SUPREME COURT OF QUEENSLAND

CITATION:	*R v K* [2003] QCA 368
PARTIES:	**R** v **K** (applicant/appellant)
FILE NO/S:	CA No 168 of 2003 DC No 784 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court
DELIVERED EX TEMPORE ON:	27 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27 August 2003
JUDGES:	McMurdo P, Dutney and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against sentence allowed.** **2. Substitute imprisonment of five years for the sentence imposed at first instance in relation to Count 1.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – where re-trial ordered by Court of Appeal – where applicant convicted on re-trial – where higher sentence imposed by second trial Judge – whether sentence imposed by first trial Judge was outside the range *R v Craig*, CA No 139 of 1990, 8 August 1990, considered *R v Donaghey*, CA No 79 of 1985, 19 June 1985, considered *R v Jurss*, CA No 456 of 1997, considered *R v Lawrence* [2002] QCA 526, CA No 131 of 2002, 2 December 2002, considered *R v Petersen* (1999) 2 Qd R 85, followed *R v Smith*, CA No 29 of 1997, 10 October 1997, considered *R v Watt*, CA No 490 of 1998, 4 June 1999, considered
COUNSEL:	S J Hamlyn-Harris for the applicant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the

respondent

DUTNEY J: The applicant is a 26 year old woman, 23 at the date of commission of the offences of which she was convicted. On 7 May 2003, following a trial, the applicant was convicted of one count of grievous bodily harm for which a sentence of seven year's imprisonment was imposed, and seven counts of assault occasioning bodily harm. The offences were committed on the applicant's son born on 8 May 2000 on various dates between 11 May 2000 and 30 June 2000.

The applicant had previously pleaded guilty in the Stanthorpe District Court to unlawfully doing grievous bodily harm to her older child on 24 January 1998. On that occasion no conviction was recorded and the applicant was placed on 12 months probation. That offence concerned the applicant's severe shaking of her infant daughter which caused brain damage, retinal haemorrhages and metaphysial fractures. That baby also suffered fractures to both forearms. As part of the probation order the applicant was required to attend formal lessons about the proper care of infants.

The applicant was tried on 20 December 2001 in the District Court at Warwick on an indictment containing, in addition to the counts on the indictment on which her recent trial was conducted, a charge of torture. The applicant was acquitted of torture but convicted of two counts of grievous bodily harm and 11 counts of assault occasioning bodily harm. The applicant received an effective sentence of five years'

imprisonment imposed in relation to the grievous bodily harm counts and shorter concurrent sentences for the other offences. She appealed. The Attorney-General cross appealed against the leniency of the sentence. The appeal against conviction was successful and in consequence the Attorney's appeal did not need to be considered. On the retrial the prosecution did not proceed on one count of grievous bodily harm and one count of assault. The present convictions resulted.

Circumstances in which the present offences were committed are as follows. Seven weeks after the birth of the child, to whom these offences relate, the applicant took the baby to a clinic and a nurse saw a bruise under the child's right eye. On referral to the local hospital doctors found fractures to the right tibia, left femur and rib fractures. The baby was transferred to the Mater Hospital where further fractures were detected. A subdural haematoma to the left side of the head was detected as was swelling to the brain which was life threatening. Medical opinion was that the injuries ranged in age from up to six weeks old down to approximately one week old.

When questioned by police on 29 June 2000 both the applicant and the baby's father, also the applicant's husband, denied any knowledge about how the injuries were occasioned. On 30 June 2000 the husband confessed in rather implausible terms to having been responsible for the injuries. The father's description of how he caused the injuries was disputed by doctors who testified at the applicant's trial.

As a result of these injuries that child is now exposed to a greater risk of spasticity, epilepsy and of suffering developmental problems. To date, however, his milestones have been at the lower end of the normal scale.

When sentenced on the retrial the learned sentencing Judge referred to the following matters as relevant. Firstly, that the applicant had previously been acquitted of torturing the baby. Notwithstanding that, however, he considered that the acquittal did not mean that the applicant was to be sentenced on the basis that the present offences were committed unintentionally. The applicant was to be sentenced on the basis that she wilfully and deliberately did grievous bodily harm and the assaults which occasioned the bodily harm. It appears to me that what his Honour was saying in raising these matters was that the acts themselves were deliberate acts although having regard to the verdict on the torture trial and to the fact that there was no element of intention attached to the grievous bodily harm that the consequences should not be taken to be intended.

There was no evidence upon which it was possible to determine why the applicant had committed the offences. There was no evidence of severe psychological or psychiatric problems which she suffered and she was not said to be mentally retarded. Given her experience with the earlier child and the training she received on probation the sentencing Judge considered that she must have been aware of

the consequences of her conduct yet despite that awareness acted in the way she did.

His Honour, the sentencing Judge, was aware of and referred specifically to R v. Petersen (1999) 2 Qd.R 85 where, at page 87, the Court made these comments in relation to a sentence imposed following a retrial:

> "We consider that where an offender is to be resentenced following a successful appeal and retrial the second sentencing Judge should start with the proposition that the offender ought, in general, not receive a harsher sentence than that imposed after the first trial. If minded to depart from that approach he or she should consider the powerful policy considerations outlined above. Only if the second sentencing Judge concludes that the earlier sentence was outside the appropriate range or the facts as they appear at the time of the resentence are significantly different from those upon which the first sentence was based should he or she impose a heavier sentence."

Similar remarks were made in the matter of Lawrence, Court of Appeal 131/2002.

At the earlier trial the matters upon which the sentencing Judge commented in passing sentence included the following. His Honour purported to give effect to the decision of the jury that the applicant was not guilty of torture and sentenced her on the basis that the injuries were not intentionally inflicted by her.
As I have already commented, I do not consider this is necessarily a different approach to that adopted by the trial Judge on the second occasion.

The Judge at the first trial also said that although done at different times the injuries to the child were all within the early weeks of his life when he was at his most fragile and wholly dependent on the applicant. The applicant's experience with the earlier child should have alerted her to the need to be particularly careful in the handling of her second child. His Honour commented that there had to be a deterrent component in any punishment for the grievous bodily harm and apart from such general deterrents there was a necessity to drive home to the offender the undesirability of a repetition of the offence. His Honour noted that as part of the probation for the earlier offence the applicant underwent a short course in child care. In the evidence before the first trial Judge there were favourable references to the way in which she cared for her son. His Honour said:

> "I would not want it suggested by anyone that you were wholly neglectful of your duty to him. It may well be that the blackouts that have been mentioned - whether they occurred or not - that there is something that just every so often led to some more forceful treatment of him than there should have been."

His Honour also remarked that the applicant took her son to the maternal and child welfare nurse who "had no reason to suspect anything until the final visit, not even to detect any hint of pain on occasions that he was there and being handled".

It was also relevant that the applicant did not express remorse.

Having regard to the remarks made by the Judges at each of the trials it seems to me that each sentenced largely on the same basis. Conscious of the decision of this Court in Petersen, however, the Judge at the second trial conceded that the earlier sentence was manifestly inadequate and imposed a higher sentence. The question which this Court now has to consider, it being conceded by counsel for both sides that, in the absence of manifest inadequacy, a sentence of five years is the proper one, is whether or not that five year sentence was in fact sufficient.

We have been referred to a number of cases which counsel for the applicant submits support his submission that the appropriate range of sentencing is five to six years. In particular, we were referred to the decision in Smith, Court of Appeal 29/1997, 10 October 1997, when a sentence of four years was imposed for grievous bodily harm after a trial in relation to a shaking injury. In Watt, Court of Appeal 490/1998, 4 June 1999, a sentence of four years was also imposed.

At the upper end of the range submitted by counsel for the applicant was the decision of this Court in Jurss, Court of Appeal 456/1997, where a sentence of five years was imposed. That was, however, in my view, a much worse case than the present.

Having made that comment I should also say that in none of those cases to which we were referred had there been any previous relevant convictions recorded against the offender.

For the prosecutor we were particularly referred to Donaghey, Court of Appeal 79/1985, 19 June 1985, where a sentence of six years was imposed for what seems to have been a worse situation and Craig, Court of Appeal 139/1990, 8 August 1990, where a sentence of six years was imposed in relation to an adult. Both of those cases are of some antiquity and it seems to me that there is now a general acceptance that sentences for these types of offences which might have been considered within range 10 or more years ago would not necessarily be considered within range now.

For my part, I consider that the sentence of five years originally imposed by the trial Judge after the first trial was within range but only just if one considers that lesser sentences have been accepted by this Court in circumstances where there has been no previous conviction. Having regard to the fact of the previous conviction, however, I would not accept that in this case a sentence of four years' imprisonment would have been open to the sentencing Judge. In saying that also I consider that the sentence of seven years imposed by the Judge at the second trial also to be within range in the circumstances outlined here. I would not necessarily conclude that a sentence even higher than that might not have been upheld on appeal although I would not express any concluded view on that.

The question I have to consider however is whether or not five years is outside the range and if it is not then in accordance with the principle established in Petersen that is the sentence which should be imposed. Having regard to the authorities to which we have been referred and to the

matters which I have addressed I consider that it cannot be said that the sentence of five years imposed here - particularly where in relation to the prior offence no conviction was recorded and only a period of probation was imposed - can be said to be manifestly inadequate.

Therefore, the proper sentence in this case, in my view, would be five years' imprisonment for the conviction for grievous bodily harm with the shorter concurrent sentences for the other offences for which the applicant was convicted. I would grant the application, allow the appeal against sentence and substitute imprisonment for five years for the sentence imposed by the trial Judge in relation to count 1.

THE PRESIDENT: I agree. I add the following observations only by way of emphasis. In my view, the sentence of seven years' imprisonment imposed by the second sentencing Judge was not manifestly excessive and was within range. The only reason for this Court's interference is that that sentence was imposed after a retrial following a successful appeal. The sentence imposed at the first trial was five years' imprisonment. Where an offender is to be resentenced following a successful appeal and retrial the second sentencing Judge should start with the proposition that the offender ought, in general, not receive a harsher sentence than that imposed after the first trial. This is because of the important policy considerations that persons wishing to exercise their right of appeal should not be at risk of later receiving a heavier sentence, which could be construed

as punishment for exercising that right of appeal: see *R v Petersen* [1999] 2 QdR 85 and *R v Lawrence* [2002] QCA 526; CA No 131 of 2002, 2 December 2002.

The particularly serious aspect of this offence is that the applicant had a prior conviction for a chillingly similar offence. On the other hand, she seemed for much of the short time she was caring for her baby son to do so competently. It is impossible, on the material before this Court, to understand how she came to commit this serious offence which constituted a grave abuse of trust. It remains a mystery.

As Justice Dutney has illustrated in his reasons, the original sentence imposed after the first trial of five years' imprisonment, though compassionate and at the very low end of the appropriate range, has not been demonstrated to be manifestly inadequate. It follows that the second sentencing Judge was constrained by the first sentence of five years' imprisonment which now must be substituted for the sentence imposed of seven years' imprisonment. I agree with the orders proposed by Justice Dutney.

PHILIPPIDES J: I agree with the reasons of Justice Dutney and the President and with the orders proposed. I would only add that I too wish to emphasise that, whilst I consider the sentence imposed at the first trial was not manifestly inadequate, it was one at the bottom of the appropriate sentencing range given the applicant's previous offending.

THE PRESIDENT: The orders are as proposed by Justice Dutney.