SUPREME COURT OF QUEENSLAND

CITATION:	*R v S* [2003] QCA 55
PARTIES:	**R** **v** **S** (applicant)
FILE NO/S:	CA No 424 of 2002 DC No 3408 of 2002 DC No 3409 of 2002 DC No 3410 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED EX TEMPORE ON:	20 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	20 February 2003
JUDGES:	McMurdo P, Mackenzie and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – where applicant and first co-offender convicted for one count of torture and one count of deprivation of liberty – where applicant and co-offender juvenile offenders - where applicant further convicted of additional criminal and property offences - whether sentence manifestly excessive particularly when regard is had to the sentenced imposed on the first co-offender *Juvenile Justice Act* 1992 (Qld) s 109, s 109 (2)(e), s 4 (a)
COUNSEL:	K M McGinness for the applicant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (DPP) for the respondent

THE PRESIDENT: The applicant, a juvenile, and his co-offenders R and O, pleaded not guilty on the 2nd of November

2002 to one count of torture and one count of deprivation of liberty on one indictment. They were each convicted after a jury trial on both counts. The applicant then pleaded guilty to the additional counts of four counts of unlawful use of a motor vehicle; five counts of stealing; one count of unlawful use of a motor vehicle with a circumstance of aggravation; one count of assault occasioning bodily harm; one count of break, enter and steal; one count of attempting to enter premises on a second indictment; one count of entering premises with intent; one count of receiving; and one count of attempted fraud on a third indictment.

He was sentenced on 13 December 2002 to 15 months' detention on each count and it was declared that one day held in presentence custody be time served under the sentence. Convictions were recorded.

The applicant contends this sentence is manifestly excessive, particularly when regard is had to the sentence imposed on the co-offender R. The applicant was 15 at the time of the torture offence and 16 at sentence. His co-offender R was 16 at the time of the offence and his co-offender O was 13 or 14. R has a lengthy criminal history but no offences for violence and had previously benefited from community-based orders. He was sentenced to six months' detention with a conviction recorded and to a 12 month probation period. O, who had no previous convictions, was sentenced to six months' detention to be served by way of an immediate release order with no conviction recorded.

The applicant, like R, had a lengthy criminal history. He had previously been cautioned for the offences of assault occasioning bodily harm and had Court appearances for unlawful use of a motor vehicle, possession of a dangerous drug, stealing, entering and being in premises and committing an indictable offence, stealing, entering premises with intent to commit an indictable offence and a wilful damage for which he had been sentenced to community-based orders, including a 12 month good behaviour bond, probation for six months, further community service orders and, most recently, to 10 months' probation on the 15th of October 2001. These offences then constituted a breach of this probation order. He had not previously been sentenced either by way of an immediate release order or to actual custody.

The facts of the offending behaviour are as follows. The complainant was a 15 year old schoolboy. On the 22nd of March, instead of attending school, he went to R's home where the applicant, O, and other young people, were also present. During the day the complainant was kept at the house and assaulted by the three offenders who rained blows on his body.

The learned sentencing Judge found that the complainant was uninjured when he arrived at the house and left with quite severe injuries to his face, head and body in the form of severe bruising, some abrasions and minor cuts consistent with him having received a large number of blows. On a number of occasions he was punched, and/or kicked, and had his head forcefully brought into contact with a metal box. He had a

cigarette extinguished on his stomach and two more on the palm of his left hand. The jury verdict was consistent with each co-offender extinguishing a cigarette on him. He was stripped to his underpants and socks, which was a humiliating experience. His facial injuries were so bad that his mother and a school friend had difficulty recognising him when they saw him at 4 p.m.

His mother then took him to hospital for treatment. Fortunately his physical injuries have settled. His victim impact statement, however, reveals what a harrowing and terrifying experience this was for him. It has had severe emotional and social consequences on the complainant and his family and he is receiving counselling.

There was no suggestion that the applicant's offending behaviour was any more or less serious than that of his co-offenders. During the trial it was suggested that part of the motive for the treatment was a belief that the complainant had, on some prior occasion, in some way sexually ill-treated the female co-offender O and another girl. His Honour noted that even if such a thing had occurred, this could not justify any vigilante behaviour. The Judge treated the incident as protracted bullying of one boy by three other youths so as to amount to actual torture.

Unlike his co-offenders, the applicant was also sentenced for a number of dishonesty offences and an offence of an assault

occasioning bodily harm. The facts of these offences are as follows.

Between 20 and 21 January 2002 the applicant and another co-offender unlawfully used four vehicles sequentially between Warwick, Annerley, Gailes and Bundall. One of the motor vehicles was then driven back to Warwick. The offenders put petrol in the vehicle at various service stations without paying and a petrol cap and some personal property were stolen from the vehicles. The offence of assault occasioning bodily harm occurred on 10 February 2002 in Warwick when the applicant assaulted a male by kicking him in the back after he had fallen to the ground as a result of another male person's punch. The complainant required admission to hospital overnight and his injuries included bruising to his back and ribs, a grazing to his lower back and suspected broken ribs. The offence of break, enter and steal occurred on 26 February 2002 when the applicant gained entry to a business premises by throwing a brick through a window. He stole money, a fax machine and computer equipment. On 4 march 2002, he entered a school in Gympie by removing louvres and then entered three rooms within the building, ransacking teachers' desks. Although nothing was taken, one of the louvres was broken and was replaced at a cost of $10. On 6 March 2002, he removed two windows from the window of a classroom but was unsuccessful in gaining entry.

The presentence report prepared by the Department of Family Services observed that the applicant remained the subject of a

community service order of 75 hours, having completed only 35 hours of that order which was about to expire. The report noted that the applicant had a significant anger-management issue related to conflict with his mother, having learnt that his step-father was not his natural father only when he was about 12 years old. He associates with a network of peers who have a history of offending and drug use. He was diagnosed with epilepsy when he was about 11. He gets a buzz from high risk taking behaviour. He is currently exhibiting behaviours of concern with his use of marijuana and other drugs, which are factors in his offending. He feels that when he commits offences, he is punishing his mother for not allowing him to live with his natural father. He has recently commenced regular appointments with the Child and Youth Mental Health Service. He accepts that his offending involving personal violence is unacceptable, but has displayed no real empathy for the victims, expressing his feelings that they "deserved it in a way", because of the way they behaved towards his friends. The report expressed concern about the effect of a custodial order on the applicant and the detrimental effect of his mixing with recidivist offenders and institutionalisation. The report expressed the view that ongoing supervision would give him the chance to work towards rehabilitation.

The applicant contends that these recommendations should have been followed and that a sentence of up to 12 months' detention and two years' probation should have been imposed and that now a sentence of 12 months' detention, coupled with

an immediate release order, is appropriate, the applicant having spent two months in detention prior to this hearing.

The offending behaviour was very serious. For the most serious offence of torture, the applicant did not have the mitigating factor of a plea of guilty. The applicant had a more extensive history than R and was on probation when he committed these offences. R had no prior convictions for violence and did not breach community based orders in the commission of the offences for which he was dealt with.

This applicant was sentenced globally, for far more offences than R, including an additional serious offence of assault. He was on probation at the time he committed these offences and had previously had the opportunity of other community based orders at the time of his offending. Although his extreme youth makes rehabilitation an important factor; see s 109, Juvenile Justice Act 1992 (Qld) ("Juvenile Justice Act"), there was no particular information here that suggested the applicant had immediately promising prospects of rehabilitation. He certainly lacked insight into his serious extensive and multi-faceted offending. The seriousness of these offences, the applicant's prior history and particularly the fact that he was on probation at the time that he committed these offences, were factors that meant that a custodial sentence was appropriate in this case. Section 109(2)(e) of the Juvenile Justice Act requires this be a "last resort" and for "the shortest appropriate period", but that expression must include some appropriate range and does not

just provide for only one possible sentence. Section 4(a) of the Juvenile Justice Act states that another of the principles of juvenile justice is that the community must be protected from offences. The applicant was a repeated property offender who had recently progressed to offences of violence.

In the end, despite Mrs McGinness' helpful and persuasive submissions, I am satisfied that the sentence of detention imposed here was necessary and that it was within the shortest appropriate period. I would refuse the application for leave to appeal against sentence.

MACKENZIE J: I agree.

PHILIPPIDES J: I also agree.

THE PRESIDENT: That is the order of the Court.
