5] He was born on 9 February 1984. The attempted murder charge was part of a spree of offending on 27 and 28 October 2003 when he was heavily intoxicated with amphetamines. Other offences for which he was dealt with at the same time were committed in June 2002, January 2003, February 2003, March 2003 and September 2003.

[6] The complainant in the attempted murder charge was the manager of the Red Rooster store at Deception Bay. He was shot three times.

[7] The head sentence was imposed for the attempted murder. It was 12 years imprisonment. Shorter, concurrent sentences were imposed for the other offences. Pre-sentence custody of 1,034 days was declared time already served under the sentences. Because the head sentence of 12 years imprisonment necessarily attracted a declaration of the commission of a serious violent offence, he will not become eligible for parole until he has served 80 percent of that period of imprisonment.

[8] The applicant maintains that he did not wish to plead guilty to the attempted murder charge, but he was prepared to plead guilty to the other charges.

[9] He has recently made an unsuccessful application to her Excellency the Governor for a prerogative pardon.

Delay

[10] The application for an extension of time was filed almost five years after the conviction and sentence.

[11] His explanation for the delay was a combination of psychiatric and psychological disorders, literacy problems, financial difficulties, and limited access to relevant

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1 *R v Tait* [1999] 2 Qd R 667.

case law, legal documentation, evidence, medical reports and legal files. He had applied for Legal Aid, which had been refused in March 2010.

[12] I did not understand that there was any serious challenge to the adequacy of the explanation for the delay. Instead, argument focussed on his prospects of success in the proposed appeal.

Grounds of appeal

[13] The applicant wishes to appeal against his conviction of attempted murder on four grounds:

(a) miscarriage of justice: that he pleaded guilty of attempted murder after being unlawfully induced, threatened and intimidated;

(b) error in law or mixed law and fact: that he was not afforded the opportunity of sighting the Crown's evidence or case against him or told that the Crown could not prove the requisite intent; thus that he was denied procedural fairness;

(c) insufficiency of evidence: that the Crown's evidence was entirely circumstantial and insufficient to support a finding of guilt; thus that the plea was equivocal and unsafe;

(d) abuse of process: that his lawyer failed to inform him of "evidential factors" which supported his defence; that if the matter went to trial, the prosecution would be unable to secure a guilty verdict.

The applicant's instructions to his solicitor

[14] The indictment was presented before a judge of the Trial Division on 22 October 2004. It appears from the order sheet attached to the indictment that Legal Aid Queensland ("LAQ") represented the applicant from about August 2005. Mrs D Vasta, who was then a solicitor employed by LAQ, had the carriage of his case.

[15] The applicant had very limited literacy skills. On two occasions (14 February 2006 and 25 September 2006) Mrs Vasta reduced his instructions to typewritten form, and had him sign them. Each time he said:

> "I have seen the material that has been provided by the prosecution in relation to the charges, that is the statements of all the witnesses, the exhibits as well as my criminal history. I understand the nature of the charges and the allegations and evidence against me. I particularly understand that for the Crown to succeed on a charge of [a]ttempted murder it must prove beyond reasonable doubt that I intended to actually kill the complainant."

He did not list the statements and exhibits he had seen. He said he understood the presumption of innocence and his right to trial by jury. He said:

> "4. I also understand that section 13 of the *Penalties and Sentences Act* provides that a defendant who pleads guilty at an early stage will receive a benefit for doing so and this will be reflected as a discount on the penalty/sentence. This is because the complainant/witnesses have been saved the expense and trauma of giving evidence and because it shows some degree of remorse.

> 5. I understand that counts 9, 10 and 11 are serious offences of violence and that the Crown will most likely submit that I be declared a serious violent offender and ordered to serve 80% of the term of imprisonment to which I will be ordered to serve if convicted.
>
> 6. I understand that the Judge is not bound by submissions by either prosecution or defence as to penalty."

He confirmed that the instructions had been read aloud to him by his lawyer, that he understood what they meant, and that he gave the instructions of his own free will, no threat, promise or inducement having been held out to him to sign them.

[16] In the instructions dated 14 February 2006, the applicant set out how his version of what happened differed from what he understood the Crown case to be. He did not deny firing the shots, but denied having had the requisite intent to kill the complainant.

[17] He said he was hit from behind by someone:

> "… and that was what triggered off the shooting before there was a struggle."

He said he understood the Crown witnesses denied hitting him or having any physical contact with him before the gun went off. He said that there had not been any cross-examination about this at the committal, which had been contested on the basis of identification. He showed some appreciation of how a jury might regard his version when he said:

> "I understand that my new lawyer has spoken with the prosecutor about the possibility of the witnesses hitting me from behind. I understand that the prosecutor has had a conference with the witnesses and they absolutely deny hitting me or having any physical contact with me before the gun went off. I understand that at a trial I will be in a position of asking the jury to believe my version of events over that of the witnesses. I understand that they were sober and were the victims in an attempted robbery. Even if the jury do accept my version that I was hit before the gun went off then the jury may conclude that I shot the gun in anger and was trying to kill someone because I was angry at being hit because the allegation is that I fired the gun at least three times into the complainant and that I had to squeeze it each time it fired and must have been aiming it in his direction. The allegations go on that I then turned the gun towards the younger complainant and the gun went off another two times."

[18] He continued:

> "• I understand that the charge of attempted murder requires [the] Crown to prove that I actually intended to kill the complainant but that this intention can just be fleeting or momentary. I accept that to fire a gun like that and the fact that the complainant received 2 gunshot wounds in his chest and 1 to his stomach makes for a strong case of attempted murder.

- I understand that the prosecution have to prove beyond reasonable doubt that I actually had an intention to kill the manager. Even though I didn't have the intention to kill or even hurt anybody, I have discussed my prospects of a jury trial with my lawyer. I understand that the prosecution will point to the fact that the complainant had three gun shot wounds to his stomach and chest. I understand that the Crown will probably say to the jury that even if I was hit over the back of the head and that it was an accident, that this would not explain me pulling the trigger three times. They [sic] crown may say to the jury that they could conclude that I pulled the trigger three times because I was angry at being hit over the back of the head and wanted to kill someone and must have been aiming it in his direction. The allegations go on that I then turned the gun towards the younger complainant and the gun went off another two times.

- I believe that the gun had a very loose trigger mechanism and it didn't take much pressure to pull the trigger but I also understand that the forensics expert who later tested the gun says that the gun needed 1.1. kgs of pressure to pull the trigger and make it fire.

- I understand that although the charge of attempted murder requires [the] Crown to prove that I actually intended to kill the complainant, this intention can just be fleeting or momentary. To fire a gun like that and that the complainant received two shots to the chest and one to the stomach makes for a strong case of attempted murder.

- It all happened so quick. After the gun went off there was a struggle with the younger bloke and the gun went off two more times. The manager and the younger bloke really laid into me punching me hard around the head and back while the manager had my legs.

- After I got away I ran to my mates house which was two blocks away and he drove me home. I had a shower and went to sleep in my mum's bed with her as I was really scared and thought that I would be spending the rest of life in jail.

[19] He referred to a note he had written while in the Arthur Gorrie Correctional Centre when he attempted suicide. Relevantly, the note read:

> "I didn't mean to shoot anyone. I was scared. I got scared when he ran at me. It was loaded."

He said:

> "I understand that for a confession to be admissible it must be voluntary and reliable. I have taken legal advice and understand that it would be difficult to argue that this confession be excluded."

[20] He did not recite what, if any, advice he was given about weaknesses in the Crown case. He made only passing reference to identification, when he said that it had been the basis on which the committal was conducted.

[21] He summarised his instructions as follows:

> "• I have been told by my legal representative that the Crown prosecutor has said that he will submit to the Judge that between 10 and 17 years is the range for attempted murder and that he will be saying that 10 years is the appropriate penalty in my case, if I plead guilty, taking into account my youth and my remorse. I understand that by law I will have to serve 80% of that term of imprisonment before being released on parole.
>
> • I know myself that I didn't intend to kill anybody or to hurt them however I want to get the benefit of a more lenient sentence than if I am convicted after a jury trial. I fully understand that when I enter a plea of guilty to the attempted murder charge I am admitting to all the world that I am guilty of the offence, including all the elements of the offence. This means that I am admitting that I intended to kill the complainant and that I am making a free and informed decision to plead guilty.
>
> • Finally I instruct my legal representative that I want to plead guilty to the charges and in doing so I understand that I freely and fully admit that I am guilty of all of the offences, including attempted murder."

[22] On about 25 September 2006[2] Mrs Vasta faxed a letter to the applicant at the Woodford Correctional Centre where he was on remand. She said:

> "We have been waiting to hear back from the Director of Public Prosecutions office about the offer to plead to the charge of Malicious Act intended to Cause Grievous Bodily Harm.
>
> I was told yesterday (Friday) that they have rejected the offer and will go to trial on Attempted Murder.
>
> Unfortunately, because we approached them with the offer they thought that you no longer wanted to plead guilty to Attempted Murder and your file was transferred to a different prosecutor.
>
> The original prosecutor that I have been dealing with has since moved to the Southport office and all of his files have been transferred.
>
> I have spent the last 24 hours convincing the new prosecutor to hand it back to the original guy and he has agreed, but it will only stay with the original prosecutor if it is a plea on 29th September 2006.
>
> That prosecutor is willing to come back from Southport to do the sentence on Friday but if it is to go to a trial then your file will be

[2] The date on the copy of the letter is indistinct, as is the facsimile marking at the top of it.

> transferred to the Brisbane prosecutor, (who, quite frankly, is pretty tough on penalty.)
>
> Anyway Aaron, it is unfortunate that you have been given some hope that the DPP would accept a plea to a lesser charge, but we're back to the stage that we were at a few weeks ago.
>
> It is your decision if you want to de-list the sentence and go to trial.
>
> It is my view that a jury will probably convict you of attempted murder and then you are facing about 3-4 years more in jail.
>
> But it is your decision. Nobody can force you to do anything.
>
> There are a lot of mitigating circumstances and this prosecutor is putting up 10 years as the appropriate sentence.
>
> Rob East [of counsel] and I are trying to get up to Woodford to see you as soon as possible. We both have court commitments.
>
> I have booked an appointment to come up and see you on Monday afternoon anyway so we'll cover what you want to do then."

[23] In the instructions dated 25 September 2006, the applicant said:

> "7. I understand th[at] my legal representative made a submission to the Director of Public Prosecutions to accept a plea of the offence of Malicious Act intended to cause Grievous Bodily Harm instead of the Attempted Murder but I understand that this had been rejected.
>
> 8. I have received advice from my legal representatives and I instruct my legal representatives of my own free will and without coercion, threat, promise or inducement that I wish my matter to proceed as follows:
>
> - I adopt my previous instructions of 14th February 2006, namely that I will plead guilty to the offences."

Submissions to the sentencing judge

[24] When he was arraigned and sentenced, the applicant was represented by Mr East, who was a barrister on the staff of LAQ. The applicant told this court that he met his barrister only five minutes before the hearing, and that he instructed him to submit that the sentence should be in the range of eight to 10 years imprisonment, having regard to his guilty plea and the prosecution having agreed to submit that the sentence should be 10 years.

[25] The prosecutor submitted that in fixing the head sentence, the starting point was within the range of 15 to 18 years; then allowance should be made for mitigating factors, including the plea of guilty.[3] He made no mention of a sentence of 10 years imprisonment.

[26] Defence counsel did not cavil with the lower end of that range as the starting point for the head sentence.[4] He told the sentencing judge that in entering a plea of guilty

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3 Transcript 29 September 2006 pages 1-14, 1-21 – 1-22.

4 Transcript 29 September 2006 page 1-21.

to such a serious charge, the applicant had always been aware that a serious violent offence declaration would be made and that it would result in his having to serve 80 percent of the sentence. He submitted that after mitigating factors (especially the plea of guilty) were taken into account, her Honour "could consider a final sentence of between 10 and 12 years, perhaps towards the middle or the upper end of that range."[5]

Sentencing remarks

[27] The offending on 28 October 2003 began at Ashmore on the Gold Coast. The applicant entered a dwelling and stole a wallet, mobile phones and a quantity of keys. He used the keys to steal a 4WD that was parked in the driveway. He attempted unsuccessfully to use stolen ATM cards at Coomera and then in Brisbane. Then he entered a home unit in Clayfield where the resident was at home. He stole a mobile phone, a wallet and a sum of money. Then he went to another property at Clayfield where he stole a wallet and its contents as well as a key which he used to take a motor vehicle.

[28] The applicant and another person proceeded to Deception Bay, where they went to the rear of the Red Rooster store. At the time there were three employees in the store – the manager, a 16 year old part-time worker and a 22 year old female cook. About 10.35 pm the manager of the store went outside, where the applicant was waiting behind a bin. The applicant confronted the manager with a stolen handgun which he had unlawfully received about a month before. The sentencing judge recorded:

> "You wanted him to give you his money. He told you to go. You discharged the pistol and you shot the manager in the stomach …
>
> You pushed the manager back into the store. The second male who was with you fled. The female within the store managed to make a triple O call. You then engaged in a confrontation with the manager and the 16 year old. It appears you fired three shots at the manager and two of them struck him. The manager and the 16 year old were attempting to wrestle with you. They let you go and you fled. The female went outside and got someone else who was in the car park to make another triple O call.
>
> The gun fell to the floor and discharged a fifth round. The manager was taken to hospital. He had severe injuries. One shot in the chest had gone right through the chest. The second shot to the chest was lateral to the sternum and it did not penetrate the chest cavity. The wound to the stomach perforated the small bowel in three places which required a removal of part of the small bowel. The manager had to be treated in intensive care and was not discharged from hospital until two weeks later."

[29] Her Honour sentenced the applicant on the basis he shot the complainant three times and discharged the weapon at him a fourth time. The weapon required one kilogram of pressure to be applied to the trigger each time it was fired. Her Honour said:

> "Mr Fuller, the Crown Prosecutor, fairly concedes that while the shooting was a foreseeable consequence of taking the gun with you

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5 Transcript 29 September 2006 page 1-25.

> to the Red Rooster which you intended to rob, the Crown cannot contend that you actually went to the Red Rooster with the intention of shooting a person there. At the time you discharged the gun you obviously intended to shoot the person at whom the gun was pointed."
>
> "There could be no suggestion that there was accidental firing of the handgun. The number of shots was not consistent with any accidental firing."

[30] Her Honour noted that the applicant had not participated in a record of interview. There had been a committal, which had focussed on identification. She noted that defence counsel had told her that neither the manager nor the female employee had been able to identify the applicant, and that the 16 year old worker had thought he could, but had identified someone else. She said:

> "Notwithstanding their failure to identify you, Mr East concedes appropriately that there was a strong circumstantial evidence pointing to your involvement in the attempted murder and the attempted robbery."

[31] Her Honour accepted that the applicant had an amphetamine addiction and that he was heavily intoxicated with amphetamines at the time. She had admitted into evidence a report by a psychiatrist tendered by defence counsel. I have perused the relevant court file, and found that it was a report by Dr Jeremy Butler dated 4 December 2005. Her Honour said:

> "It appears that you had an amphetamine addiction and you just kept using amphetamines at that stage so that you were, in the words of the psychiatrist, in effect, completely out of your mind, but not to the degree that you could not be responsible for your actions, and that is why you have pleaded guilty to these offences that occurred on the 28th of October 2003."

Letter from solicitor after the sentence was imposed

[32] On 4 October 2006 Mrs Vasta faxed another letter to the applicant at the Woodford Correctional Centre. She said:

> "Well, I can't believe that it's finally over...and that we got a really great result.
>
> Aaron, I know that, for a while you were expecting to get 10 years but as Rob [East] said, even if the prosecutor put up 10 the judge would never have gone for it.
>
> And even if the judge had, the attorney general would probably appealed [sic] the sentence and it would have been increased to something much higher.
>
> As the sentence stands, the DPP can't really appeal 12 years, even though it is pretty light.
>
> It was lovely to meet your mum and Angela and it was a big help to have Noel and Lindy there.
>
> Anyway Aaron, this is the formal letter that we send out before we close a file, just to let you know the final sentence.

I want to take the opportunity to wish you the very best of luck with your ongoing rehabilitation and future studies, wherever they may lead you. I know that you'll make the most of the next few years to educate yourself and start the foundations to build on for when you are released.

...

Anyway Aaron, here is the formal part of this letter, where we officially confirm what you got.

We confirm that we represented you before the Supreme Court at Brisbane on 29 September 2006.

You entered a plea of guilty to the following offences and were sentenced as set out in the following page:

Offence		Penalty
	Indictment #1	
...		
9.	Attempted Murder on 28.10.03	12 years imprisonment
...		
	Indictment #2	
...		
	Summary Offences	
...		

Aaron, you have spent a long time in custody already and all that time is taken off your sentence.

You were in custody from 1 November 2003 and all of this time will be taken off.

We have to advise you that you do have the right of appeal and if you want to do this you have 1 month from the date of your sentence in which to lodge an appeal against your sentence.

Counsel does not recommend that you appeal against your sentence because it was a lenient sentence and the Court of Appeal might just increase it if you do appeal.

If you will wish to appeal you should urgently:

1. lodge an appeal form with the Court of Appeal Registry or the General Manager of the Correctional Centre (Forms are available from the Correctional Centre counsellor or welfare officer); and

2. lodge a new application for legal aid for your appeal.

Legal aid will have to be re-assessed for your case. You will be advised by mail whether or not legal aid has been granted to you for the appeal but I'm sure that our office would not fund an appeal.

> Well, Aaron, as I said, I wish you all the very best for the future. Keep up the great efforts."

Setting aside a conviction based on a plea of guilty

[33] Recent cases illustrate the caution with which courts approach attempts to persuade them to set aside convictions based on pleas of guilty.

[34] In *R v Carkeet*[6] Fraser JA (with whom Keane and Holmes JJA agreed) referred with apparent approval to the observation of Steytler J in *Borsa v The Queen*[7]:

> "It is no easy matter for an appellant to persuade a court to set aside a conviction based on a plea of guilty. There must be a strong case and exceptional circumstances…[b]efore an appellate court will set aside a conviction of that kind, the appellant must show that there has been a miscarriage of justice." (Emphasis added.)

[35] In *R v Wade*[8] Muir JA (with whom Chesterman JA and I agreed) said:

> "**Relevant principles**
>
> [42] For the appellant to succeed on his appeal against conviction he must first persuade the Court to go behind his plea of guilty: he bears the onus of proof.[9] The principles relevant to the circumstances in which a Court may go behind a plea of guilty are discussed in the following passage from the reasons of Brennan, Toohey and McHugh JJ in *Meissner v The Queen*[10]:
>
> > 'A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. 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 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. The principle is stated by Lawton LJ in *R v Inns* [11]:
> >
> > > 'The whole basis of a plea on arraignment is that in open court an accused freely says what he is going to do; and the law attaches so much importance to a plea of guilty in

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6 [2009] 1 Qd R 190.
7 [2003] WASCA 254 at [20].
8 [2011] QCA 289.
9 *R v Gadaloff* [1999] QCA 286 at [4] and *R v Nerbas* [2011] QSC 41 at para [37].
10 (1995) 184 CLR 132 at 141, 142.
11 (1974) 60 Cr App R 231 at 233.

> open court that no further proof is required of the accused's guilt. When the accused is making a plea of guilty under pressure and threats, he does not make a free plea and the trial starts without there being a proper plea at all. All that follows thereafter is, in our judgment, a nullity.'
>
> It may not be strictly accurate to describe what follows as a nullity, but it is certainly liable to be set aside and a new trial ordered. If a plea of guilty is entered by the person charged in purported exercise of a free choice to serve that person's own interests, but the plea is in fact procured by pressure and threats, there is a miscarriage of justice. In such a case, the court is falsely led to dispense with a trial on the faith of a defective plea. The course of justice is thus perverted.'

[43] Dawson J's statement of principle in *Meissner*[12] is of particular relevance to the circumstances under consideration:

> '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. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence.[13] But the accused may show that a miscarriage of justice occurred in other ways and so be allowed to withdraw his plea of guilty and have his conviction set aside. For example, he may show that his plea was induced by intimidation of one kind or another, or by an improper inducement or by fraud.[14]'

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12 (1995) 184 CLR 132 at 157; [1995] HCA 41.

13 *R v Forde* [1923] 2 KB 400 at 403; *R v Murphy* [1965] VR 187 at 188; *R v Chiron* [1980] 1 NSWLR 218 at 235; *R v Liberti* (1991) 55 A Crim R 120 at 121-122; *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 232-233.

14 *Pilkington v The Queen* [1955] Tas SR 144; *R v Murphy* [1965] VR 187 at 190; *R v Barnes* (1970) 55 Cr App R 100 at 106; *R v Inns* (1974) 60 Cr App R 231 at 233; *R v Chiron* [1980] 1 NSWLR 218 at 235.

> [44] For good reason, courts exercise great caution in determining applications to set aside or withdraw guilty pleas. In *R v Mundraby*, Jerrard JA observed:[15]
>
> > 'This court was referred to the observations of Kirby P (as His Honour then was) in *Liberti*,[16] cited by McPherson JA herein. Kirby P also added that:
> >
> > > 'For good reasons, courts approach attempts at trial or on appeal in effect to change a plea of guilty or to assert a want of understanding of what was involved in such a plea with caution bordering on circumspection. This attitude rests on the high public interest in the finality of legal proceedings and upon the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission by that person of the necessary legal ingredients of the offence'."
> >
> > (Emphasis added.)

Inducement, threat or intimidation

[36] The applicant says that he pleaded guilty only because he was promised a 10 year sentence by the prosecutor and that Mrs Vasta refused to accept any instructions other than that he was guilty.

[37] Having regard to what was recorded in his written instructions of 14 February 2006 and the contents of Mrs Vasta's letter of 25 September 2006, he may well have been under the impression that the prosecutor would submit that the appropriate head sentence was 10 years imprisonment. It seems fairly clear that the prosecutor who appeared at the sentence hearing was not the one with whom Mrs Vasta had had discussions, and, of course, this court does not have evidence from any of the prosecutors as to their versions of any discussions they had with her.

[38] However, the applicant was never under any illusion that such a submission would automatically carry the day. He said in both sets of written instructions:

- that he understood he was likely to receive a discounted sentence if he pleaded guilty; and
- that he understood the sentencing judge would not be bound by submissions as to the proper penalty made by either the prosecutor or defence counsel.

[39] There is nothing to suggest that Mrs Vasta refused to accept any instructions other than that he was guilty. She did no more than advise him that on her assessment of the Crown case he was likely to be found guilty. Notably, in her letter of 25 September 2006, she said:

> "It is my view that a jury will probably convict you of attempted murder and then you are facing about 3 – 4 years more in jail. But it is your decision. Nobody can force you to do anything."

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15 [2004] QCA 493 at [21].

16 (1991) 55 A Crim R 120 at 121 – 122.

In his second set of written submissions the applicant said:

> "7. I have received advice from my legal representatives and I instruct my legal representatives of my own free will and without coercion, threat, promise or inducement that I wish my matter to proceed as follows:
>
> - I adopt my previous instructions of 14th February 2006, namely that I will plead guilty to the offences."

[40] The applicant was only 19 years old at the time of the offending in October 2003. He was 22 when he pleaded guilty and was sentenced. He may very well have been frightened, as he told this court he was. He had very limited literacy skills, although it appears from the face of both sets of written instructions that they were read to him before he signed them. He acknowledged that he had the right to plead not guilty and to make the prosecution prove his guilt beyond reasonable doubt. He asserted his innocence, but nevertheless pleaded guilty to attempted murder in what was a considered trade-off to avoid the risk of a considerably higher penalty if he were found guilty after a trial. I am unpersuaded that he pleaded guilty only because he was promised a 10 year sentence by the prosecutor or because his solicitor refused to accept any instructions other than that he was guilty. In my view he has failed to establish that he pleaded guilty after being unlawfully induced, threatened or intimidated.

Evidence

[41] In both sets of written instructions, the applicant confirmed that he had seen all the witness statements and the exhibits, but, as I have already noted, he did not list what material he had seen.

[42] He told this court that all of the relevant information was not available to him, referring in particular to a supplementary statement by the 16 year old worker Aaron Lee Glenane made on 2 November 2003, forensic and ballistic evidence about where shell casings were found, the absence of DNA evidence linking him with the crime, and the report by Dr Jeremy Butler, psychiatrist, dated 4 December 2005. His complaint seemed to be that his legal representatives had not drawn this material to his attention before he pleaded guilty. In so far as he complained of non-disclosure by the Crown, he did not identify what was not disclosed.

[43] The thrust of his submissions was that if he had known of this evidence, he would have pleaded not guilty. Obviously his legal representatives' advice about the strength of the Crown case was something he took into account in deciding to plead guilty. However, it is difficult to accept that that advice, or his appreciation of it, would have been any different if they had specifically discussed this evidence with him. It must be steadily borne in mind that this court cannot go behind his plea of guilty unless it is persuaded that there was a miscarriage of justice.

Identification

[44] The case against the applicant was circumstantial.

[45] The complainant could not identify who was responsible for shooting him. The Crown evidence on identification had been tested at the committal, as the applicant knew and acknowledged in his first set of written instructions. Glenane's supplementary statement was relevant to identification.

[46] In his first statement (which was given on 29 October 2003) Glenane described the person who shot the complainant as a 19 or 20 year old white male, about 165 cm tall, with a stocky build and really short cropped light brown hair. He said he was wearing ¾ length pants, light bluish grey in colour and a horizontally striped red, grey and blue shirt.

[47] His second statement was made on 2 November 2003 after a police officer showed him some photographs and some CCTV footage. Importantly, the footage did not depict the actual shooting. The first segment showed two male persons. One was wearing an Australian cricket jersey, green, white and yellow in colour, thongs and greenish coloured cargo pants and holding a drink. The other was wearing a white T-shirt, long blue pants with a white stripe down the side and using an ATM. The second segment showed the male in the cricket jersey. When the police officer zoomed in on the male's face, Glenane identified him as the person who had shot the complainant. It was not the applicant.

[48] In his written submissions to this court, the applicant described Glenane's supplementary statement as providing:

> "clear evidence that another individual was positively identified as the shooter other then [sic] the Appellant."

[49] I think that overstates its significance. Had the matter gone to trial, the jury would most likely have been presented with Glenane's earlier identification of the assailant as well as his response to the CCTV footage. Defence counsel put Glenane's evidence into proper focus when he submitted to the sentencing judge:

> "The plea is, in my submission, a significant factor because, at the end of the day, the case against Mr Davis was entirely circumstantial and there were certainly many features that pointed to his guilt but there were, equally, many features that pointed against it.
>
> Perhaps the most significant of them is this: The complainant could not identify who was responsible for shooting him. One of the other staff members, the female, similarly was unable to identify somebody. The young man whose hand was injured was able to identify somebody. Police showed him photographs and he, with one hundred per cent certainty, identified the person that shot the complainant and, in fact, it wasn't Mr Davis.
>
> Nonetheless, there was a body of circumstantial evidence that pointed to Mr Davis.[17]"

[50] As the applicant appreciated, the note he wrote when he attempted suicide, in which he implicated himself in the shooting, would very probably have been before the jury.

Forensic evidence

[51] The applicant asserts that crime scene photographs of blood spatter patterns and the locations at which spent cartridges were found were not disclosed to him. He asserts that he was not shown ballistic reports or reports of examinations of the weapon. However, he did not show how this evidence would have assisted in his defence.

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17 Transcript 29 September 2006 page 1-24.

[52] Police found a Browning semi-automatic pistol and five discharged .22 calibre bullet casings at the crime scene. They found the four wheel drive vehicle which the applicant had stolen in a robbery at Ashmore before proceeding to Deception Bay. Inside the vehicle were two discharged .22 calibre bullets. They executed a search warrant on the applicant's home, where they seized a .22 calibre bullet from one of the bedrooms. Scientific examinations revealed that the five casings found at the crime scene, the two bullets found in the vehicle and the bullet found in the bedroom had all been fired from the same pistol.[18]

[53] Some time after the shooting the applicant arrived at a friend's house clutching a blood-soaked T-shirt. He claimed to have been stabbed. He was driven home by another friend, after saying he could not go to the hospital because the police would be looking for him.

[54] For the purposes of DNA testing, police took reference samples from the applicant, the complainant and others. They swabbed the crime scene, the firearm and the friend's car. On analysis of the swabs, no DNA consistent with the applicant's was found. Had the applicant gone to trial, it would have been for the jury to reach their conclusions on the evidence actually presented. DNA evidence is a comparatively recent phenomenon in criminal trials, thanks to modern scientific advances. Even today, it is does not feature in every criminal trial – either because no testing was done or because test results excluded the particular accused or were inconclusive. The presence of DNA evidence implicating the applicant might have strengthened the Crown case. In its absence, on the evidence that was available, the applicant's legal representatives properly assessed the Crown case as strong, and advised him accordingly.

Intention

[55] The applicant understood that the Crown had to prove beyond reasonable doubt that he had the intention to kill when he fired the shots. In his written instructions he acknowledged being advised that the intention might have been fleeting or momentary. He was aware of the evidence that pressure of 1.1 kgs on the trigger was necessary to make it fire. He was aware of the evidence that three of the shots fired at the complainant had hit him. He acknowledged that:

> "To fire a gun like that and that the complainant received two shots to the chest and one to the stomach makes for a strong case of attempted murder."

[56] In his written instructions he said:

> "At the time I went into the store I was really scared and I was under the influence of speed. The only reason the gun went off was because I was hit from behind. I never intended to shoot anyone or to hurt anyone."

[57] His intoxication with amphetamines was a relevant consideration in determining whether he formed the intent to kill. Section 28(3) of the *Criminal Code* provides:

> "(3) When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether

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[18] Transcript 29 September 2006 pages 1-11 – 1-12.

> intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed."

[58] Dr Butler expressed the following opinion:

> "At the time of the alleged offences of 28.10.03, I believe the defendant was suffering from a mental disease *(Amphetamine induced psychotic disorder with delusions and hallucinations; Adjustment Disorder with depression and anxiety)* but that the presence of a disease did not deprive the defendant of any of the three capacities as described under Section 27 of the Criminal Code. Furthermore, the presence of amphetamine intoxication through its impact upon his state of mind would, in my opinion, have precluded any defence of unsoundness of mind had it been otherwise applicable to any of the charges apart from that of attempted murder. Even though there is significant disputation of the facts with respect to the charge of attempted murder, I believe it is possible, under the provisions of Section 28 of the Criminal Code, to infer that his state of mind would have been so affected by his amphetamine intoxication on the evening of the alleged offence that any capacity to form a specific intent to kill was severely impaired." (Emphasis added.)

[59] Had the matter gone to trial, the jury could not have returned a verdict of guilty unless it was satisfied to the requisite standard that the applicant actually formed the intention to kill. Dr Butler considered it a mere possibility that his capacity to form that intention was severely impaired by his amphetamine intoxication. Even if it were so impaired, there would still have been a residual capacity to form the intent. There was other evidence (particularly the number of shots fired and the pressure needed to engage the trigger) from which the jury could have been so satisfied even in the face of Dr Butler's opinion.

No miscarriage of justice

[60] On all of the evidence, the Crown case was a strong one, and the applicant chose to plead guilty in the expectation of receiving a more lenient sentence than he would receive if he went to trial and was found guilty by the jury. I am unpersuaded that the applicant has any prospect of success of any of his four grounds of appeal. He failed to establish that there was a miscarriage of justice.

Sentence

[61] The offences to which the applicant pleaded guilty were all very serious, especially the attempted murder. The complainant, an entirely innocent man, was shot four times, receiving multiple serious physical injuries. He was admitted to hospital where the bullets were surgically removed; he spent about two weeks in hospital. He was subsequently diagnosed as suffering post-traumatic stress disorder and a major depressive disorder as a result of what happened, and was in receipt of ongoing psychiatric and psychological treatment. He was still unable to return to work.

[62] The applicant was on bail when he committed most of the offences, including the attempted murder. He had a criminal history which included offences of violence while a juvenile, for which he was sentenced to detention.

[63] The sentencing judge took account of his youth, his pleas of guilty, and other mitigating circumstances (including remorse and some insight) in reducing what would otherwise have been a head sentence in the range of 15 to 16 years to 12 years. Her Honour said that because he had not taken advantage of opportunities for rehabilitation afforded by previous sentences, she could not reduce the notional sentence to the extent sought by defence counsel. She observed that whilst on remand he had taken some steps to improve himself, completing some TAFE courses and commencing tertiary preparation studies.

[64] Her Honour referred to *R v Griffith*[19] and *R v Cole*.[20] They were convicted after a trial by jury of attempted murder, armed robbery with circumstances of aggravation, and unlawful use of a motor vehicle with a circumstance of aggravation. The head sentence imposed on Griffith was life imprisonment, and that imposed on Cole was 19 years and three months imprisonment.

[65] Griffith was aged 40 and Cole was aged 29 at the time of the offences. They both had criminal histories, Griffith's being described as truly appalling.

[66] They planned to rob a jewellery store that had been the subject of a previous attempted robbery when the person in the store had used a weapon to defend himself. At least Cole was aware of this history. They planned their robbery in a professional manner, and armed themselves with the intention of shooting anyone who got in their way. The shop owner and his wife were the only persons present in the store when they arrived. The shop owner's attention was alerted by the barking of his dog. Then a pane of glass separating his desk from the public area of the shop was shattered upon the weapon being fired. The robbers could see his outline through the glass. A shot was fired, which grazed his cheek. He reached for his own weapon, and fired it twice in the direction of the robbers, who fled, one or more of them taking a quantity of jewellery. During the exchange of fire the shop owner shot one of the robbers who collapsed outside the shop and died shortly afterwards.

[67] Her Honour described Griffith and Cole's intention as different from and worse than the applicant's. She said:

> "It is still very serious that you took the handgun with you to the Red Rooster store and that you intended to rob the manager of the store or whoever else came outside the store whilst you were waiting there.
>
> You needed to commit a robbery to get the funds to purchase the amphetamines that you were seriously abusing at that stage. I therefore accept that if this were not a case of a guilty plea, I would be looking at imposing a head sentence of between 15 and 16 years for the attempted murder."

[68] In my view the sentencing judge correctly identified 15 to 16 years as the starting point for the applicant's head sentence. In reducing it to 12 years, her Honour made proper allowance for the plea and other mitigating factors. The sentence was not manifestly excessive.

Conclusion

[69] The applicant has not established that a miscarriage of justice was occasioned by the acceptance of his plea of guilty, or that his sentence was manifestly excessive. His

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19 [2004] QCA 110.

20 [2004] QCA 109.

application for an extension of time should be refused. So, too, should the application for bail.

[70] He had only limited literacy skills at the time of his offending. He is to be commended for the thoroughness and care with which he presented his written and oral submissions and supporting materials before this court, which were indicative of his having made good use of his time in prison to build on the steps toward self improvement which he had taken whilst on remand. This augurs well for his prospects of leading a useful and law-abiding life upon his release from custody.

Order

[71] I would order –

(1) that the application for an extension of time in which to appeal against the conviction of attempted murder and to seek leave to appeal against sentence be refused;

(2) that the application for bail be refused.

[72] **DOUGLAS J:** I agree with the reasons and orders of Margaret Wilson AJA.