SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bob; ex parte A-G (Qld)* [2003] QCA 129
PARTIES:	**R** **v** **BOB, Angipe Haby** (respondent/applicant) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant/respondent)
FILE NO/S:	CA No 377 of 2002 CA No 384 of 2002 CA No 36 of 2003 SC No 204 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld) Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX PARTE ON:	21 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2003
JUDGES:	de Jersey CJ, Davies JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal dismissed** **Application refused**
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 peculiar domestic relationship between respondent and deceased involving sexual exploitation – where stabbing impulsive rather than premeditated – where type of wound not normally fatal – where respondent remorseful – where plea of guilty – where no prior convictions – whether original light sentence justified CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR

	OFFENCES – OFFENCES AGAINST THE PERSON – GENERALLY – where sentencing judge misinformed about prospect of respondent being deported – where sentencing judge did not craft sentence in relation to issue of deportation
	Migration Act 1958 (Cth), s 501 *Penalties and Sentences Act* 1992 (Qld), s 188(1)(c)
COUNSEL:	L Clare for the appellant in CA No 377 of 2002 and for the respondent in CA No 384 of 2002 and CA No 36 of 2003 P D T Applegarth SC, with A W Moynihan, for the respondent in CA No 377 of 2002 and for the applicant in CA No 384 of 2002 and CA No 36 of 2003
SOLICITORS:	Director of Public Prosecutions (Queensland) for the appellant in CA No 377 of 2002 and for the respondent in CA No 384 of 2002 and CA No 36 of 2003 Boe Callaghan for the respondent in CA No 377 of 2002 and for the applicant in CA No 384 of 2002 and CA No 36 of 2003

THE CHIEF JUSTICE: Unless in context of the so-called battered wife syndrome a sentence of five years imprisonment suspended after one year imposed on a wife who deliberately stabbed her husband causing his death would cry out for explanation. This is not a battered wife case. Indeed the major violence was apparently the respondent's responsibility albeit a response, it seems, largely to the deceased's succumbing to a serious gambling addiction.

The circumstances of this offence were certainly deliberative. Angered by the deceased's having taken $50 from her purse for that gambling purpose and following an argument, the respondent stabbed him from behind in the leg using a long bladed knife she had fetched for the purpose, plunging the knife well into the leg over a distance of 11 centimetres almost through the knee. While it must be accepted that she had no intent to kill or do grievous bodily harm she must have

intended to injure him. As she said, she was intent on causing him pain.

The Attorney-General on this appeal against sentence rightly emphasises those aspects and submits that a sentence of seven to eight years imprisonment without moderation should have been imposed, relying on Baggett, CA No 1 of 2000, Kelly, 167 of 1998 and Whannel, 193 of 1992. On the other hand counsel for the respondent focuses on aspects said to put the case into a very unusual category, indeed unique.

No doubt the circumstances of homicides vary infinitely - and in rare cases sentences as apparently lenient as this one may be justified. What are the circumstances raised here? At the time of the killing the respondent was aged in her twenties, although it is difficult to be certain of her age, and the deceased was approximately 59. They had lived together since 1993.

As a young teenage PNG village girl the respondent had been "sold" by her parents to the deceased, a Caucasian Australian male then aged 51, for about $4,000. He brought her to Australia on false identification papers created by him. He was a Vietnam war veteran diagnosed as suffering from post-traumatic stress consequent upon his war experiences. He in fact brought her to Australia without her parent's permission or knowledge, introducing her into a social environment in Adelaide. He effectively maintained the respondent, in the

criminal sense, in an unlawful sexual relationship over the next three years or so.

When she was still aged only 15 she and the deceased went on to the IVF program to conceive a child. A child was born in the year 2000 at a time when the respondent had probably just turned 17. The relationship was characterised by some violence although it would seem most of that came from the respondent in response to the deceased's gambling. It was a generally dysfunctional relationship aggravated by his psychiatric condition and a gambling habit which led to the squandering of their meagre resources.

The deceased died from the loss of blood following a single stab wound at the back of his left thigh. Dr Naylor concluded only moderate force would have been required and he had never in his experience seen a fatal wound, whether accidental or not, at that site.

In summary the respondent emphasises three aspects rendering the case quite exceptional. First the perculiarity of the domestic relationship from which the incident arose which while not involving a battered wife had been shaped by the deceased's sexual exploitation of a young teenager and affected by his psychological problems and gambling addiction.

Second her action in stabbing the deceased which, while deliberative, was said to have been impulsive, a response to his final act of stealing her money in order to feed his

gambling addiction; and third, its being an unusual injury causing death in view of location and the amount of force used.

Coupled with the absence of premeditation, the respondent's remorse, her guilty plea, albeit it very late, a lack of prior convictions and the impact of a lengthy custodial term on the welfare of her very young child, the circumstances just covered do, in my view, put this case into a most unusual category such as to justify what would otherwise be an extremely lenient Court response to offending of this gravity.

The learned Judge was in this extremely unusual circumstance entitled, in my view, to reduce the head sentence to five years, so that she would be statutorily entitled to impose a suspension, in the light of her reasonable wish to leave the applicant in a situation of certainty as to her release, having regard to both her interests and those of her child. I would accordingly refuse the Attorney's appeal.

The respondent has herself applied for leave to appeal against sentence. Her primary contention is that her Honour erred in any event, by imposing a sentence requiring her to serve one year's imprisonment, in light of her Honour's being misinformed about the operation of section 501 of the Migration Act 1958 and the prospect of the respondent's being deported to her land of birth. That section effectively provides that the Minister may cancel a visa such as the respondent enjoys, if the Minister reasonably suspects the

holder of the visa does not pass the "character test". That will not be successfully negotiated if the person has a substantial criminal record, which is the case if the person has been sentenced to a term of imprisonment of 12 months or more.

Her Honour was informed by counsel for the respondent that the visa would be rendered vulnerable by a sentence of imprisonment of "more than 12 months actual custody", which was incorrect. The respondent sought to reopen the proceedings contending for a sentence of "imprisonment proximate to but less than one year coupled with a community-based order to support her rehabilitation following her release from custody", on the basis that would not attract the operation of the statutory provision, and exclude the prospect of a review of her visa.

On the hearing of the re-opening application the learned Judge accepted that she had been misinformed, but indicated in effect that she had not crafted the sentence which she imposed by any reference to that issue. As she said when sentencing the respondent:

> "I might add that I would have imposed a sentence of six years imprisonment upon the defendant but for the fact that I am of the view that the interests of justice require that she should have a finite period in imprisonment so plans can be made with respect to her child and that she should know what to expect".

Her Honour was apparently not influenced by the issue of deportation in the context of the Migration Act in determining upon the sentence imposed, and she was not obliged to take

that significantly into account. Indeed, as the Judge rightly pointed out during the reopening proceedings, what was proposed then, and what is renewed here now, that is "to fashion a sentence which would not otherwise be considered appropriate solely to circumvent the Migration Act", would not be a correct approach to the matter.

Her Honour described that as "the very thing that ought not to occur, that is fashioning a sentence solely to defeat the exercise of a discretion under section 501 of the Migration Act". I respectfully agree.

Accordingly, no "clear factual error of substance" within the meaning of section 188(1)(c) of the Penalties and Sentences Act justifying an activation of the discretion to re-sentence was made. Erroneous material was put before her Honour, but it was not material to the approach she in fact chose to take to the matter of sentencing, and her approach was appropriate. The respondent's challenge to her Honour's refusal to reopen should therefore be rejected.

There is no need, in the circumstances, to consider any suggested discrepancy between the Court of Appeal's approach in R v. S 2001 Queensland Court of Appeal 531 and the High Court authority of Shrestha 1991 173 Commonwealth Law Reports 48. Otherwise the sentence imposed by her Honour could not possibly, sensibly, be said to be manifestly excessive.

Both the Attorney's appeal and the application for leave to appeal brought by the prisoner should be refused.

DAVIES JA: I agree.

ATKINSON J: In my view the sentence imposed was within the sound exercise of the sentencing discretion of the learned sentencing Judge and both appeals should be refused.

THE CHIEF JUSTICE: The appeal against conviction is dismissed. The application for leave to appeal against sentence is refused.
