SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hall* [2002] QCA 125
PARTIES:	**R** **v** **HALL, Gregory John** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No32 of 2002 SC No 598 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2002
JUDGES:	Williams JA, White and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. Appeal allowed;** **2. Set aside the sentence of 4 years imprisonment and in lieu thereof impose a sentence of 6 years imprisonment.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – where a sentence of 4 years imprisonment imposed on the respondent consequent upon his pleading guilty to a charge of the manslaughter of his baby son – where previous conviction of assault occasioning bodily harm to 15 day old baby – whether sentence outside the scope of a proper sentencing discretion – whether manifest inadequacy - *R v Irvine* distinguished – whether a serious violent offence declaration should be imposed – where sentence of 4 years imprisonment set aside and 6 years imprisonment substituted *Criminal Code* (Qld) s669A(1)

Penalties & Sentences Act 1992 (Qld) s 9(4)(g)

R v Amituanai (1995) 78 A Crim R 588, considered
R v Auberson & Attorney-General of Queensland [1996] QCA 321; CA No 248 of 1996, 3 September 1996, considered
R v De Salvo [2002] QCA 63; CA No 284 of 2001, 15 March 2002, considered
R v Irvine & Attorney-General of Queensland [1997] QCA 138; CA No 82 of 1997, 8 May 1997, distinguished
R v Keating [2002] QCA 19; CA No 251of 2001, 6 February 2002, considered
R v Melano; ex-parte Attorney-General (1995) 2 QdR 186, considered
R v Ross [1996] 411; CA No 347 of 1996, 25 October 1996, considered
R v Walsh CA No 85 of 1986, 12 June 1986, considered

COUNSEL: P Rutledge for the appellant
A W Moynihan for the respondent

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

[1] **WILLIAMS JA:** The Attorney-General of Queensland appeals against a sentence of 4 years imprisonment imposed on the respondent consequent upon his pleading guilty to a charge of manslaughter. The deceased was the baby son of the respondent.

[2] The baby received injuries on the evening of 13-14 June 1999 when some 19 days old. The material establishes that the baby had been screaming and the respondent claimed he gave him "a little bit of a shake". Thereafter the baby was given a bottle and was apparently quiet. At about 6.40am on 14 June the baby was taken by the respondent to the Logan Hospital. That was some hours after the initial shaking. It was then noted that the baby had blood around the mouth and nose, was floppy, unresponsive and had enlarged pupils. There was also mild superficial bruising over the lower flank and a linear bruise to the left side of the neck. CT scans revealed marked swelling of the brain with a compression of the ventricles and bleeding on the surface of the brain. There was extensive retinal haemorrhaging.

[3] The brain damage was so severe that recovery was not feasible. However the baby remained alive for many months, eventually dying on 6 April 2000. During that 10 month period the baby had to be fed through a gastronomy button and had seizures up to 30 times a day. His body was always rigid. He cried as if in constant pain and could not be comforted.

[4] When initially spoken to by the police the respondent alleged that a 5 year old child in the house had probably tried to waken the baby and probably jerked him trying to lift him out of the cot. He made no admission. It was later that he told the police that he had given the baby "a little bit of a shake".

[5] Medical specialists were of the view that the shaking would have had to be violent to cause the brain injuries. At least one specialist expressed the opinion that "shaking sufficient to cause those injuries would have been considered excessive and dangerous by any person of normal intelligence observing the incident."

[6] The respondent was aged 40 at the time of the offence and had a significant, and relevant, criminal history. He was convicted of unlawful wounding on 26 November 1979, when aged 20, and placed on 2 years probation. Then, most significantly for present purposes, on 30 November 1983, when aged 23, he was convicted of assault occasioning bodily harm to a 15 day old baby. He was placed on 2 years probation for that offence. The circumstances as revealed in the material were that he threw his child onto a bed from chest height on two occasions and carried the baby between his thighs. He also hit the child three times on the back with an open hand causing fractures to several ribs.

[7] On 5 September 1998, when aged 29, he was again convicted of assault occasioning bodily harm. On that occasion he struck a person he had been drinking with from behind and knocked him unconscious. He was given 100 hours community service. Finally on 21 December 1994, when aged 35, he was convicted of assault occasioning bodily harm to his stepsister. He apparently punched her in the face during an argument. He was placed on 1 year probation.

[8] It can thus be seen that the respondent has a history of violence, and he should have been aware from the 1983 incident involving his young son that violently shaking a child could cause serious harm. The fact that he had a previous conviction for a serious assault on a very young child distinguished this case from the sentences relied on as comparables. A presentence report from Dr S McCulloch, a consulting psychologist, was before the court. Relevantly she concluded:

> "My subjective assessment of Mr Hall's intelligence places him outside of the two-thirds of the population which, according to standard measurement, falls in the range referred to as 'average'. I would suggest that whilst the client would not be classified as presenting with 'mild mental retardation', his intelligence quotient most probably falls between these two classifications. This would see him as being capable of functioning satisfactorily, but with limitations, in the world."
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> "I am of the view that Mr Hall requires an ongoing, long term, intensive therapeutic program. For this to be successful, it will require specific assessment and the tailoring of a treatment plan, conducted by a specialist in the area of the outcome diagnosis, which will take into account his intellectual limitations, his long term historical difficulties and his current presenting symptoms. . . .
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> In sum, I am of the view that Mr Hall's intelligence, history, and personality characteristics together, significantly limit his ability to function appropriately under circumstances of emotional pressure, so that he acted out of his frustration and anger and so allegedly caused the death of his son, Jaden."

[9] The attention of the learned sentencing judge was specifically directed to the sentence in *Irvine* CA 82 of 1997, 8 May 1997, where, on an appeal by the

Attorney-General, the Court of Appeal did not interfere with a sentence of 5 years imprisonment with a recommendation for parole after 9 months for the manslaughter of an infant caused by shaking. In delivering his reasons in *Irvine* the Chief Justice observed that "the sentence imposed below was certainly not a heavy one from the actions involved" but considered that it was broadly within the range contended for by counsel for the prosecution before the sentencing judge. Though the sentence could be "described as at the bottom end of the range in fixing the head sentence" the appellate court indicated reluctance to make any adjustment given that it was an Attorney's appeal. In his reasons the President expressed the view that the sentence was "inappropriately low" but again was not prepared to interfere given the nature of the appeal.

[10] As was pointed out below, and again in this Court, *Irvine* can be distinguished on a number of grounds. There the offender realised immediately that his conduct had harmed the child and urgently sought medical assistance. Further, he did not have this respondent's criminal history. *Irvine* was also much younger; he was aged 26 at the time.

[11] Because of the decision in *Irvine* the prosecutor before the sentencing judge felt constrained to say that he could not submit that 5 years was outside of the range, but he made the submission that it would be "the extreme lower end of the range". He went on to submit that the circumstances of the present case required "a very significant sentence".

[12] During argument in this Court the point was made that in this case the baby suffered considerably for some 10 months before death. That is not an entirely irrelevant consideration when it comes to penalty.

[13] The learned sentencing judge referred to the circumstances of the offence, to the respondent's criminal history, to the fact that the previous offence involving a young child "ought to have been more than chastening and warned you that your capacity for irrational outbursts and violence was likely to pose a significant threat to others, including babies", to the report of the psychologist and the respondent's intellectual deficits and concluded:

> "I propose to take into account the factors in mitigation, in particular the resource savings to the community associated with your plea of guilty, which has avoided a trial and the trouble and expenses to the community and witnesses that a trial would have involved, and what I may summarise as your difficult personal circumstances, as well as what I take to be deep and genuine remorse by imposing a more lenient sentence than would otherwise have been imposed. I intend to do this by reducing the head sentence."

[14] It was in that context that a 4 year sentence was imposed. The learned sentencing judge did not specifically refer to *Irvine* in his remarks.

[15] In argument in this Court counsel referred extensively to *Irvine* and also to *Walsh* CA 85 of 1986, 12 June 1986 and *Ross* CA 347 of 1996, 25 October 1996. *Walsh* pleaded guilty to the manslaughter of a 16 month old child involving shaking the baby, striking the baby in the face, and striking the baby in the abdomen. The assault occurred whilst the offender was in a state of uncontrolled frenzy because he was unable to stop the child crying. The offender was aged 24 at the time of the

offence and had no previous convictions. The sentence of 9 years imprisonment was upheld by the Court of Criminal Appeal but it was observed that the sentence was at the "upper end of the range". Ross pleaded guilty to the manslaughter of her 7 week old son. She was a 21 year old mother who had great difficulty in coping with being the mother of a young child. There was psychiatric evidence that at the time the offender was suffering an adjustment disorder which led to excessive anger and frustration. She had no prior convictions. The sentence of 6 years imprisonment with recommendation for parole after 18 months was not disturbed by the Court of Appeal.

[16] A careful consideration of the facts of this case, and considering those facts in the light of the sentences in *Walsh*, *Ross*, and *Irvine*, results in the conclusion that the sentence here was inappropriate. Bearing in mind the provisions of s 669A(1) of the *Criminal Code* and the approach to such an appeal laid down in *R v Melano ex parte Attorney-General* [1995] 2 QdR 186, I have come to the conclusion that the sentence imposed was outside the scope of a proper sentencing discretion and that the manifest inadequacy should be corrected. However, bearing in mind that this is an Attorney's appeal moderation is called for.

[17] Given the circumstances of the offence and the respondent's criminal history a head sentence in the range 8 to 9 years would ordinarily be called for. That has to be discounted for the plea of guilty and the other mitigating circumstances, primarily the personal factors relating to the respondent. When such considerations are given effect to the appropriate sentence is one of six years imprisonment.

[18] In this Court counsel for the Attorney also sought a declaration that the conviction was for a serious violent offence; the sentencing judge had not been asked to make such a declaration. In the course of submissions counsel for the Attorney contended that in the circumstances of this case the criminal history of the respondent was relevant to the exercise of the discretion whether or not to make such a declaration. In that context reference was made to the recent decisions of this Court in *Keating* [2002] QCA 19 and *De Salvo* [2002] QCA 63 in the light of s 9(4)(g) of the *Penalties & Sentences Act* 1992 as amended in 1997 and the Second Reading Speech relating to the 1997 amendments.

[19] As the sentencing judge was not asked to exercise the relevant discretion, it is not appropriate given the facts of this case for this Court to make such a declaration on appeal by the Attorney. That is not to say that there may not be cases where the Court of Appeal would consider it appropriate to make such a declaration on an Attorney's appeal even though it had not been asked for at first instance.

[20] Against that background this is not the appropriate case in which this Court should consider the operation of s 9(4)(g) of the Act in the light of the recent decisions referred to.

[21] The orders of the court should therefore be:

1. Appeal allowed;

2. Set aside the sentence of 4 years imprisonment and in lieu thereof impose a sentence of 6 years imprisonment.

[22] **WHITE J:** The Attorney-General appeals against a sentence of four years imposed on the respondent after he had pleaded guilty to the manslaughter of his infant son.

[23] The baby was born on 26 May 1999, the third child of the respondent and his de facto wife. Their other children were then aged five and three years. The mother suffered from severe epilepsy and had ceased taking her medication during pregnancy for fear of harming the baby. After the child was born the mother's own mother, Mrs Cassall, came to assist in the care of the baby, particularly at night so that the mother could sleep which was beneficial for her condition.

[24] Mrs Cassall left the respondent's home on the evening of 13 June 1999 to return to her own home leaving the night care for the baby to the respondent.

[25] The respondent ultimately told police that he had gone to sleep on the lounge after getting the baby a bottle of milk and putting him back to sleep in the bedroom with his mother at about midnight. The respondent said that he was awoken at about 2.30 a.m. by the screaming of the baby. He told police that he picked up the child and gave him "a little shake to quiet him" and then gave him a bottle. He admitted to being upset that his wife had not awoken because she was in the room with the baby.

[26] Initially the respondent had said that nothing had happened in the night and he was woken by the five year old telling him that there was something wrong with the baby. He was seen to be unresponsive with foaming saliva flecked with blood around his mouth and was having difficulty breathing. The respondent attempted to waken the child by putting him in a cold bath but with limited success. He then drove to the Logan Hospital, presenting with the child at 6.42 a.m. The infant was observed to have blood around the mouth and nose. He was floppy, unresponsive and with large pupils. His right eye was enlarged, unresponsive and with clouding in the cornea. Mild superficial bruising was noted over a lower limb and a linear bruise was noted on the left side of the baby's neck.

[27] CT scans showed very marked swelling of the brain with bleeding. The baby was intubated and ventilated and in due course a shunt was inserted into his skull to attempt to remove some of the pressure. He was transferred to the Mater Hospital. On examination by an ophthalmic surgeon extensive retinal haemorrhaging was noted in the right eye with scattered haemorrhaging in the left. The baby was transferred back to Logan Hospital and, eventually, in November 1999, placed in home based palliative care in order to avoid the risk of infection in hospital. The baby was incapable of being fed orally and received nutrition through a gastronomy button. He suffered severe reflux and spent the remainder of his life irritable and unable to be consoled. He had seizures up to 30 times a day with a very high tone to his body which was always rigid. He continued to deteriorate and on 6 April 2000 was re-admitted to Logan Hospital and died that evening, 10 months after the shaking incident.

[28] The post mortem established that the baby had suffered a diffuse axonal injury, the most likely cause of which was a severe shaking. The specialist ophthalmologist concluded:

> "In my opinion, such shaking would have been violent. Indeed, shaking sufficient to cause those injuries would have been considered excessive and dangerous by any person of normal intelligence observing the incident."

The respondent was asked by police to demonstrate how he shook the infant and was given a doll to do so. The medical specialists were of the view that, although a dangerous manoeuvre, it was insufficient to have caused the injuries that the baby in fact suffered.

[29] The respondent was a mature man of 40 at the time of the commission of the offence. He had a significant prior criminal history for violence. In 1979 he was convicted of wounding when he was aged 20 and placed on probation. In 1983 he was convicted of assault occasioning bodily harm and again placed on probation. That offence related to another of his children who was born on 15 May 1983. That baby left hospital on 20 May with his parents (not the mother of the deceased child with whom this appeal is concerned) and was re-admitted on 30 May when he was found to be suffering from several fractured ribs. The accused admitted to police that on 23 May he had thrown the baby on to the bed from chest height. On 25 May he carried the baby across to the television between his thighs using firm pressure. On 26 May he held the baby between his thighs with firm pressure so that the child was white and gasping for breath. On the night of 25 and morning of 26 May he admitted to hitting the baby three times on the back with an open hand from above the head to quieten it. He was placed on probation for two years.

[30] The respondent was convicted of assault occasioning bodily harm in 1988. He hit the complainant, a friend, with whom he had gone to the local pub after he was angered by comments made by him. The complainant was struck from behind knocking him unconscious. This led to a community service order. In 1994 the respondent struck his step-sister by punching her in the face. He was convicted of assault occasioning bodily harm and again placed on probation.

[31] A report placed before the court below prepared by a psychologist contains an account given by the respondent of a chaotic childhood punctuated with violence. The psychologist's "subjective assessment" of the respondent's intelligence placed him

> "outside of the two-thirds of the population which, according to standards measurement, falls in the range referred to as "average.".

She suggested that while he would not be classified as presenting with mild mental retardation his intelligent quotient probably fell between those two classifications. She saw him as being capable of functioning satisfactorily in the world but with limitations. He had been unable to maintain continuous employment for more than about 18 months, having sustained injuries in an accident and thereafter was on a disability pension. The psychologist concluded that since the respondent had never addressed his former problems and difficulties because of lack of insight and motivation he had been unable to deal appropriately with his crying child.

[32] Mr A Moynihan, who appeared on behalf of the respondent submitted strongly that the Attorney was fettered in his appeal by the approach of the Crown prosecutor below as to the appropriate range. Below and before this court the case of *Irvine*, CA No. 82 of 1997 was much discussed. *Irvine* was an Attorney's appeal against a sentence of five years imprisonment with a recommendation for eligibility for parole after nine months. In that case an infant died after being severely shaken by the offender, a 26 year old man. The Attorney contended on appeal that the sentence was "unduly light" but sought only to alter the sentence imposed below with a non-parole period of 18 months. The court rejected that submission

consistently with authorities such as *Melano* [1995] 2 Qd R 186 on the ground that making minor adjustments to substantial sentences was not justified on an Attorney's appeal. However, Macrossan CJ observed that compared with other decisions of the court "the sentence imposed below was certainly not a heavy one for the actions involved". He concluded

> "[t]here is a distinct impression that in sentencing below the sentencing Judge imposed a sentence which would have to be described as at the bottom end of the range in fixing the head sentence, and he has added to that a parole recommendation which, again, would have to be regarded as a generous one to the respondent in terms of the consequence of the respondent's actions."

[33] Fitzgerald P's view was that the sentence

> "was inappropriately low, probably because circumstances of mitigation were taken into account twice – once to reduce the head sentence and again to reduce the period after which the respondent [was] to be eligible for parole."

[34] The Crown prosecutor referred the learned sentencing judge to those passages in *Irvine*. He distinguished that case from the present particularly referring to the differences in age and the want of violence in his (Irvine's) history. He submitted:

> "Your Honour, therefore it is my submission that whilst I can't say that the sentence imposed there of five years as a head sentence is outside the range, it would, in my submission, be the extreme lower end of the range and your Honour can take into account the accused's plea of guilty either by imposing a lower head sentence or by a recommendation for parole, but not both, in my submission.
>
> In those circumstances your Honour can structure the sentence in either of those two ways, but a very significant sentence as is indicated by *Irvine* is the only appropriate result."

It may be that the Crown prosecutor's submissions are incorrectly reported in as much as there seems to be a need for a full stop after "range", the deletion of "and" and the commencement of a new paragraph at that point. Otherwise the submission cannot be read consistently with the passages from *Irvine*, to which reference has been made, to which the Crown prosecutor had referred immediately preceding the submission set out above.

[35] Mr Moynihan submitted that consistently with the Crown prosecutor's submission the learned sentencing judge possibly took as a starting point a sentence of six years and reduced it to four years to take account of the plea of guilty and matters personal to the respondent such as his limited functioning ability and his significant remorse. However, it seems to me that the Crown prosecutor was not submitting that the starting point before reduction was five years or, indeed, six years, but something heavier as an appropriate sentence.

[36] Mr Rutledge, who appeared for the Attorney, referred the court to *Walsh*, CA No. 85 of 1986, a case where the offender lost control and punched a 16 month old infant in the head and the abdomen and shook the child of the woman with whom he was living because it would not stop crying. The infant survived for a short time in

hospital but did not respond to treatment. The offender was 24 years of age with no criminal history. He was sentenced to imprisonment for nine years, a sentence which was described by Connolly J as "towards the upper end of this range". The range for manslaughter generally had been described as between five and ten years.

[37] *Ross,* CA No. 347 of 1996, was a rather different kind of case. The applicant was a 21 year old mother who suffocated her seven week old son and sought leave unsuccessfully to appeal against a sentence of six years imprisonment with a recommendation to be considered for parole after 18 months. The applicant had difficulty with motherhood and in dealing with her baby's persistent crying. She had limited family support. The court reviewed a number of sentences imposed for infant manslaughter noting that the unlawful killing of a young child arises through circumstances

> "from killing in the course of systematic gratuitous abuse, (usually by a de facto), killing because of accumulated frustrations or a single occasion of frustration, to killing by a mother who is mentally disturbed as an aftermath of the birth".

[38] Difficulty in establishing a sentencing pattern for such offences was noted by the court in *Ross* including this court's observations in *Auberson*, CA No. 248, 249 of 1996 (not an infant manslaughter case) where

> "… the difficulty in identifying a sentencing pattern [for manslaughter cases] emphasises the importance of an appellate court not interfering with a trial judge's exercise of the sentencing discretion; 'except where that course is plainly warranted because the sentence is outside the sound exercise of the sentencing discretion'".

[39] Here the learned sentencing judge gave due regard to all of the relevant factors but it seems to me that he gave insufficient weight to the respondent's past history of violence and in particular the offence in 1983 where injuries were inflicted on his new born baby, and the long period of suffering, so far as can be understood, of the infant, *Amituanai* (1995) 78 A Crim R 588. As Williams JA has noted, since this is an Attorney's appeal, moderation is called for. I agree with his Honour that given the circumstances of the offence and the respondent's criminal history a head sentence in the range of eight to nine years would ordinarily be called for. Taking into account the respondent's plea of guilty and matters personal to him, particularly his intellectual deficits as well as the need for deterrence which is an important function of the court in attempting to protect the most vulnerable in the community, the appropriate sentence is one of six years imprisonment.

[40] I agree with the observations which his Honour has made about the submissions made on behalf of the Attorney concerning a declaration that the conviction was for a serious violent offence.

[41] I agree with the orders proposed by Williams JA.

[42] **PHILIPPIDES J:** I agree with the order proposed by Williams JA that the sentence of 4 years imprisonment be set aside and, in lieu thereof, a sentence of 6 years imprisonment be imposed for the reasons given by Williams JA and White J.