SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chambers, Harrison and Fisher; ex parte A-G (Qld)* [2002] QCA 534
PARTIES:	**R** **v** **CHAMBERS, Erwin Samuel** (respondent) **HARRISON, Raymond Lloyd** (respondent) **FISHER, Graham Andrew** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (applicant)
FILE NO/S:	CA No 316 of 2002 CA No 317 of 2002 CA No 318 of 2002 DC No 3348 of 2001 DC No 2465 of 2002
DIVISION:	Court of Appeal
PROCEEDINGS:	Sentence Appeals by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EXTEMPORE ON:	5 December 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 December 2002
JUDGES:	de Jersey CJ, Helman and Philippides JJ Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**Allow each appeal and substitute, for the term of 10 years imprisonment imposed on the count of unlawfully doing grievous bodily with intent to do grievous bodily harm, imprisonment for 15 years, with a declaration that the respondent has been convicted of a serious violent offence. The sentences should otherwise remain undisturbed.**
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 – APPLICATION TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – where 3 co-accused pleaded guilty to a number of offences, the most

serious being grievous bodily harm with intent to cause grievous bodily harm – where victim savagely bashed and left in permanent vegetative state – where learned trial Judge imposed a penalty of 10 years imprisonment due to their comparative youth and apparent remorse – where the Honourable the Attorney-General appeals – where sentence manifestly inadequate

R v Bates; R v Baker [2002] QCA 174; CA No 295 of 2001 and CA No 329 of 2001, 17 May 2002, considered
R v Dinsdale (1999) 202 CLR 321, distinguished
R v Everett (1994) 181 CLR 295, applied
R v Fahey, Solomon & AD [2002] 1 Qd R 391, not followed
R v G [1999] QCA 477; CA No 303 of 1999, 16 November 1999, considered
R v Melano [1995] 2 Qd R 186, followed
R v Bird & Schipper [2000] QCA 94; CA No 318 of 1999 and CA No 325 of 1999, 24 March 2000, considered
R v Wilde; ex parte A-G (Qld) [2002] QCA 501; CA No 238 of 2002, 15 November 2002, applied

COUNSEL: A J Rafter for the applicant in CA Nos 316 of 2002, 317 of 2002 and 318 of 2002
A J Glynn SC for the respondent in CA No 316 of 2002
M J Byrne QC for the respondent in CA No 317 of 2002
T Carmody SC for the respondent in CA No 318 of 2002

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

THE CHIEF JUSTICE: The Honourable the Attorney-General appeals against sentences imposed on the respondents in respect of a number of offences and particularly the offence of doing grievous bodily harm with intent in which the victim was Mirsad Turkinovic.

For that offence, each of the respondents was sentenced to ten years' imprisonment, attracting automatically the serious

violent offence declaration, meaning that the respondents will have to serve at least eight years' imprisonment for that offence. The respondents, Chambers and Harrison, were also sentenced to a concurrent two year term for the offence of assault occasioning bodily harm in company, and Chambers to a cumulative two years for 72 counts of burglary and stealing from houses and like offending. It is the grievous bodily harm with intent charge on which the Court should focus.

That offence was committed on 7th April 2001. Chambers was then 17 years old and 19 when sentenced, Fisher 20 and 22 when sentenced, and Harrison 19 and 21 when sentenced.

In respect of that offence the learned sentencing Judge did not distinguish between the respondents in terms of culpability and his approach was in that respect justified. The respondents all have past criminal histories which the Judge however considered of limited relevance. Chambers was on bail at the time of this offence.

Without provocation the respondents brutally attacked the complainant at about 2 a.m. on a Saturday last year in Brisbane in the vicinity of the intersection of Adelaide and Albert Streets. The complainant was then a 21 year old post graduate psychology student at the University of Queensland. With his brother, Nihad, and a friend, Anel, the complainant had been to nightclubs and was walking from the Riverside precinct towards Alice's Nightclub at the top end of Adelaide Street.

The complainant unwittingly stumbled into a dispute between the respondent Chambers and about 15 other people and effectively Chambers transferred the quarrel to the complainant. The complainant had innocently inquired, "What's going on?" drawing Chambers' statement, "It's got nothing to fucking do with you."

Chambers thereupon ran up to the complainant and punched him hard in the back of the head. The complainant fell forwards. Other members of the group assaulted Nihad and Anel. Meanwhile, three or four people were kicking the complainant who was on the ground. A security video shows what then transpired over a period of 30 to 40 seconds. We have watched the video tape.

The respondents Harrison and Fisher kicked the complainant while he was on the ground. The complainant attempted to get up and move away. Fisher then rammed the complainant into a metal shutter door. Harrison supported himself as he lifted his body up and stomped down with both feet on the complainant's head twice. Harrison then kicked the complainant.

Later Harrison again kicked the complainant and stomped on him, with Fisher kicking him at the same time. Fisher also then stomped on the complainant while Harrison further kicked into him. Chambers kicked the complainant in the head with a follow through motion similar to that involved in kicking a

football. The three respondents then ran up Adelaide Street towards George Street.

During the course of this attack the complainant was not moving of his own volition and appeared to have trouble breathing.

The counts of assault occasioning bodily harm in company concern Chambers' and Harrison's subsequent attack committed upon Anel, whom they kicked and punched in the head. Anel fortunately did not suffer serious injuries.

The position is different with the complainant. From a situation of vibrant health with good prospects in life, he has been reduced to a persisting vegetative state. I quote from a medical report before the learned Judge.

> "This means that he has no awareness of his external environment or of his internal environment and is unable to interact or be aware of interactions with his surroundings. He has no head control and no trunk control and does not initiate any voluntary movements of his upper or lower limbs. He has a reflex swallow but at times will aspirate. He is unsafe to feed orally and requires his feeds via a tube into the stomach called a PEG. This is required to maintain his nutrition and to avoid recurrent lung aspiration and resulting pneumonia. He has contractures of his shoulders more marked on the right, so that he is unable to fully abduct or flex his shoulder and is limited in extension of his right elbow. He requires assistance with all activities including moving to and from bed and to and from a wheelchair and bathing and feeding and toilet care.
>
> He has a severe brain damage which is not going to improve over time. His current condition will not show any further improvement and, in fact, his physical limitations are likely to deteriorate over time given his lack of voluntary movements. He is requiring ongoing physical therapy to avoid further joint contractures, but

is not a candidate for any rehabilitation as he is unable to respond to any instructions.

Because of his underlying condition, he requires 24 hour full-time care. He requires care for all basic needs including basic oral feeds as well as oral toilets and PEG feeds as well as extensive physiotherapy to maintain joint movements and all essential care for transfers and any other difficulties that may be encountered. This will be a lifetime requirement. There is no prospect that he would show any significant improvement with time."

The learned Judge described the complainant as a "dead man living". He had, as I have observed, been a promising student. He would likely have become a successful organisational psychologist. His family and friends are devastated. The amenity of life of his devoted parents has, unsurprisingly, been destroyed. The effect on his brother, Nihad, has likewise been devastating.

The two year terms to be served cumulatively upon the ten year term by Chambers, concerned 72 serious property offences, burglary, stealing, breaking into houses, entering houses, entering with intent at night, attempted entering with intent at night, unlawful use of motor vehicles, arson of a motor vehicle, wilful damage.

Those offences spanned the period 26th January 1998 to 15th March 2001 and concerned property valued at $57,540. Chambers forced entry into almost 70 houses. The cumulative term was amply warranted and could not be the subject of any reasonable challenge.

In sentencing the respondents, the learned Judge referred to their comparative youth, pleas of guilty and the circumstance that they all felt deeply remorseful. He considered the case virtually on all fours with Fahey, Solomon and AD [2002] 1 QdR 391 where the Court of Appeal held that a sentence of ten years for similar offending was not manifestly excessive.

Mr Rafter, who appeared for the appellant, made two valid points in relation to Fahey and Solomon. First, the Court of Appeal held effectively only that the ten years was within a range appropriate to that case, and second, that while extremely serious, the resultant disability in that case was less severe than in this. That complainant, for example, is able to feed himself and can speak to a degree and importantly, his condition was expected to improve.

This case falls but a fraction short of murder once one acknowledges the living death of the complainant. As put by Mr Rafter, "He clings to life only in a biochemical sense. His life fails to pass any adequate threshold of quality." Given that the respondents intended to do grievous bodily harm, the real distinction between their offending and murder is marginal.

Against a maximum penalty of life imprisonment, ten years' imprisonment is to my mind manifestly inadequate as a penalty for these offences, such that this Court should intervene. See Melano [1995] 2 QdR 186 at 189 and Dinsdale (1999) 202 CLR 321.

Comparison with two other cases confirms that view, notwithstanding they concern different offences. The first is Mullins, sentenced on the 13th of December 2001 by Justice Philippides following a trial to 20 years' imprisonment. There has been no appeal against that.

Mullins was 26 years old. After a mugging he kicked a passing cyclist into the river intending to kill him. That complainant suffered horrific injuries, but less severe than in the present case in that that victim can speak and is conscious.

The margin between an intention to kill and an intention to do grievous bodily harm is of less significance to sentencing in cases where the damage done is at the worst end of the range, as here. In those cases the damage actually done should weigh heavily in determining sentence.

The other case is Bates and Baker [2002] QCA 174, where following appeal a sentence of 18 years' imprisonment was imposed for manslaughter resulting from what the sentencing Judge termed "a vicious battering". Those offenders had pleaded guilty. It was substantially the plea which influenced the Court of Appeal to set aside the life term imposed by the sentencing Judge on Bates. Once one accepts this sentencing Judge's description of the unfortunate complainant as "a dead man living", there is little to distinguish the case of Bates from the present. There was

certainly more premeditation in that case. But on the other hand the crime to which these offenders pleaded involved proof of no intent. Here there is the acknowledged intent to do grievous bodily harm.

Reference was made on appeal to Schipper [2000] QCA 94. Schipper was, following appeal, sentenced to nine years' imprisonment for doing grievous bodily harm with intent. The consequences to the victim in that case, although serious, do not begin to approach those visited upon this complainant.

Before the learned Judge, relying on Fahey and Solomon, the Crown Prosecutor submitted that an appropriate sentence would be 12 years' imprisonment. As recently observed in Wilde [2002] QCA 501, that does not constrain this Court now if we believe such a penalty would have been manifestly too low. Otherwise this Court would compound error.

The observation in G [1999] QCA 477, that in determining these appeals the Court "would ordinarily not sentence the respondent to any higher sentence than that contended for by the Crown below" should be approached on the assumption that the sentence contended for below by the Crown was within an appropriate range.

In my view, for offending of this gravity and after allowing for the pleas of guilty and the youth of the offenders, the respondents should be imprisoned for a term of the order of 15 years.

I would regard the 10 years imposed in Fahey and Solomon as a very low sentence for such offending. Further, the disabilities inflicted on this complainant are even more serious than occurred in that case. Sight cannot be lost of the fact that the maximum penalty is life imprisonment. These offences must reasonably be considered as among the most serious examples of the offence in view of the disastrous consequences to the victim, and that is so notwithstanding the absence of a weapon such as a gun, a knife or a bat. It is the pleas of guilty on the reasoning of Bates and Baker and the comparative youthfulness and remorse of the respondents which warrant the imposition of finite lesser terms. Allowing appropriately for the different circumstance that the very similar offending in Mullins nevertheless amounted to attempted murder and not doing grievous bodily harm with intent, and Mullins having gone to trial, and that Bates and Baker's also comparable offending actually led to death and convictions for manslaughter, I consider that an appropriate adjustment should, in this case, after allowing for the pleas of guilty, youthfulness, and remorse and prospects of rehabilitation, have led to the imprisonment of each respondent on this count for 15 years.

In the case of Chambers, two years for the property offences would still have to be served cumulatively. That overall result should not, in my view, be regarded as crushing in context of the so-called totality principle.

The disturbing extent of violent crime in Brisbane's inner city area, especially during the night, warrants the imposition of appropriately deterrent penalties. That was not achieved here.

We were pressed with the contention that if allowing this Attorney's appeal, the Court should substitute new sentences towards the lower end of the range, as suggested in Dinsdale for example. On the other hand the Court should, by its responses to these appeals, foster predictability and consistency in sentencing, (see Everett (1994) 181 CLR 295 at 306).

I would allow each appeal and substitute for the term of 10 years' imprisonment imposed on the count of unlawfully doing grievous bodily harm with intent to do grievous bodily harm, imprisonment for 15 years with a declaration that the respondent has been convicted of a serious violent offence. The sentences should otherwise remain undisturbed.

HELMAN J: I agree. I should like to add something on the subject of deterrence.

This was a case - not the only one of recent times - of random sadistic violence in a public place in the centre of this city perpetrated to satisfy nothing more than aggressive instincts of the worst kind. The injuries inflicted on the victim have been so serious as to deprive him of any prospect of a normal life. In such a case the deterrent aspect of punishment

demands substantial weight and should never be overlooked by a sentencing judge, even though of course consideration must also be given to an offender's plea of guilty, apparent remorse, and youth. But if proper weight is not given to deterrence of conduct of this kind our cities and towns will become unacceptably dangerous places.

PHILIPPIDES J: For the reasons stated by the Chief Justice and by Justice Helman, I too consider that the sentences imposed were manifestly inadequate. In the cases before us the extreme and irremediable harm resulting from the offending was an important factor which legitimately weighed heavily in the sentences to be imposed as was the need for deterrence. I agree with the orders proposed.

THE CHIEF JUSTICE: The orders are as indicated by me previously.
