SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ma* [2012] QCA 317
PARTIES:	**R** **v** **MA, Qianli** (applicant)
FILE NO/S:	CA No 245 of 2012 DC No 1357 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2012
JUDGES:	Margaret McMurdo P and White JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to unlawful wounding and was sentenced to 18 months imprisonment, suspended after three months with an operational period of 18 months – where applicant's counsel below contended for head sentence of 18 months imprisonment – whether sentence manifestly excessive in all the circumstances CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – PARTICULAR CASES – where applicant pleaded guilty to unlawful wounding – where applicant challenged veracity of Schedule of Facts agreed to below – where applicant's lawyer had taken applicant through Schedule – where applicant had benefit of interpreter and Schedule was explained orally before primary judge – where applicant had been advised his case was not strong – whether applicant's plea of guilty was made in the exercise of a free choice – whether miscarriage of justice

Criminal Code (Qld), s 323(1)
Migration Act 1950 (Cth), s 501

Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited
R v Bob; ex parte Attorney-General (Qld) [2003] QCA 129, cited
R v Cui [2009] QCA 334, considered
R v Frame [2009] QCA 9, cited
R v Kidner [2005] QCA 430, considered
R v Lewis, ex parte Attorney-General (Qld) [2003] QCA 133, considered
R v McDonald [2003] QCA 439, considered

COUNSEL: The applicant appeared on his own behalf, assisted by an interpreter
D R Kinsella for the respondent

SOLICITORS: The applicant appeared on his own behalf, assisted by an interpreter
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with White JA's reasons for refusing this application for leave to appeal against sentence.

[2] **WHITE JA:** The applicant pleaded guilty in the District Court at Brisbane on 28 August 2012 to one count of unlawful wounding. He was sentenced to 18 months imprisonment to be suspended after serving three months with an operational period of 18 months. The applicant is a Chinese citizen who was, at the time of the incident giving rise to the charges – 22 January 2012 – a student enrolled at the South Bank TAFE studying building design. In his application for leave to appeal his sentence he contends that it is manifestly excessive but his written submissions raise other matters relating to his conviction.

[3] He required the services of an interpreter in Mandarin below and in this court, where he appeared for himself.

[4] The applicant was 27 years when he offended and 28 at sentence. He has no criminal history in Australia nor any elsewhere according to Interpol investigations.

[5] The sentence proceeded in accordance with a Schedule of Facts[1] which were not contested in any way by defence counsel. However, in his written submissions, which were translated into English by an accredited translator, the applicant challenges the factual basis upon which the primary judge understood his plea. While not entirely clear, but in light of the applicant's explanation of what he intended by his guilty plea, it is possible that he is seeking to withdraw his plea. In order to consider that possibility, the facts advanced below need to be set out and then the applicant's submissions, both written and made orally at the hearing, can be appreciated.

---

1 AR 20-21.

[6] At about 11.00 pm on 21 January 2012 the complainant, who is also Chinese, attended a karaoke bar at Sunnybank Hills with a group of friends which included the applicant's new housemate. At about 3.00 am the housemate introduced the complainant to the applicant. At about 3.30 am the complainant was outside smoking when the housemate and his friends, including the applicant, decided to leave. The group had a bar tab and they were arguing with the applicant as he did not have any money to pay for his part of the bill. The applicant walked away saying he was going to get money.

[7] The complainant, the housemate and the other friends remained in the carpark waiting for the applicant to return. He did so after about 15 minutes. As he walked up to the group the complainant said, "Hello, let's fix the bill and go home". The applicant was seen to be holding a large kitchen knife in his hand. When he was about a metre away from the complainant he pushed the knife towards the complainant's chest with force in a stabbing motion. The point of the knife hit the complainant in the chest and caused a small cut. The complainant grabbed the blade of the knife with his left hand, pushing it away, causing a small cut to his left arm and a deep cut to his left thumb. The applicant tried to stab the complainant a second time and on this occasion the complainant grabbed the knife with his right hand which caused a cut to that hand. The applicant persisted and the complainant pushed the applicant and knife away, calling for help.

[8] A number of people came to his aid and tackled the applicant to the ground. The complainant could not stop the bleeding in his hands so he was taken to the QEII Hospital. His wounds were treated with suturing, the most serious of which was the wound to the left thumb which was deep enough to show the tendon. The marks from the knife on the complainant's lower right chest were described by the treating doctor as "scratch marks". All of those injuries were photographed and the photographs tendered below.

[9] The applicant also sustained injuries and was taken by ambulance to the Princess Alexandra Hospital having been rendered unconscious initially. He told the examining doctors that he had been drinking heavily prior to being assaulted and had been punched and kicked in various parts of his body. He was able to walk home assisted by his girlfriend who had not witnessed the assault. He was found to have multiple haematomas on his head, several skin grazes and tears on his limbs and some tenderness in his neck. He had no fractures.

[10] The complainant attended the police station on 23 January and made a complaint. Police attended at the applicant's residence and spoke to him. He accompanied them to the police station and participated in an interview with the assistance of an interpreter. He told police that he had attended the bar with his friends and they were all drinking. He said he had drunk two bottles of beer and between five and 10 glasses of Johnnie Walker before 11.00 pm. He had drunk to the point of vomiting and remembers being surrounded by three others asking for money. He thought it was unfair and felt threatened and humiliated because he had been asked to pay $200. He told police he went home but was worried for the safety of his girlfriend whom he had already taken home. He agreed that no one directly threatened his girlfriend. He took a knife and returned, according to the Schedule of Facts, "to get them to back off". He told police he did not intend to stab the complainant's chest but could not remember if the complainant had said something to provoke him. Neither could he recall if somebody had harmed him first and then

he used the knife or if someone was harmed and then the group started harming him. The Schedule of Facts stated:

> "The Crown does not accept that the accused or his girlfriend were threatened, or that the complainant provoked the [applicant]. The use of the knife was unprovoked and unexpected."[2]

[11] The applicant said at this hearing that his lawyer had taken him through the Schedule of Facts.

[12] The Crown prosecutor below said:

> "The Crown, of course, accepts that [the applicant's] perception of things that night was affected by his use of alcohol but it doesn't accept that his girlfriend was directly threatened or that he was directly threatened. … [I]t's accepted from the account of the witnesses that he was obviously drunk on the night. Obviously to the point where his impression of the circumstances was altered."[3]

[13] The applicant's written submissions suggest that:

- Because of language problems, communication with his lawyers "was very limited" (he had an interpreter).
- He carried the knife in anticipated self-defence.
- He used the knife in self-defence.
- The nature of the wounds was not suggestive of defensive wounds.
- In the struggle for possession of the knife the complainant was accidentally injured by the knife.
- He "muddle-headedly" pleaded guilty to "[taking] the initiative to injure someone."

[14] However, in para 6 of his submissions the applicant concludes that after receiving legal advice he understood that he would not "win the appeal". He adds: "However, I still hold that I do not deserve such long-term imprisonment for what I have done." He then adds immediately after that he does not expect a commutation of his sentence but hopes that the conviction would be based on his version of the facts rather than "the story fabricated and made up by the accuser":

> "If the sentence is made by the judge based on the real fact, I will completely accept and follow it, but if the sentence is still made based on the fabricated evidence of the accuser, I will feel dissatisfied and being [sic] wrongfully and unjustly treated."

[15] The applicant said in his written submissions:

> "I did not know that the said guilty plea is my admission that I had intentionally harmed someone. I thought the guilty plea I made was my admission that my carrying a knife with me had caused injuries to someone."

---

2 AR 21.
3 AR 8-9.

The applicant emphasises that he did not have the intention to harm the complainant "or took the action to take the initiative to harm other people". He notes that his housemate had a key to the house where he lived and so he was anxious that they might come to his house. The applicant is aggrieved that in his sentencing remarks the primary judge did not mention the assault on him by several people from the group "before" the incident took place. He explains that he was surrounded, verbally abused and threatened and that they "dragged and pulled [him] for a long time". The applicant says that in that circumstance his intention was to get the money but, noting the knife on the table, he carried it back with him when he returned with the money. He said he was carrying the knife for self-defence.

[16] On his return, the applicant says he took out the knife "trying to warn the other party". However, instead of "stopping and backing away" the complainant rushed in and tried to seize the knife from his hand. During the struggle, "as I was holding the handle of the knife", the complainant grabbed the blade. The applicant says he was frightened that if the weapon was taken from him he would be in an even worse situation. The wounds were caused as he was trying to shake off the complainant.

[17] In the course of this application hearing it was explained to the applicant that the offence to which he pleaded guilty, unlawful wounding under s 323(1) of the *Criminal Code*, did not require him to intend to cause injury to the complainant. It was sufficient, in the absence of a defence of self-defence or of accident, that he did the wounding.[4]

[18] It was also explained to the applicant that should he wish to seek to vacate his plea of guilty then he would need to swear an affidavit deposing to matters which would raise relevant defences which might lead to the respondent obtaining affidavits from his lawyers which would abrogate his legal privilege and the proceedings would need to be adjourned.

[19] The applicant, whilst still expressing disagreement about some of the underlying factual bases for the sentence, said he did not wish the matter to be adjourned nor did he wish to pursue vacating his plea of guilty. He said he wished to complete his TAFE course in December 2013.

Discussion

[20] As the Chief Justice said in *R v Lewis; ex parte Attorney-General (Qld)*:[5]

> "In order to set aside the conviction, the appellant, in seeking leave to withdraw the plea of guilty, must demonstrate that the acceptance of the plea has produced a miscarriage of justice (*R v McKenzie* (2000) 113 A Crim R 534, [31], [32]). As confirmed by *R v Gadaloff* CA 24/1999, the essential question is whether the entering of the plea should be regarded in all the circumstances as attended by such unfairness as to warrant a new trial."

[21] Below, the applicant had the benefit of an interpreter. Although the Schedule of Facts was tendered by the prosecutor, it was only after she had fully explained the

---

4 The applicant had been charged with wounding with intent to cause grievous bodily harm in respect of which a *nolle prosequi* was entered after the applicant had pleaded guilty to the lesser charge of unlawful wounding.

5 [2003] QCA 133 at [14].

circumstances of the offending, consistently with that schedule, orally, to the court. The applicant could have been under no misapprehension as to the basis upon which he had entered his plea and would be sentenced. Further, the applicant was, it may be assumed, of average intelligence and with some understanding of English. He was enrolled in a particular course, it may be assumed in English, and was taking classes to "improve his English".[6] He worked as a waiter in a restaurant at South Bank. The applicant heard the explanation advanced by his counsel on his behalf about how he came to be involved in the act of violence that night which did not depart in essential facts from the Schedule. His counsel explained that the applicant felt threatened and that some pressure was being put on him. But he also told the court that the applicant: "… does accept fully the intolerable nature of such conduct and the consequences that are likely to follow."[7] His counsel also informed the court that the applicant had suffered "extra-curial punishment" in as much as he had to be taken to hospital by ambulance as he had been knocked unconscious by members of the group and was treated for cuts and bruises.

[22] The witness statements given to police are not in the record as the agreement to plead on specific facts meant that the sentence was, as to the facts, largely uncontentious. It may be assumed, however, that they are consistent with the account put forward by the prosecutor. The photographs of the complainant's injuries support the prosecution case. The applicant said his girlfriend approached a senior barrister who looked at the materials and advised that there were no prospects of success.

[23] In the absence of any sworn evidence or intention to seek to provide it (and its nature) the applicant's submissions do not give rise to any concern that his plea of guilty was not made in the exercise of a free choice and there has been no miscarriage of justice.[8]

Sentence application

[24] Although the applicant seems to have resigned himself to his sentence, it is appropriate to review it. The prosecutor submitted for a range of 18 months to two years with some actual custody. She referred the primary judge to *R v Kidner*[9] and *R v Cui*.[10] Defence counsel submitted for a head sentence of 18 months with an immediate parole release order to take account of the mitigating circumstances. He particularly relied on observations by Keane JA (as his Honour then was) in *Cui* to support an immediate parole release order. His Honour had made the comment in the course of allowing an appeal against sentence: "[t]o the extent that a period of actual custody was arguably warranted …". Defence counsel seized on this to argue that not all instances of wounding with a knife required the imposition of actual custody. The primary judge considered that the circumstances in *Cui* were less serious than the case before him.

[25] In *Cui* the offender pleaded guilty to one count of unlawful wounding. He was sentenced to two years imprisonment suspended after six months with an operational period of two and a half years. The court set aside that sentence and,

---

6 AR 12.
7 AR 12.
8 *Meissner v The Queen* (1995) 184 CLR 132 at 141.
9 [2005] QCA 430.
10 [2009] QCA 334.

in lieu, sentenced the offender to 18 months imprisonment with a parole release date being the date of hearing, that was, after serving two months in actual custody.

[26] That offender was born in China and was 25 years at the time of the offence and 26 at sentence. He had no previous convictions and was in employment when sentenced. Character referees spoke highly of him. He made a personal apology to the complainant; they remained friends; he had paid him $3,000 as compensation for the injury. The facts were that approximately two years before the sentence hearing the complainant knocked on the offender's door seeking repayment of a small sum of money. The offender told him to go away but the complainant began to punch and kick the door. Ultimately the offender emerged armed with a knife, put it to the complainant's throat saying that he would cut him. He then cut the complainant's left upper arm with the knife. He threatened a flat mate with the knife and was forced back into his bedroom. Later in the evening he went downstairs with the knife calling out that he would give the complainant back his money and drove away. He was stopped by police and arrested. He co-operated, although he made later claims against the complainant and asserted that the knife was not sharp. The major wound suffered by the complainant was five centimetres long and quite superficial but did require stitches.

[27] Keane JA referred to *R v Kidner*[11] where Chesterman J (as his Honour then was) said offences of wounding inflicted by a knife were to be punished by custodial sentences even where the offender was young, is a first offender and otherwise of good character. After considering the facts in *Kidner*, Keane JA concluded that the sentence did not sufficiently recognise "the very minor nature of the wounding … and the compelling considerations in mitigation of sentence …" and said:

> "That a custodial sentence was imposed below reflects the seriousness with which wounding with a knife is regarded by the courts. But the concern of the courts as to the use of the knife cannot be allowed to overwhelm other considerations such as the very minor nature of the wounding which occurred here, the strong evidence of remorse, the offender's previously good record and the absence of any reason to apprehend a risk that he will re-offend in this way."[12]

Then his Honour said:

> "To the extent that a period of actual custody was arguably warranted, I considered that the period served by the applicant to the date of the hearing in this Court was sufficient."[13]

[28] The primary judge correctly identified the present facts as more serious than those in *Cui* if for no other reason than that the injuries were more serious and the persistence more. There were the added mitigating factors in *Cui* of clearly demonstrated remorse and the compensation which had been paid to that complainant.

[29] *R v Kidner*[14] concerned a young Aboriginal offender aged 22. After a day drinking he and his brother had an argument about the provision of further alcohol.

---

11 [2005] QCA 430.
12 At [21].
13 At [21].
14 [2005] QCA 430.

The brother refused to find any more and the offender walked to the kitchen, armed himself with a small kitchen knife and stabbed his brother on the left side of the abdomen. The wound was about three centimetres in length and described as shallow. It required some suturing and treatment at the local hospital. There were minor complications and the complainant required antibiotics and further treatment. The offender had no prior criminal history and was in fulltime employment. He had the support of his family and his complainant brother submitted that he should not be sent to prison. He pleaded guilty to one count of unlawful wounding and was sentenced to two years imprisonment suspended after three months with an operational period of two years. Chesterman J said:

> "Given the attitude of the Courts to offences of this type, it cannot be said that to require the applicant to spend anytime [sic] in prison would be manifestly excessive. That being the case, it cannot be argued with success that a requirement to spend a further three weeks in prison is manifestly excessive."

[30] By the time that application was heard the offender had served most of the three months imprisonment and was due to be released in three weeks. The President, agreeing, said that the knife was described only as small and the wound as shallow. Although the complainant had reconciled with the offender by the time of sentence, her Honour noted that the primary judge "rightly considered that deterrence was an important aspect of the sentencing process on the facts of this case".[15] Her Honour noted that the two year sentence could have been fully suspended or a lengthy period of community service could have been imposed but the sentence which was imposed was not outside the sound exercise of a sentencing discretion.

[31] Mr Kinsella, for the respondent, also referred to *R v McDonald*.[16] That was an application for an extension of time in which to seek leave to appeal a sentence of three years imprisonment suspended after 18 months in respect of a conviction after a plea of unlawful wounding. The complainant and the offender became engaged in a consensual fight over a disturbance begun by the offender. The fight involved others. During the fight the complainant was engaging another man when he was stabbed in the back by the offender who had obtained a knife from a house into which he had run during the fight. The wound was substantial, penetrating to a depth of four centimetres and of 7.5 centimetres in length. The knife broke during the attack which did not penetrate the lung but only because of the complainant's size. The offender eventually surrendered but gave a self-serving description of what had occurred which was contradicted by other witnesses and eventually pleaded guilty. The offender was an illegal immigrant from Papua New Guinea and it was expected that he would be deported at the expiration of his sentence. He was sentenced on the basis that he had no previous convictions; had a good work record; was well thought of by those who knew him and that the offence was out of character because of over consumption of alcohol. He was said to be remorseful. The court varied the sentence because no tangible benefit had been given for his co-operation by his plea and the three year sentence was suspended after 12 months.

[32] The head sentence imposed by the primary judge here was that submitted for by the applicant's counsel. In that circumstance it is difficult for the applicant to contend

---

15 At reasons p 4.

16 [2003] QCA 439.

for something less.[17] Requiring the applicant to serve some actual period in custody reflected the seriousness of the offending in taking a large kitchen knife from home, back to the group and producing it in the circumstances in which the quite serious wounds were sustained by the complainant. The applicant's gross intoxication was noted as the probable cause of this dangerous conduct. Even if the situation was more as perceived by the applicant, he produced the knife and used it. The sentence imposed was still within the range of a sound sentencing discretion. The matters in mitigation, being co-operation with police; no criminal history; otherwise good character; an early plea; and the fact that he, too, had sustained injuries in the altercation, were reflected in the suspension at three months instead of six months. In all of those circumstances it cannot be said that the sentence was manifestly excessive.

[33] One further matter needs to be mentioned. The applicant said his student visa expired in December 2013 at the completion of his course and he was desirous of completing his course. The consequences of a sentence of imprisonment on his student visa were not been raised before the sentencing judge. Section 501(2) of the *Migration Act* 1958 (Cth) provides that the Minister may cancel a visa granted to a person if:

> "(b) the person does not satisfy the Minister that the person passes the character test."

The "character test" is not passed if the person has a substantial criminal record as defined by s 501(7). That subsection provides that a person has a substantial criminal record if :

> "(c) the person has been sentenced to a term of imprisonment of 12 months or more."

[34] It is a matter for the discretion of the Commonwealth authorities as to whether or not the applicant's student visa is cancelled before it expires in December 2013. In *R v Bob; ex parte Attorney-General (Qld)*[18] the court observed that it was impermissible to fashion a sentence which would not otherwise be considered appropriate solely to circumvent the provisions of the *Migration Act* insofar as those provisions relate to the cancellation of a visa.

[35] I would refuse the application to appeal the sentence.

[36] **DAUBNEY J:** I respectfully agree with White JA.

---

17 *R v Frame* [2009] QCA 9.

18 [2003] QCA 129.