SUPREME COURT OF QUEENSLAND

CITATION:	*R v WAZ* [2015] QCA 16
PARTIES:	**R** **v** **WAZ** (applicant)
FILE NO/S:	CA No 125 of 2014 DC No 73 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Beenleigh
DELIVERED ON:	24 February 2015
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2014
JUDGES:	Fraser and Gotterson JJA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal against sentence.** **2. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to thirteen counts on the indictment – where the offences were attempted unlawful use of a motor vehicle with damage (Count 1), armed robbery (Counts 2, 3, 4, 5, 6 & 14), attempted unlawful use of a motor vehicle (Count 7), armed robbery in company (Counts 8 & 10), unlawfully using a motor vehicle (Counts 9 & 11), stealing (Count 12) and fraud (Count 13) – where the applicant was sentenced to nine months' detention for Count 1, to three years' detention for each of Counts 2, 3, 4, 5, 6, 8, 10 and 14, to six months' detention for Count 7, to twelve months' detention for each of Counts 9 and 11 and to seven days' detention for each of Counts 12 and 13 – where all sentences were concurrent and the applicant was ordered to serve 50 per cent of each sentence – where no convictions were recorded – whether the sentences imposed on Counts 2, 3, 4, 5, 6, 7, 8, 10 and 14 were manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR

INTERFERENCE – OTHER MATTERS – where the applicant was a child at the time of the offending but had an adult co-offender – where the sentencing judge used the sentence imposed on the adult co-offender as the starting point for determining the applicant's sentence – whether the sentencing judge erred – whether the applicant has a justifiable sense of grievance arising from a comparison between the period he is required to serve in detention before his supervised release and the period his adult co-offender is required to serve in custody before his eligibility for release on parole

Charter of Youth Justices Principles (Qld), s 1
Criminal Appeal Act 1912 (NSW), s 6(3)
Criminal Code (Qld), s 668E(3)
Penalties and Sentences Act 1992 (Qld), s 9, s 9(2)
Youth Justice Act 1992 (Qld), s 150, s 150(2)(b), s 150(5), s 227, s 227(2)
Youth Justice and Other Legislation Amendment Act 2014 (Qld), s 34

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Kentwell v The Queen (2014) 88 ALJR 947; [2014] HCA 37, followed
R v DAZ [2012] QCA 31, cited
R v Maygar; ex parte Attorney-General (Qld); R v WT; ex parte Attorney-General (Qld) [2007] QCA 310, considered
R v RAO & BCR & BCS; Ex parte Attorney-General (Qld) [2014] QCA 7, considered
R v WAN [2012] QCA 21, considered

COUNSEL: L K Crowley for the applicant
B J Merrin for the respondent

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

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Gotterson JA. I agree with those reasons and with the orders proposed by his Honour.

[2] **GOTTERSON JA:** On 24 April 2014 at the Childrens Court at Beenleigh, the applicant, WAZ, was sentenced on pleas of guilty to 13 counts alleging offences committed between June 2012 and March 2013.

[3] The applicant was 15 and then 16 years of age during the period of offending. He did not act alone in what was series of serious violence and property offences over nine months. One co-offender, Jonathon Peter Prindable was 17 and then 18 years old during the period and the other, Chris Cvetkovski was in his late twenties. Both Mr Prindable and Mr Cvetkovski were sentenced as adults on pleas of guilty prior to the sentencing of the applicant.

[4] The total effective sentence imposed on the applicant was three years' detention, with release after serving one-half of the period. No conviction was recorded as a particular concession to the steps that the applicant had taken towards rehabilitation.

Circumstances of the offending

[5] The offending in Count 1 occurred on 18 June 2012. It involved the applicant breaking into a vehicle parked outside a unit complex at Kingston. The complainant owner noticed a male person sitting in the driver's seat of her vehicle. When challenged, the intruder ran away, but dropped a red necktie which had been kept in the rear pocket of his jeans. The applicant was later identified from forensic analysis of the tie.

[6] Count 2 concerned an armed robbery at the 7-Eleven outlet at the Grange on 25 October 2012. The applicant made plans with Mr Cvetkovski whereby they would stage a hostage situation. The pair entered the store, whereupon the applicant pulled out a large kitchen knife and held it at Mr Cvetkovski's throat. The store attendant was directed to open the secure console and to remain in place while the applicant and Mr Cvetkovski took cash and cigarettes.

[7] The applicant was further charged with armed robbery after an incident at the Lucky 7 Convenience Store at Kuraby on 10 November 2012, at about nine o'clock in the evening. Soon after entering the store, the applicant pulled out a knife about 30 cm long. When the applicant pointed the knife at his neck, the attendant resisted. However, the attendant was overpowered by the applicant and forced to empty the cash register and cigarette cabinets. The applicant then alighted on foot with proceeds of his venture.

[8] Count 4 occurred on 11 November 2012. At about 8.40 pm the applicant entered the Coles Express at Yatala. He claimed that he was blind and needed the attendant's assistance. The attendant declined on the basis that he had to remain behind the counter, but that he would call the manager to help. Having waited for all other customers to exit the store, the applicant drew a gun and aimed it at the attendant. The attendant was instructed to "act normal" and to fill plastic bags with cigarettes and cash. The applicant left the Coles Express with the bags and their contents in a red vehicle driven by Mr Prindable.

[9] The applicant offended again that night (Count 5). At around 10 pm, he entered the Woolworths petrol station at Underwood and followed the attendant around the main counter. As the attendant entered the secured area, the applicant pulled out a gun and pushed the attendant inside. The attendant was then forced to empty the cash register and fill plastic bags with cigarettes. At the same time, the applicant took off a silver crucifix chain that he was wearing and forced it upon the attendant "for luck". Again, the applicant left the store with the bags and their contents and absconded in Mr Prindable's vehicle.

[10] Counts 6 and 7 occurred on 12 November 2012 at the Coles Express, Belmont. There were no other customers in the store when the applicant again pretended to be blind and seeking assistance. When the attendant refused to leave the secure counter area, the applicant approached him, pulled out a handgun and pointed it at the attendant's head. When ordered to do so by the applicant, the attendant opened the door to the secure area, emptied three cash registers and bagged around 50 packs of cigarettes. Count 7 occurred subsequently, when the applicant demanded that the attendant hand over his car keys. The attendant complied. After the applicant had

departed the Coles Express in Mr Prindable's vehicle with proceeds of the robbery, the attendant inspected his own vehicle and noted that the doors had been opened and cigarette packets left in the centre console.

[11] Counts 8 and 9 involved a different type of offending. It occurred on 12 November 2012 around midday. This time the applicant was travelling in Mr Prindable's vehicle. They started to follow the complainant's car, a Toyota Corolla. When the complainant turned off a main arterial road, Mr Prindable's vehicle, described by the complainant as a "fire engine red" sedan, sharply veered in front, blocking the complainant's path. The applicant then got out of Mr Prindable's vehicle brandishing a small, black handgun. He demanded the complainant get out of her car. After she did so, the applicant sat in the driver's seat of her car. He had difficulty starting it. When it did start, the applicant and Mr Prindable drove off in opposite directions.

[12] Counts 10 and 11 also involved an armed hold up of a vehicle. The complainant was driving a friend's Toyota Camry on 13 November 2012. At about 1.45 pm, he noticed a red vehicle behind him flashing its lights. Believing that it was a police vehicle, the complainant pulled over. Mr Prindable manoeuvred his vehicle on an angle blocking the complainant from driving away. The applicant got out of Mr Prindable's vehicle. He opened the complainant's door whilst holding a black handgun. The complainant exited his car. The complainant surrendered his mobile phone to the applicant after being instructed to do so. The applicant then drove off in the complainant's car, in the same direction as Mr Prindable.

[13] Counts 12 and 13 were dishonesty offences related to Counts 10 and 11. With respect to Count 12, the applicant was charged with stealing. When the police recovered the Toyota Camry, it was found that the attached number plates had been stolen. Count 13 involved the applicant filling up the Camry with petrol without paying on two occasions.

[14] The applicant handed himself into police on 14 November 2012. This followed the arrest of Mr Prindable earlier that day in the red vehicle, a Holden which itself had been stolen. The applicant was accompanied by his grandmother. During a formal police interview, the applicant admitted to all counts, except Count 1 for which he was identified by DNA analysis. The applicant was arrested after the police interview and then spent 27 days in custody. He was granted bail on 11 December 2012.

[15] The fourteenth, and final, count of offending occurred while the applicant was on bail on 8 March 2013. At about 8.25 pm, he entered the Kuraby Lucky 7 Convenience Store and requested tobacco products. The attendant kept observing the applicant, noting that his movements had become "quite incessant and that he was looking around the store constantly."[1] When the attendant turned to process the sale at the cash register, the applicant produced a six to seven inch knife. A tussle ensued, in which the applicant overcame the attendant's resistance and forced him to withdraw money from the register. The applicant then let go of the attendant suddenly and ran away, taking money from the register with him.

[16] A fingerprint from the Lucky 7 store led the police to arrest the applicant on 9 March 2013. The applicant again participated in a formal police interview where he

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1 Exhibit 3, Schedule of Facts, AB 77.

confessed to offending after arguing with his family and feeling enraged. He was arrested and remanded in custody. On 30 April 2013, the applicant was again granted conditional bail, having spent a further 52 days in custody.

[17] At a very rough estimate, the applicant's offending involved thefts of about $2,735 in cash and more than $10,000 worth of cigarettes.

Sentencing submissions and remarks

[18] Having outlined the offending and the personal circumstances of the applicant, the prosecutor submitted the following:

> "The greatest guidance, in my submission, in relation to sentence comes from your Honour's own decision and sentence on Jonathan Prindable. In sentencing him your Honour described the conduct as a rampage. It is the case that Prindable was an adult and sentences (sic) pursuant to the provisions of the Penalties and Sentences Act, but in the Crown's submission 17 year olds are not treated very much – very differently to youths like WAZ. While youth enjoys the benefits of that youth because of an acceptance of immaturity being at the root of the offending and generally their offences are indicative of their immaturity, WAZ, while a young person, has engaged in very adult-type offending."[2]

[19] Defence counsel contrasted the culpability of the applicant with that of Mr Cvetkovski and Mr Prindable on the basis that:

> "Fifteen to 19 year olds generally tend to be less experienced at committing offences. At the age of 15, he would've needed some guidance. Cvetkovski at the age of 28 surely offered him that guidance. 15 to 19 year olds tend to commit offences in groups. All of his offending bar two offences are committed in company with other people in some way, shape or form."[3]

[20] The prosecutor also highlighted the changes to the *Youth Justice Act* 1992 (Qld) ("YJA"), whereby the applicant was to be sentenced "… in the context of a sentencing regime that now says a sentence of detention is not… a sentence of last [resort]."[4]

[21] In the course of receiving submissions, the learned sentencing judge rejected defence counsel's proposal of a conditional release order,[5] having stressed that the serious nature of the applicant's repeated offending lifted the situation "into a completely different stratosphere."[6]

[22] The seriousness of the applicant's offending was again highlighted in the course of the sentencing remarks. His Honour particularly referred to the frequency and nature of the offending when he stated:

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2 AB19 L37-AB20 L15.
3 AB25 LL31-37.
4 AB21 Tr1-8 LL5-12.
5 AB31 LL25-31.
6 AB30 L17.

> "It's that pattern of offending, the sheer number of offences, the serious nature of that offending, the relative professionalism of it. I'm afraid that once you get to eight armed robberies I don't see any way that you can any longer be regarded as an amateur, even though there were amateurish aspects to what you did and, in particular, you were never disguised. But there was always a weapon and they were in every case clearly utilised to secure compliance by the victims with the very real threat that they could or would be used if the victims didn't comply. You otherwise have a very, very minor criminal history, some shop goods – taking shop goods away, and it's just extraordinary that you've launched into the big time in the way that you did."[7]

[23] The learned sentencing judge also noted the dearth of authorities at the appellate level involving serious youth offending in such a number, pattern and nature of offences.[8] Without any comparable decisions to assist, his Honour observed that "it seems, then, that I need to look to the penalty imposed on Mr Prindable as a starting point."[9] It was noted that Mr Prindable had been sentenced to six years' imprisonment, with parole eligibility after two years.[10] His Honour further observed that features of the YJA, including reduced maximum penalties and differently structured penalties particularly with regard to the way in which detention is served, also needed to be taken into account.[11] He then sentenced the applicant to three years' detention for each of the armed robbery counts (Counts 2, 3, 4, 5, 6, 8, 10 and 14), to serve one-half of the sentences. Detention for shorter periods was imposed on the other counts. All periods of detention are to be served concurrently.

Grounds of Appeal

[24] By a notice of appeal filed on 21 May 2014, the applicant sought leave to appeal his sentence.

[25] At the commencement of the hearing of the application on 29 October 2014, leave was granted to rely upon the grounds set out in an amended notice of appeal dated 23 October 2014. The grounds as amended are as follows:

1) The learned sentencing judge erred in using the sentence imposed on the adult co-offender Jonathan Prindable as the starting point for determining the Applicant's sentence.

2) The sentences imposed on Count 2,3,4,5,6,7,8,10 and 14 are manifestly excessive.

3) The Applicant has a justifiable sense of grievance arising from a comparison between the period he is required to serve in detention before his supervised release and the period his co-offender Jonathan Prindable is required to serve in custody before his eligibility for release on parole.

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7 AB38 L40-AB39 L5.
8 AB39 LL6-15.
9 AB39 L16.
10 AB39 L16; see also AB107 L10-AB108 L25.
11 AB39 LL23-27.

[26] In both written and oral submissions, counsel for the applicant treated grounds 1 and 3 as related, and addressed those grounds together. It is convenient to treat them in the same manner in these reasons.

Grounds 1 and 3

[27] Although these grounds were addressed together, at the outset, the applicant's counsel identified the central theme of each ground. Ground 1 is referenced to his Honour's use of Mr Prindable's sentence as a "starting point". That, it was submitted, was a "specific error in approaching the sentencing of the applicant".[12] Ground 3 is concerned with "undue weight being placed upon Mr Prindable's sentence … the parity point".[13]

[28] With respect to Ground 1, the applicant's grievance is that by taking Mr Prindable's sentence as a starting point, the "learned sentencing judge unduly restricted his sentencing discretion and imposed a resultant sentence that was not one that individual justice warranted".[14] Specifically, it was submitted for the applicant that this approach had led to a consequential failure to take into account the individual circumstances of the applicant and the legislative principles under the YJA.

[29] In oral submissions, counsel for the applicant accepted that Mr Prindable's sentence was relevant to the applicant's sentence. However, he submitted that its relevance went only "to the extent to which parity principles would enable it to be taken into account."[15] Adopting an observation of a member of the Court, counsel contended that Mr Prindable's sentence was irrelevant in a "positive" sense, that is, in guiding what sentence should be imposed on the applicant. Rather, the appropriate use of it was as a high-water mark to verify that not too high a sentence was to be imposed on him.[16]

[30] Counsel for the respondent submitted that the learned sentencing judge did, in fact, give appropriate weight to the applicant's circumstances and the YJA. She developed the submission by referring to the treatment by his Honour of a number of the applicant's personal circumstances, his rehabilitation and his insight into his offending, as special circumstances justifying the applicant's release from custody after serving 50 per cent of the detention period as opposed to the legislative standard of 70 per cent set by s 227 of the YJA. It was also submitted for the respondent that the use of the term "starting point" was merely an "unfortunate phrase"[17] and that it could be inferred from the transcript of the sentence hearing that there had been only a limited reliance by the learned sentencing judge on Mr Prindable's sentence.

[31] To my mind, the expression "unfortunate phrase" aptly acknowledges the inappropriateness of adopting Mr Prindable's sentence as akin to a standard to be adjusted to reflect the criminality of the applicant's offending, his personal circumstances and the YJA principles. However, insofar as the expression may also have been intended to suggest that the learned primary judge's allusion to the sentence was "in passing" and on that account excusable, I am unable to agree. His Honour's description

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12 Tr1-2 LL36.
13 Tr1-2 LL38-40.
14 Applicant's written submissions [14].
15 Tr1-4 LL1-5.
16 Tr1-7 LL30-45.
17 Tr1-7 LL23-27.

of the starting point as "logical"[18] and "appropriate"[19] in the course of submissions reveal as much the prominence of the role given by him to Mr Prindable's sentence in fixing the applicant's sentence as does the term itself. It was the initial point of reference for fixing the sentence, not merely a checkpoint for parity.

[32] The adoption of Mr Prindable's sentence as the starting point is, on its face, perplexing. It does not reconcile easily with the acknowledgement by the learned primary judge that Mr Prindable was sentenced as an adult; that there was a difference in the type of offending and degree of involvement between the two of them; and that there were YJA considerations applicable to the applicant. In these three important respects, the sentencing considerations for Mr Prindable differed significantly from those for the applicant. There was no basis for close comparability, and no justification for according starting point prominence, if not primacy, to Mr Prindable's sentence. All these factors bespeak error in principle on the part of the learned sentencing judge.

[33] In my view, to have adopted Mr Prindable's sentence as the starting point was erroneous in principle. It overlooked a fundamental consideration, namely, that the sentencing regime for child offenders and that for adult offenders are distinctly different. The important difference has consistently been recognised by this Court. For example, in *R v Maygar; ex parte Attorney-General (Qld)*[20] Keane JA, with whom Williams JA and Mullins J agreed, observed:

> "[57] There could be no justifiable sense of grievance on Maygar's part if he were obliged to serve a longer period in custody than Woodman. That he must serve a longer period of imprisonment is simply the consequence of the application of different sentencing regimes to him and to Woodman: Maygar falls to be sentenced under the law relating to adults and Woodman falls to be dealt with under the laws relating to children. In the sentencing of child offenders, the considerations of leniency and child protection which inform the regime established by the *Juvenile Justice Act* must be observed by a sentencing judge. It may be thought that the drawing of a line in this regard between Maygar and Woodman by reason of the small difference in their ages is arbitrary; but a line has to be drawn somewhere for these purposes. More importantly, the drawing of this line is not a matter of judicial discretion: the line has been drawn by the legislature whose function it is to determine when a person should be dealt with as an adult by the criminal justice system. Maygar can have no legitimate grievance about that."[21]

[34] The line of which Keane JA spoke is the dividing line fixed by the Queensland Parliament to separate two sentencing regimes, each with its own guiding principles. When sentencing a youth offender, a sentencing judge is to take heed of the specific "sentencing principles" in s 150 of the YJA. These principles

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18 AB21 L18.

19 AB22 L31.

20 [2007] QCA 310.

21 Cited in *R v DAZ* [2012] QCA 31 at [44], where White JA acknowledged that the observations of Keane JA also applied to the YJA.

accommodate the youth aspects of offending, rehabilitation and personal circumstances. In this respect, they are distinctly different from the "sentencing guidelines" in s 9 of the *Penalties and Sentences Act* 1991 (Qld) ("PSA"), which apply to the sentencing of adult offenders. By way of illustration, it is a sentencing principle in s 150(2)(b) YJA that "a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community". Also, notwithstanding the recent removal of the guideline that a detention order should be the sentence of last resort from s 9 of the PSA,[22] such caution continues to operate in the youth sentencing regime pursuant to s 150(5) YJA.[23]

Disposition

[35] For these reasons I have concluded that Ground 1 is established. The error of legal principle in exercising the sentencing discretion vitiated the sentencing process.[24] It requires that the applicant be granted leave to appeal his sentence and that the appeal be allowed. Given the success of Ground 1, it is unnecessary to decide Grounds 2 and 3.

[36] In framing the further orders that ought be made, it is necessary to have regard to the terms of s 668E(3) of the *Criminal Code* (Qld). That provision requires that if on an appeal against sentence, the Court is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, then the Court shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

[37] In considering the cognate New South Wales provision[25] in *Kentwell v The Queen*,[26] a majority of the High Court (French CJ, Hayne, Bell and Keane JJ) recently observed that, under the provision, in the case of specific sentencing error enlivening the appellate court's power to intervene, there is a duty to re-sentence "unless in the separate and independent exercise of its discretion, (the court) concludes that no different sentence should be passed".[27]

[38] I now turn to consider the sentence appropriate to the applicant's offending. In doing so, I shall have regard to submissions made in relation to both Grounds 2 and 3.

The appropriate sentences

[39] The seriousness of the applicant's offending cannot be understated. For the most part, the offending (Counts 2 to 13) occurred over a short period of time of about two weeks. As the learned sentencing judge correctly noted, not only was the frequency of the offending of relevance, but also the manner of its execution, particularly its "relative professionalism".[28] As well, planning was evidently involved in most of the offences, either by way of co-operation with co-offenders (for example, in holding Mr Cvetkovski hostage) or by way of a contrived manner of execution (for example, in feigning blindness). There was also, at times, a degree of insensitivity bordering on scorn towards the complainant involved. This was a

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22 Effected by s 34 of the *Youth Justice and Other Legislation Amendment Act* 2014.
23 Which was inserted in the YJA by s 9(2) of the same Act.
24 *House v The King* (1936) 55 CLR 499 at 505.
25 *Criminal Appeal Act* 1912 s 6(3).
26 [2014] HCA 37.
27 At [35], [40]-[43].
28 AB38 L45.

feature of Count 5 when the applicant insisted that the attendant take the necklace with a crucifix.

[40] The commission of Count 14 while the applicant was on bail elevated the seriousness of the offending. Despite having been arrested and spending 27 days in remand for his first series of armed robberies, the applicant was again offending with the same *modus operandi* within less than three months.

[41] It need be acknowledged that the applicant's re-offending on bail is, in some respects, symptomatic of his personal circumstances. The applicant's counsel at sentence outlined his fractured family background in which his parents had separated when he was four years old. She informed his Honour that the relationship between the parents remained acrimonious and vitriolic. This had led to the applicant's moving out of home in the middle of grade 9. As a consequence he had not completed his formal schooling and had fallen under the influence of negative peer associations.[29]

[42] As noted, the learned sentencing judge referred to the dearth of comparable authorities in this Court which might assist.[30] Counsel who appeared on this application confined the cases referred to in submissions to those that had been referred to at sentence.

[43] In submitting for a period of actual detention, the respondent maintained reliance upon the decision of this Court in *R v WAN*.[31] In that case, the child applicant was part of a gang of youths charged with a series of offences, the more serious of which involved burglary and wilful damage, and grievous bodily harm. For most of the offending, the applicant was not identified as the instigator. McMurdo P (Fraser and White JJA agreeing) concluded that the head sentence of three years' detention with release after serving 50 per cent for the burglary and wilful damage was manifestly excessive, particularly in light of the maximum penalty of five years' detention for burglary under the YJA. It was ordered that the sentence for that offence be substituted with a sentence of two years' detention, to serve 50 per cent. A sentence of 18 months' detention to serve 50 per cent on the grievous bodily harm count was undisturbed by the Court.

[44] The applicant, at sentence and before this Court, placed some reliance on *R v RAO & BCR & BCS; Ex parte Attorney-General (Qld)*.[32] The youth offenders there were involved in three separate armed robberies, all committed over two days. Disguises and weapons (batons or knives) were used. The sentencing judge sentenced the applicants to probation or to probation and community service. No detention was ordered and no convictions were recorded. The Attorney-General appealed the sentence on the basis of manifest inadequacy with respect to the failure to impose a period of detention and/or to record a conviction. The appeal was dismissed. The offending in *WAN* was regarded as more serious given that despite the use of weapons, no actual violence was inflicted.[33] The Court considered that it would have been open to the sentencing judge to record convictions and to have ordered detention subject to immediate release. That neither was done did not demonstrate

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29 AB25 Tr1-12 LL10-40.
30 AB39 LL14-15.
31 [2012] QCA 21.
32 [2014] QCA 7.
33 At [42].

manifest inadequacy in sentencing but was explicable as a manifestation of leniency towards youth in sentencing.[34]

[45] The applicant's reliance on that case before this Court was, however, tempered by a realistic acknowledgement that actual detention in his case was both appropriate and likely.[35] Detention for three years with release after 18 months was, it was submitted, "plainly unjust". A sentence of shorter, but unspecified, duration should be imposed "to enable the applicant to return and continue with his rehabilitation as he had demonstrated up until the date of sentence".[36] This latter submission was referenced to the applicant's voluntary participation in the Re Solv program.[37]

[46] This case presents an unusual combination of very serious offending and significant features of mitigation. The maximum sentence under the YJA for armed robbery is 10 years' detention. The features of the offending to which I have referred, the applicant's personal role in it and his re-offending while on bail, strongly suggest that it is in the community's interest in being protected[38] that the applicant be required to serve a period of actual detention. His offending was, in its extent and in the role he took in it, considerably worse than that in *WAN*.

[47] Allowing for the features of mitigation including the applicant's relatively minor criminal history, his co-operation in turning himself in to police, the support given to him by his family, his clear sense of remorse,[39] and his efforts towards rehabilitation, I consider that for Counts 2, 3, 4, 5, 6, 8, 10 and 14 a sentence of three years' detention is appropriate in each case.

[48] Further, pursuant to s 227(2) YJA, I would order that the applicant serve 50 per cent of each sentence. By permitting release at 50 per cent and not the default 70 per cent, the applicant will be afforded the opportunity to continue his rehabilitation in the community sooner. In order to further benefit the applicant's rehabilitation, no convictions ought be recorded.

[49] Under these proposed sentences, the applicant will have to serve 18 months in actual detention, compared with the two years which Mr Prindable must serve before becoming eligible for parole. The applicant cannot be aggrieved on the basis of parity. He was the main perpetrator, particularly in respect of the infliction of threats and violence. His co-offender's role was that of the getaway driver.

[50] As to the other counts, I would endorse as appropriate the same sentences as the learned sentencing judge had imposed. They do not impact upon the total period of detention actually to be served.

Orders

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34 At [43].

35 The applicant's counsel stated that his "complaint" did not concern his Honour's rejection of a conditional release order: Tr1-9 LL28-30.

36 Tr1-9 LL33-36.

37 AB122-123.

38 *Charter of Youth Justice Principles*, s 1.

39 As recognised by the learned sentencing judge (AB36 LL33-35) and the Pre-Sentence Report (AB44).

[51] Given that the sentences which I consider to be appropriate are no different from those imposed at sentence, consistently with *Kentwell*, the appeal against sentence must be dismissed. I would propose the following orders:

1. Grant leave to appeal against sentence.

2. Appeal dismissed.

[52] **HENRY J:** I agree with the reasons of Gotterson JA and the orders he proposes.