NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Pyke***, 2013 NSCA 61

Date: 20130510
Docket: CAC 394824; CAC 395341
Registry: Halifax

Between:

Cordelle Alvin Pyke

Appellant/Respondent

v.

Her Majesty the Queen

Respondent/Appellant

Judges:	MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A.
Appeal Heard:	April 2, 2013, in Halifax, Nova Scotia
Held:	Appeal against conviction is dismissed and, subject to recalculating the remand credit, the appeal against sentence is dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A. concurring
Counsel:	Luke A. Craggs, for the appellant/respondent Mark Scott, for the respondent/appellant

Reasons for judgment:

[1] In the Winter of 2011, Mr. James Sprague was attacked outside his mother's apartment and stabbed several times by a gang of young men. The Crown alleged that the appellant, Cordelle Alvin Pyke, was one of the attackers and inflicted one of the wounds. A Nova Scotia Supreme Court jury agreed and convicted him of several serious offences, including attempted murder. He was sentenced to five years in prison, less credit for time served. Mr. Pyke now appeals this verdict, asserting that it is unreasonable. Meanwhile, the Crown appeals the sentence, asserting that it is too lenient.

[2] Aside from correcting a mathematical error with the sentence calculation, I would dismiss both appeals.

BACKGROUND

[3] These two men lived across the street from each other on Evans Avenue in Halifax's Fairview district. Several days before the attack, Mr. Pyke confronted Mr. Sprague, on the street near their homes, in an attempt to collect a $40 drug debt. At the time, Mr. Pyke was carrying a cut-off hockey stick and accompanied by his dog. The dog chased Mr. Sprague who, in response, stabbed the dog and apparently smashed a window in the Pyke home. This prompted both the dog and Mr. Pyke to retreat.

[4] Meanwhile, Mr. Sprague's older brother Jason had been home on vacation from Saskatchewan. He attempted to diffuse the situation by agreeing to look after the drug debt, the vet bills and the smashed window. So, from the Sprague brothers' perspective, the matter appeared to have been settled. Subsequent events would prove them wrong.

[5] Fast forward to February 5th, 2011. Jason was still home on vacation. He and James had time on their hands. So they were driving around in Jason's car, after having smoked some dope and taken some *Ecstasy*. Jason was driving. Their mother, during a cell phone call, reported that she needed some milk. So the two men headed to the nearby Superstore. Upon leaving the store parking lot, James spotted the appellant in the passenger seat of his brother Tereeko's car. Tereeko

Pyke was driving. There were others in the back seat but James did not recognize them.

[6] As the Sprague brothers headed home with the milk, the Pyke car followed. James was nervous. Jason parked his car in front of his mother's place and went inside to deliver the milk while James waited in the car. The Pyke brothers then simply drove into their own driveway and parked in their normal spot behind their apartment building. This provided James with some temporary relief. However, that was to be short-lived. Suddenly he saw three Pyke brothers and others heading towards his car. Here is how James explained it to the jury:

> **A.** Yeah, he [Jason] went in -- he went inside to drop off the milk and after he got let through the doors and I couldn't see him anymore, then six or seven guys, including the four that stabbed me, Tylor McInnis, Cordelle Pyke, Kellen Pyke, Teereko Pyke, they were all there and two or three other people were there.
>
> And they come around both sides of 24 Evans, their building, which is right across the street. I seen three or four guys come from one side of the building and three or four guys coming from the other side of the building, and they're all walking towards me.
>
> And once they start -- once I see that they're not going nowhere near their building, that they're heading towards me, then I started to roll up the window and lock the doors.
>
> . . .
>
> **Q.** Who do you see outside of the car?
>
> **A.** I see Teereko Pyke. I see Cordelle Pyke. I see Kellen Pyke. And I see Tylor McInnis. And I see other faces which I can't identify.
>
> . . .
>
> **Q.** Where's Cordelle?
>
> **A.** He's -- him, along with Tylor McInnis and Kellen and the other guys that I don't know who they are, they're all walking together towards the car.
>
> **Q.** Okay. Did you get out of the car?

A. No, I didn't. Not -- not at that point. Not at that point and I didn't get out of the car. At that point I was thinking, "This is the safest spot for me to stay."

And then once they realized that I wasn't going to get out of the car then I heard Teereko and Kellen say, "Get something for me to break this fuckin' window with." And then —

Q. Okay. Where's Cordelle?

A. Cordelle's at the back -- the back window of the passenger side where I'm sitting. He's at the back window.

Q. How far is he away from you?

A. If I'd rolled down the window I could probably touch him.

Q. What do you see when you look back there?

A. I see six or seven guys trying to bust the windows out of my brother's car.

Q. When you say you saw Cordelle, if you rolled down the window you could touch him, how do you know it's Cordelle?

A. Because I could clearly see the tattoo on his face. I know what he looks like. It's just like I could tell that Tylor McInnis was there, just like I could tell that Kellen was there and just like I could tell that Teereko was there.

[7] James then explained why he did not simply drive away:

A. I thought about that -- I still think about that. But when there's six or seven guys beating the windows out of your car and you're looking around scared, like I can't say why I didn't. I should have.

[8] Once the attackers managed to break a car window, James decided to make a run for his apartment door, where Jason was waiting. He did not make it:

Q. So now the window got smashed. What do you do next?

A. Then I think, "Do I feel like sitting in this passenger seat and letting these guys kill me where I sit?" And I looked towards my building and I see my brother standing there at the lobby. And he sees what's going on. And he's standing there with the door open.

So I jumped out of the car and I tried to make a run for the door. I jumped down over a little ledge there that was -- there's two little ledges go -- there's three steps and two ledges on each side of my steps.

I jumped out of the car and I tried to jump down over that. And as I was jumping over it, Teereko caught me by the hood.

. . .

Q. Do you see where Cordelle is?

A. Cordelle's running towards me along with the rest of them. They were all just trying to get hold of me before I made it to this door here where my brother was standing.

Q. Did Cordelle do anything to help you?

A. No. As soon as Teereko caught me, they all started punching and kicking and throwing me into these walls here.

[9] Then the knives came out, with brother Kellen Pyke being the first to stab, inserting the blade into his victim's chest:

A. ...They tried to throw me face first into the cement. But somehow I managed to get myself up over the wall a little bit and I kind of caught myself on top of the wall. And then I stood back up and I turned around.

Q. Who did you see when you turned around?

A. I turned around and I see Kellen standing there and I see him pull out a knife. And then I look in the other direction and I see Tylor McInnis pulling out a knife.

And I looked at the other side and I see Cordelle pulling out a knife, and I see Teereko with a knife. And I went to hit Kellen with my left hand. And as I went to do that, he caught me right in the chest there with his knife.

Q. How far away is Cordelle when you see him with a knife?

A. They're all within arm reach. They're all standing there punching and hitting me and attacking me. They're all within reach.

[10] Others then followed suit, stabbing their victim several more times before throwing him through a window and leaving him for dead. As James described to the jury, Cordelle was one of the stabbers:

Q. And where was Cordelle standing in relation to your back?

A. He was standing somewhere in my back side. Like I told you, there was five or six guys running around me, stabbing me. He was somewhere in the back side. Once I got —

Q. Which back side? The left back, your right back?

A. I'm not sure whether he was in the left back, right back. He could have reached me from any angle. I know he put a knife into me. I saw him with it in his hand, so —

. . .

But like I told you, I can't tell you exactly what order or exactly who stabbed me where. But I can tell you that these guys all had knives in their hands and I can tell you I have seven stab wounds. One guy didn't do that when there's five or six guys with knives. It's ---

Q. How long did the stabbing last?

A. From after they threw me into that wall and I stood up and saw the knife in Kellen's hands it took them probably 30 seconds to put seven holes in me and to throw me through that door.

[11] On cross-examination, James insisted that Cordelle had stabbed him:

Q. And you've told us about the – when Kellen stabbed you in the chest. Are you able to attribute the other stab wounds you received to any other people?

A. No. I know they all -- they all were swinging their knives at me. I can't say who stabbed me where from there.

Q. Can't tell who stabbed you where?

A. I can't tell which ones was from who, no. I went into shock after I got stabbed that seriously in my lung.

Q. Okay. And on this issue of Cordelle, you're not able to say whether or not Cordelle stabbed you?

A. I know that he stabbed me. I don't know when. I know that —

Q. How do you that he stabbed you, if you went into shock and don't remember?

A. Because I seen him swinging. I don't -- I seen them swinging the knives at me. I don't know what – I know he hit me. I can't remember which hole it was. I wasn't concerned about that.

Q. Okay. So you're saying you remember —

A. I remember seeing —

Q. --- him stabbing, you just can't remember where?

A. I remember seeing – I remember seeing him have a knife in his hand and looking back and seeing him swing the knife and being stabbed.

Q. So I guess you're able to attribute or you're able to put a knife in Cordelle's hand, from what you're saying?

A. Yes, there was a knife in his hand.

Q. And today you're able to tell us that he stabbed you, you just don't know which one?

A. Yes.

[12] During the attack, brother Jason had been trying in vain to get into one of the apartment units to call for help. When the mob left, Jason rushed his brother into his car and headed for the hospital. James was bleeding profusely and they used their shirts to try to limit the flow. They got as far as a nearby pizza shop where an ambulance met them and took James the rest of the way to the hospital.

[13] Fortunately for all involved, James survived. He was initially hospitalized with extensive bleeding and a collapsed lung and then, after returning home, was re-hospitalized due to complications with his recovery. However, aside from some minor lingering effects, he has essentially recovered from his injuries.

ISSUES

[14] It is important to note from the outset that Mr. Pyke, in appealing his conviction, takes no issue with trial Justice Felix A. Cacchione's charge or any of his rulings. Instead he highlights two aspects of the Crown's case that he says coalesce to make these jury verdicts unreasonable. Firstly, he asserts that the victim completely lacked credibility. Here he presents a litany of concerns ranging from Mr. Sprague's extensive criminal record to his questionable courtroom antics. In this regard, Mr. Pyke also asks us to consider the judge's remarks (in the absence of the jury) where he too questioned James Sprague's credibility and in fact expressed unease with the verdicts. The Appellant also challenges brother Jason Sprague's credibility.

[15] Secondly, Mr. Pyke challenges the evidentiary foundation for these verdicts. Specifically, the judge instructed the jury that they would have to be satisfied that Mr. Pyke actually stabbed Mr. Sprague, in order to find him guilty. In other words, their only path to conviction was to find him guilty as a principal, as opposed to a party, to this offence. Yet there was no evidence of Mr. Pyke actually inserting a knife. Instead the jury would have to infer this from all the circumstances including Mr. Pyke's presence, wielding a knife. Mr. Pyke insists that this inference was unreasonable in the circumstances.

[16] In appealing the five-year sentence, the Crown advances two main arguments. Firstly, it asserts that the judge allowed his unease about the verdict to taint his approach to sentencing and that this led to errors in principle. Alternatively, even without an error in principle, the Crown insists that the

sentence is simply demonstrably unfit and should be set aside. It recommends, instead, a sentence of eight to ten years. It also highlights an apparent mathematical error regarding the judge's credit for remand time. As I will come to explain, the Crown is correct on this last score.

[17] When considering each of these issues, I will initially identify the applicable standard of review. I will therefore approach the issues as follows:

1. The reasonableness of the verdict
    a. Standard of review
    b. The Sprague brothers' credibility
        i. Generally
        ii. The judge's expressed concerns
    c. The sufficiency of the evidence
2. The appropriateness of the sentence
    a. Standard of review
    b. Alleged error in principle
    c. The fitness of the sentence
    d. Credit for remand time

ANALYSIS

The Reasonableness of the Verdict

a. Standard of Review

[18] Going back over 25 years to the Supreme Court of Canada's ruling in **R. v. Yebes**, [1987] S.C.J. No. 51 at ¶ 23, an appeal court's role in assessing a jury verdict has been clear. Specifically, it should be respected provided it "is one that a properly instructed jury acting judicially, could reasonably have entered".

[19] However, as the court in **Yebes** also confirms, our role involves more than a sufficiency of evidence analysis. Instead, we must carefully consider all the evidence in applying this test:

> ¶25 ...The function of the Court of Appeal, under s. 613(1)(a)(i) of the Criminal Code, goes beyond merely finding that there is evidence to support a conviction. The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence. In the Court of Appeal, the majority clearly found that there was sufficient evidence to justify the verdict and both Macdonald and Craig JJ.A. rejected all rational inferences offering an alternative to the conclusion of guilt. It is therefore clear that the law was correctly understood and applied.

See also **R. v. Biniaris**, [2000] S.C.J. No. 16, at ¶ 38 and 39.

[20] Within the past month, the Supreme Court of Canada in **R. v. W.H.**, 2013 SCC 22 confirmed this approach. In the process, Cromwell J., for a unanimous court, cautioned against an appeal court meddling by acting as a "13th juror":

> ¶27 Appellate review of a jury's verdict of guilt must be conducted within two well-established boundaries. On one hand, the reviewing court must give due weight to the advantages of the jury as the trier of fact who was present throughout the trial and saw and heard the evidence as it unfolded. The reviewing court must not act as a "13th juror" or simply give effect to vague unease or lurking doubt based on its own review of the written record or find that a verdict is unreasonable simply because the reviewing court has a reasonable doubt based on its review of the record.
>
> ¶28 On the other hand, however, the review cannot be limited to assessing the sufficiency of the evidence. A positive answer to the question of whether there is some evidence which, if believed, supports the conviction does not exhaust the

> role of the reviewing court. Rather, the court is required "to review, analyse and, within the limits of appellate disadvantage, weigh the evidence" (*Biniaris*, at para. 36) and consider through the lens of judicial experience, whether "judicial fact-finding precludes the conclusion reached by the jury": para. 39 (emphasis added). Thus, in deciding whether the verdict is one which a properly instructed jury acting judicially could reasonably have rendered, the reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury's conclusion conflicts with the bulk of judicial experience: *Biniaris*, at para. 40.

[21] Like here, the issue at trial in **W.H.** involved the jury's assessment of the complainant's credibility. As Cromwell J. explains, this issue, falling squarely within the jury's domain, does not easily lend itself to appellate court second guessing:

> ¶30 The traditional test for unreasonable verdict applies to cases such as this one in which the verdict is based on an assessment of witness credibility. This was affirmed, in the context of a judge-alone trial, in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 131. However, in applying the test, the court of appeal must show great deference to the trier of fact's assessment of witness credibility given the advantage it has in seeing and hearing the witnesses' evidence: *W. (R.)* at p. 131.
>
> ¶31 This point was underlined in *R. v. C. (R.)*, [1993] 2 S.C.R. 226, also a judge-alone case, in which the Court approved the dissenting reasons of Rothman J.A. in the Court of Appeal: (1992), 49 Q.A.C. 37. Rothman J.A. noted, at para. 16:
>
> > Credibility is, of course, a question of fact and it cannot be determined by fixed rules. Ultimately, it is a matter that must be left to the common sense of the trier of fact . . . .
>
> ¶32 This counsel of caution applies with particular force to verdicts reached by juries. In *R. v. François*, [1994] 2 S.C.R. 827, McLachlin J. (as she then was) reiterated that the general rule enunciated in *Yebes* "also applies to cases where the objection to the conviction is based on credibility – where it is suggested that testimony which the jury must have believed to render its verdict is so incredible that a verdict founded upon it must be unreasonable": pp. 835-36. There are a number of points in *François* that are particularly relevant to this case:
>
> 1. It is for the jury to decide, notwithstanding difficulties with a witness's evidence, how much, if any, of the testimony it accepts. As McLachlin J. put it, at p. 836:

> More problematic is a challenge to credibility based on the witness's alleged lack of truthfulness and sincerity, the problem posed in this appeal. The reasoning here is that the witness may not have been telling the truth for a variety of reasons, whether because of inconsistencies in the witness's stories at different times, because certain facts may have been suggested to her, or because she may have had reason to concoct her accusations. In the end, the jury must decide whether, despite such factors, it believes the witness's story, in whole or in part.

2. Credibility assessment does not depend solely on objective considerations such as inconsistencies or motives for concoction. As McLachlin J. said in *François*, at pp. 836-37:

> [Credibility] turns not only upon such factors as the assessment of the significance of any alleged inconsistencies or motives for concoction, which may be susceptible of reasoned review by a court of appeal, but on the demeanour of the witness and the common sense of the jury, which cannot be assessed by the court of appeal. The latter domain is the "advantage" possessed by the trier of fact, be it judge or jury, which the court of appeal does not possess and which the court of appeal must bear in mind in deciding whether the verdict is unreasonable: *R. v. W. (R.)*, *supra*. [Emphasis added.]

3. The jury is entitled to decide how much weight to give to factors such as inconsistency and motive to concoct. Particularly where the complainant offers an explanation for inconsistencies, the jury may reasonably conclude that those inconsistencies lose "their power to raise a reasonable doubt with respect to the accused's guilt": *François*, at p. 839. Again in François, at p. 837, the Court said this:

> In considering the reasonableness of the jury's verdict, the court of appeal must also keep in mind the fact that the jury may reasonably and lawfully deal with inconsistencies and motive to concoct, in a variety of ways. The jury may reject the witness's evidence in its entirety. Or the jury may accept the witness's explanations for the apparent inconsistencies and the witness's denial that her testimony was provoked by improper pressures or from improper motives. Finally, the jury may accept some of the witness's evidence while rejecting other parts of it; juries are routinely charged that they may accept all of the evidence, some of the evidence, or none of the evidence of each witness. It follows that we cannot infer from the mere presence of contradictory details or motives to concoct that the jury's

> verdict is unreasonable. A verdict of guilty based on such evidence may very well be both reasonable and lawful. [Emphasis added.]
>
> 4. To sum up, the reviewing court must be deferential to the collective good judgment and common sense of the jury. As stated in *François*, "the court of appeal reviewing for unreasonableness must keep in mind . . . that the jury may bring to the difficult business of determining where the truth lies special qualities which appellate courts may not share": p. 837.

Cromwell J. concludes with this cautionary note for appeal courts:

> ¶33 *R. v. Burke*, [1996] 1 S.C.R. 474, and *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, while judge-alone cases, further underline the great deference which must be shown by the appellate court to the trial court's assessment of credibility. In the latter case, Deschamps J., for the majority, reiterated the applicable principle as follows:
>
> > Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7). [Emphasis added; para. 10.]
>
> ¶34 Perhaps the most useful articulations of the test for present purposes are those found in *Biniaris* and *Burke*. In the former case, Arbour J. put it this way: ". . . the unreasonableness . . . of the verdict would be apparent to the legally trained reviewer when, in all the circumstances of a given case, judicial fact-finding precludes the conclusion reached by the jury": para. 39 (emphasis added). In the latter, Sopinka J. concluded that a verdict based on credibility assessment is unreasonable if "the trial court's assessments of credibility cannot be supported on any reasonable view of the evidence": para. 7 (emphasis added). While appellate review for unreasonableness of guilty verdicts is a powerful safeguard against wrongful convictions, it is also one that must be exercised with great deference to the fact-finding role of the jury. *Trial by jury must not become trial by appellate court on the written record*. [Emphasis added.]

[22] With this guidance, I now turn to the appellant's attack on the Sprague brothers' credibility.

b. The Sprague Brothers' Credibility

i. *Generally*

[23] As noted, Mr. Pyke raises a litany of concerns about Mr. James Sprague's credibility. He laid them out in detail in his factum:

> 41. The Appellant submits the following is a summary of the list of shortcoming with James Sprague's testimony:
>
> i. His consumption of marijuana "mostly everyday" (AB Vol. III, page 327, lines 1-17, 363).
>
> ii. His use of MDMA ["Ecstasy"] and his evasive, inconsistent answers about how frequently he used the drug and how many times he used it in the days before he was stabbed (AB Vol III, page 328, pages 572-593). He admitted being under the influence of MDMA at the time he was stabbed (AB Vol. III, page 637).
>
> iii. His criminal record for offenses of dishonesty and breaching court orders or promises made to courts (AB Vol. III, pages 331-334, pages 463-467).
>
> iv His habit of carrying a "flip knife" (AB Vol. III, pages 349-350).
>
> v. Unilaterally removing his shirt in court to demonstrate where the scars from the stab wounds were located (AB Vol. III, page 408).
>
> vi. Incorrectly believing the book of photographs taken on February 15, 211 depicting his injuries (Exhibit 2) was taken "months after the fact" (AB Vol. II, page 430; AB Vol. V pages 1202-1218).
>
> vii. In the course of his direct examination he was asked to identify the jeans he had been wearing on the night in question. He found a two dollar coin in one of the pockets and asked if he could keep it. (AB Vol. III pages 441-442).
>
> viii. On two occasions court broke early so he could review transcripts of his interview with police and his preliminary inquiry testimony. On both occasions, when asked he testified he had only read part of the transcripts (AB Vol. III 477, 681-682).

ix. While waiting for court to open on January 12, 2012 he threw a water bottle at Tereeko Pyke in the waiting area outside of the court. He said he wanted to "hit Tereeko in the face." At the time he was under oath and bound by two recognizances to keep the peace and be of good behavior (AB Vol. III, p. 498-500).

x. Prior inconsistent statement about the number of times he had purchased marijuana from the Appellant. (AB Vol. III, p. 509-515).

xi. Prior inconsistent statements between what he testified to in court regarding the "dog incident" and what he told others through text messages shortly after the fact. (AB Vol. III, pages 552-556, pages 563-566).

xii. Prior inconsistent statement about the number of attackers carrying knives (AB Vol. IV, page 687).

xiii. Prior inconsistent statement about his level of certainty the Appellant produced a knife (AB Vol IV, p 689-690). At pages 692-693, a portion of the transcript where the investigator appears to lead him on this subject is put to him, and he adopts what the investigator tells him both in the interview, and the trial.

xiv. In a photo lineup, he incorrectly identified an uninvolved third party as Tyler McInnis (AB Vol IV p, 730-754; AB Vol V p. 1239-1288).

42. There were times throughout his testimony where James Sprague was argumentative with both counsel and Justice Cacchione chastised him a number of times. Over a lunch break, he approached Crown counsel and advised he wanted to speak to the judge. This exchange is recorded (AB Vol IV, pages 762-764). This appears to be the exchange in which James Sprague complains his lunch had not been paid for in which Justice Cacchione commented that he "reeked of marijuana". Justice Cacchione erroneously referred to this exchange as being with Jason Sprague in his decision. (Sentencing AB Tab 5, para 32).

[24] Furthermore, although brother Jason Sprague was not a direct eye witness to the crime, Mr. Pyke also challenges his credibility:

> 43. Jason Sprague also had a lengthy, although somewhat dated, criminal record. His testimony was challenged primarily on the basis that he elicited information from third parties about who was responsible for the attack on his brother. The text messages in question were put to him at AB Vol. IV pages 854-863). These text messages – which would have the effect of undermining his testimony he had firsthand knowledge of who participated in the attack – were acknowledged by Jason Sprague, but he denied they influenced what he told police or what he testified to.

[25] I take no issue with any of these assertions. The evidence of the Sprague brothers, particularly that of James, left a lot to be desired. The jury had every right to question their credibility and or reliability.

[26] However, it remained the jury's call. They were free to accept (or reject) any aspect of the evidence, as they saw fit. In fact, the judge made this clear to them:

> I also remind you that while Counsel and I may emphasize certain portions of the evidence which may have impressed each of us individually as being significant, it is your obligation to consider all of the evidence presented and to make your own independent decisions as to what is important and persuasive in that evidence. If my view of the evidence, my recollection of it does not coincide with yours, you will be guided in your findings of fact by your own recollection of the evidence, not mine, nor that of Counsel.

As well, the judge properly instructed the jurors to apply their common sense when assessing credibility, reminding them that they could pick and choose as to which aspects of the testimony they decide to accept:

> In weighing the testimony of various Witnesses, there are some matters which may appeal to your common sense as factors that you may take into account in judging how much reliance to place upon their evidence. It is a common occurrence that Witnesses see and hear things differently. Discrepancies do not necessarily mean that testimony must be wholly discredited. Discrepancies in small or unessential matters, for example, may be and usually are unimportant.
>
> You are not obliged to accept everything a Witness says, or conversely, if you feel that you cannot accept part of what a Witness says, you are equally not obliged to reject the whole of that Witness' testimony. You are free to form your

> own conclusions as to whether you will accept the whole, none, or part of a Witness' evidence.
>
> Mere discrepancies may easily and innocently occur in light of the prevailing circumstances. A deliberate falsehood, on the other hand, is an entirely different matter. It is nearly always serious, and may well taint the whole of a Witness' evidence.
>
> To make your decision, you should consider carefully and with an open mind all of the evidence presented during the Trial. It will be up to you to decide how much or how little you will believe and rely upon the testimony of any particular Witness. As I said, you may believe some, none, or all of it.
>
> When you go into the Jury Room to consider the case, use the same common sense that you use every day in deciding whether people know what they're talking about, and whether they're telling the truth. There's no magic formula in deciding how much or how little to believe of a Witness' testimony, or how much to rely on it in deciding this case.

[27] Therefore, in the face of this clear and direct caution, it is obvious that, despite all these credibility problems, the jury was nonetheless convinced that Mr. Pyke stabbed James Sprague that day. In the end, that remained their prerogative.

[28] In short, as the Supreme Court of Canada reminds us in **W.H.**, *supra*, questions of credibility fall within the jury's exclusive domain. It would be inappropriate for us to interfere by acting as a "13th juror" in this case.

ii. *The Judge's Expressed Concerns*

[29] As noted, the judge had serious concerns about the Sprague brothers' credibility. He made this clear on several occasions, but always in the absence of the jury. Mr. Pyke summarizes these references in his factum:

> 34. It is abundantly clear from reviewing the record that Justice Cacchione would have found the Appellant not guilty. At the pre-charge conference, Crown Counsel referenced James Sprague's testimony in support of his argument to have charged on common intent. Justice Cacchione quipped in response "That's assuming that they accept anything Mr. Sprague said as being truthful." (AB Vol. IV, page 1022, lines 8-9).

35. The sentencing decision revealed how unsettled Justice Cacchione was by being required to sentence Mr. Pyke. In reviewing the pre-sentence report and Mr. Pyke's address to the court, he referenced family members' and Mr. Pyke's belief that he was wrongfully convicted (Sentence AB, tab 5, paras. 13, 14, 22).

36. Justice Cacchione's comments respecting the Sprague brothers focused on the inconsistencies both within their testimony and with prior statements, their drug use at the time of the offense and while testifying, their criminal records, and Jason Sprague's apparent attempts to elicit information about the incident from third parties prior to giving a statement to the police. (Sentencing AB, tab 5, paras 28-36).

37. He concluded his musings of the Sprague brothers by saying they could not "by any measure be viewed as reliable and trustworthy witnesses" and "...it is safe to infer that both James and Jason Sprague were prepared to say whatever it took to serve their own purpose." (Sentencing AB, tab 5, para. 36)

38. In summation, he stated:

> **39** This sentence is made particularly difficult as a result of this. The presentence report, if accepted as accurate and truthful with respect to the accused always acknowledging his guilt on prior occasions when in conflict with the law but not doing so in this case, adds to the Court's difficulty.
>
> **40** As an aside, but in keeping with the foregoing, this Court cannot fail to consider the look of surprise evident on the faces of both Crown and defence counsel when the verdict was returned. This Court has presided over countless jury trials over the last 26 years. I cannot help but feel a sense of unease at the verdict.

[30] Mr. Pyke suggests that the judge's expressed concerns further undermine this verdict or at least corroborate the credibility concerns outlined above. The Crown, on the other hand, insists that these comments are totally irrelevant because the issue of credibility rested exclusively with the jury.

[31] In my view, the judge's comments can be put to very limited use. After all, the reasonableness of this verdict can only be tested against the evidence presented at trial. Of course, the judge's comments are not evidence and, to that extent,

strictly speaking, they are extraneous to the test. At the same time, it is difficult to completely ignore the fact that the judge, present with the jury to see this evidence unfold, took the unusual step to express concerns. Therefore, while not directly relevant to our task, these comments should prompt us to be extra vigilant when completing our review of the evidence (as directed by **Yebes** and **W.H.**, *supra*).

c. The Sufficiency of the Evidence

[32] As noted, James Sprague did not testify to seeing the appellant insert his knife. Instead, he placed him at the scene wielding a knife at arm's length. The jury was therefore asked to infer that he was responsible for one of the stab wounds. Mr. Pyke insists that this was an unreasonable inference for the jury to draw. He explains in his factum:

> 58. Even if he was to be believed, James Sprague's ability to make a correct identification of Mr. Pyke as one of the stabbers was challenged in light of his recent drug use, the less than ideal light conditions, the briefness of the incident and the fact he "went into shock" after he received the first stab from Kellen Pyke.
>
> 59. A summary of James Sprague's evidence as it relates to Cordelle Pyke can be condensed as follows:
>
> - Cordelle Pyke was part of the group of six or seven men who surrounded his brother's car and attempted to extract him from it;
> - Cordelle Pyke was part of the group that roughed up Mr. Sprague, and then produced a knife;
> - He was initially stabbed through his left nipple by Kellen Pyke;
> - After the first stab, he went into shock;
> - Cordelle Pyke was one of five or six guys "running around" him and was somewhere behind him at the time he was stabbed;
> - All or most of the attackers, including Cordelle Pyke, were swinging their knives at him. He did not identify in which hand the Appellant held the knife, did not say how long any of the

> blades were inside his body, and believed the Appellant was behind him at the time;
>
> - Other than the stab wound through his left nipple, he did not know which attacker stabbed him where, but on cross examination he enhanced his testimony and believed Cordelle Pyke was responsible for one of the stabs in the back;
>
> - He [mistakenly] believed the wounds in his back were caused by surgery, not stabbing.

60. It is clear from reviewing the record that James Sprague suffered seven stab wounds. The injuries were photographed 10 days after the incident by a Halifax Regional Police identification member. The photographs were tendered as Exhibit 2 at trial and are reproduced at AB Volume V, pages 1202 to 1218.

61. Mr. Sprague incorrectly believed the wounds to the right side of his back, as depicted in photograph 15 and 16 of Exhibit 2, were surgery scars from having tubes inserted. (AB Vol. II, p. 431 line 21 to p. 432 line 9).

62. Dr. Drew Bethune was part of the team of surgeons who treated James Sprague. He explained the significance of each injury as depicted in Exhibit 2 at pages 895-900 (AB Vol. V). At page 913 and 914, he was cross examined on this issue and stated he believed a chest tube was inserted through the stab wound depicted in photograph 13. The smaller of the two wounds on his back is "unlikely" to be a surgery scar; the larger of the two was conclusively not a surgery scar.

63. In other words, James Sprague's testimony that he was stabbed seven times lines up with the photographic and medical evidence but not his belief that two of the scars depicted in the photo were caused by the surgery.

64. James Sprague linked the number of stab wounds he received with the number of attackers. His testimony at AB Vol. III, page 414 lines 9-13 summarizes his apparent belief that the number of wounds he received is tied to the number of attackers.

> But like I told you, I can't tell you exactly what order or exactly who stabbed me where. But I can tell you that these guys all had

> knives in their hands and I can tell you I have seven stab wounds. One guy didn't do that when there's five or six guys with knives.

[33] Respectfully, I cannot accept defence counsel's able submissions in this regard. Instead, the following factors, in my view, render it reasonable for this jury to infer that the appellant inflicted one of these stab wounds:

- the Appellant was at the scene,
- he pulled a knife,
- he was standing behind Mr. Sprague wielding this knife at close range,
- while there were surgical insertions, at least one of Mr. Sprague's wounds to his back was a stab wound, and
- the appellant had a clear motive to harm Mr. Sprague.

[34] Furthermore, this jury was well cautioned on the risks of drawing inferences. Specifically, despite the lack of direct evidence on this point, they knew that they had to be satisfied beyond a reasonable doubt that the appellant stabbed Mr. Sprague. The judge properly explained this to the jury, beginning with their ability to draw inferences from circumstantial evidence:

> I'm going to give you one other quick example. You go to bed at night, and your mail box is empty. You get up in the morning, and there's a newspaper in your mail box. You did not see, hear, or talk to the delivery person, but you know that that person was there. This is an example of drawing an inference from proven facts.
>
> In the course of considering the inferences to be drawn, if you find additional inferences pointing to the direction of a certain fact being true, that situation will then increase the certainty of your conclusion. Facts then may be proven by both direct and circumstantial evidence.

The judge then sounded this note of caution:

> Circumstantial evidence is not to be regarded as some kind of second class evidence. The law does not demand that you act only on direct evidence. Circumstantial evidence not infrequently may be the very best evidence because it is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition almost with the certainty of mathematics.
>
> You must be careful, however, when dealing with circumstantial evidence because of the possibilities of error. *Before basing a verdict on circumstantial evidence, you must be satisfied beyond a reasonable doubt that the guilt of the Accused is the only reasonable inference to be drawn from the proven facts*.
>
> I should also caution you that an inference is a much stronger kind of belief than conjecture or speculation. If there are no proven facts from which an inference can be logically drawn, it is therefore impossible to draw an inference. At best, what you would be doing is speculating or guessing. And, Members of the Jury, that is simply not good enough.
>
> Whether your findings be based upon direct evidence, upon circumstantial evidence, or upon both types of evidence considered in combination, you must not make a finding of guilt in connection with any offence unless and until you are satisfied beyond a reasonable doubt that the essential elements of such offence have been established beyond a reasonable doubt by the prosecution.
>
> [Emphasis added.]

[35] In his factum, Mr. Pyke also highlighted several of James Sprague's prior inconsistent statements, including one where he initially told the police that he was unsure if the appellant actually stabbed him:

> 65. A review of James Sprague's testimony relating to Mr. Pyke's participation in the attack reveals that his ability to recall detail increased as his testimony progressed and more information was put to him.
>
> 66. He was impeached about a prior inconsistent statement given to Cst. Marinelli of Halifax Regional Police in which he stated he was "not sure if Piper [the Appellant's nickname] got me with one though", referring to getting him with a knife. (AB Vol. IV, p. 690).
>
> 67. His cross-examination led him to later in the same interview where Cst. Marinelli, despite having just heard Mr. Sprague was "not sure" if Cordelle Pyke had stabbed him asked "...where did Piper stab you or

Cordelle did he stab you?" To this answer, Mr. Sprague answered in the affirmative and stated "I think Piper might have been the one in the back." (AB Vol. IV page 692-293).

69. After this exchange James Sprague's belief that Cordelle Pyke stabbed him in the back grew from the "I think", as said in his statement to "I still do believe he did get one of the ones in the back." (AB Vol. IV page 693, lines 9-10). No sources of this new found belief is stated.

70. Observe how James Sprague was led by Cst. Marinelli. Observe how he gave a non-committal answer in his statement and then became committed to that same answer at trial. Observe how this answer, which supported his belief Cordelle Pyke stabbed him was adopted despite his testimony the statement was of little value because he was under the influence of pain-killers at the time. Observe how the adopted belief that Cordelle Pyke stabbed him in the back is incompatible with his belief that the wounds to his back were caused by surgery.

71. It is respectfully submitted that James Sprague's testimony naming the Appellant as one of the stabbers is a series of unfounded conclusions interwoven in a tapestry of exaggeration, embellishment, half-truths and fabrications.

72. James Sprague provided testimony that the Appellant was present and was one of several people who swung a knife at him. It is clear that the end result of the attack was that he had seven stab wounds in his upper body and eleven holes in his sweater. What was not established – even taking James Sprague's testimony at face value – is that the Appellant actually hit James Sprague with a knife.

73. At its most compelling, James Sprague's testimony establishes the Appellant was one of five or six persons present with knives who had the ability to stab him. The evidence distinguishing the Appellant as being more or less likely to have caused the wounds than the others in the group does not exist.

However, again the jury was appropriately instructed on this issue:

You are the sole Judges as to whether or not there has been an inconsistency with an earlier out-of-Court statement, and you are the sole Judges as to the effect, if any, that such an inconsistency may have upon the credibility and reliability of the Witness' testimony given at Trial. The mere fact that you

find such an inconsistency does not mean that you should find the Witness to be either incredible, or unreliable.

You will, of course, in deciding this, look at the nature of the inconsistency; that is, was it something minor which may have been innocent and not at all serious, or was it a major inconsistency? Even if you find that there has been a major inconsistency, this may or may not impact seriously upon the credibility and reliability of the Witness' testimony.

This will depend on your further finding as to whether or not the Witness has explained the apparent major inconsistency, and if so, whether you believe the explanation or feel that it may -- might reasonably be true.

Thus, for example, if a Witness said something to the police in a statement which is very different from what the Witness says to you from the Witness Box, but the Witness, in testifying before you, when asked about this, for example, says, "No, I didn't say that to the police", or "Yes, I may have said that but the police were not putting down what I was saying at the time, only what they wanted to put down", or "The police were putting words in my mouth", or "I was frightened when I spoke to the police and that's why I didn't tell it straight", you will decide whether that statement or explanation is believable or might reasonably be true. If so, then I would not think that the prior inconsistency should affect the credibility of or reliability of what the Witness has told you from the Witness Box in Court here.

Perhaps, by way of explanation, the Witness may have said that he or she had just simply forgot, or was mistaken in what they said before, and now their memory has been refreshed, and they agree that what they told the police, or what they said at the Preliminary Inquiry was true. Again, if you accept that explanation or if you believe that it might reasonably be true, then I would not think that the apparent inconsistency should affect the credibility of the Witness, although you may, nevertheless, wonder just how reliable the Witness' memory is.

On the other hand, if you reject the explanation and you are satisfied that the Witness has, in giving evidence before you, deliberately tried to mislead you, this is, of course, serious and it may taint the whole of that Witness' testimony.

[36] In fact, the judge specifically referred to the very inconsistencies now being challenged:

Let me give you some examples.

. . .

> His evidence at Trial was that the stab wound inflicted to the heart area was inflicted by Kellen. He told you that he saw five or six guys with knives, but he could not say who stabbed him where, just that the Accused stabbed him. He told you that he saw the Accused with the knife in hand. He was then asked about his evidence at the Preliminary Inquiry, and there, when he was asked about who stabbed him, the question was, "Do you know anybody else, other than Kellen, who stabbed you?" His answer was, "No, not specifically, but Tyler did in the back." At Trial, he was sure that Cordelle stabbed him.
>
> On direct examination, he told you that five or six guys had knives. He was shown a copy of his statement and he -- given to the police. He agreed that the questions and answers in that statement were accurate. In his statement to the police, when asked if he said that there was a fourth person with a knife, his answer was that he wasn't sure about the fourth person. He agreed that this contradicted what he said on direct examination. His explanation was because he was on a lot of drugs at the time he gave his statement.
>
> On direct examination, he was quite certain that Cordelle Pyke, the Accused, stabbed him. At Page 3 of his statement given to the police, which he agreed was accurate, he told the police that he wasn't sure if Piper -- that is Mr. Pyke's nickname -- the Accused, had a knife. His evidence was that not much of his statement was trustworthy because he was on a lot of drugs at the time he gave his statement. In that same statement, when asked where the Accused stabbed him, his answer was that he wasn't sure where, on the side or the back, and that there were five or six of them.

[37] In summary, this jury received thorough and accurate instructions on all the issues now raised by the appellant on appeal. Yet every juror agreed that the appellant stabbed James Sprague. Therefore, despite the judge's expressed concern, the lack of direct evidence, and the appellant's strong challenge to the complainant's credibility, our vigilant review of the record offers nothing to upset this verdict.

[38] I would therefore dismiss the appeal against conviction.

The Appropriateness of the Sentence

a. Standard of Review:

[39] For very good reason, trial judges are accorded significant deference when it comes to sentencing. They know best the nature of the crime and the offender's circumstances. Thus, for us to interfere, the appellant must establish either an error in principle or alternatively that the sentence was demonstrably unfit. This test has been repeated over and over again in Canadian courts. One recent reference from this court can be found in **R. v. Knickle**, 2009 NSCA 59, where Roscoe J.A. explained:

> ¶11 It is well established that in reviewing sentences imposed by trial judges, appellate courts must show great deference and intervene only where the sentence is demonstrably unfit. Recently, in **R. v. L.M.**, 2008 SCC 31, the Supreme Court of Canada reiterated the deferential approach required. LeBel J., for the majority wrote:
>
> > [14] In its past decisions, this Court has established that appellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that . . . the sentence [is] clearly unreasonable" (**R. v. Shropshire**, [1995] 4 S.C.R. 227, at para. 46, quoted in **R. v. McDonnell**, [1997] 1 S.C.R. 948, at para. 15). This Court also made the following comment in **R. v. M. (C.A.)**, [1996] 1 S.C.R. 500, at para. 90:
> >
> > > . . . absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[40] Here the Crown asserts both errors in principle and an unfit sentence. I will now address each.

b. Alleged Errors in Principle

[41] Essentially, the Crown says that the sentencing judge's questioning of the jury's verdict led him astray. As a result, they say that he "watered down" Mr. Pyke's moral culpability and misapplied the parity principle:

> 1. The sentence in this matter was the product of the trial Judge's disagreement with the jury's verdict on attempted murder. This led him to imply that the jury's findings on the level of participation were ambiguous. From there he watered down the moral culpability of the Respondent and gave undue weight to the principle of parity in nebulous circumstances. This resulted in an unfit sentence.

[42] In fact, in oral argument, the Crown went so far as to suggest that the judge was wrong to have even articulated his concerns about this verdict.

[43] For the following reasons, I would reject these propositions.

[44] Firstly, I do not criticize the judge for taking the extraordinary step of commenting on this verdict. After all, we must bear in mind that the spectre of a wrongful conviction represents profound fear for every judge. This is especially so in Nova Scotia where unfortunately we have experienced perhaps this Country's most notorious example; the wrongful conviction and imprisonment of the late Donald Marshall Jr.. As long as it has no effect on the sentencing outcome, I would not fault the judge for simply voicing his concerns. As noted, it cautions us to be extra vigilant when reviewing the evidence.

[45] Furthermore, I am not satisfied that the judge allowed these concerns to affect his decision on sentence. In fact the judge made it clear that, despite his reservations about the Sprague brothers' credibility, he would nonetheless sentence Mr. Pyke for attempted murder, as convicted. His concerns simply served to make his task all the more difficult:

> ¶57 As I indicated before, this is a particularly difficult sentencing as a result of the factors that I have listed. I must sentence Mr. Pyke for attempted murder.

[46] Placed in this context, I am not satisfied that the judge "watered down" Mr. Pyke's moral culpability simply because he articulated concerns with the verdict.

[47] That said, it is clear that the judge misinterpreted one aspect of the jury's verdict when he said this:

> ¶35 This Court is bound to accept as proven all facts expressed or implied that are essential to the jury's verdict of guilty. By its verdict the jury accepted that Mr. Pyke was one of several persons who attacked James Sprague on February 5th, 2011. *The finding of guilt however does not indicate if Mr. Pyke was convicted as a principal or as an aider.* [Emphasis added.]

[48] Here the judge mis-spoke. The jury clearly found Mr. Pyke to have been a principal as opposed to an aider because that was the only option they were given. Recall, the judge instructed the jury that, before convicting, they would have to find Mr. Pyke to have actually stabbed his victim. Therefore, they could not have found him to be simply an aider, based on this instruction.

[49] However, in the context of the judge's complete decision (together with the deference he is owed) this error does not command our interference. Had he actually found Mr. Pyke to have been simply an aider and purported to use this as a mitigating factor, then I might have been persuaded to act. However, he simply left that question up in the air.

[50] As to the Crown's parity principle issue, it asserts that the judge erred by referring to the sentence imposed on one of the co-accused in this case, namely brother Kellen Pyke. It argues in its factum:

> 66. Particular note should be made of the trial Judge's reliance on the sentence for the co-accused, Kellen Pyke. The trial Judge commented that the "only difference" between Cordelle Pyke and Kellen Pyke was the guilty plea to aggravated assault. Not only does it appear that the trial Judge utilized the co-accused's sentence as a starting-point for Cordelle Pyke; he ignored the factual void and significance of the guilty plea itself. He further underemphasized that the mental element and moral culpability for aggravated assault is significantly lesser than that for attempted murder.
>
> [See *R. v. Smith*, 2012 NSCA 37, at para.51 (tab 36).]

[51] Again, I fail to see any error here. Instead the judge's words must be placed in context. Here is exactly what he said:

> ¶56 The only difference between Kellen Pyke and the accused, apart from their criminal backgrounds or records, is that Kellen was convicted or pled to aggravated assault, whereas Cordelle was convicted by a jury of attempted murder.
>
> ¶57 As I indicated before, this is a particularly difficult sentencing as a result of the factors that I have listed. I must sentence Mr. Pyke for attempted murder.

So while (at para. 56) the judge observed that brother Kellen Pyke was sentenced for the lesser offence of aggravated assault, in the very next paragraph he properly identified his task of sentencing for attempted murder. Furthermore, it must be noted that Kellen Pyke's sentence was significantly lower. This belies the Crown's suggestion that the judge was inappropriately influenced by that disposition. Mr Pyke explains this in his factum and I agree:

> 40. Justice Cacchione sentenced Cordelle Pyke to a total sentence of 60 months, which is two years longer than the sentence received by Kellen Pyke. This is a significant increase which reflects the facts the judge had heard at trial, the increased moral culpability of attempted murder, and the absence of the 11th hour guilty plea.

[52] In short, I see no errors in principle at play in this sentence appeal.

c. The Fitness of the Sentence

[53] The Crown told the sentencing judge that a range of eight to ten years would be appropriate. On appeal, it cites the following case summaries to justify that recommendation:

> 72. The Appellant offers the following case summaries to assist this Court in determining the appropriate range for this offence and this offender:
>
> > (i) *R. v. Thiara*, 2008 BCSC 1414 (tab 39) – The accused and his friends went to beat the victim who owed the accused money for a drug debt. Guns were involved. They lured him to a crack house where he was shot through the abdomen. He was shot twice more trying to escape. The victim lost a kidney and part of the small intestine. A rod was placed in his hip. The accused was 19 at the time of the offence and involved in the drug trade since shortly after he turned 17. Following the offence, the accused began working with his father renovating homes for the disabled.

He was convicted of one breach of his release conditions involving a curfew violation. The Crown sought a period of incarceration of 8 to 12 years; the defence one of 6. The Court sentenced the offender to 10 years' incarceration noting that the drug trade is a scourge. The lure of easy money and a fantasy life leads to violence and inherent risk. The Court noted that the offence occurred within a lifestyle chosen by the offender and that he was lucky not to be serving a life sentence. The Court noted as mitigating the offender's youth, efforts towards rehabilitation and genuine remorse. Otherwise, it would have ordered 12 years.

(ii) *R. v. Joseph*, 2003 BCCA 369 (tab 22) – The Appellant pleaded guilty to two counts of attempted murder. A joint recommendation was rejected and the trial Judge ordered 10 years' incarceration. The victim had shortchanged the Appellant on a drug deal. The Appellant tracked the victim down when told of his whereabouts by friends. A gun was used in a car chase. Shots were fired in a rural area where schools and residences were present. The intended victim was not struck. The passenger in the victim's car was struck in the back without any damage to internal organs. Twelve shots were fired. The Court of Appeal concluded that the sentence of 10 years was at the low end of the possible range.

(iii) *R. v. Kipp*, 2010 BCSC 584 (tab 23) – The offender, 23, fired thirteen shots at the victim over a drug dispute. The victim was hit four times and another person hit as well. The Crown sought 12 to 14 years' incarceration. The defence sought eight. The Court ordered a sentence of 11 years minus 4½ remand credit. The offender had a significant record; however, this was the first for violence. [His record was not as significant as that of the offender in this case.] The Court noted that the offender was 20 at the time with an unfortunate aboriginal upbringing. There were efforts at rehabilitation and efforts to leave his lifestyle which were confirmed by his action and comments by his counselor. He was on bail and subject to a prohibition at the time.

(iv) *R. v. Blandon*, 2012 ONSC 3864 (tab 6) – The offender was convicted of both second degree murder and attempted murder. There was an exchange with another group at a bar. The offender and his friends returned with knives and attacked the group outside. The victims did not want to fight. Victim #1 was killed by a stab to the chest. Victim #2 was stabbed when he attempted to render assistance to victim #1. The offender was 19 at the time and had a short youth record. He had a supportive family and a 3 year old son. He pleaded guilty and expressed genuine remorse. This was counterbalanced by the unprovoked attack, lack of

impulsivity, and gratuitous violence. The trial Judge accepted a 10 year joint recommendation for attempted murder.

(v) *R. v. Johnson-Lee*, [2009] O.J. No. 4860 (S.C.) (tab 21) – In a bar fight victim #1 was stabbed in the neck. The accused also joined in cornering victim #2 and stabbing him in the heart. Victim #2 died. The offender was 21 years old with a youth record of violence, drugs, and breaches. He had lots of family support. He was sentenced to life without parole for 15 years for the second degree murder conviction and 8 years' concurrent for the attempted murder conviction.

(vi) *R. v. Valentine-Remy*, 2011 QCCQ 10060 (tab 42) – The Appellant pleaded guilty to attempted murder. The Crown sought 9 years' incarceration. The defence sought 2 years on top of an equivalent of 58 months' remand credit. The offender was in his car and saw the victim, who was known to him, on the street. He stabbed him five times. One wound perforated his heart. Another perforated his liver. The motive was either revenge or retaliation for a matter which had occurred a year previous. While impulsive, it was in cold blood. The Court concluded that his guilty plea and age were the only mitigating factors. Offender was sentenced to 9 years' incarceration minus his remand credit.

(vii) *R. v. J.B.*, 2012 ONSC184 (tab 1) – The offender was a drug dealer. He shot the victim, another drug dealer, on a rural side road. The offender had owed money to the victim for marijuana and cocaine. The meeting place had been arranged for monetary compensation. The offender, rather, began shooting at the victim, wounding his chest, buttocks, leg, finger, ear and chin. None of the wounds were life-threatening. The offender was 27 in a common-law relationship with a child. He sold drugs for money. He had an extensive record, including eight convictions for violence. The Crown sought life imprisonment. The defence sought 10 to 12 years minus remand credit. The Court concluded motive, even if it was not necessarily part of the jury's verdict. There was little mitigating. The offender was sentenced to 16 years less remand credit.

[54] Relying on these authorities, it adds:

73. It is submitted that the lower end of the range for attempted murder is reserved for those who plead guilty, express remorse, and show promise for rehabilitation. Other offenders who may fall into this category are those who were

under the influence of alcohol and acted in the heat of the moment. Some may have underlying mental health issues.

74. Here, there was some indication of an intent to get on with the offender's life once released from prison. This had been stated in the past, only with the offender to return to selling drugs. Even the trial Judge's remarks appear to indicate marginal acceptance of the offender's stated intention to turn himself around.

75. There is otherwise little to mitigate on sentence. The offender has the right to maintain his innocence. He loses the mitigating effect of remorse, however. Otherwise we have a drug dealer who sought retribution and enlisted a number of friends to assist in committing a vicious, unprovoked attack on a helpless victim. The injuries sustained through the attack were life-threatening. He is a lucky murderer. His criminal record and chosen lifestyle can only aggravate.

76. The range of sentence as recommended by the Crown at trial was fair and reasonable in the circumstances. The trial Judge, rather, undercut this sentence based on unease with the verdict by up to 50%. This was an error.

[55] Not surprisingly, Mr. Pyke disagrees, asserting a range of 5 to 15 years:

41. The Appellant's factum offers commentary about range of sentence at paragraphs 56 - 60 and 70 - 72. The Appellant has attempted, unsuccessfully, to distinguish sentences at the lower end of the range and characterize them as irrelevant to this case.

42. One of the cases before Justice Cacchione (not cited in the Appellant's Book of Authorities) is *R. v. Smith* [2010] O.J. No. 1236 (C.A.). This case dealt with a first time offender who received a 10 year jail sentence for attempting to murder another man after a petty dispute. The victim was stabbed eight times in the back, left with a broken knife blade embedded in his spine, and permanently disabled.

43. The trial judge in *Smith* identified a range of 5 to 15 years, which was tacitly accepted by the Court of Appeal. The Court of Appeal found the trial judge put Mr. Smith in the middle of the range due to the "devastating and long-lasting" nature of the victim's injuries and concluded there was no error in principle that would justify appellate interference.

> 44. Paragraph 72 of the Appellant's factum offers a number of cases in which high single digit or double digit sentences were imposed for attempted murder. These cases were not before the Justice Cacchione at sentencing and, with respect, nor should they have been. Each case has facts which are significantly more aggravating than the present case either because of the use of a firearm in a public place, car chases, grievous and permanently debilitating injuries, a second victim who died or a lengthy history of violence.
>
> 45. Moreover, these cases merely highlight the broad range of sentence for attempted murder and reiterate the broad range within which Justice Cacchione was working.

[56] In my view, all this comes down to our need to defer to the sentencing judge's conclusion. With no error in principle, it is not for us to clean the slate and impose what we think would have been proper. Therefore, although perhaps on the low end of the scale, in all the circumstances of this matter, I cannot say that this disposition is "demonstrably unfit".

d. Credit for Remand Time

[57] That said, the Crown is correct when it asserts that the judge made a mathematical error when calculating the appropriate credit for Mr. Pyke's remand time. Specifically, Mr. Pyke spent 448 days on remand before sentencing. The judge decided to credit Mr. Pyke with 1.5 days credit for each day so served (and this has not been appealed). This led to a 22-month total credit. However, Mr. Pyke was serving a 165-day sentence on unrelated matters when he consented to being remanded for the charges that form the basis of this appeal. This 165-day sentence effectively represented a net sentence of 110 days when taking the presumed 1/3 remission credit into account. Therefore, the credit in the present appeal should have been based on 338 days as opposed to 448 days. This would therefore translate into an appropriate credit of 507 days (338 X 1.5) or 17 months (as opposed 22 months).

[58] Mr. Pyke asks us to simply ignore this error and defer to the judge's broad discretion. That seems to me to be out of the question. The judge intended to sentence Mr. Pyke to five years less credit for time served. At the sentencing hearing, Mr. Pyke acknowledged that his remand credit would have to be adjusted downward to account for the 145-day sentence he was serving at that time.

Therefore, to properly defer to the judge's intention, we must adjust for this error in calculation by adding an additional five months to the sentence.

Disposition

[59] I would dismiss the appeal against conviction and, subject to recalculating the remand credit, dismiss the appeal against sentence.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Beveridge, J.A.