SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ireland; Ex parte Attorney-General (Qld)* [2019] QCA 58
PARTIES:	**R** **v** **IRELAND, Matthew James** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 32 of 2019 DC No 266 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Mackay – Date of Sentence – 31 January 2019 (Dick SC DCJ)
DELIVERED ON:	9 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2019
JUDGES:	Gotterson JA and Boddice and Brown JJ
ORDERS:	**The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEALS BY CROWN – where the respondent pleaded guilty to an offence of assault occasioning bodily harm of a three year old girl – where the offence took place shortly before, but in the same sequence of events as, conduct for which the respondent was convicted of the unlawful killing of an 18 month old boy – where the respondent had been baby-sitting the siblings – where the respondent was sentenced to eight years, six months imprisonment for the unlawful killing – where, more than two years later, the respondent was sentenced to six months imprisonment for the assault occasioning bodily harm – where the sentencing judge ordered that the sentences be served concurrently and the parole release date be extended by two months – whether, by ordering that the sentences be served concurrently, the sentencing judge imposed a sentence that was manifestly inadequate *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, cited *Lacey v Attorney General (Qld)* (2011) 242 CLR 573;

[2011] HCA 10, cited
R v Chmieluk; Ex parte Attorney-General (Qld) [2018] QCA 271, cited
R v Hill, Bakir, Grey and Broad; ex parte Cth DPP (2011) 212 A Crim R 359; [2011] QCA 306, cited
R v MCX [2018] QCA 249, cited
R v Rann [2005] QCA 366, cited
R v RY; ex parte Attorney-General (Qld) [2006] QCA 437, cited
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: D C Boyle for the appellant
D A Holliday for the respondent

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

[1] **GOTTERSON JA:** I agree with the order proposed by Boddice J and with the reasons given by his Honour.

[2] **BODDICE J:** On 5 June 2017, the respondent was convicted of one count of manslaughter. The victim, an 18 month old child, was being babysat by the respondent whilst the parents were away seeking medical treatment. The respondent was sentenced to eight years, six months imprisonment for that offence. After allowing for 803 days pre-sentence custody, a parole eligibility date was fixed at 24 March 2019.

[3] On 31 January 2019, the respondent pleaded guilty to an offence of assault occasioning bodily harm, which had been committed two days prior to that unlawful killing. The complainant was the deceased child's three year old sister. That assault also occurred when the respondent was baby-sitting the children. The respondent struck the female child once on the head with his hand. A subsequent medical examination noted a large bruise to the female child's left forehead.

[4] The respondent was sentenced to imprisonment for six months for the offence of assault occasioning bodily harm. It was ordered that sentence be served concurrently. However, his parole eligibility date was fixed at 24 May 2019, effectively after he had served an additional two months imprisonment.

[5] The Attorney-General for the State of Queensland appeals against the sentence of imprisonment imposed on the respondent on 31 January 2019, for the offence of assault occasioning bodily harm. The sole ground of appeal is that the sentence imposed is manifestly inadequate.

Background

[6] The respondent was born on 3 July 1985. He was aged 29 at the time of the commission of the assault occasioning bodily harm, and 33 years at sentence.

[7] The respondent has a lengthy past criminal history, both in Queensland and in New South Wales. Relevantly, he has prior convictions for armed robbery in New South Wales and for dishonesty, drug and *Bail Act* offences in Queensland.

[8] The offence of assault occasioning bodily harm was committed on 24 March 2015. At the time of its commission, the respondent was abusing alcohol. He had a past history of abusing the dangerous drug, methylamphetamine.

Sentencing remarks

[9] The sentencing judge observed that the offence involved a single strike by the hand of the respondent to the head of a three year old child, leaving a four centimetre by four centimetre bruise, an appreciable injury capable of observation by medical practitioners. That offence, having occurred when the respondent was entrusted with the care of that child, involved a significant breach of trust.

[10] The two victim impact statements spoke of the lasting physical and mental consequences to both the female complainant and to her parents, as a consequence of the violence inflicted upon the female complainant and her deceased sibling.

[11] The sentencing judge noted the respondent's plea of guilty to the offence was properly to be taken into account. The sentencing judge noted the respondent's past circumstances, including problems with alcohol and observed that alcohol had played a part in the offence. The respondent had also struggled in the past with the abuse of methylamphetamine, which had resulted in his conviction for armed robbery in 2005.

[12] The sentencing judge accepted a submission by the respondent's counsel that he had been the subject of assault whilst in prison. Since his conviction of the offence of manslaughter, he was serving his time in custody in very high security, for his own protection. Notwithstanding that circumstance, the sentencing judge observed the respondent had made good use of his time in custody.

[13] The sentencing judge observed the offence had taken place prior to the commission of the offence of manslaughter, for which the applicant had been sentenced to eight years and six months imprisonment in June 2017. It was necessary for the sentencing judge to determine whether, if both offences had been dealt with together, it would have resulted in a longer sentence being imposed upon the respondent.

[14] The sentencing judge concluded that had the offences been dealt with together, it was likely the respondent would have been given some extra time for the assault occasioning bodily harm, but it was difficult to assess how much extra time. The sentencing judge also observed that had the offence of assault occasioning bodily harm come before the court alone, it was unlikely, having regard to the circumstances of that offence, that the respondent would have received a sentence of actual imprisonment.

[15] The sentencing judge concluded:

> "The judge there sentenced you to eight and a-half years. I think he probably would have made that nine years knowing about the other assault. So that is a difference of six months. A plea of guilty is conventionally recognised by ordering that you serve a third of that time. Rather than cumulate your sentence, I am going to make it a concurrent sentence, but I am going to extend the time for your

> eligibility for parole, which is now the 24th March '19. On working on that six months, a further two months is the 24th of May…"[1]

Legal principles

[16] Crown appeals against sentence are exceptional.[2] Interference with the sentence on a Crown appeal requires demonstration of error on the part of the sentencing judge.[3] Error is not demonstrated simply by a sentence being markedly different from other sentences imposed in other cases.[4] Manifest error can be shown if the sentence imposed is "out of the range of sentences that could have been imposed and therefore there must have been error, even though it is impossible to identify it".[5] If the difference is such that in the circumstances it must be concluded there was a misapplication of principles, intervention is warranted on appeal.[6]

Attorney-General's submissions

[17] The Attorney-General submits error warranting intervention has been demonstrated, as the sentencing judge, without explanation or apparent reason, failed to apply the principle of asking what would have been the effective head sentence imposed if the respondent had been sentenced at the one time.

[18] The sentencing judge correctly acknowledged the applicable principle and attempted to apply that principle in her reasons, but imposed a sentence inconsistent with that sentence reasoning, namely, a concurrent six month head sentence.

[19] The Attorney-General further submits that once error has been demonstrated, a consideration of all of the circumstances supports a conclusion that the sentence imposed was unreasonable or unjust. The offence involved serious offending against a defenceless three year old child, when that child was entrusted to the sole care of the respondent. The respondent lied to police in relation to the circumstances of that offence and had evidenced no remorse. The respondent was a mature man with a previous criminal history and the offence resulted in mental and emotional harm to the child complainant.

[20] The Attorney-General submits those sentences warranted a higher head sentence to be imposed cumulatively on the respondent's existing sentence. Even allowing for consideration of totality, a cumulative sentence in the order of 12 months imprisonment was appropriate, with an adjusted parole eligibility date requiring the respondent serve at least four months of that sentence.

Respondent's submissions

[21] The respondent submits the sentence imposed was not manifestly inadequate. That sentence properly reflected the nature of the assault and the injuries occasioned by it. It involved a single strike to the forehead, resulting in a large bruise to the forehead. The respondent pleaded guilty to that offence. There was a period of three years between the offence and sentence. That period had been spent entirely

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1 AB24/30.
2 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at [16].
3 *R v Hill, Bakir, Grey and Broad; ex parte Cth DPP* [2011] QCA 306 at [23].
4 *Wong v The Queen* (2001) 207 CLR 584 at [58].
5 *Hili v The Queen* (2010) 242 CLR 520 at [60].
6 *Wong v The Queen* (2001) 207 CLR 584 at [58].

in custody, during which period the respondent had attempted to seek treatment for his alcoholism, a relevant factor to his offending behaviour.

[22] The respondent submits that the sentencing judge properly recognised the serious aspects of the offending and the mitigating factors, by delaying the respondent's parole eligibility date by a period of two months.

Consideration

[23] The respondent to this appeal engaged in reprehensible conduct whilst entrusted with the care of two very young children. Whilst undertaking that task, he committed the offence of assault occasioning bodily harm and two days later, unlawfully killed the younger sibling. For that latter offence, he received a sentence of eight years, six months imprisonment.

[24] This appeal is not against the sentence imposed for the offence of manslaughter. This appeal relates to a sentence of six months imprisonment, to be served concurrently, for one offence of assault occasioning bodily harm involving the striking of a three year old child's head once, with the respondent's hand. The injury inflicted was a bruise of a considerable size.

[25] As the sentencing judge correctly observed, if the offence of assault occasioning bodily harm had been considered by the Court in isolation, without the other circumstance, it would not have attracted a sentence of actual imprisonment. Further, the offence of assault occasioning bodily harm occurred prior to the offence of manslaughter, but was not dealt with until a significant time after that sentence of manslaughter. That factor was relevant in the exercise of the sentencing discretion.

[26] At the sentencing hearing, the Crown contended for a sentence of between nine and 18 months imprisonment, but conceded it would be open and proper to sentence at the lower end because of totality.[7] It was also properly acknowledged by the Crown Prosecutor that it was open to the sentencing judge, if the sentence was not to be ordered to be served cumulatively, to alter the parole eligibility date, although it was contended the circumstances warranted the imposition of a cumulative period of imprisonment.

[27] Those concessions having been made by the Crown, there is no basis upon which to conclude that the exercise of the sentencing discretion to impose a concurrent sentence of imprisonment, involved a misapplication of principle. The sentencing judge was aware of the relevant principle. The sentencing judge acknowledged the need to consider what would have been the appropriate sentence had the offences been dealt with together.

[28] The sentencing judge applied that principle, not by making the head sentence of six months cumulative, but by instead making that sentence concurrent and delaying the parole eligibility date so that the respondent was required to serve two months of that sentence. The actual period in custody served by that order was consistent with the actual period of custody served by an offender who has cooperated with the administration of justice by pleading guilty to an offence for which the offender obtained a sentence of six months imprisonment. That order reflects a proper application of sentencing principles.

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7 AB15/32.

[29] Further, a review of the comparable authorities supports a conclusion that a concurrent sentence of six months imprisonment was within a proper exercise of the sentencing discretion for an offence of assault occasioning bodily harm involving bruising inflicted by a single blow by the offender's hand. Both *R v RY; ex parte Attorney-General (Qld)*,[8] and *R v Rann*,[9] involved the infliction of more serious injuries from multiple blows. Similarly, *R v MCX*,[10] involved violence to two children of a much greater magnitude, with one child suffering a fractured leg.

[30] A challenge to the exercise of discretion in sentencing is not an exercise in reviewing the merits of the sentence; it is an enquiry into whether there has been error.[11] Whilst another sentencing judge may, in the proper exercise of the sentencing discretion, have ordered the respondent to serve a further and longer period of imprisonment cumulatively, there is no basis upon which to conclude that the exercise of the sentencing discretion in the present case involved a misapplication of principle.

Conclusion

[31] No misapplication of principle having been established, there is no warrant for intervention by this Court.

Order

[32] I would order the appeal be dismissed.

[33] **BROWN J:** I agree with the order proposed by Boddice J and with the reasons given by his Honour.

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8 [2006] QCA 437.
9 [2005] QCA 366.
10 [2018] QCA 249.
11 *R v Chmieluk; Ex parte Attorney-General (Qld)* [2018] QCA 271 at [83].