SUPREME COURT OF QUEENSLAND

CITATION:	*R v AS; ex parte A-G (Qld)* [2004] QCA 259
PARTIES:	**R** **v** **AS** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 183 of 2004 SC No 175 of 2004 SC No 179 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	28 July 2004
JUDGES:	de Jersey CJ, Williams JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. For the sentence of three and a half years detention imposed in respect of the offence of manslaughter, substitute detention for five years** **3. The orders made on 27 May 2004 are otherwise to stand**
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 the respondent pleaded guilty to the manslaughter of a taxi driver – where the Attorney-General appeals on the ground that the three and a half year detention imposed in respect of the manslaughter is manifestly inadequate – whether the sentence imposed in respect of the manslaughter is manifestly inadequate

Juvenile Justice Act 1992 (Qld), s 176(3)(a), s 150(2)(e)

Bryan v R; Lewis v Attorney-General of Queensland [2004] HC Trans 246, 23 June 2004, cited
Everett v R (1994) 181 CLR 295, cited
R v A [1995] QCA 148; (1995) 79 A Crim R 100, considered
R v Bates; R v Baker [2002] QCA 174; CA No 295 of 2001, CA No 329 of 2001, 17 May 2002, considered
R v Briody [2002] QCA 364; CA No 135 of 2002, 17 September 2002, considered
R v Kazakoff; ex parte Attorney-General [1998] QCA 459; CA No 236 of 1998, 27 August 1998, cited
R v K; R v K; ex parte Attorney-General of Queensland [1998] QCA 284; CA No 185 of 1998, CA No 189 of 1998, 22 September 1998, considered
R v Liekefett; ex parte Attorney-General [1973] Qd R 355, cited
R v Nagy [2003] QCA 175; [2004] 1 Qd R 63, cited
R v Simeon [2000] QCA 470; CA No 167 of 2000, 21 November 2000, considered

COUNSEL: M J Copley for the appellant
B G Devereaux for the respondent

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

[1] **de JERSEY CJ:** The respondent, when aged 16 years, pleaded guilty to the manslaughter of a taxi driver on 27 December 2002, to stealing his property, and to the summary offences of obstructing police officers and assaulting police officers in the course of his subsequent apprehension. For the manslaughter, he was sentenced to three and a half years detention, to be released after serving 50 per cent and then to be subject to a supervised release order. The stealing attracted a concurrent three month term, with no separate penalty being imposed for the summary offences. The Honourable the Attorney-General appeals on the ground that the three and a half year detention imposed in respect of the manslaughter is manifestly inadequate.

[2] The deceased was a 40 year old married man with a dependent 16 year old son. The deceased was studying law, and drove a taxi on a part-time basis. Victim impact statements showed that the death has understandably had a substantial impact on the family.

[3] The respondent, with three male and one female companions, took the deceased's taxi home from the city late at night. They expected to have insufficient money for the fare – they had only eight dollars, and had agreed to decamp as necessary at the end of the trip. One of them, not the respondent, directed the deceased to stop at the Cavendish Road High School, apparently on the basis they would be able to run through the school grounds with the deceased unable to follow in the taxi. On arrival there, one of the other youths (H) asked the others to wait across the street, so that he would attempt the payment. The deceased declined to accept only eight dollars, and H informed the others. The deceased drove his taxi to where the

respondent was standing with H, and demanded payment. H and the deceased had words, then the respondent approached the deceased and delivered a single punch to the deceased's face. The deceased fell backwards to the ground. The respondent then entered the taxi and removed the coin dispenser, a mobile phone and the ignition keys. The group then fled the scene. The female suggested calling an ambulance, but that was not done. The youths went home.

[4] Another taxi driver discovered the deceased's unconscious body, dripping blood, at 2 am, and called the police and the ambulance. When the police saw the deceased at 2.45 am, he was still breathing. He was admitted to hospital and survived for seven days before succumbing to intracranial pressure.

[5] The group of youths, though not including the respondent, met the following day and discussed the event with friends who fortunately then gave information to the police.

[6] Police officers executed a warrant on the respondent's house on 21 December 2002 and located the taxi keys and the telephone. The respondent sought to flee. He assaulted one police officer and struggled with another. Two further police officers could not restrain the respondent, and capsicum spray was used for that purpose.

[7] The learned sentencing Judge had the benefit of a pre-sentence report in relation to the respondent, who was 15 years three months old when he committed the offences. Her Honour noted that the respondent commenced using drugs in the year 2000 when he was in grade eight, that he had been guilty of truancy, and was expelled from school in 2002. Negative peer influence was a contributor to his offending behaviour. The respondent has not had the benefit of fatherly direction and discipline. He had spent 523 days in pre-sentence custody, where he had behaved himself, and the prospects for rehabilitation were promising. He was remorseful.

[8] The respondent had some prior criminal history, which included no previous convictions for offences of violence. On 31 January 2001 he was reprimanded for entering or being in a dwelling house and committing an indictable offence, for possession of a dangerous drug and for possession of utensils. On 4 October 2002, he was placed on a six month good behaviour bond for possession of a graffiti instrument. He was subject to that bond when he committed the instant offences. While on remand in custody for these offences, he was reprimanded on 3 March 2003 for a wilful destruction offence. There was no violence it is true, but the respondent did not come to be sentenced for these offences with even a relatively clean slate.

[9] The learned Judge identified, as features favouring the respondent, his pleas of guilty, his limited prior criminal history, the absence of pre-meditation, that only one blow was involved, his remorse, and his behaviour during detention. On the other hand, as Her Honour recognized, the respondent subjected the deceased to an unprovoked attack sufficiently forceful to knock him down, at a time when the deceased was carrying out his employment; the respondent displayed callous disregard in failing to check on the deceased or summon help, and thereby denied the deceased the prospect of early medical attention; the respondent

opportunistically stole the deceased's property; and he endeavoured to evade police who had to make concerted efforts to subdue him.

[10] As to the absence of pre-meditation, the delivery of the blow may have been virtually on the spur of the moment, but it should not be overlooked that the event had its genesis in a dishonest plan to do down the taxi driver, a plan designed to ensure their evading both the fare and him. The delivery of the blow was not part of that plan, it is true, but it may reasonably be characterized as a development from otherwise reprehensible conduct which was thought out in advance.

[11] The Crown Prosecutor submitted that four to five years detention should have been imposed, 50 per cent to be served. Defence Counsel's ultimate submission was that the respondent be sentenced to no more than three years detention.

[12] Her Honour discussed *R v A* (1995) 79 A Crim R 100 and *R v K; R v K; ex parte Attorney-General of Queensland* [1998] QCA 284. In *A*, for roughly similar offending, a penalty of three years probation was imposed following trial. That 16 year old offender had served nine months in custody prior to being sentenced. As this learned Judge pointed out, *A* is somewhat different in that that blow was delivered in the course of a general melee, whereas the respondent's blow was the only act of violence. The case is not presently helpful, in any event, because the Attorney-General's appeal against the probation order failed because the prosecutor had submitted that a non-custodial penalty was appropriate. A non-custodial response was plainly out of the question here.

[13] The juvenile offender in *K* intentionally placed a large rock on the highway, leading to a collision seriously injuring the occupants of a vehicle and killing one of them. On an Attorney's appeal, three months detention with three years probation was lifted to two years imprisonment. In *K*, the court considered that though a collision was intended, the prospect of death or serious injury would have been less obvious.

[14] The learned sentencing Judge considered the respondent's callousness following the delivery of the blow rendered this case more serious than either *A* or *K*.

[15] Reference to other cases is not of great assistance here, although the helpful summary by Williams JA in *R v Briody* [2002] QCA 364 of sentences imposed on youthful offenders for armed robbery suggests that in a case like this, where a life has been lost, the sentence should have been more substantial than three and a half years detention.

[16] Pursuant to s 176(3)(a) of the *Juvenile Justice Act*, the maximum penalty which could have been imposed in respect of the manslaughter was 10 years detention. Section 150(2)(e) obliged the Judge to impose the shortest appropriate period of detention. Although only of marginal relevance, *R v Simeon* [2000] QCA 470, which concerned an offence of manslaughter committed by a 27 year old offender, in the course of a party, by the delivery of a punch, was sentenced to seven years six months imprisonment with a recommendation for consideration of parole after two years nine months.

[17] I respectfully consider that the learned Judge gave insufficient attention to the circumstance that taxi drivers are especially vulnerable to acts of irrational violence,

and especially at night time, so that there is a high need that penalties act as a general deterrent. The taxi service is a very important adjunct to the publicly run transport system. Taxi drivers are generally hard working, industrious people, yet they are subjected to the wide gamut of human misbehaviour, from drunkenness through theft to even personal violence, irrational and often opportunistic. Substantial sentences in response to violence like this are necessary to send a signal as to what should be obvious – its utter unacceptability. The community reasonably expects the courts to impose substantial penalties in these situations. Doing so is not a knee jerk reaction to expressions of public anger which may mellow with time: it is simply what is necessary.

[18] The court has a duty to protect, so far as it can, those working in these vulnerable situations. I do not consider that three and a half years detention, with 21 months to be served, appropriately reflected that important consideration. Neither did it adequately reflect the extreme gravity of gratuitously causing a death, in this case of a husband and father, by a criminally violent act and where by his callous conduct after delivering the blow, the respondent denied the deceased the early treatment which may have preserved his life. Further, there is the stealing, which confirms contempt for the rights of the deceased consistent with the attitude which inspired the blow, and his enthusiastic efforts to evade apprehension. His treatment of police officers reasonably doing their duty was consistent with a rejection of the fundamentals for stability, and a counter that he was immature needs to be assessed against other respects in which his behaviour may be seen as worldly-wise.

[19] Those features combined to warrant a substantial term notwithstanding the respondent's age, limited history, rehabilitation, past deprivations, pleas of guilty and remorse. I do not accept Mr Devereaux's submission that deterrence was of only minor significance because the offender was a child, and I do not accept that results from a proper interpretation of the legislation. To my mind, the predominately important goals in this sentencing process were deterrence and community denunciation.

[20] I accept the submission by Counsel for the appellant that detention of the order of five to six years should have been imposed, with 50 per cent to be served. I would impose a five year term. I would regard that as the shortest appropriate period of detention, balancing all relevant considerations, and allowing for the moderation which attends the disposition of Attorney appeals. Those circumstances justify a penalty at around the half way point of the range established by the maximum penalty of 10 years detention. In response to a submission by Mr Devereaux, I should say that I do not consider imposing a term of that order would involve lifting a previously applicable level: as I have indicated, past cases do not clearly establish any particular range, within the statutory limitation, such as would apply here.

[21] After preparing these reasons, I had the advantage of reading the reasons for judgment of Williams JA, with which I agree. I wish to record particularly my agreement with His Honour's observations in para [30], as to the significance of the Code's providing in s 669A(1) that this court's discretion to vary a sentence on an Attorney's appeal is "unfettered".

[22] I would order:

1. that the appeal be allowed;

2. that for the sentence of three and half years detention imposed in respect of the offence of manslaughter, there be substituted detention for five years;
3. that the orders made on 27 May 2004 otherwise stand.

[23] **WILLIAMS JA:** The relevant facts are fully set out in the reasons for judgment of the Chief Justice which I have had the advantage of reading; I agree with all that is said therein but wish to add some further observations.

[24] In a number of cases courts have recognised that taxi drivers are in a particularly vulnerable situation when it comes to assault and robbery, and that is a factor which has regularly been taken into account in determining the appropriate penalty for an offence of violence against a taxi driver: *Briody* [2002] QCA 364. Taxi drivers provide a necessary service for the public which requires them at night to take complete strangers into their motor vehicles and often drive to remote, secluded locations. Since society expects that of taxi drivers, society also demands that those who take advantage of the vulnerability of taxi drivers should be severely punished. The same approach is followed with respect to other persons in society whose occupation places them at greater risk of being assaulted; *R v Kazakoff; ex parte Attorney-General* [1998] QCA 459 and *R v Nagy* [2004] 1 Qd R 63.

[25] It is an unfortunate and disturbing fact that many of the offences involving violence against taxi drivers are committed by young males aged between 16 and 20 years. Courts have been called upon to sentence many offenders in that age group for the offence of robbery with actual violence; some of the cases are collected in *Briody*. Here there was no robbery because it was accepted that the stealing of the keys, mobile telephone and money was an afterthought; the respondent did not assault the deceased with a view to obtaining that property. It must also be remembered that the punch in this case, the assault, was not as pre-meditated as the assaults involved in the robbery cases. Relativity however must be maintained between sentences imposed in those robbery cases and the cases where the assault results in the death of the taxi driver, subject, of course, in this case to the consideration that the relevant maximum penalty because the offender was a juvenile is 10 years detention.

[26] In his submissions counsel for the respondent contended that the principle of deterrence plays but a minor role when sentencing a juvenile pursuant to the provisions of the *Juvenile Justice Act* 1992. I reject that submission. Section 150(1)(a) requires the court when sentencing a juvenile to have regard to "the general principles applying to the sentencing of all persons" and when a juvenile kills another human being the conduct is so grave that the ordinary principles of sentencing are called in to play and largely outweigh the juvenile justice principles which are more appropriate to less serious crimes committed by juveniles. It is significant for present purposes to also note that s 150 requires the court to have regard to the "nature and seriousness of the offence" and the "impact of the offence on a victim". Further, in Schedule 1, the Charter of Juvenile Justice Principles, the first principle stated is that the "community should be protected from offences".

[27] Society cannot allow the unjustified killing of a human being to go unpunished. If appropriate punishment for such a crime is not imposed then the very fabric of society is undermined and reasonable people in the community lose faith in the criminal justice system.

[28] Whilst, as has been acknowledged previously in this court, sentences imposed for the crime of manslaughter "can vary from non-custodial sentences in truly exceptional cases up to life imprisonment for the most serious examples" in most cases the sentence imposed has required the offender to serve quite a number of years in actual custody; *R v Bates; R v Baker* [2002] QCA 174 at para [56]. The only "unusual" feature of this case is the age of the offender at the time of the killing. Whilst that cannot be ignored it is, in my view, not the dominant consideration because of the nature of the crime committed.

[29] In my view the learned sentencing judge placed too much emphasis on the age of the offender and the issue of rehabilitation of the offender and failed to give appropriate weight to the seriousness of the crime in determining the appropriate penalty.

[30] In his submissions counsel for the respondent emphasised that this was an appeal by the Attorney-General from a sentence imposed on a young offender. He referred generally to the approach taken by appellate courts to such matters, and referred in particular to passages in the reasoning of the High Court in *Everett v The Queen* (1994) 181 CLR 295. However, it is important to remember that s 669A of the Criminal Code confers a right of appeal on the Attorney-General and the court has an "unfettered discretion" to vary the sentence under appeal. In *Bryan v The Queen; Lewis v Attorney-General of Queensland* [2004] HC Trans 246 (23 June 2004) in refusing to grant special leave Gummow J (with the concurrence of Kirby and Hayne JJ) after referring to the wording of the section observed that s 669A "is a provision which appears to be unique to Queensland and differs significantly from the provisions governing the disposition of prosecution appeals against sentence elsewhere in Australia." The term "unfettered" was inserted by amendment in 1975 to overcome the decision of the Court of Criminal Appeal in *R v Liekefett; ex parte Attorney-General* [1973] Qd R 355. In my view this court is not constrained upon the hearing of this appeal in the way suggested by counsel for the respondent in his submissions.

[31] In my view the sentence imposed was manifestly inadequate and I agree that the sentence should be increased as proposed by the Chief Justice in his reasons.

[32] **MULLINS J:** I agree with the reasons for judgment of the Chief Justice and the orders which he proposes. I also agree with the observations made by Williams JA.