SUPREME COURT OF QUEENSLAND

CITATION:	*R v WAY; Ex parte Attorney-General (Qld)* [2013] QCA 398
PARTIES:	**R** **v** **WAY** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 200 of 2013 SC No 595 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	3 December 2013
JUDGES:	Margaret McMurdo P and Muir and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to amend the grounds of appeal refused.** **2. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the 16 year old respondent attempted to murder a 14 year old schoolgirl, stabbing her about 12 times with a knife in her neck, head, shoulders, upper back and, when she was trying to protect herself, her arms and hands – where the respondent and complainant were not known to each other prior to the attack but did attend the same school – where the respondent chose the complainant because she was female and his physical inferior and the attack took place in the girls' toilets – where the respondent had fantasised about harming others and then killing himself – where the respondent had no diagnosable mental illness – where the respondent surrendered to the police after the attack and subsequently pleaded guilty to attempted murder 13 months after arrest – where the respondent was sentenced under the *Youth Justice Act* 1992 (Qld) ("YJ Act") to four years detention to be released after

serving 50 per cent – where the appellant contends that the sentence was manifestly inadequate – where the appellant also seeks leave to amend the notice of appeal to add the ground that the sentencing judge erred in failing to determine that the offence was a "particularly heinous offence" within the meaning of s 176(3)(b)(ii) of the YJ Act, the effect of which would be to increase the maximum penalty from 10 years detention to life – where the appellant contends that, merely because the prosecutor did not submit that the respondent should have been sentenced under s 176(3)(b)(ii) at first instance does not absolve the sentencing judge from the responsibility of imposing a proper sentence – where the respondent contends that the matter in s 176(3)(b)(ii) is a "circumstance of aggravation" within the meaning of s 1 *Criminal Code* 1899 (Qld) and, as the prosecutor did not plead the circumstance of aggravation in the indictment, the appellant is precluded from now relying on it – whether the sentencing judge erred in failing to determine that the offence was a "particularly heinous offence" within the meaning of s 176(3)(b)(ii) – whether the matter in s 176(3)(b)(ii) is a "circumstance of aggravation" within the meaning of s 1 *Criminal Code* – whether the sentence was manifestly inadequate

Criminal Code 1899 (Qld), s 1, s 564(2), s 630
Penalties and Sentences Act 1992 (Qld), s 161B(3)
Youth Justice Act 1992 (Qld), s 3, s 140, s 150(1)(b), s 176(3)

Everett v The Queen (1994) 181 CLR 295; [1994] HCA 49, cited
Malvaso v The Queen (1989) 168 CLR 227; [1989] HCA 58, cited
R v AS; ex parte A-G (Qld) [2004] QCA 259, cited
R v E; ex parte A-G (Qld) (2002) 134 A Crim R 486; [2002] QCA 417, cited
R v Ellis [2002] QCA 402, cited
R v Henderson; Ex parte Attorney-General (Qld) [2013] QCA 63, cited
R v JAJ [2003] QCA 554, cited
R v KU, ex parte Attorney-General (No 2) [2011] 1 Qd R 439; [2008] QCA 154, cited
R v Lepp [1998] QCA 411, cited
R v LY [2008] QCA 76, considered
R v N; ex parte A-G (Qld) [2003] 149 A Crim R 497; [2003] QCA 391, cited
R v RJI, unreported, Supreme Court of Queensland, Indictment Nos 31 and 32 of 2013, North J, 18 October 2013, considered
R v W; ex parte Attorney-General (Qld) [2000] 1 Qd R 460; [1998] QCA 281, cited
R v Wilde; ex parte A-G (Qld) (2002) 135 A Crim R 538; [2002] QCA 501, cited
R v Wilton (1981) 28 SASR 362; (1981) 4 A Crim R 5, cited

R v ZTJ, unreported, Supreme Court of Queensland, Indictment No 1583 of 2009, Boddice J, 24 March 2011, considered
The Queen v De Simoni (1981) 147 CLR 383; [1981] HCA 31, discussed

COUNSEL: W Sofronoff QC SG, with J Robson, for the appellant
D C Shepherd, with J P Benjamin, for the respondent

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

[1] **MARGARET McMURDO P:** The respondent, a 16 year old youth at the time of the offending, pleaded guilty in April this year to the attempted murder of a 14 year old female student on 9 May 2012. They attended the same high school. A pre-sentence report was ordered under the *Youth Justice Act* 1992 (Qld) (YJ Act). He was sentenced under the YJ Act on 22 July 2013,[1] by which time he had turned 17, to four years detention with an order that he be released after serving 50 per cent. A period of 439 days pre-sentence custody was declared to be imprisonment already served under the sentence. The appellant, the Attorney-General of Queensland, has appealed against that sentence contending that it is manifestly inadequate. He has applied for leave to amend his notice of appeal to add an additional ground of appeal that the learned sentencing judge erred in failing to determine that the offence was a "particularly heinous offence" within the meaning of s 176(3)(b)(ii) of the YJ Act.

[2] Before stating my reasons for refusing the application for leave to amend the notice of appeal and for dismissing the appeal, I will set out the tragic circumstances of the offending; summarise the pre-sentence and psychiatric reports; discuss the sentencing proceeding; and set out the appellant's contentions.

The circumstances of the offending

[3] A sensible starting point in the resolution of this appeal is to set out the circumstances of this dreadful offence which has devastated the victim and the families of both the victim and the respondent.

[4] The complainant was in grade 9 and the respondent, who was in grade 11, did not know each other prior to 9 May 2012. The complainant arrived at school at about 7.00 am for cross-country training. She saw some students, including the respondent, walking around the school. She put her bag at her locker and went to the girls' toilets. The respondent, who was wearing dark glasses, walked back and forth in front of the toilets. As the complainant was putting on makeup she heard a noise, turned and saw the respondent. She told him this was not the boys' bathroom. He did not respond as he walked up to her, faced her and stabbed her on the neck and upper back. She suffered stab wounds to her hands as she tried to protect herself as he continued his attack despite her screams. She escaped from the toilets but fell to the ground and he tried to drag her back in by her feet. She kicked out at him, managed to get to her feet and tried to run. He grabbed her jumper but she was able to pull free. Two male students saw the attack outside the toilets and

1 The Act, s 140.

staff and students went to her assistance and called an ambulance. The respondent fled.

[5] The complainant was treated at Royal Brisbane Hospital. She had approximately 12 stab wounds to the head, face, neck, shoulders, arms and hands. Miraculously, they were not life-threatening. The right wrist wound was closed with two sutures; the right thumb wound was closed with four sutures and the right forehead wound was closed with five sutures. The remaining wounds were dressed. The deepest wound was a neck wound running adjacent to the C2 vertebrae. The injuries would have caused moderate pain and discomfort.[2] Photographs of her injuries taken two days later were tendered.[3]

[6] Later that day, police recovered the knife which the respondent left at the scene. Photographs were tendered.[4] Two more knives and a hammer were found in the respondent's locker.

[7] At about 9.20 am the respondent handed himself into the Caboolture Police Station. He had cut himself with the knife during the attack. The photographs of his injury depicted the respondent as lightly built and as appearing younger than his age.[5] Acting on legal advice, he declined to be formally interviewed.

[8] The police investigation revealed that the respondent had written a short story for an English assignment in early 2012 in which the main character attended his high school and massacred his peers in a violent rampage before committing suicide. The assignment was tendered.[6] Police also found a notebook in his bedroom which contained a list of the advantages and disadvantages of committing suicide.

[9] The respondent was committed for trial on 24 August 2012 following a full hand up committal without cross-examination. The trial was listed to commence on 8 April 2013. The Crown was advised the respondent would be pleading guilty on 2 April 2013.

The psychiatric report

[10] Psychiatrist, Dr Scott Harden, prepared a report on 12 June 2013 to assist the author of the pre-sentence report.

[11] He was originally asked by the respondent's lawyers to provide a psychiatric report in the respondent's case in July 2012. Before providing the present report, the respondent's lawyers gave him written permission to utilise material from the first report.

[12] When the respondent was in grade 3 or 4, he began to have violent thoughts about those who had teased or victimised him. By the time he was in grade 8 and 9, he was researching violence to the point of watching "snuff" films, which involve the actual killing of other human beings, and he began to have suicidal thoughts. By the time he was in grade 10, he was pre-occupied with this material and with the idea that he should do something like this. He was shocked and appalled but also fascinated and excited by the snuff films. He thought that if he hurt someone, he could feel empowered and it would probably be thrilling. Police found a document

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2 Report by Dr George Allen, ex 3.
3 Ex 2.
4 Photographs of the knife are ex 4.
5 Photographs of his injury are ex 8.
6 The essay was tendered as ex 9.

at his house entitled "pros and cons" which was about him hurting someone and then killing himself because he was feeling pressured with school work. Towards the end of 2011 he thought he might actually carry out these plans. He decided he would first hurt an animal and went out with a knife and a large bag to find a dog. He was unable to find one, became scared, returned home and discarded this plan as "animals were too innocent".[7] On one occasion, he took a knife to the movies for self-defence. If the opportunity arose, he thought he could see if he enjoyed hurting people.

[13] He hid knives in his room a month or two before the offence with a view to implementing his plan. He had thought about stabbing someone in the school toilets for some time. He decided the previous evening to commit the offence as he was feeling stressed about debating preparation and about not having completed his three pieces of school work. He was angry with himself for watching pornography. He thought if he attempted to kill someone, this would relieve his stress. He might then kill more people. He wanted to know whether he would feel guilty or gain stress relief and to prove that he was not a "wimp".[8] If he could inflict pain on someone else then he could inflict pain on himself and succeed in killing himself. If he went through with this plan, he thought he would be shot or overwhelmed by police because he would not "want to go on".[9] He did not prepare an escape plan and hoped he would be killed.

[14] The night before the attack he packed three knives and a hammer into his bag. He had not realised that cross-country training meant that there would be more people than usual at school at 7.00 am. He took the smallest knife from his bag and put it in his back pocket. He followed a girl whom he did not know into the girls' toilet block, thinking it would be easier to overpower a female. He came at her with the knife and, as he stabbed her, his hand slipped and he cut himself. He repeatedly attacked her on the back of the neck thinking, "I'm finally doing this."[10] He was scared but it was too late to stop. She managed to get to the door and he tried to drag her back but she got away again. He tripped over and ran, dropping the knife outside the toilet. His fantasy was shattered. He was disappointed that he had failed to stop himself when he could have. His hand was bleeding. He ran to the railway station and thought about jumping in front of a train but none came. He did not want to be found before he killed himself. In the end, he was unable to kill himself and decided to turn himself in. He realised that attacking the girl was "such a massive mistake".[11] He felt "really bad and foolish",[12] extremely guilty and wanted to die. He thought about the victim and about writing a letter of apology to her and her family but was unsure how to go about it. He wanted to express that what he did "wasn't fair".[13]

[15] His parents told Dr Harden that the respondent had been stressed after commencing a part-time job in early 2011 and from his involvement in the debating team. He was a perfectionist about school work and was concerned about his appearance. He had a fascination with crime, forensic science, behavioural psychology, watched TV crime shows and researched serial killers on the internet. He had initially fantasised

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7 Ex 1 (AB 57).
8 Ex 1 (AB 58).
9 Ex 1 (AB 58).
10 Ex 1 (AB 59).
11 Ex 1 (AB 59).
12 Ex 1 (AB 59).
13 Ex 1 (AB 60).

about finding sexual serial killers and hurting them in a vigilante fashion. He spoke a lot to his parents about his feelings of guilt and remorse.

[16] The respondent had no previous involvement in the criminal justice system, had not received any psychiatric assistance or psychological counselling prior to his offending and had no relevant medical or drug and alcohol abuse history. Whilst in detention he was completing his grade 12 studies and was obtaining As and Bs. He was regularly attending the gym and felt more confident about his appearance and physical strength. He valued himself more and better understood those around him. He valued his family and his academic skills. He had changed his way of dealing with stress by not bottling things up. He was an only child who achieved well academically and was a perfectionist. He had been bullied by children from another school and began carrying a knife. He had female friends and wanted, but did not have, a girlfriend. He filmed up the skirts of his female peers and would later masturbate to this video footage. He watched pornography, generally of the non-violent kind, whilst masturbating. He progressed to pornography involving anal sex, involving multiple sexual partners, bondage and rape pornography but he knew that what he was watching was not real. He claimed to be no longer interested in this voyeuristic behaviour and was now sickened by violent rape pornography. He had formed a romantic relationship with a girl which may develop when he is released. He may write a science fiction book and study mathematics and economics at university. However, he was unsure about pursuing further education because his perfectionism placed him under great stress. He was a cooperative, pleasant young man who was bright, insightful and reflective.

[17] Dr Harden assessed his summary risk rating for future violence as low but there could be a concern if he perceived he was rejected by others and withdrew from pro-social interpersonal supports. His score on the psychopathy checklist youth version was 3 out of 30, not an elevated score. In Dr Harden's opinion, the respondent had long standing feelings of perfectionism and perceived physical and other inadequacies, particularly with regard to his academic performance, public performance, such as debating, and his attempted romantic relationships with girls. He did not seek assistance for his problems from adults prior to the offence. He coped by ruminating upon internal fantasies of harming others, largely as a form of revenge, as well as developing an interest in sexually violent material. He came from a stable, intact family and had a history of a high level of school and social performance and had no significant history of substance use or rule-breaking behaviour. His offending appears to have been driven by significant anxiety about external stressors combined with poor coping strategies.

[18] Since the offence, after a short period of distress, he adapted well to incarceration and continued his education. He had a good understanding of the thinking processes that led him to offend and of the potential consequences for him and others. He had undertaken psychological therapy and appears to have made significant progress to deal with his self image problem, anxiety and stress since Dr Harden first saw him nine months earlier. He did not meet criteria for a specific psychiatric diagnosis although he had a tendency to generalised anxiety and perfectionism which has caused a level of distress and dysfunction in the past and might do so in the future but had consistently improved since the offence. He did not suffer from paraphilia, despite his interest in watching sexually violent material. The formation of his first romantic relationship was a good prognostic sign, although the relationship remained untested by reality in the community. He had

very few factors associated with an increased risk of recidivism for interpersonal violence but increased stress, such as that associated with relationship breakdown, could increase the chance of regression.

The pre-sentence report

[19] The author of the pre-sentence report relied on personal interviews with the respondent on 30 April and 11 and 18 June 2013; interviews with the respondent's parents on 13 June 2013; Dr Harden's psychiatric report; an interview with Counsellor Tom Strong on 12 June 2013; information provided by a case worker from the Brisbane Youth Detention Centre; youth justice records and personnel; and information provided by the Director of Public Prosecutions.

[20] The author stated that disrupted self concept and fascination with violence and horror contributed to the respondent's offending and his:

> "engagement in grandiose fantasies of power and control represented a maladaptive coping strategy to alleviate feelings of depression, insignificance and powerlessness. Increased stress associated with threats to his self-concept exacerbated [the respondent's] perceptive and thought disturbances, resulting in an escalation of his violent fantasies and the commission of his offence."[14]

[21] He did not fully appreciate the severity of his offence. His capacity to empathise with the complainant was restricted by his own experience of consequences and impacts. He felt regret for his involvement in the offence, but exhibited limited insight and appreciation for the harm caused to the complainant, her family and the broader community. He would be assisted by education regarding the impact and trauma caused to others by his offending. He had developed insight into the factors associated with his offending and had progressed in his willingness to engage with supports and services to address these issues.

[22] He had the support of his parents who have provided a stable, supportive pro-social family life. He has a supportive relationship with his counsellor and it is planned to continue this therapeutic engagement upon his release into the community. The Department would assist his engagement in long term psychological intervention to support his reintegration into the community and minimise his risk of future violent recidivism.

[23] He had articulated pro-social future goals and was incorporating support needs and knowledge of risk areas into his transition planning. If sentenced to a period of detention he would be required to participate in vocational, educational, recreational, therapeutic and offence focussed intervention programs. Upon his release after serving the custodial component of the order, he would be subject to the conditions of a supervised release order which would include not only statutory conditions and regular reporting, but also participation in therapeutic intervention with a mental health practitioner familiar with issues of identity, sexuality and violence in young people. Should he fail to comply, the Department would make an application to the Childrens' Court for cancellation of the supervised release order.

The sentence proceeding

[24] The prosecutor submitted that the maximum penalty for the offence of attempted murder was 10 years under s 176(3)(a) of the YJ Act. It is highly significant to this

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[14] Ex 1 (AB 51).

appeal that the prosecutor did not submit that the Court should consider "the offence to be a particularly heinous offence having regard to all the circumstances" so that the maximum imprisonment was life under s 176(3)(b) of the YJ Act.

[25] The prosecutor submitted that the offending was extremely serious and disturbing. It was planned and calculated as the psychiatric report demonstrated. The respondent had been pre-occupied with actually killing a person since grade 10. He waited until the complainant was alone and vulnerable and deliberately chose a younger female who was physically his inferior. He was persistent in his sustained attack on her. There was no motive. It was an aggravating feature that the offence was committed in a school where the complainant would have felt safe.

[26] He tendered the complainant's victim impact statement which described her terrifying experience and its subsequent detrimental impact on both her and her family. A report from her general practitioner stated that she was suffering from PTSD.[15] She believed he was going to kill her. Statements from the complainant's mother and younger brother also addressed the detrimental impact of this dreadful offence on the complainant and on them.

[27] The prosecutor submitted this was a more serious example of offending than that contained in both *R v LY*,[16] where a detention order of two and a half years was imposed with release after serving 50 per cent, and *R v ZTJ*[17] where a sentence of three and a half years detention was imposed with release after serving 55 per cent. In this case, a sentence of four to five years detention was required. The mere fact that the respondent pleaded guilty did not require an order for release after 50 per cent and there should be no departure in this case from the statutory requirement that the respondent serve 70 per cent of the period of detention.

[28] Defence counsel accepted the accuracy of the psychiatric and pre-sentence reports. *LY*, he submitted, supported a sentence of three to four years detention with release after about 50 per cent. The respondent came from a good family and was largely a straight As student. Although he had no diagnosable mental disorder, he developed feelings of anxiety and spiralled downward relatively quickly. Counsel tendered references from the respondent's parents, his 2012 Mathematics B and Mathematics C teacher, relatives and friends, including a Justice of the Peace. They all spoke well of the respondent, his previous good character and talent and how shocked they were to learn of this offending.

[29] In sentencing the respondent, the judge noted that the YJ Act required that a detention order be imposed only when no other sentence was appropriate and as a last resort and for the least time justified in the circumstances. The YJ Act also focussed on rehabilitation and on the reintegration of the child into the community. The respondent had no criminal history and his parents and family had no idea he could commit such an offence. His Honour then rehearsed the circumstances of the offending which he described as a ferocious and sustained attack with a knife which must have been utterly terrifying. There seemed to be no comprehensible reason why the respondent would take weapons to school intending to attack indiscriminately. He had been engaging in strange and disturbing behaviour unbeknown to his parents. It was sheer good fortune that the victim survived the attack. Even after she managed to leave the toilet block the respondent dragged her back

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15 Ex 11.

16 [2008] QCA 76.

17 Unreported, Supreme Court of Queensland, Indictment No 1583 of 2009, Boddice J, 24 March 2011.

intending finish her off. The psychiatrist could not identify any psychiatric illness or disorder and assessed recidivism as relatively low. In light of the offending, it was to be hoped that was true. The judge referred to the victim impact statements concluding that the complainant had sustained PTSD and noting how remarkable it was that she had coped as well as she had, a credit to her and to those who have supported her.

[30] The judge noted the mitigating features of youth, absence of prior offending, apparent good prospects of rehabilitation and the plea of guilty and sentenced the respondent to four years detention, ordering that he be released after serving 50 per cent of the sentence.

The appellant's contentions

[31] The appellant's principle contention is that the application for leave to amend the grounds of appeal should be granted and that the sentencing judge erred in failing to determine the offence was a particularly heinous offence under s 176(3)(b)(ii) of the YJ Act. The prosecutor did not raise this matter for consideration but the offence fell into that category. It was premeditated. The respondent planned to indiscriminately kill a school child. He chose a younger female whom he could overpower. He may have gone on to kill others. He took a number of knives to school and targeted the younger, smaller complainant while she was alone, vulnerable and concealed from others in the girls' toilet. He stabbed her in areas calculated to do grave damage. The attack was horrific and bloody. His murderous intent was frustrated only by the complainant's resistance and the fortuitous intervention of others. It was a sustained attempt to kill, making this a serious example of attempted murder: *R v Lepp*.[18] The offence occurred at a public high school. It has had a serious detrimental impact on the complainant, her mother and younger brother. The respondent was not disadvantaged or acting under the influence of mental illness. He still did not fully appreciate the severity of his offence and had limited insight. For all these reasons, the judge should have considered this to be a particularly heinous offence so that the maximum penalty was not 10 years detention but life.

[32] The application of the sentencing principles under s 150 of the YJ Act and the Schedule 1 Charter of Youth Justice Principles did not diminish the importance of community protection: *R v JAJ*[19] and *R v E; ex parte A-G (Qld)*.[20] This was especially so where the offending involved the use of weapons: *R v W; ex parte Attorney-General (Qld)*.[21] *R v LY*[22] was a much less serious case than this and turned on its own unique facts. *ZTJ*[23] was also readily distinguishable. This case required a much longer period of detention than both *LY* and *ZTJ*.

[33] The prosecutor's omission to ask for a proper sentence did not shift the responsibility of imposing a proper sentence from the sentencing judge: *R v KU, ex parte Attorney-General (Qld) (No 2)*.[24] This was an exceptional case where this Court should intervene to impose the proper sentence where the sentencing judge failed to appreciate the seriousness of the offending. This was necessary to

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18 [1998] QCA 411, [19].
19 [2003] QCA 554, [20].
20 (2002) 134 A Crim R 486, [37].
21 [2000] 1 Qd R 460, 463.
22 [2008] QCA 76.
23 Unreported, Supreme Court of Queensland, Indictment No 1583 of 2009, Boddice J, 24 March 2011.
24 [2011] 1 Qd R 439, 465.

maintain public confidence in the administration of justice: *R v Henderson; Ex parte A-G (Qld)*.[25] This Court was not constrained from now imposing a sentence of the appropriate severity as the prosecutor's contention as to the level of appropriate penalty was manifestly too low: *R v N; ex parte A-G (Qld)*[26] and *R v Wilde; ex parte A-G (Qld)*.[27]

[34] The appellant rejected the respondent's contention, that if leave to amend the grounds of appeal were given, the effect of the definition of "circumstance of aggravation" in s 1 *Criminal Code* 1899 (Qld) and as that term is used in s 564(2) *Criminal Code* was that if the prosecution wished to rely on s 176(3)(b)(ii) of the YJ Act, it must plead that circumstance in the indictment. The respondent contended the prosecution's failure to do so meant that it could not rely on s 176(3)(b)(ii) in this appeal. The appellant's answer to this contention was that s 176(3)(b)(ii) of the YJ Act is not a circumstance of aggravation. Rather, s 176(3)(b)(i) reduces the maximum penalty ordinarily applicable to an offender found guilty of particular offences when the offender is a child. By contrast, s 176(3)(b)(ii) restores the maximum penalty applicable to a child found guilty of specified offences to that provided in the *Criminal Code* where "the court considers the offence to be a particularly heinous offence having regard to all the circumstances". Under s 176(3)(b)(ii) the sentencing judge can exercise a discretion akin to that provided under s 161B(3) *Penalties and Sentences Act* 1992 (Qld). It follows that s 1 and s 564(2) *Criminal Code* do not apply. And it was unnecessary to include the matter in s 176(3)(b)(ii) as a circumstance of aggravation in the indictment.

[35] In addressing the issue of manifest inadequacy, as there were no comparable decisions involving juvenile offenders, the appellant referred to sentences involving adult offenders, submitting they were comparable. In support of that surprising submission, counsel referred to comments of the Chief Justice in *R v AS; ex parte A-G (Qld)*[28] as to the "marginal relevance" of adult sentences when determining that a sentence imposed on a juvenile was not excessive. When the Court pointed out the very different statutory sentencing regimes applicable to children on the one hand and adults on the other, this contention was not pursued. In response to the Court's enquiry as to whether there were other first instance cases involving youths sentenced under the YJ Act for attempted murder, counsel handed up the decision of *R v RJI*.[29]

[36] The appellant submitted he should be given leave to amend his grounds of appeal and the appeal should be allowed. The sentence should be set aside and a sentence of 11 to 12 years detention with release after 50 per cent substituted. If leave to amend is not given, or if it is found the offence was not particularly heinous under s 176(3)(b)(ii) of the YJ Act, the sentence was manifestly inadequate and a sentence in the range of eight to ten years detention with release after 50 per cent should be substituted.

The application for leave to amend the grounds of appeal

[37] The YJ Act s 176 relevantly provides:

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25 [2013] QCA 63, [51].
26 [2003] QCA 391, [11].
27 (2002) 135 A Crim R 538, 543 [31].
28 [2004] QCA 259, [16].
29 Unreported, Supreme Court of Queensland, Indictment Nos 31 and 32 of 2013, North J, 18 October 2013.

"**176 Sentence orders – life and other significant offences**

(1) If a child is found guilty of a relevant offence before a court presided over by a judge (***the court***), the court may—

…

(b) make a detention order against the child under subsection (2) or (3).

…

(3) For a relevant offence that is a life offence, the court may order that the child be detained for—

(a) a period not more than 10 years; or

(b) a period up to and including the maximum of life, if—

(i) the offence involves the commission of violence against a person; and

(ii) the court considers the offence to be a particularly heinous offence having regard to all the circumstances.

…

(10) In this section—

relevant offence means a life offence … ."

[38] The sentence proceeding took place on 22 July 2013. It is common ground that attempted murder was a relevant offence for the purposes of s 176. The sentence was conducted on the basis that the respondent was to be dealt with under s 176(3)(b)(i) so that the maximum period of detention was 10 years. The prosecutor specifically adverted to s 176(3)(b)(i) and stated in terms that the maximum period of detention to which the respondent could be sentenced was 10 years. Defence counsel and the sentencing judge proceeded on that basis. The first time there was any attempt to depart from that approach was when the appellant filed his outline of submissions in this appeal on 31 October 2013, more than three months after the respondent was sentenced. The prosecutor at sentence was highly experienced and respected. There can be no doubt that he made an informed and deliberate decision that this was not an appropriate case in which to submit that the maximum penalty was life under s 176(3)(b)(ii). It is also clear that the judge accepted prosecutor's approach as appropriate.

[39] The community interest in the finality of litigation means that courts discourage parties from departing on appeal from the way they have elected to conduct litigation at first instance. This is especially so in criminal matters, particularly those involving children. Schedule 1 of the YJ Act contains the Charter of Youth Justice Principles to which a sentencing court must have regard: see s 3 and s 150(1)(b) of the YJ Act. Principle 7 states:

"If a proceeding is started against a child for an offence –

(a) the proceeding should be conducted in a fair, just and timely way".

[40] To allow the appellant to amend his grounds of appeal at this point and to make submissions on appeal which were not put by the prosecutor at sentence, would be inconsistent with principle 7 and would effectively place the respondent child in a position of double jeopardy. An appellate court will allow an appellant to put contentions on appeal against sentence which were not put to the sentencing judge, only where exceptional circumstances justify such a course: *R v Wilton*,[30] cited with approval in *Malvaso v The Queen*,[31] *Everett v The Queen*[32] and *R v KU, ex parte Attorney-General (Qld) (No 2)*.[33] The appellant has not demonstrated extraordinary circumstances warranting this dramatic and late change in the way he now seeks to conduct the case against the respondent child. The application to amend the grounds of appeal should be refused.

Is s 176(3)(b)(ii) of the YJ Act a circumstance of aggravation under s 1 *Criminal Code?*

[41] Although I would refuse leave to amend the grounds of appeal, the respondent's contention that reliance on s 176(3)(b)(ii) is a circumstance of aggravation under s 1 *Criminal Code* which must be pleaded in the indictment if it is to be relied upon, raises a point of law which may be of considerable future importance. It is not necessary to determine it for the purposes of the disposition of this appeal but it is a question which the Court should resolve.

[42] The answer to the question is by no means straight forward but for the following reasons I am ultimately persuaded that reliance on s 176(3)(b)(ii) is not a circumstance of aggravation under s 1 *Criminal Code*.

[43] The respondent contended that the application of s 176(3)(b)(ii) depends on a finding by the Court, having regard to all the circumstances, that the offence falls into a particular category, namely, that it is particular heinous. That categorisation is a circumstance of aggravation within the meaning of s 1 and s 564(2) *Criminal Code* which was required to be pleaded in the indictment if the prosecution intended to rely on it. This differed from the serious violent offence provisions in Pt 9A *Penalties and Sentences Act* which concerned only the period of time an offender would spend in custody before being released on parole.

[44] The respondent's contention stems from *The Queen v De Simoni*[34] where the plurality[35] held that, if an indictment does not refer to particular circumstances of aggravation, a sentencing judge may have regard to those circumstances only if they would not render the accused liable to a greater punishment. De Simoni pleaded guilty to robbery which is punishable by a maximum penalty of imprisonment for 14 years. The maximum penalty was increased to life imprisonment where the offender was armed with any dangerous or offensive weapon or instrument or wounded or used any other personal violence. De Simoni wounded the victim in the course of the robbery but that circumstance was not charged. It was a circumstance of aggravation which should have been charged if it was to be relied upon to impose a heavier sentence. *De Simoni* is patently distinguishable from the present case. There is no direct or close analogy between the situation in *De Simoni* and the provisions of s 176(3)(b)(ii) with which this case is concerned.

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30 (1981) 28 SASR 362, 367-368 (King CJ).
31 (1989) 168 CLR 240.
32 (1994) 181 CLR 295, 302 (Brennan, Deane, Dawson and Gaudron JJ).
33 [2008] QCA 154, [95].
34 (1981) 147 CLR 383.
35 Gibbs CJ, Mason and Murphy JJ.

[45] There are difficulties with the respondent's contention. The first is that s 176(3)(b)(ii) allows the court to make a judgment as to whether the offence is a particularly heinous offence, having regard to all the circumstances. This does not seem analogous to requiring proof of a circumstance of aggravation. The second is that, unlike a circumstance of aggravation which must be pleaded in the indictment which the prosecution presents to the court, the terms of s 176(3) make plain that it is for the court to determine the penalty for those offences to which s 176(3) applies. The court must determine whether the child offender is to be sentenced under s 176(3)(a) and detained for a period of not more than 10 years or under s 176(3)(b) for a period up to and including the maximum of life where the court considers the offence to be a particularly heinous one having regard to all the circumstances. This is inconsistent with the prosecutor pleading the matter as a circumstance of aggravation in the indictment.

[46] I gain some comfort for this construction from the fact that neither the YJ Act nor the *Criminal Code* have any procedural provisions to facilitate pleading the matters raised in s 176(3)(b)(ii) in the indictment. This may be compared to the position where the circumstance of aggravation for the offence of stealing is that the offence was committed after a previous conviction. In that situation, so as to avoid prejudicing the jury by reading out the fact of a previous conviction, s 630 *Criminal Code* provides that the accused is "called upon to plead to so much only of the indictment as charges the subsequent offence".[36]

[47] Although there are distinctions, the power given to the court under s 176(3) is comparable to that given under s 161B(3) *Penalties and Sentences Act* where a person convicted of a Schedule 1 offence is sentenced to between five and ten years imprisonment. The court has a discretion as to whether to declare the offender to be convicted of a serious violent offence with the result that the offender must serve 80 per cent of the sentence before becoming eligible for parole. In *R v Ellis*,[37] this Court found that the exercise of that discretion did not equate to a circumstance of aggravation increasing the penalty which must be pleaded in the indictment.

[48] For all these reasons, I consider that the better view is that, where s 176(3) applies, the court may sentence the child offender under s 176(3)(a) or, where the requirements of s 176(3)(b) are met, under that sub-subsection. The matters listed in s 176(3)(b)(i) and (ii) are not circumstances of aggravation which must be charged in the indictment if intended to be relied upon as increasing the applicable penalty.

Is the sentence manifestly inadequate?

[49] The final issue for resolution is whether the sentence was manifestly inadequate. Determination of this issue is not a consideration of whether this Court may have imposed a heavier penalty if sentencing at first instance but whether it was not open to the judge to impose the penalty he did. A useful starting point is to consider the circumstances of those cases involving youth offenders who have pleaded guilty to attempted murder which were relied upon at first instance and in this appeal as having some comparability.

R v LY

[50] In *R v LY*,[38] the applicant, who was 15 at the time of the offending, pleaded guilty to attempted murder and conspiring to murder and was sentenced to an effective term

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36 *Criminal Code*, s 630(1)(a).

37 [2002] QCA 482.

38 [2008] QCA 76.

of four years detention with release after two years. She contended the sentence was manifestly excessive. This Court varied the sentence by ordering that she be detained for two and a half years and that she be released after 15 months.

[51] Her co-accused, Hockey, a young adult, pleaded guilty to these counts and to armed robbery and was sentenced to an effective term of imprisonment of 10 years.

[52] LY came from a caring, affluent family. Prior to her offending, she had counselling at her private school over her relationship with her parents. When she was 13, she developed a friendship with a male youth who raped her. She made a complaint to police but later withdrew it. She was greatly detrimentally affected by this incident, as was her relationship with her parents. She developed a major depressive disorder and a post-trauma syndrome. She took alcohol and experimented with illicit drugs.

[53] She met Hockey through the internet. He was two and a half years older, had a troubled past and demonstrated behavioural problems throughout his schooling. He used illicit drugs from the age of 14. At 15 his best friend was killed in a motor vehicle accident and he tried to commit suicide. He developed an alcohol problem and became a binge drinker. He worked at a restaurant and used and dealt in illicit drugs. He was diagnosed with attention deficit hyperactivity disorder. A psychiatrist considered him of average intelligence and with an anti-social nature. He falsely told LY that he had been in the air force and was a hit man. In order to impress her he showed her his handgun which was in fact a replica, but which she believed was a working firearm. They began to see each other every second day without the knowledge of her parents. Their relationship developed into an intense sexual one. She ran away from home to be with him, stealing $1,000 from her mother's account.

[54] Her parents became aware of her relationship with Hockey when they tracked her down to a friend's place and took her home. They argued about her relationship with him, confiscated her mobile phone and grounded her. She was bitterly resentful and she and Hockey decided to murder her parents. He said he did not want to use his gun because it did not have a silencer and suggested cutting their throats with a knife. She agreed as long as she did not have to use the knife. She proposed they kill her parents one morning after a night out when they were likely to be affected by alcohol. She arranged for him to come to her home at about 5.30 am. She anticipated funding their life together with money from her parents' bank account. She suggested that he wait behind the bathroom door, put his hand over the mouth of whichever parent entered the bathroom first and then slash their throat with the knife he had brought with him. Hockey tried to implement the plan which was ultimately unsuccessful. The mother heard the scuffle and called the police. All four protagonists waited together for the police to arrive.

[55] LY pleaded guilty at an early time and evidenced a willingness to facilitate the course of justice. She was 15 at sentence and had no prior history of offending. She was sentenced under s 176(3)(b)(i) so that she faced a maximum term of detention of 10 years. This Court agreed with the sentencing judge that the gravity of the offences made the recording of convictions necessary and that a detention order was the only appropriate sentence. The Court referred to "an astonishing number of mitigating factors" including that her mother was uninjured, her father suffered only minor injuries, her youth and her mental state. She experienced significant trauma when sexually assaulted at 13, a matter which could have affected her prefrontal cortex, an important area of the brain in moderating impulses and behaviour. This may have impaired her capacity for judgment. She had

promising rehabilitation prospects and had made substantial improvement while remanded in custody but she needed ongoing professional support for at least two years to maintain her progress. She pleaded guilty at an early time and cooperated with the police. She had insight into the seriousness of her actions and felt guilt and regret. Tendered statements from her parents, references and her prior good history supported her rehabilitative prospects. Her parents had forgiven her, were keen to do everything possible to support her rehabilitation and wanted her to receive a non-custodial sentence. This Court concluded that four years detention was not the least time justified in the circumstances and substituted two and a half years detention.

R v ZTJ

[56] The remaining comparable sentences discussed in this appeal were decisions of sentencing judges in the Trial Division. In *R v ZTJ*,[39] the 15 year old ZTJ pleaded guilty to attempted murder. He was 17 at sentence. He threw a blanket over the head of the female complainant and tried to strangle her. She awoke during the attack but initially was unaware of what had happened. She later found a knife in her bed and reported this to her parents. When she later found out what had happened she was traumatised. But for ZJT reporting what he had done to his youth worker, this the matter would not have come to the attention of police to whom he made admissions. ZJT had a previous offence with sexual connotations involving a knife for which he was on probation at the time. He had demonstrated persistent disturbing behaviour concerning young females. It was to his credit that he desisted of his own motion. He was drunk at the time. The prosecution submitted the appropriate penalty was detention for four years with release after serving 50 per cent but as he had spent two years in custody, consideration should be given to immediate release on a supervised release order. After taking into account pre-sentence and psychiatric reports, the victim impact statement and the mitigating features and after referring to *LY*, the judge determined that the appropriate sentence was three and a half years detention with release after serving 55 per cent, that is, effective from the date of the sentence. It was appropriate to record a conviction. For the breach of the previous probation order, the judge re-sentenced him to three years probation with additional conditions, namely, that he receive treatment, that he refrain from both carrying a knife and using illicit substances and alcohol, and that he submit to drug and alcohol testing and treatment as directed.

R v RJI

[57] In *R v RJI*,[40] RJI, who was 16 years old, telephoned the complainant, a 15 year old young woman, and they arranged to meet. They were sitting on her front steps chatting for about an hour. She was tired and asked him to leave. He wanted her to go home with him but she had school the next day and did not want to. He punched her hard in the right cheek with a closed fist, ordering her to "go and get a jumper now". The punch caused swelling to her jaw (count 1, assault occasioning bodily harm). She screamed that she did not want to go with him. He told her to "shut the fuck up" and took her mobile phone so that she could not text her mother. He ordered her to get on his bicycle. She eventually complied to avoid being hit again (count 2, deprivation of liberty).

[58] He drove her to a bridge where he went through her Facebook page messages and found a message from a young man, S. He punched her in the back of the head,

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39 Unreported, Supreme Court of Queensland, Indictment No 1583 of 2009, Boddice J, 24 March 2011.

40 Unreported, Supreme Court of Queensland, Indictment Nos 31 and 32 of 2013, North J, 18 October 2013.

kicked her in the ribs, winding her, and punched her in the right eye. She screamed, fell to the ground and could not see out of her eye for about 10 minutes. She told him to ring an ambulance. He said, "You're just putting on a big act" (count 3, assault occasioning bodily harm). He continued to yell at her about S and said if she did not change schools he would come after her. He told her to get back on his bicycle and she complied.

[59] He took her to his home where they arrived at about 5.00 am. He told her to wait outside so that no-one saw her. She asked him to leave his mobile phone as she wanted to play games on it while she waited. He had a shower and made breakfast. She used his phone to call her mother to come and get her. Her mother arrived and beeped the car horn. He tried to make the complainant run away with him. He jumped the fence and she feigned an injury. He returned and pushed her towards a garden shed (count 4, common assault). He grabbed her by the hair and dragged her into the shed (count 5, common assault). He pushed her against the wall to hide her from her mother and held his hand over her mouth so she could not speak (count 6, deprivation of liberty). She made noises to attract her mother's attention. He picked up a 25 cm long knife with a serrated blade from the table and held it so that the tip of the blade was touching her stomach, saying, "if you move, I'm going to kill you, I'm going to stab you" (count 7, common assault). The complainant was frightened, grabbed some scissors from a nearby table, stabbed him in the leg, ran to her mother's car and they drove home.

[60] About a week later, she went to her brother-in-law's house at the request of her sister, T. RJI was there. She was angry with T for setting her up and phoned her mother who picked her up and they drove to the complainant's grandmother's house for a family barbeque. RJI arrived to apologise but was not allowed inside. He began to fight another youth. The complainant's mother and grandmother told him to leave. He abused the mother and punched her in the face. She retaliated by punching him. The complainant hid behind a vehicle until the police arrived. When RJI saw the complainant he rushed towards her but the police took him away without charging him.

[61] Later that afternoon, RJI was carrying a knife and told another youth that he was going to bash the complainant. The youth told another young man who told the complainant's mother that RJI had a big knife and was going to the complainant's house to kill her. The complainant's mother phoned police who found RJI hiding in a cupboard in the complainant's bedroom with a cask of wine, an apple and a knife which he attempted to hide (the summary offences of trespass and possession of liquor by a minor).

[62] When the complainant and her mother returned home, they searched the house to be sure RJI was not there, pushed furniture up against the doors and slept together in the lounge room. At about 11.30 pm, RJI banged on the front window and called out to the complainant. He threw rocks at her bedroom window. Her mother telephoned police before leaving for the safety of a relative's home. RJI sent the complainant 30 SMS text messages within one week asking her to get back with him. She replied to only one, explaining that she did not want to be in a relationship and that she wanted to move on. He sent a message to S, telling him that she was his girlfriend and if he saw them together he would bash her. He sent messages to 13 people's Facebook pages in an effort to contact her (count 8, stalking with violence).

[63] About four months later, the complainant was at a party with friends, including S, who was now her boyfriend. At about midnight, the host announced the police were on their way and the party was over. The complainant and her friends walked to a park. About 20 minutes later, RJI, who was on bail, ran towards the group carrying a stick. He called the complainant a "motherfucker". He was not wearing a shirt. S took his t-shirt off to protect the complainant and fight RJI. RJI hit S across the knuckles with the stick, breaking it, and then ran away (count 1, assault occasioning bodily harm while armed). S chased RJI who threw two beer cans at him, but missed. S threw a can back but also missed. Ultimately, RJI ran away. The complainant asked her friends to borrow a phone to call police but they would not let her. Later that night she and S were walking home. They stopped at a park for a drink of water and sat at a table. A friend was looking for her bag and went to a football field to search for it. RJI was there with his friends. He saw the complainant's female friend and yelled at her, calling her a dog for speaking to the complainant. He punched her twice to the back of the head with a closed fist (count 2, common assault). The female friend followed RJI to a set of flats where he took a knife from the sink and threatened to kill her (count 3, deprivation of liberty).

[64] He told her to send an SMS text message to the complainant. She explained the complainant did not have her phone. RJI said that he was going to stab the complainant and asked where she was. She told him that the complainant was at home asleep. RJI said, "I don't care. We are going over and we will wait in the alleyway, I'll stab her and you're going to be the witness." The female friend tried to run away. He told her not to leave and threatened to kill her, pointing the knife at her while they walked towards the complainant's home. As they walked through a park they saw the complainant and S. RJI ran towards them holding the knife. S said, "Hey, what's that for?" RJI said, "I'm going to stab you" and "I'll kill ya" (count 6, threatening violence at night). S ran away to find a stick and RJI ran towards the complainant with the knife. The complainant backed away but RJI punched her in the face and she fell to the ground. He stabbed her with the knife in the stomach, torso and legs. She tried to crawl away. He told her to "get up, get up and walk". She crawled backwards up a small hill. He continued to stab her as she tried to escape. She held her arms up to defend herself and he continued stabbing her in the forearms. She yelled out "stop it, stop it, I'm bleeding, you're going to kill me". A nearby householder heard the screams and armed with a golf club came to the complainant's assistance. When another passer-by ran towards RJI telling him to stop, he ran away (count 8, attempted murder).

[65] The complainant stumbled to the back gate of the park and collapsed. S attempted to cover her wounds with his hands. The householder obtained a sheet and scissors and attempted to bind the wounds. The complainant's female friend assisted him. It was difficult to find the wounds because of the large amount of blood and the complainant began to vomit. The ambulance took her to Townsville Hospital. She had 13 penetrating wounds, one to the abdomen, one to the lateral chest wall, one to the hip, two to the thigh, and eight defensive wounds to her forearms. Two wounds went down to but did not penetrate the muscle. All wounds were treated and sutured.

[66] In sentencing, the judge referred to RJI's previous offending, primarily property offences or burglary but including a previous assault occasioning bodily harm against the same complainant in December 2011 for which he was given probation. His Honour discharged the current probation orders and instead ordered RJI to serve

12 months concurrent detention. The judge noted that counsel were unable to find any comparable cases reflecting RJI's dysfunctional background. The pre-sentence report stated that, despite his low IQ, he had made good progress in rehabilitation on remand and the psychiatric report was guardedly hopeful. The offending was serious and disturbing and the offence of attempted murder called for a very significant sentence despite his youth. The complainant's life was endangered and the offending had had a detrimental impact on her. Taking into account the principles applicable to sentencing youthful offenders, the community interest and the seriousness of the offending, four years detention should be imposed for the offence of attempted murder. The judge imposed lesser concurrent terms of detention in respect of the remaining indictable offences and reprimanded him on the summary offences, recorded convictions and ordered that he be released from custody after serving 50 per cent.

Conclusion on this ground of appeal

[67] To intentionally try to kill another human being is to commit one of the most serious offences under Queensland's *Criminal Code*, attempted murder. Even those sentenced for this offence under the YJ Act must expect stern punishment to reflect the gravely anti-social nature of such behaviour. Whilst *LY*, *ZTJ* and *RJI* are not closely comparable on their facts, like this case they were serious examples of the offence. None of them suggest that the sentence of four years detention to serve 50 per cent imposed here was manifestly inadequate. The sentencing judge rightly concluded that in this case detention was the only sentencing option and a conviction must be recorded. In determining the period of detention to be imposed, the YJ Act requires that the period of detention imposed be for the shortest possible period.[41]

[68] There were extremely serious aspects to this offending. It was premeditated and senseless. The respondent was not suffering from any mental illness and understood the wickedness of his actions. The completely blameless young complainant was a hapless victim of the respondent's irrational, morbid, adolescent fantasies. Miraculously, despite the vicious and sustained nature of the respondent's attack on her, she was not seriously physically hurt although she has suffered PTSD and will no doubt remember this terrifying incident for the rest of her life. It has also had a significant detrimental impact on her parents and younger brother. The offence occurred at the victim's school in the female toilet where she was entitled to feel secure.

[69] On the other hand, the youthful respondent had no prior contact with the criminal justice system. His teachers and parents were unaware of his long history of dark thoughts which progressively became even darker, culminating in this offence. It is frightening that "snuff" films can be so readily accessed on the internet. This case is a stark example of their potentially dreadful effect on troubled teenage minds. The appellant may wish to consider whether legislative changes or increased police resources are needed to assist in the apprehension of those who distribute such evil material.

[70] The respondent was a clever, talented student and a high achiever who had the support of caring parents. He had a low self-image and did not seek assistance for his adolescent turmoils which worsened as he internalised them. It is significant that he voluntarily surrendered to police and since his placement in custody has

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41 YJ Act, s 150(2)(e), sch 1 principle 17.

accepted treatment. He volunteered the shocking and concerning details of his reasons for offending to Dr Harden, knowing they would be placed before the court. He is now progressing well with counselling which he will continue when released into the community under supervision. Dr Harden, the experienced and respected youth psychiatrist who prepared a court report, considers that he is generally of low risk of re-offending, although noting that he will be especially vulnerable at times of emotional crisis.

[71] After balancing the competing contentions of the seriousness of the offence and its impact on the complainant and her family; the interests of the community both in terms of its protection and in the respondent's rehabilitation; and the mitigating features, I am satisfied that the sentence imposed is not manifestly inadequate. I would dismiss the appeal.

ORDERS:

1. Application for leave to amend the grounds of appeal refused.

2. Appeal dismissed.

[72] **MUIR JA:** I am grateful for McMurdo P's careful recitation of the facts and discussion of principle with which I respectfully agree. I also agree with the orders she proposes. I wish, however, to make some additional observations. In my view, the sentence imposed on the appellant was very lenient even allowing for: the early plea of guilty; the fact that the complainant recovered completely and quickly from her wounds (at least physically); and the absence of "a particularly heinous offence" finding.

[73] The offending was planned, the appellant was armed with a knife and his victim was defenceless. The attack was viciously and remorselessly pursued. The complainant escaped death or serious permanent physical injury only by sheer good fortune. The facts of *R v ZTJ* are thus not remotely comparable. The Court in *R v LY* referred to the presence of a great many mitigating factors. That is not the case here.

[74] The offending in *R v RJI* was at least as grave as the appellant's offending, but, in my view, that offender was also treated with particular leniency.

[75] **GOTTERSON JA:** I agree with the orders proposed by Margaret McMurdo P and with the reasons given by her Honour. I agree also with the observations of Muir JA.