SUPREME COURT OF QUEENSLAND

CITATION:	*R v PU* [2004] QCA 392
PARTIES:	**R** **v** **PU** (applicant/appellant)
FILE NO/S:	CA No 309 of 2004 DC No 1804 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders made 28 September 2004 Reasons delivered 22 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2004
JUDGES:	Williams JA, White and Jones JJ Judgment of the Court
ORDERS:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed** **3. Set aside the sentence imposed at first instance and in lieu thereof sentence the applicant to 19 days imprisonment to 28 September 2004 from 9 September 2004 and thereafter order that she be released on probation for three years, the probation order to be in the usual terms with a special condition that she submit to such parenting, counselling and other programs as directed by her probation officer**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – PLEA OF GUILTY, CONTRITION AND CO-OPERATION – ASSISTANCE TO AUTHORITIES AND CO-OPERATION – where applicant pleaded guilty to one count of failing to provide the necessaries of life – where applicant failed to provide medical treatment to child – whether sentence manifestly excessive – co-operation with authorities – naming of co-offender – discount in sentence applicable –

discussion concerning the reasons for discount in such circumstances

Penalties and Sentences Act 1992 (Qld), s 13A, s 93

R v Cole, unreported, Queensland District Court, Indictment No 366 of 1999, 1 August 2000, considered
R v Field, unreported, Queensland District Court, Indictment No 2917 of 2002, 19 November 2002, considered
R v Salameh (1991) 55 A Crim R 384, followed

COUNSEL: P J Callaghan for the applicant/appellant
C W Heaton for the respondent

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

[1] At the conclusion of the hearing on 28 September 2004, the court made the following orders and indicated it would publish its reasons at a later date. The orders are:-

1. Application for leave to appeal against sentence granted;
2. Appeal allowed;
3. Set aside the sentence imposed at first instance and in lieu thereof sentence the applicant to 19 days imprisonment to 28 September 2004 from 9 September 2004 and thereafter order that she be released on probation for three years, the probation order to be in the usual terms with a special condition that she submit to such parenting, counselling and other programs as directed by her probation officer.

[2] The court now publishes its reasons:

[3] **THE COURT:** The applicant, on 9 September 2004, pleaded guilty to one count of failing to provide the necessaries of life to her daughter between 7 – 10 June 2003. She was sentenced to 12 months imprisonment to be suspended after she had served three months with an operational period of two years.

[4] The child was born on 2 May 2001 and was thus two years old at the time of the incident. At the time of these events the appellant, her de facto partner MS and the child were living in a caravan park in Brisbane. MS had commenced living with the applicant and her daughter about four weeks previously. He was not the father of the child. The applicant was born on 2 November 1982 and she was thus 21 years of age at the time.

[5] At approximately 6.00pm on 8 June 2003 the applicant left the child in the care of MS while she visited a friend in a nearby caravan. When she returned 15 minutes later MS was holding the child in his arms trying to comfort her. The applicant noticed something wrong with the child. MS told her that the child was having a tantrum and had struck her head on a door. The child had a history of throwing tantrums. MS went on to say that the child may have knocked herself out because when he found her she was shaking or convulsing on the floor. He picked her up and cuddled her hoping she would be okay.

[6] The applicant noticed that the child's legs were stiff and her toes were pointing outwards. She noticed also that she was grinding her teeth.

[7] The couple decided to wait until the next day to see if the child improved before taking her to the doctor. The applicant attempted to feed her and after two attempts the child drank half a bottle of milk and later drank some more. They kept the child under observation during the night. MS was making reassuring comments that the child was tough and would be okay. On the next morning the child was not able to be roused and at about 10.00am the applicant attempted to seek advice from her mother who lived in Newcastle. She was unable to make contact with her mother until 3.30pm that afternoon. The applicant's mother advised her to take the child to the hospital if she was not any better within the hour. MS suggested they should wait a little longer to see if there was any improvement arguing that if she went to hospital she could lose the child to welfare.

[8] Finally the ambulance was called at 3.45pm and the child was taken to hospital. The ambulance officers assessed the child as having a Glasgow Coma score of 4 on the 15 point scale.

[9] A physical examination of the child revealed extensive bruising over both thighs, arms and cheeks, and bruising to her forehead. Other investigations revealed acute subdural haemorrhage and subarachnoid haemorrhages in the temporal occipital and parietal areas of the brain. She also had bilateral retinal haemorrhages. The head and eye injuries are consistent with the child having been violently shaken. MS has been charged in respect of this conduct but has not yet been brought to trial. The applicant has undertaken to give evidence at his trial.

[10] During the submissions at the sentence hearing, the learned sentencing judge raised concerns about the diverse nature and the age of some of the injuries evident on the child's person. He repeated his concerns in his sentencing remarks[1]. However the substance of the charge relates to the delay of some 22 hours in seeking help for the child when she was obviously in need of medical attention. There is no suggestion that the delay in taking the child to the hospital exacerbated the injuries that she had suffered. Consequently, the failure on the part of the applicant has not contributed to the very serious physical and mental deficits which the child now suffers and which were outlined by the learned sentencing judge.[2]

[11] The conduct of the applicant has to be assessed against the background of her intellectual functioning and her social experiences as detailed in the report of Mr Hatzipetrou, psychologist. From the various tests undertaken by the applicant, Mr Hatzipetrou found conflicting interpretations for her level of intellectual functioning, some suggesting she was below average and others at a low average level. His Honour found in accordance with Mr Hatzipetrou's overall assessment that the applicant was functioning at a low average level.

[12] The applicant had troubled relationships with her own parents and had earlier had a problem with substance abuse. Her relationship with the child's father, who was

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1 Record Book 20/35-50

2 Record Book 20/22-33

unsupportive, ended in February 2003. Soon after that she formed an association with MS which appears to have been an abusive one. MS obviously influenced her decision not to take more immediate action. Mr Hatzipetrou opined that the applicant's actions were "naïve and negligent yet her reactions were not intentional nor deliberately malicious"[3]. He recommended that the applicant be referred for psychological consultation and that she undertake a Positive Parenting Program. He felt that such treatment and programs apart from improving her parenting skills would assist the applicant in her personal rehabilitation.

[13] A further important consideration in sentencing was the applicant's undertakings to give evidence on the trial of MS. The prosecution accepted that offer and submitted that her evidence "will form an important aspect of the case against [MS]"[4], and further confirmed that the applicant had "provided considerable assistance"[5].

[14] Notwithstanding these concessions by the prosecution the learned sentencing judge formed the view that such assistance should result in a "relatively minor reduction" in sentence[6]. This was manifested by his reducing the period of actual imprisonment before suspension of the sentence from four months to three months.

[15] On appeal counsel for the applicant argues that the learned sentencing judge has downplayed the importance of the applicant's undertaking. Notwithstanding the fact that MS has made admissions about his actions, the applicant's direct evidence in a case against him importantly shows his attempts to dissuade her from involving others. Moreover, the undertaking is a measure of her remorse and as well is given against any number of disincentives not to become involved. The remarks of Kirby J in *R v Salameh*[7] are apposite to these arguments.

[16] Sentences for offences of this kind understandably cover a wide range. The "**Cruelty to Children Schedule"** lists a number of cases covering breaches of s 364 of the *Criminal Code* where the maximum penalty is seven years. The schedule identifies a range extending from probation to 12 months imprisonment.

[17] By comparison, the maximum penalty for the subject offence is three years. The applicant points particularly to the case of *R v Cole*[8] where the offending was far more serious and extended over a much longer period of time but where the defendant had a more reduced capacity to understand and to react. In that case the penalty imposed was a 12 months imprisonment to be served by an Intensive Correction Order.

[18] Reference was also made to the case of *R v Field*[9] where the mother of the child failed to seek medical help for her 21 month old daughter who had been sexually assaulted by the de facto partner sustaining serious injuries to her vagina and anus. The delay extended for a period of three weeks even though the fact of the injury

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3 Record Book p 38
4 Para 8.2 of In Camera submissions
5 Ibid at para 9.2
6 In Camera transcript 2/17
7 (1991) 55 A Crim R 384/388
8 366 of 1999 District Court, Newton DCJ
9 Indictment 2917 of 2002 District Court, Hoath DCJ

was more obvious than in the present case. In that instance the defendant was admitted to probation for a period of two years.

[19] The respondent argues that but for the applicant's co-operation in giving her undertaking a period of imprisonment was open on the facts of this case. The weight to be given to the degree and level of co-operation in the prosecution of MS was a matter for the sentencing judge. It could not be said therefore that a term of 12 months imprisonment to be partially suspended is out of the range for this type of offence.

[20] Whilst that submission might have some merit, the court, in this instance, is not only concerned with the range of penalty appropriate to cases of this kind. Two aspects take this case out of the ordinary. Firstly, the opinions of Mr Hatzipetrou were a powerful indication of the need for some supervision of, and counselling for, the applicant. Secondly, having regard to the concessions made by the prosecution in its in camera sentencing submissions which were not departed from before this court, argument that the learned sentencing judge downplayed the importance of the applicant's undertaking does have some force. It seems to us that the lack of recognition of the need for further treatment and counselling coupled with the lack of weight given to the applicant's undertaking that the sentencing discretion has miscarried and for those reasons the applicant ought to be re-sentenced.

[21] The applicant has been in prison since the date of sentencing 9 September 2004 until the date of the hearing of the appeal – a period of 19 days. If to that length of imprisonment, the admission of the applicant to probation for a period of three years is added, with the requirement that she undertake specialised parenting counselling as directed and otherwise complies with the provisions of s 93 of the *Penalties and Sentences Act* 1992 then the interests of justice will be appropriately served.

[22] We would grant the application for leave to appeal and allow the appeal. We would set aside the sentence imposed at first instance and in lieu thereof sentence the applicant to 19 days imprisonment from 9 September 2004 and thereafter released on probation for three years. The probation order is to be in the usual terms with a special condition that she submits to such parenting, counselling and other programs as directed by her probation officer.